Carriage of the Package by Sea: An Analysis of Laws Governing Shipowner Liability for Cargo Damage

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CARRIAGE OF THE PACKAGE BY SEA: AN ANALYSIS
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BY
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ABSTRACT

This thesis traces the development of laws governing limitation of shipowner liability to cargo owners from the Harter Act to the Hague Rules and the Carriage of Goods by Sea Act (COGSA). The inadequacy of the $500 per package limitation of liability as protection to shippers is illustrated through the use of case studies by comparing the application of this provision to break-bulk shipments when COGSA was first passed to its application today in the age of containerization.

The efforts of the major maritime nations to revise the Hague Rules/COGSA system in the Visby Amendments are examined and compared to the new regime proposed by cargo interests from developing nations in the United Nations Convention of the Carriage of Goods by Sea. Although the Visby Amendments provide some benefits to shippers over the Hague Rules, uncertainties surrounding the interpretation of clauses pertaining to containerized cargo have prevented the United States from adopting them. While the Hamburg Rules offer shippers better protection, they have not been accepted by any major maritime nations primarily because of opposition from carriers.

Finally, the new bill on shipowner liability being considered by Congress is examined and an alternative approach to determining shipowner liability is proposed.
I would like to thank Professor Lawrence Juda for his assistance in preparing this thesis. I should have taken his editorial suggestions more seriously. I would also like to thank the librarians at the Reference Desk and in the Interlibrary Loan Office of the University Library for their help in obtaining old and obscure documents.
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Introduction

The Carriage of Goods by Sea Act, 1936, contains a provision that limits shipowner liability for cargo damage to $500 per package or per customary freight unit. The objectives of this thesis are first, to expose the obsolescence and inadequacy of this provision as protection to the shipper for losses of cargo shipped on ocean common carriers, and second, to show how U.S. legislation regarding shipowner liability with respect to cargo has not evolved with international maritime law concerning the same issue.

Recognizing the need to regulate the use of ocean bills of lading by common carriers, Congress passed the Carriage of Goods by Sea Act (COGSA) in 1936. This act was the American version of the rules formulated by the International Maritime Committee (CMI) in 1921 and adopted as the International Convention for the Unification of Certain Rules Relating to Bills of Lading, signed at Brussels in 1924 (Hague Rules). The United States became party to the Brussels Convention in 1937 with the understanding that where there was a discrepancy between the two, COGSA would supercede the Hague Rules.

Three factors have made the $500 per package provision obsolete today. The most obvious is that due to inflation, $500 no longer covers the percentage of the value of cargo that it did in 1936. Another factor is that with the development of high technology industries the inherent value of manufactured goods shipped today is far greater than the value of goods
shipped prior to the second world war. The most critical factor is the development of containerization as the most common method of transporting manufactured goods. In the context of containerization, the term "package" has become ambiguous; it could have a wide range of meanings and has even been equated with the term "container" in some court decisions. To appreciate the potential unfairness of this provision today, one need only consider the impact on the owner of a lost container of personal computers if the carrier is allowed to limit his liability to $500 for the container.

Because of the unfairness of the low limitation of liability and the constant need to define "package" as it pertains to containerized cargo, the international shipping community amended the Hague Rules in the 1968 and 1979 Protocols of the Brussels Convention (the Visby Amendments). The result of the 1968 amendment was an increase in the limitation of shipowner liability to 10,000 poincare francs ($663) per package or 30 poincare francs ($0.90) per kilo, whichever was higher. The system was changed again in the 1979 Protocol to 667 special drawing rights (SDR) per package or 2 SDRs per kilo. In 1981, this equaled $755 per package or $2.26 per kilo. These amendments are in effect but have not been adopted by the United States.

Many shippers (cargo owners), especially those from developing countries, still felt that there was a need to change the law to offer more protection to the shipper,
particularly when operating under COGSA with United States
carriers and suing for damages in U.S. courts without the
benefit of the Visby Amendments. In the 1970s, the United
Nations Conference on Trade and Development (UNCTAD) and the
United Nations Commission on International Trade Law (UNCITRAL)
became involved in the effort to revise dramatically the
conditions of carrier liability on an international level. The
result was the formulation of the Convention on the Carriage of

The Hamburg Rules incorporate several changes to the
Hague Rules and Visby Amendments that are meant to provide a
superior level of protection to the shipper. Under these rules
the burden of proof is on the carrier to show that he took all
measures reasonably required to avoid damage to the cargo.
These rules expunge the seventeen exceptions to liability found
in COGSA/Hague Rules and increase the level of shipowner
liability to 2.5 SDRs per kilo or 835 SDRs per package.
Although these rules are gaining some acceptance within the
international shipping community, the United States has not yet
adopted them.

This problem was selected for study for two reasons. The
first is simply that the law is no longer reasonable; the ocean
common carrier can limit his liability to a very low percentage
of the value of the cargo while other common carriers (truck
and rail) are virtual insurers of the cargo. The second
reason that this problem was selected is that the House Commit-
tee on the Merchant Marine and Fisheries is considering a new bill that will amend this law to make it conform more to international standards and to take into account the developments in shipping that have made the original provision inadequate. The time is appropriate, therefore, to analyze this issue in detail, not only with respect to U.S. shippers and carriers but also in an international context, to show how the entire shipping community has attempted to treat this problem.

This thesis contains five sections. The first section analyzes the legislative history of the Hague Rules and COGSA. Section two examines court decisions involving the per package limitation shortly after the law was passed and section three contains recent decisions concerning large pieces of machinery and cargo shipped in containers. Section four examines the Visby Amendments, the Hamburg Rules, and the new bill introduced by the House Committee on the Merchant Marine and Fisheries as they apply to shipowner liability with respect to cargo. Section five contains general conclusions and recommendations. This section summarizes the material previously presented and proposes an alternative method for establishing the extent of shipowner liability that does not set specific dollar values as the limit of liability and does not require a definition of the term "package" as it applies to unitized cargo.
Chapter One: Legislative History of the Hague Rules and COGSA

At common law and prior to the passage of any legislation governing the responsibilities of shipowners to cargo owners, the carrier had the absolute duty to provide a seaworthy vessel and was strictly liable for any cargo damage except under a few conditions; the carrier was not liable for losses resulting from an act of God, an act of the public enemy, the fault of the shipper, or an inherent vice in the nature of the goods. The carrier could escape liability under those exceptions only if he had exercised reasonable care in the custody of the cargo. In 1851, passage of the "Fire Statute" added fire as one of the recognized exceptions to liability provided that the fire had not been the result of shipowner design or neglect. In addition, the carrier could exonerate himself from liability for damage caused by other means, but only through contract -- by stipulating the conditions in the bill of lading.

Problems arose when carriers took advantage of their superior bargaining position over shippers and began abusing their contractual rights; carriers wrote clauses into bills of lading relieving themselves of liability for cargo damage resulting from every imaginable cause. To correct this situation, Congress in 1893 passed the Harter Act, legislation designed to improve the shipper's position in
securing protection for his cargo. Under the Harter Act, carriers were not allowed to write any clauses into the bill of lading that would relieve them of liability for damage caused by negligence in the care and custody of the cargo. To appease the carriers, Congress absolved the carriers of the absolute duty to provide a seaworthy vessel by including a provision stating that they need only exercise due diligence to make the vessel seaworthy at the beginning of the voyage. In addition, Congress added a clause stating that if the carrier had exercised due diligence to make the vessel seaworthy, he could escape liability for damage caused by errors in navigation or management of the vessel and for damage resulting from an attempt to save property or life at sea, as well as for the traditional causes -- acts of God or the public enemy, an inherent vice in the nature of the goods, or the fault of the shipper.

The Harter Act had three major faults; the first was that the shipper had the onus of proving that the carrier had not exercised due diligence to make the vessel seaworthy. This placed an unfair burden on the shipper, who usually had little chance of obtaining the evidence necessary to prove the carrier's negligence. In this way, carriers frequently escaped liability even when they had not fulfilled their obligation to exercise due diligence. The second fault was that although the carriers could not exonerate themselves from liability for reasons other than those stipulated under section 192, the
carrier was free to limit his liability to very low values. A valuation as low as $100 per package was frequently accepted by the courts as a reasonable limitation of shipowner liability to cargo. With these two "escape routes" available to shippers, shippers could not obtain sufficient protection against losses. Despite these advantages, the carriers were not satisfied with the Harter Act either. Their dissatisfaction lay in the third fault of the legislation: if the shipper could prove that the carrier had not exercised due diligence, the carrier could not escape liability even if he could show that the damage had been caused by one of the exceptions to liability stipulated in section 192.

Conflicts that arose as a result of these three deficiencies of the Harter Act, and the lack of uniformity of laws governing bill of lading use worldwide, led to a series of conferences held in the early 1900s in London and at the Hague under the auspices of the Imperial Shipping Committee and the International Maritime Committee. The result of these meetings, as mentioned earlier, was the formulation of the Hague Rules governing the use of ocean bills of lading. In September 1921, the International Law Association adopted the rules at a conference held at the Hague, and encouraged the international shipping community to abide by them.

The Hague Rules, like the Harter Act, were a compromise between two opposing interests -- the shipowners on one side who wanted to avoid liability for cargo damage whenever pos-
sible, and the cargo owners and insurers on the other side who wanted to receive adequate compensation for their losses. The new rules incorporated many of the provisions of the Harter Act; however, modifications were made to correct the deficiencies discussed earlier. The carriers insisted on a rule that would allow them to avoid liability for damage caused by unseaworthiness as long as they had exercised due diligence to make the vessel seaworthy at the beginning of the voyage. This provision was designed to prevent situations in which shipowners could be held liable for damage because "a loose rivet in the deck, or a crack in a hatch cover, or one less mess boy than required" indicated a lack of due diligence but were unrelated to the cause of damage.

To get this provision, shipowners made several concessions to the shippers. The first was that the carriers accepted the burden of proving that they had exercised due diligence before they could claim exemption from liability under one of the exceptions. This corrected the problem in the Harter Act in which shippers had to prove negligence on the part of the carrier in order to receive compensation for their losses. A second significant concession to the shippers was the acceptance by the carriers of the £100 per package limitation of liability ($500 per package under COGSA).

Shipowners at the Hague conference agreed to this demand only because they felt that the success of the conference depended on it. In his address to the International Shipping Conference
held in London in Nov. 1921, Sir Norman Hill, representative of the Liverpool Steamship Owner's Association, stated:

The point is one which was pressed with the greatest persistence by the Cargo Interests. At the Hague we challenged the reasonableness of the amount. We sought to base it on the freight and offered to agree to a limit fixed at even twenty times the freight. But all our offers were refused.28

When asked by the representative of the Japanese Shipowners' Association why they had accepted the £100 per package limitation, Hill replied:

I can only say that we did our utmost at the Hague to get a lower limit, and what we thought was a more reasonable limit, and we failed... We fought it right up to the very end, and I think every representative of the shipowners who met at the Hague and was there following the arguments, knew that it was a case of either taking the £100, or having done with the whole thing... I think myself the figure is too high. I think the cargo owners have made a mistake in asking for it, but we could not have carried the Rules without.29

Despite the dissatisfaction with the £100 per package provision, this conference, representing shipowners from all of the major maritime nations, passed a resolution recommending the adoption of the Hague Rules:

That this Conference, ...which has had before it the "Hague Rules, 1921" recently adopted by the International Law Association for submission to the various interests concerned in Bills of Lading, is of the opinion that the interests of trade and commerce are best served by full freedom of contract, unfettered by State Control. But that in view of the almost unanimous desire manifested by merchants, bankers, and underwriters for the adoption of the Hague Rules this Conference is prepared to recommend them for voluntary international application, and if and so far as may be necessary for adoption by International Convention between Maritime Countries, Italy and Japan reserving the right to raise questions on the Rule which prohibits the shipowner fixing a limit
of liability below £100 per package.

After submission to the International Diplomatic Conference on Maritime Law at Brussels, the Convention was signed on 24 August 1924 by all of the participating nations, including the United States. Despite the recommendations by the American delegates to the Convention, and support from the United States Shipping Board, the United States did not become party to the Convention until 1937, and then only with the understanding that where there was a discrepancy between COGSA and the Convention, COGSA would prevail.

Several attempts were made to amend the Harter Act in the 1920s, including a bill incorporating the Hague Rules introduced to Congress by Senator Borah in 1927 after hearings were held on the Brussels Convention before a subcommittee on the Committee on Foreign Relations of the Senate. No action was taken on either the bill or the Convention and a similar bill was submitted in March 1928 by Mr. White, Chairman of the House Committee on the Merchant Marine and Fisheries. This bill was re-submitted in June 1929 and hearings were held again in March 1930.

The first part of this bill was essentially identical to the Brussels Convention, but Title II contained several changes that were meant to make the new rules more compatible with American shipping practices. This bill became the subject of the Conference on Uniform Ocean Bills of Lading conducted by the national Chamber of Commerce in November 1930 and attended
by numerous trade associations. The participants at this conference recommended several changes before they would support passage of the bill. Although the Senate had already approved the Brussels Convention, the Conference in 1935 sent a letter to the State Department urging that it stop the ratification process until Congress had passed the domestic legislation containing their proposed amendments. The Conference suggested that only then should the Convention be ratified, subject to the reservations containing their proposed changes. It was this amended bill, S.1152, that was the subject of hearings held before the Senate Committee on Commerce in 1935 and the House Committee on the Merchant Marine and Fisheries in 1936.

The $500 per package provision was not one of the major issues discussed during the Senate hearings, but it was addressed several times during the House hearings. When explaining the benefits of S.1152 to the Chairman of the hearings, A. B. Barber, manager of the Transportation and Communication Department of Chamber of Commerce of the United States, stated:

The bill (sec. 4, par. 5) prohibits the carrier from limiting his liability below $500 per package or customary freight unit, with the parties free to agree upon a higher figure if they wish, but not upon a lower figure. That does not mean they will get $500 for every package, but they will get the value, if it is within $500, and they may agree to take a higher limit; but the shipowner may not put in his bill of lading a proviso that the limit shall be lower than $500, or the actual value of the goods, if less than that amount.40
When the chairman asked if the carrier was entitled to write such clauses into his bill of lading under the Harter Act, Barber responded:

Yes . . . and that is very commonly done and it is very difficult for a shipper to search out, through all of these different bills of lading, and find out just what the provisions are. Sometimes they are in very fine type. So this is one of the principal reasons the shippers believe this is a good measure.41

In later testimony, Charles Haight, Chairman of the Bills of Lading Committee of the International Chamber of Commerce, spelled out the advantages for the shipper in the new bill:

. . . the shippers are today, in The Hague rules, and in this bill . . . getting more advantage than anybody else affected by it. . . . They get a tremendous advantage in raising the limit per package to $500. That is far above the average value per package. . . . The steamship owners at The Hague conference said,"You ought to fix, first, our right to limit liability to the value of the average package", and the cargo representatives practically said, "Unless you give us $500 per package as that limit, we are going to bolt the conference." It was a complete and absolute defi and the owners, in order to try and get . . . international uniformity and stop this ridiculous situation, under which every country in the world has a different law, succumbed.42

It is clear, then, that at this time, the $500 per package limitation was demanded by shippers, was expected to cover the value of most cargo shipped in packages, and was high enough that most shippers would be completely reimbursed for damage caused by negligence without having to rely on cargo insurance for total compensation. The shipowners strongly opposed this provision and agreed to it only because they felt that uniformity was important and, further, that they would be
able to escape liability for unseaworthiness unless they were negligent. These latter considerations outweighed their objection to the $500 per package limitation. Passage of COGSA and ratification of the Brussels Convention by the United States accomplished two things: it created a situation in which every major maritime nation operated under a uniform legal framework that provided a fair distribution of the risks of ocean cargo carriage between shippers and carriers and it clarified the rights and responsibilities of both parties enough so that for many years, litigation for cargo claims was significantly reduced.
Chapter Two: Case Law and the Per Package Limitation for Break-bulk Cargoes

Although the per package limitation of liability today causes numerous problems for shippers and carriers, it was originally a clear and reasonable means of establishing the level of the carrier's liability to shippers. It became popular with carriers after the passage of the Harter Act, which prevented carriers from including clauses in their bills of lading that would exonerate them from liability for causes other than those stipulated in the act. A statutory provision incorporating this method of establishing liability received support from shippers as well during the formulation of the Hague Rules, as long as the limit was sufficiently high to cover the value of most cargo.

When Congress held hearings on the Hague Rules and corresponding U.S. legislation, the term "package" was never defined, nor was a definition included in the Carriage of Goods by Sea Act. The most likely reason for this is that the meaning of the term was obvious; the most common cargoes were shipped in small units that easily conformed to the term "package." The first part of this chapter contains a brief look at court cases involving cargo claims from the late 1920s through the 1950s that provide some concrete evidence as to how the per package limitation was first used. In these cases the question of what was the package was not at issue since what constituted the "package" in the bill of lading was clear to
the shipper and carrier, as well as to the court. These cases do, however, offer some insight as to how various sorts of general cargo were shipped prior to containerization, the approximate value of typical packages, under what conditions the carrier was allowed to limit his liability, and under what conditions the carrier forfeited his right to limit. As these cases will show, the use of the per package limitation, either as a value written into the bill of lading under the Harter Act or as the statutory limit under COGSA, generally produced equitable and predictable results in which the distribution of the risks of ocean cargo transport was clearly defined.

A. Cases in which the carrier forfeited his right to limit after failing to offer the shipper an opportunity to declare a higher value.

Under the Harter Act, the courts upheld the per package limitation written into the bill of lading only if the carrier had offered the shipper the opportunity to declare a higher value for the cargo and pay a higher, or ad valorem, rate to increase the carrier’s liability to cover the full value of the cargo. If the carrier failed to offer a choice of rates, he forfeited his right to limit and was fully liable for the damages. Examples of this can be found in the 1927 case of the Shinyo Maru, in which the carrier was found liable for the full value of a damaged shipment of arsenic acid, in the 1926 case of Lawrence Leather Co. v. Compagnie General Transatlantique, where the shipper recovered the full value of 332
cases of furs that had disappeared, and in *F. A. Strauss & CO. v. Canadian Pacific Railroad*, in which the shipper was completely compensated for the value of three bales of silk stolen while in the custody of the carrier. In all of these cases, the bills of lading contained package limitations less than the value of the lost cargoes, but the carriers were not allowed to limit their liability because of their failure to offer the shippers higher rates to increase carrier liability.

B. Cases in which carriers were allowed to limit because shippers failed to declare a higher value for the cargo.

The carrier's practice of charging *ad valorum* rates when shippers declared the value of their cargo in the bill of lading was not specifically authorized by the Hague Rules or COGSA; however, the practice persisted anyway when the new rules went into effect and the courts continued to view it as a legitimate means of increasing the carrier's liability above the $500 per package limitation. In cases where the shipper clearly had the opportunity to declare a higher value and pay an *ad valorum* rate but neglected to do so to save on the freight, the courts upheld the per package limitation even when it resulted in significant losses to the shipper. This was true in the Harter Act case of *The Emden*, in which the carrier was allowed to limit his liability to $400 for four lost cases of musical instruments worth $1600, and in the 1940 COGSA case of *Shackman et al v. Cunard White Star*, where the ship-
per recovered only $1000 for the loss of two cases of furs valued at more than $18,000.

C. Cases in which carriers forfeited the right to limit their liability when an unreasonable deviation caused cargo damage.

Another hold-over from the Harter Act era was the practice of forcing the carrier to forfeit his right to limit when an unreasonable deviation was the cause of cargo loss or damage. Although the Hague Rules and COGSA state that a deviation to save life or property at sea may not be considered unreasonable, the courts have been left with the task of determining what does constitute an unreasonable deviation. The most prevalent early examples of unreasonable deviation involved cargo that was damaged because it had been shipped on deck, exposed to the elements, when below deck stowage or some other protection had been required. In the 1939 case of *Pioneer Imports v. The Lafcomo*, the shipper recovered the full value ($56,970) of a shipment of flower pips ruined by exposure to seawater even though the bill of lading limited his liability to $25 per cubic foot because the carrier failed to stow and cover them in the manner stipulated in the contract of carriage.

In a later case, *Jones v. The Flying Clipper* tried in 1953, the court awarded the shipper a recovery of more than $2000 per package for damage to a shipment of automobile parts.
because the carrier had stowed the crates on deck when below deck stowage was clearly indicated. The court's reasoning for their decision was that allowing carriers to limit their liability for damage caused by an unreasonable deviation would encourage them to ignore their obligations to shippers and would be tantamount to condoning their wilful misconduct.

Although the $500 per package limitation seems painfully low today, it did in fact fully compensate shippers of most cargoes through the 1950s. In the 1954 case of Teneria El Popo v. Home Insurance Co., the $500 per package limitation easily covered the value of a shipment of furs damaged by a beetle infestation caused by carrier negligence. The limitation was significant enough that until recently, carriers employed innovative methods, such as trying to pro-rate payment for partial damage to cargo, in order to escape paying out the full $500. Pro-rating of damages was invalidated by the court in the 1940 case of Pan-Am Trade and Credit Corp. et al v. The Campfire as a clear attempt to negate the purpose of COGSA, which was to motivate carriers to care properly for the cargo by preventing them from limiting their liability below $500 per package.

In all of these cases, what constituted the "package" was clear; bales of fur or silk, boxes of musical instruments, crates of car parts, and boxes of flower rootstocks were all considered packages for the purposes of determining shipowner liability. The court's task in these cases was first, to
decide if the carrier was liable for damage at all, and second, to determine when and to what extent liability could be limited. The definition of the term "package" was not always so clear, however. In Stirnimann v. The San Diego, the court had to decide if individual unboxed pieces of a crane were packages covered by the $500 limit or if the carrier was entitled to limit his liability to $500 for the whole crane. Even though freight had been paid as a lump sum for the entire crane, the court found that each piece of the crane constituted a package covered by the $500 limit.

Except in one case discussed above, where the value of two packages of furs was greater than $18,000, the $500 limit provided a very significant level of protection to the shipper, usually covering the entire value of cargo shipped as packages. The courts made their decisions under the presumption that the $500 per package limitation was meant to benefit the shipper and act as a motivating force for the carrier to care for the cargo. Any clause that the carrier included in his bill of lading to limit liability below that amount, any deviation from the expected method of transportation, or any attempt to prevent the shipper from declaring a higher value resulted in the carrier forfeiting his right to limit his liability. In cases where the shipper had the opportunity to declare a higher value but failed to do so to save on the freight, the courts upheld the limit, either in the bill of lading or under COGSA. In the one case where the cargo was not shipped as traditional
"packages", the court treated each piece of cargo as a COGSA package protected by the $500 limit instead of allowing the carrier to limit liability based on the freight unit, which would have come to a lesser amount.

In summary, the $500 per package limitation for many years produced the results that were originally intended; it allowed most cargo owners to ship at the normal rate and receive substantial protection, it encouraged shippers of very high valued goods to pay for increased carrier liability, and it provided a significant motivation to carriers to protect the cargo and abide by the terms of the bill of lading.

This situation began to change in the late 1950s when large pieces of machinery were shipped more frequently and in the late 1960s when containerization of cargo became popular. In cases involving large pieces of machinery, the most pressing problem for the courts has been deciding under what conditions the machinery should be treated as a single package, and when liability should be based on the customary freight unit instead. The only clear result of these decisions so far is that the outcome essentially depends on who hears the case rather than on the sound principle that the package limitation is intended to benefit the shipper, not the carrier.

The same situation exists in container cases, where the question facing the court is whether a 40' x 8'x 8' metal box, designed by shipping companies to facilitate the handling of large amounts of cargo at one time and reduce
time spent in port, containing assorted cargoes, some pac-
kaged within the container, some simply stowed inside, should be treated as a single package or whether the individual items within the container are the packages. Common sense clearly dictates that a carrier should never be allowed to limit his liability to $500 for an entire container full of cargo because such a result would pervert the purpose of COGSA by reducing a shipper's protection to a negligible amount. Unfortunately, as the following container cases will show, the courts have not always been guided by common sense and an understanding of the purpose of COGSA, but have become embroiled in efforts to create elaborate tests to determine when the container is a COGSA package and when it is not.

The decisions in these more recent cases indicate that the $500 per package limitation has lost its predictability and has become a disaster for cargo interests while providing carriers with the excellent opportunity to escape liability for damage caused by their negligence now when $500 covers only a small fraction of the value of cargo shipped in containers or as single large units.
The absence of a definition of the term "package" in COGSA has begun to pose significant problems for courts faced with the task of determining liability for damage to single large pieces of cargo that do not look like typical break-bulk packages. This section presents three cases in which the courts reached vastly different conclusions concerning liability for damage to similar types of cargoes.

Part One: Large Pieces of Machinery: Are They COGSA Packages?

In cases involving large pieces of machinery, one appeals court insisted on treating the cargo as a COGSA package simply because skids (a wooden base supporting the machinery) were used to aid in handling the cargo. Another appeals court felt that the absence of a skid disqualified the cargo as a package and required that liability be based on the customary freight unit instead, while a third appeals court discounted any importance of the skid at all, and based its decision on the presumption that the limit based on the customary freight unit was included in COGSA specifically for these types of cargo to guarantee protection to the shipper of unpackaged goods. This sampling of cases involving large pieces of machinery is meant to show the variety of opinions held by different courts and
that so far, no conclusive decision has been reached as to how this class of cargo should be treated under COGSA.

A. Machinery not on skids is not a COGSA package.

In 1953, the second circuit affirmed a district court decision that a tractor with some parts covered by waterproof paper and partially encased with wooden planking was not a COGSA package, primarily because the tractor was resting on its own treads rather than on skids. In *Gulf Italia v. American Export Lines* the court decided that the carrier's liability for damage caused by his negligence should be determined based on $500 per customary freight unit, bringing recovery to $17,300.

The majority opinion here agreed with the district court that Congress had not intended to allow carriers to limit their liability for damage caused by their negligence to a mere "pittance of $500" by calling this tractor a package when liability based on the freight rate provided a far more equitable result for the shipper.

B. Machinery on skids is a COGSA package.

A toggle press weighing more than three tons, bolted to a skid but not otherwise packaged, was a COGSA package in *Aluminios Pozuelo v. S. S. Navigator* in 1968. The court based its decision primarily on the definition of the term
"package" in Black's Law Dictionary:

The skid attached to the toggle press shipped by Aluminios, while to some extent protecting the machine, served primarily to facilitate delivery so as to make the press an article "put up * * * in a form suitable for transportation or handling." The court felt that because the skid was attached to facilitate handling, the press should be treated as a package, limiting liability to $500 for $3754 in damages.

It appears that this court, by stretching the term "package" to include a large piece of machinery simply because it was attached to a skid, has chosen to ignore the original purpose of the $500 per package provision in COGSA, which was to provide a high level of protection to the shipper even when cargo is shipped at the normal rate. Congress included an alternative approach for cargo not shipped as traditional packages, liability based on the customary freight unit, that was meant to be used when it better fulfilled the original intent of the act. A decision based on the questionable importance of the presence of skids does little to distribute the risks of ocean transport in an equitable and predictable manner.

C. Machinery on skids is not a COGSA package.

In 1974, the ninth circuit decided in Hartford Fire Insurance Co. v. Pacific Far East Line, Inc. that a damaged electrical transformer weighing 37,000 pounds attached to a skid but not otherwise boxed was not a COGSA package. Keeping the legislative intent of COGSA in mind, the court concluded
that the writers of COGSA included the $500 limit based on the freight unit to provide a comparable level of protection to the shipper of unpackaged cargo.

In addition, the court felt that it was obligated to use the ordinary meaning of the term "package" since Congress did not include a definition of the term in COGSA, and that technological advances in the shipping industry do not justify the "over-extension of the statutory term." This court was unwilling to allow the arbitrary factor of having a skid attached to influence their determination of the carrier's liability when a far more equitable result could be obtained by using the freight unit as the basis for liability.

One result of these three cases is clear: any shipper of large pieces of machinery would be well advised not to attach the machinery to skids, nor try to protect the cargo further by covering parts of it with wood or paper if any dispute would be settled by the second circuit, where decisions are frequently made with the carrier's best interests in mind. The cargo owner who ships out of west coast ports, however, can apparently go to the extra trouble of protecting his cargo by covering it or placing it on skids because damages will be awarded under the assumption that COGSA was designed chiefly to protect his interests.

Unfortunately, this same inconsistency surrounds cases involving cargo shipped in containers. The methods for determining whether the container should be treated as a package have evolved significantly over the last 15 years but the most
recent trend has been not to consider the container a package when the bill of lading discloses the contents of the container. Even this relatively predictable means of establishing carrier liability was abandoned by the second circuit this year in a decision that promises to have profound deleterious effects on shippers in the future unless the law is amended.

Part Two: Containerization and the Per Package Limitation

The introduction of containerization for the purposes of consolidating large amounts of cargo into a single unit has brought significant benefits to both carriers and shippers. For carriers, containerization has drastically reduced the amount of time necessary for vessels to spend in port by the mechanization of cargo handling, thus reducing stevedoring costs as well. It has also enabled shipping companies to build much larger vessels and use more space on board for stowing cargo, providing carriers with the opportunity to increase their profits on each voyage.

Shippers have benefitted from containerization as well. By loading containers themselves, shippers can ensure that their cargo is adequately protected against damage while the added protection of the metal walls of containers has reduced the amount of packaging required for individual pieces of cargo. In addition, containerization has reduced the incidence of pilferage, which was so common in break-bulk shipments.
Containerization has produced its share of problems, however. Included in these is the need to define "package" as it pertains to containerized cargo. As containers reduced the need for extensive packaging of cargo, the meaning of the term "package" lost the clarity it had in break-bulk shipments. Accordingly, application of the per package limitation no longer produces the predictable results it once did and frequently violates the original purposes of the provision. As the following container cases will show, the courts have generally failed to let the past usage of the per package limitation serve as a guide for establishing liability for containerized cargo, with the result that the shipper is no longer guaranteed protection under section 4(5) of COGSA.

A. Container is a package when the bill of lading does not disclose the contents.

The 1972 decision in Royal Typewriter Co. v. M/V Kulmer-land held that the container is a COGSA package when the bill of lading does not describe the contents. In this case, 350 cartons of adding machines were loaded into a container, which was stolen from the terminal after it was discharged from the ship in New York. The trial court decided that the container was a COGSA package and awarded the shipper $500 for a loss of $29,400.

On affirming this decision Judge Oaks introduced the "functional economics test" for deciding whether the container
should be the COGSA package. This test involved determining if the packages as stowed in the container could have been shipped overseas without further packaging. He asserted the "where the shipper's own packing units are functional, a presumption is created that a container is not a 'package' which must be overcome by evidence supplied by the carrier that the parties intended to treat it as such." The court found that because these machines could not have been shipped break-bulk in the flimsy cartons in which they were stowed in the container, the burden of proof shifted to the shipper to show why the container should not be considered the package. Since the bill of lading described the number of packages as one container said to contain machinery, the court felt that the shipper failed to show why the container should not have been the package and limited recovery to $500.

This case shows that this "test" was particularly harsh on the shipper who attempted to avail himself of the benefits of the container by avoiding the extensive packaging that was necessary to protect cargo shipped break-bulk. Applying this test, only the shipper who went to the needless expense of packaging his cargo excessively was able to obtain the protection under COGSA to which he was legitimately entitled. Unfortunately, the courts failed to appreciate the ramifications of this test until much later and continued to consider it a valid way of determining if the carrier was liable for more than $500 for the entire container.
B. Lift on/ lift off tanks carrying liquid are not COGSA packages even when the bill of lading lists them as such.

In 1974 the second circuit reversed a decision that 11 lift on/ lift off (LO/LO) tanks each containing 2000 gallons of damaged liquid latex were packages under COGSA. In Shinko Boeki Co., Ltd. v. S. S. Pioneer Moon the appeals court considered three possible ways that the latex could have been shipped. The first would have been break-bulk in 55 gallon drums. In this type of shipment, each drum would obviously have been a COGSA package and liability would have been $200,000 for the entire shipment. A second method would have been as bulk cargo in deep tanks of a tanker. With this method, liability would have been assessed per customary freight unit ($500 per long ton). This would have brought liability to $37,000 for damages totalling $27,733.75. If, however, the LO/LO tanks were considered COGSA packages, liability would have been limited to $5500, approximately one-fifth the value of the cargo lost.

The court decided that the tanks should be thought of as "smaller, movable versions" of the deep tanks in the vessel, noting that the tanks belonged to the carrier and were re-used voyage after voyage. With these factors in mind, the court determined that the only logical method of establishing liability would be by the customary freight unit, allowing the shipper to be completely compensated for his losses.

This case brings out an important point; even in 1974,
the per package limitation when applied to a break-bulk shipment still provided more that adequate protection to the shipper. Once the court started to treat containers (or LO/LO tanks) as packages, however, protection dropped to an almost negligible amount. If the courts made their decisions under the assumption that the purpose of COGSA was to ensure that carriers would be held responsible for most damage caused by their negligence even when cargo was shipped at the normal rate, they would not be able to justify treating containers as COGSA packages. This court could not accept the result in which the shipper would lose most of his protection simply because he employed a different technology for shipping his cargo. Instead, the court made its decision with the shipper's interests in mind, acknowledging that treating containers as packages would lead to certainty, but that "'certainty at the expense of legislative policy and equity is undesirable.'"

C. Container is not a COGSA package when the bill of lading discloses the contents.

In 1971, one of the first container cases produced a landmark decision that held that when the contents of the container are described in the bill of lading, the individual contents, not the container, constitute packages under COGSA. In Leather's Best, Inc. v. S. S. Mormaclynx a container of leather worth $49,500 was stolen from the container terminal after being discharged from the vessel. Concerning its
decision that each bale, not the entire container, was a package, the court stated:

... we cannot escape the belief that the purpose of [sec.] 4(5) of COGSA was to set a reasonable figure below which the carrier should not be permitted to limit his liability and the "package" is thus more sensibly related to the unit in which the shipper packed the goods and described them than a large metal object, functionally a part of the ship in which the carrier caused them to be "contained."71 [citations omitted]

The court struck down a clause in the bill of lading limiting shipowner liability to $500 per container because it attempted to limit liability below $500 per package.

The decision in Leather's Best formed the basis for several others concerning containerized cargo (including the decision in Shinko Boeki). In 1972, the second circuit affirmed another decision that the contents of the container, not the entire container, constituted COGSA packages. In du Pont de Nemours International v. S. S. Mormacvega, a container stowed on deck loaded with 38 pallets of resin in packages was washed overboard during transit. The court awarded the shipper $19,000 in damages, $500 for each pallet, for a loss of $109,000.

In his appeal, the shipper did not assert that each package of resin rather than each pallet should have been covered by $500; instead, he claimed that because the container had been shipped under a clean bill of lading, stowage on deck constituted an unreasonable deviation, invalidating the carrier's right to limit his liability. The court disagreed,
finding that on a vessel that has been retrofitted specifically for the purpose of carrying containerized cargo on deck, on deck stowage is not an unreasonable deviation and that by the late 1960s, transporting containers on deck under a clean bill of lading had become a common and acceptable practice.

In 1974, the functional economics test was used again as evidence in the court's decision in Cameco, Inc v. S. S. American Legion that the container is not a package when the bill of lading discloses the contents and when the cargo could have been shipped break-bulk without further packaging. In this case a container loaded with 270 cartons and four pallets of 100 cases each of canned hams was stolen while in the custody of the carrier. Since the hams were packed in the same corrugated cartons used prior to containerization, they constituted functional packing units, placing the burden on the carrier to show why his liability should be limited to $500 for the container. The court awarded the shipper a full recovery after the carrier failed to prove why the container was equivalent to a package.

This case had the unfortunate result of strengthening the validity of the functional economics test as a means of establishing carrier liability. Even after the test was abandoned in a later case, the reasoning behind it still appears to influence some courts in their decisions concerning containerized cargo.

Two landmark decisions were made by the second circuit in 1981 concerning containerized cargo that provided still more
support for the concept that where the bill of lading discloses the contents of the container, the container is not a package under COGSA. In 

Mitsui and Co., Ltd. v. American Export Lines, Inc., the trial court found that "bundles" (stacks of 15) of tin ingots shipped in a container, not the entire container, constituted packages under COGSA.

The court based its decision primarily on what was written into the bill of lading, and under the assumption that each bundle constituted a package, awarded the shipper $62,000 for the lost cargo. The court of appeals affirmed the award but for different reasons.

The appeals court felt that the stacks of ingots were not packages because they were not wrapped or boxed in any way and thus constituted "goods not shipped in packages." The bill of lading included a clause that read:

> The words 'shipping unit' shall mean each physical unit or piece of cargo not shipped in a package, including articles or things of any description whatsoever, except goods shipped in bulk, and irrespective of the weight or measurement unit employed in calculating freight charges.

According to this clause, liability should have been assessed by the ingot; however, the bill of lading also incorporated COGSA, which would ordinarily limit liability to $500 per long ton, a lesser amount. As a result of this ambiguity as to which "unit" was covered by the $500 limit, the court ruled against the carrier as the party that drew up the contract.

On that basis, the court determined that the shipper should have been entitled to recover $500 per ingot (as the shipping unit); however, the court felt that the shipper mis-
represented the manner in which the cargo had been stowed by calling the stacks "bundles" as if they had been packaged in some way. Because of this misrepresentation, the court decided that each bundle of 15 ingots was the shipping unit, limiting the shipper's recovery to $62,000.

One of the important results of this case is that revoked the functional economics test as a method for determining shipowner liability. The court saw two dangers in employing the functional economics test. The first is that if carriers could limit their liability to $500 for the entire container simply because the cargo did not lend itself to being "packaged" in a traditional manner, the purpose of COGSA would be defeated. The other danger is that shippers who want to ensure that they receive the protection afforded them under sec. 4(5) would be forced to lose the benefits of containerization by packaging cargo extensively so it would qualify as "packages" when little or no packaging is actually required.

The conclusion reached by this court was that the functional economics test was not an equitable means of establishing liability because it placed an unfair burden on the shipper to go to extra expense to package his cargo or else accept that the carrier would not be liable for more than $500 for the entire container. In his concurring opinion, Judge Oaks, the creator of the functional economics test, agreed that the test should be abandoned:

In the realm of container shipping, where the bill of lading specifies the contents, the ship's container should not be deemed a package -- even presumptively only -- irrespective of how the goods within it are
A final case in which the contents of the container constituted packages was also decided by the second circuit in 1981 in Smythgrayhound v. M/V 'Eurygenes'. This case involved damage by fire to three shipments of 1500 cartons of stereo equipment shipped in eight containers. Originally, the district court referred the question of whether the containers were packages to a court magistrate. The Magistrate first applied the functional economics test and found that the cartons had been packed sufficiently to be shipped break-bulk, leading to the conclusion that the cartons were the packages. However, other factors led the Magistrate to decide that the "subjective intent" of both parties was to treat the containers as COGSA packages.

The district court affirmed this conclusion but rejected the Magistrate's reasoning that the shipper's "subjective intent" was to consider the containers packages:

... no shipper ever actually intends that its recovery will be limited to $500 per container, or that any carrier, in the absence of an express agreement, intends that the recovery should exceed $500 per container.85

Instead, the court based its decision on the fact that the shipper chose to use the containers rather than ship break-bulk, indicating "acquiescence" in treating the containers as packages.

Pointing out that the benefits of containerization are shared by both carriers and shippers, the court of appeals

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rejected the argument that a shipper who chooses to use containers for the sake of convenience automatically assumes that the container itself will be subject to the $500 per package limit. In addition, the court found that the use of both "containers" and "cartons" in the bill of lading indicated that there was no agreement as to what constituted the package. To resolve this question, the court examined the case law developed by the same circuit in the past.

The court based its final decision on the one reached in Mitsui: where the bill of lading discloses the contents of the container, the container will not be treated as the COGSA package regardless of who stuffed and sealed it, why the shipper used it, or whether the carrier had verified the contents:

Mitsui and our decision today will put carrier interests on notice that the container will not be considered the COGSA "package" where the bill of lading disclosed the contents of the container. Mitsui's holding is consistent with the congressional purpose of establishing a reasonable minimum level of liability.86

The shipper recovered $500 per carton. The court conceded that this decision did not answer all questions concerning the package limitation but it did indicate that in most cases, liability should not be limited to $500 for the container.

Each final decision in this section was made under the assumption that section 4(5) of COGSA was designed to protect the shipper by establishing a level of liability high enough to motivate carriers to care properly for the cargo. With this in mind, it is difficult to appreciate the second circuit's most
recent decision concerning containerized cargo, which seems to negate much of the ground gained by shippers by 1981.

D. Liability limited to $500 per container even when the bill of lading discloses the contents.

In 1984, Judge Sofaer of the southern district of New York awarded the shipper of two containers of plants damages of $80,322, the total value of the goods, after determining that the carrier had been negligent in caring for the cargo. In Binladen B S B Landscaping v. M. V. Nedlloyd 'Rotterdam', two containers of live plants shipped from the U.S. arrived dead at Saudi Arabia because the carrier had provided the shipper with one container that had a faulty ventilation system and had failed to start the refrigeration unit soon enough in other container. The district court found that the individual plants within the containers constituted COGSA packages because some of them had been individually wrapped, potted, and boxed and because the bill of lading disclosed the contents as being "7790 Live Plants" for one container and "11420 Live Plants Misc. and 24 packages shade cloth" for the other. Judge Sofaer based his decision on the precedent set in Mitsui and Smyth-greyhound that the container is not a COGSA package when the bill of lading discloses the contents.

In a decision that is certain to have long-lasting effects, the second circuit determined that based on the wording of the bill of lading (listing the number of containers as the
packages and listing the number of plants under the description of the cargo), this was a case of goods not shipped in packages. In a reversal of the conclusions reached by the same circuit in *Mitsui* and *Smythgreyhound*, Judge Mansfield stated:

... we are satisfied, notwithstanding our traditional reluctance to treat a container as a COGSA package, that the terms of the bill of lading should govern; if the bill of lading lists the container as a package and fails to describe objects that can reasonably be understood from the description as being packages, the container must be deemed a COGSA package. This rule not only accords with the 1968 Brussels Protocol... but has the virtue of certainty.

We accordingly hold that, when the bill of lading does not clearly indicate an alternative number of packages, the container must be treated as a COGSA package if it is listed as a package on the bill of lading and if the parties have not specified that the shipment is one of "goods not shipped in packages." Maximum damages in such a situation then are $500 per container, irrespective of the contents. Although this rule could drastically reduce the damages available to shippers in some situations, it does not depart from the principle that the limited liability clause in COGSA was designed to "set a reasonable figure below which the carrier should not be permitted to limit his liability."

We recognize that the rule established by us today, which will henceforth limit a carrier's liability under the same circumstances to $500 per container, resolves an uncertainty noted in earlier decisions... and that, in view of this uncertainty, the parties might have reasonably believed that the description of the number of plants on the bills of lading was sufficient to bring the shipment within the *Smythgreyhound* rule to the effect that a container whose contents are disclosed... should not itself be treated as a package.89 Accordingly, the court determined that liability in this case should be determined on the basis of $500 per freight unit. Since freight was charged at a per-container rate, the carrier
will most likely be able to limit his liability to $1000 for the two containers.

This decision poses several significant problems. The first is that even when the shipper has disclosed the contents of the container, unless the cargo is of the sort that lends itself to being packaged in boxes or crates, liability will most likely be limited to $500 for the entire container. This is especially true considering the recent trend by carriers to offer per-container freight rates regardless of the weight or size of the cargo inside the container.

As Judge Feinberg stated in his dissent in Standard Electrica, S. A. v. Hamburg Sudamerikanische Dampfschiffahrtsgesellschaft, these cases should always be decided with the shipper's interests in mind and with the understanding that the $500 limitation was originally intended to result in total compensation to the shipper of most cargoes:

The purpose of section 4(5) when enacted in 1936 was to protect cargo interests like appellant. . . . Therefore, one would think that in a close case section 4(5) would be construed consistently with that purpose -- to protect the cargo interest. . . . Inadequate it has become; technological advancement and decline in the purchasing value of the dollar have combined to reduce the meaning of the $500 minimum liability limitation Congress gave to cargo interests. But I do not understand why we should add to the inequity. The call for congressional revision may be sound, but in the meantime we should construe the existing statutory term as applied to the facts before us in consonance with its legislative purpose.90

In fact, it is difficult to imagine a container-load of any cargo that would be worth only $500. This alone should discourage the courts from allowing carriers to limit their
liability under any condition to $500 for the container. In Binladen, we are asked again to accept the result that a carrier can limit his liability to $500 for the entire container simply because the shipper has not gone to the needless expense of putting his cargo into individual cartons when that was not required to protect his goods. While this decision may lead to certainty, it is "certainty at the expense of equity" and is inconsistent with the legislative intent of COGSA -- to provide substantial protection to shippers of most cargoes.

Certainty would also be achieved if the courts determined that the container should never be a COGSA package or freight unit for the purposes of establishing liability. Legal counsel for cargo interests can provide compelling evidence for this conclusion. They point out that the container usually belongs to the carrier and must be returned to the carrier after every voyage, while the packaging material of a true package obviously belongs to the shipper or consignee and is destroyed after one or two uses. The container was invented by a shipping company to decrease stevedoring costs and facilitate the handling of large numbers of packages at one time so that turn-around time in port would also decrease. The container is functionally a part of the ship's gear; at one point it is analogous to the slings that were used to move large numbers of packages from the pier into the ship's hold for break-bulk shipments, and later is analogous to the hold itself, in which cargo is stowed, not packaged.
In addition, all of the tests invented by the courts to determine when a container should be the package, (whether the cargo could have been shipped break-bulk without further packaging, who stuffed the container, and whether the carrier had verified the contents of the container), are extraneous matters that were never incorporated into COGSA and simply cloud the issue. The fact is that the act was written to force carriers to pay for their negligence; that is one reason why carriers buy P & I (protection and indemnity) insurance.

Another reason that COGSA was written was to ensure that carriers would not have to pay for damage that was not caused by their negligence. This is why shippers buy cargo insurance -- to pay for damage caused by the exceptions to liability included in COGSA. By allowing the carriers to limit their liability to $500 for the entire container for damage caused by their negligence, the courts have returned shippers to their status before COGSA was enacted, when carriers could escape liability by writing very low limits into the bill of lading.

Naturally, carrier interests think otherwise; they argue that the shipper always has the option to pay a higher rate to increase carrier liability. This is true, but it ignores the fact that the $500 per package limitation is supposed to cover the value of most packages, except for very high value goods, and still does so as long as the container is not considered the package. When liability is limited per container, even the shipper of low value goods in not protected. Also, most ship-
pers assume that their "packages" or items within the container (be they potted plants, stereo components, or cartons of adding machines), are adequately covered by the $500 limit. They therefore have no reason to declare a higher value.

Some have argued that if the carriers are held liable for $500 for the individual items in the container, the shipper will pay anyway when freight rates soar as carriers buy more insurance to cover the damages:

...it makes little difference to the carriers whether the limitation is $500 or $50,000. A predictable limitation most importantly serves the purpose of letting the parties know beforehand whether the shipper will arrange his own insurance for the excess above the limitation, or whether the risk is to be covered by the carrier and reflected in the carrier's freight rate. Either way, the cost of insuring the shipper's property from transportation loss will ultimately fall upon its owner. It is unrealistic to think that the carrier will insure the shipper's property out of its own pocket.93

This statement ignores the effect that inflation has had on the level of protection received by shippers and the fact that the inherent value of cargo has risen dramatically since 1936. If the limitation had been allowed to fluctuate with inflation, the $500 limit of 1936 would be approximately $3400 today.94

Obviously, this law needs to be amended; application of the $500 provision today is neither predictable nor equitable. The international shipping community recognized the deficiencies of this provision in the era of containerization and modified the Hague Rules accordingly in two protocols to the Brussels
Convention, while third world shippers have formulated new rules (the Hamburg Rules) that offer them even more protection. The United States, however, has not ratified the protocols or the Hamburg Rules and is just now considering amending COGSA to make it more appropriate for today's shipping practices. The next chapter contains an examination of all of these proposed changes as they pertain to the per package limitation of ship-owner liability.
By the late 1950s, some provisions of the Hague Rules had become obsolete; the £100 per package limitation no longer offered shippers adequate protection because inflation was reducing the actual value of the limit at the same time that the inherent value of the cargo being shipped was increasing. In addition, as containerization of general cargo became more prevalent in the 1960s, the term "package" started to lose its clarity. These three factors led to increased litigation over cargo claims and made it obvious to the shipping community that some revision of the Hague Rules was necessary to make them more appropriate for modern shipping practices.

Since the 1960s, two groups have been active in attempting to update the conditions of shipowner liability to cargo. The CMI, as the original creators of the Hague Rules, have chosen simply to amend the old rules while UNCTAD (and UNCITRAL) have pushed for a completely new system that would recognize the increasing role of third world countries in international shipping. This chapter examines these two different efforts, pointing out some of the benefits and deficiencies of both, and contains a brief look at the bill that the House Committee on the Merchant Marine and Fisheries reported out to Congress in 1985 to amend COGSA.
Part One: The First Visby Amendments

In 1959, the CMI convened to review and revise the Hague Rules per package limitation because inflation had rendered the £100 limit inadequate as protection for most shippers. In 1963, they proposed changing the £100 limitation to 10,000 Poincare francs per package, worth approximately $662 at that time. This proposal was the subject of the Twelfth Session of the Diplomatic Conference on Maritime Law held in Brussels in May 1967 and February 1968. The outcome of this conference was the formulation of the 1968 Protocol to amend the 1924 Brussels Convention. In the context of this study, the most important modifications are found in Articles 2(a) and 2(c), (written to replace portions of Article 4(5) of the Hague Rules), which read:

2(a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of Frs. 10,000 per package or unit or Frs. 30 per kilo gross weight of the goods lost or damaged, whichever is higher.

2(c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the Bill of Lading as packed in such article of transport shall be deemed the number of packages or units for the purposes of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.

The first clause changes the limit from 100 pounds
sterling to 10,000 poincare francs per package (based on a gold value), thus increasing carrier liability to approximately $662 per package. As an alternative to the per package limitation, it allows shippers to collect damages of approximately $0.90 per kilo of cargo when that produces a higher recovery. The second clause attempts to clarify the meaning of the term "package" as it applies to containerized cargo by stating that when the shipper has enumerated the contents of the container in the bill of lading, the individual items within the container, not the entire container-load, will be covered up to 10,000 francs ($662).

The first meeting held in May 1967 was devoted mainly to the creation of the new limit. During this meeting, the United States and Norwegian delegations proposed abolishing the per package limitation altogether and replacing it with a limitation based solely on weight. The U. S. delegation felt that a limit based on weight would provide better protection to shippers of containerized or palletized cargoes. Norway, however, sought a limitation of $3.70 per pound gross weight to achieve uniformity with the newly created International Convention for the Carriage of Goods by Road (CMR).

Both proposals were met with opposition from those who believed that this system would not adequately compensate shippers of high value, low weight goods. To overcome these objections, the Norwegians proposed a limitation equal to $662 per package, but not less than $.90 per pound gross weight as
long as the weight of the cargo had been inserted in the bill of lading. The U. S. delegates were concerned that this proposal would limit recovery to too low a value if the container were treated as a package and instead, proposed a similar compromise of $662 per package or $3.70 per pound, whichever was higher. Decisions on these proposals were postponed until the second meeting held in February 1968.

During the second meeting, the United States agreed to the $662/package or $0.90/pound limits provided that a clause was included that would prevent the container from being treated as the package. The proposed clause read:

••• provided that a container, pallet or similar article of transport equipment used for consolidating cargo shall not be deemed to be a "package" within the meaning of this paragraph.99

After some criticism, the force of the clause was softened to allow the container to be treated as a package when the contents are not disclosed in the bill of lading:

Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading shall be deemed the number of packages or units for the purposes of this paragraph. Otherwise, such article of transport shall be considered the package or unit.100

Even in this form, the clause was still aimed at protecting the shipper of containerized cargo by ensuring that the carrier would not be able to limit his liability to $662 for the entire container as long as the contents were described in the bill of lading. It is important to note that this clause did not imply that the shipper would have to pay an ad valorem
rate just for enumerating the contents in the bill of lading; at this point, simply disclosing the number of packages or units was sufficient to prevent the carrier from limiting to $0.90 per pound or $662 for the container.

In a rather startling about-face, the British delegation proposed instead a clause stating that the container would be considered a package unless the shipper enumerated the contents:

When any goods received into his charge by the carrier are shown in the bill of lading as being, or as being packed in, any container, pallet or similar article of transport used to consolidate freight, such container, pallet or other article shall be deemed to be a package or unit for the purpose of this clause, unless some smaller unit has been declared by the shipper before shipment as being a package or unit for such purpose and the number and description of such smaller units has been inserted in the bill of lading.101

The wording of this clause was chosen specifically to correspond to Article 4(5) of the Hague Rules that has been used to justify ad valorem rates. The implication was that the shipper would be expected to pay a higher rate just for disclosing the contents in the bill of lading, even if he only wanted each package or unit in the container to be covered by the $662 limit. It was the hope of the U.S. delegation, however, that the practice of charging ad valorem rates would be discontinued under the new protocol because it has proven too costly to shippers in recent years.

From the 1920s through the 1940s, declaring a higher value for the cargo was usually unnecessary because most pac-
kages were worth less than the £100 or $500 limit, but the value of cargo has since increased, with the actual power of the limit decreasing as a result of inflation. This has forced shippers either to insure their cargo with independent underwriters or pay an exhorbitantly high increase in the freight to cover the value of the cargo. The unreasonably high ad valorem rates have prevented most shippers from exercising this option. By not declaring a higher value for their cargo, however, shippers are frequently trapped because many courts have taken the failure to declare as proof that the shipper has acquiesced to treating the container as the package. It was this situation that the U. S. delegates had hoped would be avoided by amending the old rules.

The fear of the U.S. delegates was that with the clause proposed by the British, the carrier would automatically charge a higher rate when the shipper disclosed the contents of the container. They foresaw a situation in which shippers would be discouraged from disclosing the contents because of the excessively high rates accompanying the disclosure, thus allowing the container to be treated as the package. Liability would then be limited to the unreasonably low amount of $0.90 per pound. Since the purpose of this conference was to raise the level of carrier liability, not lower it, the United States delegation led a successful move to defeat the British proposal.

On the surface, Articles 2(a) and 2(c) appear to offer a
much greater level of protection to shippers by establishing liability on the per package or unit basis, or on the per weight basis, whichever is higher, and by preventing the container from being treated as a package when the contents are disclosed in the bill of lading. The 1968 Protocol has not received full support from many American authorities, however, because the intent of these two clauses, as indicated by the chairman of the conference before the amendments were passed, would still be to allow the carriers to charge an ad valorem rate whenever the shipper disclosed the contents of the container, even if the shipper did not want coverage greater than $662 per package or unit.

Despite two recommendations from the Maritime Law Association of the United States that the protocol be ratified, it has never been submitted to the Senate for approval, although some U.S. courts have attempted to apply clause 2(c), albeit incorrectly, in some container cases. Despite the lack of support from the United States, the 1968 Protocol entered into force on 23 June 1977, having been ratified by several major maritime nations.

One question that has arisen regarding the protocol is the meaning of the term "unit" in clauses 2(a) and 2(c). The same term was used in the Hague Rules, and when COGSA was written, it was replaced with "customary freight unit" to clarify its meaning. Under Hague or COGSA, liability based on the freight unit usually meant using the long ton, 40 cubic
feet, 100 pounds, and most recently, the container-load as the units. However, since the 1968 Protocol contains the alternative method of limiting liability on a per weight basis, the term "unit" in the amendments has become synonymous with unpackaged "object" or "item" when the amendments are controlling.

With this interpretation of the term having been accepted by the shipping industry and most legal authorities, the appeals court in Binladen was incorrect in stating that its decision to limit liability to $500 per freight unit was consonant with the 1968 Protocol. While limiting liability in this case to the freight unit may have been correct under COGSA, under the Protocol each plant within the containers would clearly have been the "units" and the shipper would have recovered the full $80,000 for the lost cargo, not $500 per container. Application of this Protocol in the cases involving large pieces of machinery discussed earlier would have allowed using the per weight calculation to determine liability. With this method, a recovery limited to $500, as occurred in Aluminios Pozuelo, would have been impossible.

In summary, there are two ways to view this protocol: the first is that it authorizes carriers to charge ad valorem rates automatically whenever the contents of the container are declared in the bill of lading. This would most likely inhibit shippers from enumerating the number of packages or units, with the result that the container would be treated as a package.
With this interpretation, shippers might be in a better position under COGSA, as long as the courts continue to prevent carriers from limiting their liability to $500 per container when the shipper discloses the contents. Unfortunately, as Binladen proves, shippers cannot always depend on that outcome. The other view is that the amendments offer shippers greater protection in two ways -- by ensuring that the individual packages or unpackaged objects within the container are each covered by the limit (provided the contents are disclosed in the bill of lading), and by allowing a recovery based on weight when that would produce a greater value (such as for large pieces of machinery or for goods shipped as bulk in containers).

It would appear that the protocol offers shippers two benefits. It leads to predictability because the shipper is guaranteed coverage over the individual contents of containers whenever they are enumerated in the bill of lading, and it produces a far more equitable result in claims for damage to very large and heavy cargoes by establishing liability on a weight basis. It would seem that these two benefits outweigh the potential disadvantage to shippers -- that carriers could charge a higher rate whenever the contents of the container are enumerated in the bill of lading. In fact, this disadvantage could be negated if the United States ratified the 1968 Protocol with the understanding that ad valorem rates could only be charged by carriers if the shipper wanted to increase
the limit per package, unit, or kilo, above the values stipulated in the amendments. An added improvement to the protocol would be to establish an ad valorem rate structure that would be sufficient to cover the carrier's added costs but low enough that shippers would willingly pay the higher rate when more coverage was necessary.

Until the United States takes these or similar steps, however, courts will continue to be faced with uncertainty as to how to apply antiquated limitation laws to a vastly different shipping industry, resulting in perversions of the intent of COGSA such as occurred in Binladen and Aluminios Pozuelo.

Part Two: The Hamburg Rules

At about the time that the 1968 Protocol was adopted by the CMI, two U.N. organizations that are particularly sensitive to the trade needs of developing states, UNCTAD and UNCITRAL, began a review of international law governing shipping practices, especially bill of lading use and common carrier liability. It was their belief that a new legal regime, more appropriate for use by developing states, was needed to replace the Hague Rules, which had been designed in the early 1900s by the few major maritime powers that continue to dominate international shipping today. The developing states, whose nationals are primarily cargo owners rather than shipowners, wanted a system in which they would not have to rely on the
developed states' insurance industry to obtain protection for their cargoes, and where carriers assumed responsibility for any losses caused while the cargo was in their custody.

The result of the review was that in 1976, UNCITRAL submitted a draft convention on carriage of goods by sea to the U.N. Conference on the Carriage of Goods by Sea held in Hamburg, Germany. The conference adopted the Convention on the Carriage of Goods by Sea (the Hamburg Rules) on 31 March 1978. Although many states have signed the new convention, no major maritime nation has ratified it or expects to do so.

A. Carrier liability under the Hamburg Rules

Where the Hague/Visby rules represent a balance between cargo and carrier interests from the developed states, the Hamburg Rules are a compromise between developed and developing state needs. These rules are almost a throw-back to the situation that existed in the U.S. prior to the passage of the Harter Act, in which carriers were strictly liable for all damage, with only a few exceptions. Although the developing states failed to get a regime of strict liability for carriers in the Hamburg Rules, they did succeed in increasing significantly the conditions under which the carrier would be liable for cargo damage. Under Article 5(1) of the new convention, the carrier is liable for all damage unless he can prove that he or his agents "took all measures that would reasonably be required to avoid" the damage. This
"liability with fault" stipulation means that the carrier cannot escape liability for damage caused by negligence in navigation or management of the vessel, or for damage caused by any of the other exceptions to liability stipulated in the Hague Rules, even if he can prove that he exercised due diligence to make the vessel seaworthy. In addition, the carrier is liable for damage caused by delay in the delivery of the goods, and by fire if the claimant can prove that the fire was caused by the fault or neglect of the carrier.

B. Burden of Proof under the Hamburg Rules

A very important change in the Hamburg Rules involves burden of proof. Under Hague/COGSA, the carrier has the burden of proving two things: (a) that he exercised due diligence to make the vessel seaworthy, and (b) that the damage was caused by one of the exceptions to liability stipulated in Article 4(2). Once the carrier has met this burden, the burden shifts to the shipper to prove that damage was caused by the carrier's negligence in the care and custody of the cargo. Under the Hamburg Rules, with the exception of damage caused by fire, the carrier always has the burden of proving that cargo loss or damage was not caused by his negligence.

The first major change, instituting a liability with fault regime, is in fact much more reasonable today than the situation that exists under the Hague Rules. While a provision allowing carriers to escape liability for damage caused by
negligence in navigation or management of the vessel may have been reasonable in the early days of ocean transport of cargo, there is no legitimate reason today that carriers should be excused from liability caused by such negligence in the age of radar, sophisticated electronic aids to navigation, and other devices that help steer and propel modern vessels. The other provision, the burden of proof always resting with the carrier, is also more appropriate since the carrier is always privy to the necessary evidence, if it exists, to prove his case. The shipper, on the other hand, usually cannot readily obtain evidence of a carrier's negligence. Naturally, these two provisions of the Hamburg Rules have not been met with great enthusiasm by carrier interests.

C. Achieving harmony with other transport conventions

One of the objectives of the writers of the Hamburg Rules was to bring ocean carrier liability law in line with laws governing liability of air, rail, and motor carriers. Accordingly, the wording of the "liability with fault" provision of the Hamburg Rules is similar to the liability provisions in the other transport conventions. Some observers have criticized this wording as too great a change from the traditional language in carriage of goods by sea law, which could have been incorporated in a manner that would have achieved the same goals but which would have been more readily accepted and more easily applied with reference to past
Another way that the Hamburg Rules conform to the other international transport conventions is in the use of the SDR as the unit of account used to determine carrier liability. The decision to use the SDR arose from the 1976 IMCO Conference that chose to use the SDR in the Convention on Limitation of Liability for Maritime Claims, 1976. It was thought by the writers of the Hamburg Rules that the SDR, a unit based on a "basket of currencies," would be more stable than a unit based on a gold value. (The use of the SDR has been so widespread in transport liability conventions that the CMI has chosen it to replace the Poincare franc in the 1979 Protocol amending the Hague Rules.) Article 6(1) of the 1978 Convention limits carrier liability to 835 SDRs (about $825) per package or other shipping unit, or 2.5 SDRs (about $2.47) per kilo of gross weight, whichever is higher, while article 6(2) contains a container clause similar to the one incorporated into the 1968 Protocol amending the Hague Rules.

D. Bill of lading requirements in the Hamburg Rules

A very important change in the Hamburg Rules is the requirement in article 15 that very specific information, such as the number of packages or units within containers and the weight of the cargo, must be included in the bill of lading. This clause could be interpreted as implying that since this information is obligatory in the bill of lading, carriers could
only charge a higher rate if the shipper wishes to raise the limits above 835 SDRs per package or 2.5 SDRs per kilo. If this interpretation were to be adopted, it would avoid the ambiguity in the 1968 Protocol that some authorities believe entitles the carrier to charge a higher rate whenever the shipper enumerates the contents of the container in the bill of lading.

In summary, the Hamburg Rules attempt to force carriers to accept a far greater level of liability not just by raising the per package limit to about $825, but also by discarding the seventeen exceptions to liability found in Hague/Visby and by placing the burden of proof entirely on the carrier to show that damage was not caused by his negligence. In addition, the 1978 Convention seems to avoid the potential problem in the 1968 Protocol -- allowing carriers to charge higher rates for enumerating the contents of containers in the bill of lading -- by requiring this information at all times.

Unfortunately, the only part of the Hamburg Rules that has been readily accepted is the use of the SDR as the unit of account. The general feeling in the major maritime nations (held primarily by carrier interests) is that these rules would disrupt the balance already achieved between carriers and shippers in the Hague/Visby Rules and would require a re-working of the distribution of risks between cargo insurers and P & I insurers. Also, if some countries adopt the Hamburg Rules while others continue under the Hague/Visby system, the conflict of laws that will arise could create a significant inter-
ference in the flow of commerce. Many shippers, even those from the U.S., are more supportive of the 1978 Convention. They see it as a good opportunity to increase carrier liability to a reasonable level and to simplify the terms under which liability is determined. Cargo insurers and carriers, who believe they would suffer under the Hamburg Rules, feel that the answer lies in the continued updating of the original regime on a world-wide basis as new technologies and shipping practices create a demand for clarification and change.

Part Three: Amending COGSA: Will it be Visby or Hamburg?

Recently, Dow Chemical Company petitioned the Federal Maritime Commission (FMC) to clarify the definition of the term "package" in COGSA. The FMC refused on the grounds that only the court system or Congress had the authority to do so. Finally responding to long-standing shipper demands, the House Committee on the Merchant Marine and Fisheries in August 1985 introduced a bill to amend COGSA. Since the bill was introduced just before Congress recessed, no hearings have been held yet and the only information available at this time is the bill itself.

The draft bill contains two alternatives for amending COGSA. The first simply incorporates the 1968 and 1979 Visby Amendments to the Hague Rules. Section 309 contains a container clause similar to the one in the 1968 Protocol, which states that when the contents of a container or pallet are enumerated in the bill of lading, the container or pallet will
not be treated as a COGSA package. This section also limits shipowner liability to the same values as the 1979 Protocol -- 666.67 SDRs per package or 2 SDRs per kilo gross weight, whichever is higher.

A second version of section 309 is included at the end of the bill and incorporates the Hamburg Rules rather than the Visby Amendments. It appears that the intention here is that both versions will amend COGSA if the bill is passed, but only the section based on the Visby Amendments will immediately go into effect. The Hamburg Rules version will only go into effect by replacing the Visby Amendments if and when the 1978 Convention on the Carriage of Goods by Sea enters into force for the U.S., within one year after the deposit of the U.S. instrument of ratification and notice of denunciation of the Hague/Visby Rules, and when more seaborne foreign trade takes place with states that recognize the Hamburg Rules rather than the Hague/Visby regime.

While an amendment of COGSA is long overdue, it is unfortunate the this bill does not clarify those points that caused concern in the 1968 Protocol, especially the question of whether the carrier can charge a higher rate automatically when the contents of the container are enumerated in the bill of lading. The system of charging ad valorem rates also needs to be refined so that shippers are not put in a position where they find declaring the actual value of the cargo too costly to obtain added protection for their cargo. In addition, the bill
should include a better definition of the term "package" than the one that appears in the draft, which obfuscates rather than clarifies the meaning of the term. The definition needs to state that "package" is synonymous with unpackaged items or objects inside the container as well. Only if this term is clarified sufficiently will the courts be able to apply the law with consistency and fairness. Without a clarification, however, shippers and carriers will continue to disagree as to what is covered by the per package limitation, so that the purpose of amending the bill will be defeated.
Conclusion

The extent of shipowner liability to cargo owners has changed significantly since the Harter Act was passed in 1893. During the period when the Harter Act was the only law governing ocean bills of lading, carriers could escape liability by writing very low limits of liability into the bill of lading. One of the purposes of amending the Harter Act by the formulation of the Hague Rules and COGSA was to increase shipowner liability to a very substantial value, £100 or $500 per package or freight unit. This system worked smoothly for many years by offering shippers complete protection for most cargo shipped in break-bulk packages.

The benefits of the per package limitation began to shift from shipper to carrier in the 1960s as the shipment of heavy, high value machinery and the use of containers to consolidate cargo became commonplace. The definition of the term "package" lost its clarity as the courts extended its meaning to included large unpackaged objects and entire container-loads of cargo, with the result that carrier liability dropped to negligible amounts.

In an effort to decrease the amount of litigation over cargo claims, the CMI revised the Hague Rules in 1968 and 1979 by clarifying the terms of carrier liability, especially with regard to containerized cargo, and by increasing the amount of
protection received by shippers to a more reasonable level. The United States has been very slow in acknowledging the advantages of the amendments, primarily because of pressure from U.S. shipowners who realize that under the amendments, they would have less chance of being able to limit their liability to $500 per container.

Shippers from developing countries have remained dissatisfied with the Hague/Visby regime because they feel that it forces shippers to rely too heavily on the developed states' large cargo insurers for protection. As a result, the rules formulated by UNCTAD and UNICITRAL in the interest of shippers from developing states would place a far greater burden on carriers to compensate for cargo damage and would reduce the importance of cargo insurers for protection. These rules are appealing to many observers because they go a long way towards simplifying the terms of carrier liability; however, carriers oppose them because they would increase carrier liability in several ways, and cargo insurers are concerned that all of their business would shift to P & I insurers since most of the risks would be transferred from the cargo owners to the ship owners. These two groups have so far been successful in preventing the adoption of these rules by the major maritime nations.

Large shippers, especially those in the United States who have not yet received the benefits of the Visby Amendments, have expressed support for the Hamburg Rules, primarily because
they feel that these rules would be even better than the Visby Amendments in providing protection for their cargo and in reducing the amount of litigation over cargo claims. The House Committee on the Merchant Marine and Fisheries has recognized this interest by including the Hamburg Rules as well as the Visby Amendments in their bill to amend COGSA. While adoption of the Hamburg Rules is unlikely at this point, continued pressure from U.S. shippers and an increase in the importance of shippers from developing states in world trade could lead to their adoption in the future.

Both the Hamburg Rules and the Visby Amendments attempt to clarify the meaning of the term "package" as it pertains to containerized cargo; however, some disagreement about the definition still exists and is bound to be a point of contention in cargo cases in the future. This problem could be avoided if the shipping community would accept the fact that the term "package" causes more trouble than it is worth and is not necessary for the purpose of establishing the level of carrier liability in the era of containerization. Perhaps a better way of establishing liability would be to base it on a percentage of the value of cargo shipped in a container. For example, under the normal rate, the carrier would reimburse the shipper for damages up to 50% of the value of the cargo in that container. With the value of the cargo in each container stated on the bill of lading, both the shipper and carrier would know the minimum limit of the carrier's liability. The
rate structure could be constructed so that the rate would increase by a specific amount to increase coverage by increments of 10%. The shipper could pay a higher rate to increase carrier liability, buy insurance from an independent insurer to cover any damages above 50% of the cargo's value, or simply accept the risk himself. The shipper would have a genuine choice as long as ad valorem rates were high enough to cover the carrier's added cost for increased liability but not too high to prevent the shipper from paying a higher rate when he wishes to increase carrier liability.

This would be such a vast change from the well-established system of determining liability that acceptance of it would be unlikely. It simply suggests that we do not need to retain a system that results in constant variation of application because of different interpretations of terminology, and that we could progress beyond this archaic per package limitation system that treats shippers of low and high value cargoes and shippers of packaged and unpackaged goods differently to a regime that provides all shippers with equal and adequate protection.
References

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46 U.S.C. sect. 1304(5): Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: Provided, that such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

3
The CMI is a private organization whose membership consists primarily of lawyers from the Maritime Law Associations of Belgium, France, Germany, Denmark, Italy, Norway, the U.S., Sweden, and Japan. Its main goal is the worldwide unification of maritime law. Francesco Berlingieri, "The Work of the Comite Maritime International: Past, Present, and Future," Tulane Law Review, 57 (1983), 1260. Also involved in the creation of the Hague Rules was the Imperial Shipping Committee, which published a report on a conference held for shippers and carriers concerning the need for uniform rules governing bills of lading: "Report by the Imperial Shipping Committee on the Limitation of Shipowner's Liability by Clauses in Bills of Lading, and on Certain other matters relating to Bills of Lading," 25 February 1921.

4
51 Stat. 233, U.S.T. No. 931. The Senate Resolution of 1 April 1935, included in the instrument of ratification, stated the following understanding: "That should any conflict arise between the provisions of the Convention and the provisions of the Act of April 16, 1936, known as the 'Carriage of Goods by Sea Act', the provisions of said Act shall prevail." According to Whiteman, Digest of International Law, vol. 14, pp. 137-138: "The term 'understanding' is often used to designate a statement when it is not intended to modify or limit any of the provisions of the treaty in its international operation but is intended merely to clarify or explain or to deal with
some matter incidental to the operation of the treaty in a manner other than as a substantive reservation. Sometimes an understanding is no more than a statement of policies or principles or perhaps an indication of internal procedures for carrying out provisions of the treaty."


6 Ibid.

7 The special drawing right is an artificial reserve unit valued in terms of a "basket of 5 currencies" proportioned as follows: US$0.54 (42%), DM0.46(19%), £0.071(13%), FO.74(13%), and Y34.00(13%). 1984 World Currency Yearbook. (Brooklyn, N. Y.: International Currency Analysis, Inc., 1985), p. 11.

8 Table provided by the House Committee on the Merchant Marine and Fisheries.

9 Supra, note 5, at p. 1248.

10 Article 5(1): The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

11 On 17 June 1985, 2.5 SDRs equaled $2.48. The value of 835 SDRs was $831.58. Wall St. Journal, 18 June 1985, p. 60.

12 Staggers Rail Act (P.L. 96.448), Motor Carrier Act (P.L.96 298).


46 U.S.C. sect. 182: No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board the vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.


46 U.S.C. sect. 190: It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

46 U.S.C. sect. 191: It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence properly [to] equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.
46 U.S.C. sect. 192: If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent, or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

Supra, note 5, at 1241.


May et al v. Hamburg-Amerikanische Packetfahrt Aktiengesellschaft, (the Isis), Supreme Ct. of the U.S. 290 333, 54 S. Ct. 162, 78 L. Ed. 348. Justice Cardozo states: "We are told that the provisions of the Harter Act... will lead to absurdity and hardship if an unseaworthy condition is to take away from the carrier an exemption from liability for the negligence of its servants in the management of the vessel without a causal relation between the defect and the disaster. ... The maritime law abounds in illustrations of the forfeiture of a right or the loss of a contract by reason of the unseaworthiness of a vessel, though the unseaworthy feature is unrelated to the loss. The law reads into a voyage policy of insurance a warranty that the vessel shall be seaworthy for the purpose of the voyage. ... [I]rrespective of any relation of cause and effect, the breach of warranty will vitiate the policy."

Article 4(1): Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy and to secure that the ship is properly manned, equipped, and supplied and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the
provisions of paragraph 1 of article 3.

25 Supra, note 23.

26 Article 4(1): Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

27 Article 4(5): Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pounds sterling per package or unit or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.


29 Ibid., pp. 84-85.

30 Ibid., p. 201.

31 The other signatories were: Germany, Argentina, Finland, France, Belgium, Chile, Cuba, Denmark, Spain, Estonia, Great Britain, Hungary, Italy, Japan, Latvia, Norway, Netherlands, Poland, Portugal, Rumania, Yugoslavia, Sweden, Uruguay.


33 S. 1295, 70th Cong., 1st sess. For a complete listing of all bills concerning this issue introduced to Congress, see the report on uniform ocean bills of lading prepared by the Conference on Uniform Ocean Bills of Lading, Nov. 1930, reprinted in supra, note 33, at 29.

H. R. 3830, 71st Cong., 1st sess., above.

For a complete discussion of the changes made to the Brussels Convention in the White Bill, see supra, note 33, at 32.

For a listing of the changes suggested by the Nov. 1930 conference, see supra, note 33, at 33-34.

Supra, note 33, at 40.


Hearings before the House Committee on the Merchant Marine and Fisheries on S. 1152, 74th Cong., 2nd sess., 1936, on uniform ocean bills of lading, p. 25.

Ibid.

Supra, note 42, at 67.

Apples were shipped in cases or barrels; butter was packed in cases, boxes or kegs; wool, jute, copra, cotton, and silk were shipped in bales; refined sugar, rice, salt, coffee, cement, flour, and fertilizer were shipped in bags; wine moved in barrels; tobacco was shipped in hogsheads, bales, or cases; oranges and eggs were shipped in crates. Alan E. Branch, The Elements of Shipping (London: Chapman and Hall, Ltd., 1970), pp. 128-135.

1927 A.M.C. 511. In this case, a shipment of 15 packages of arsenic acid was damaged by seawater while in transit between Japan and San Francisco. The bill of lading contained a clause with faulty wording that left the limit of liability unclear. As written, the clause read: "said company will not become liable for any value exceeding one hundred dollars ($1000.00) [sic] upon each of the named packages, unless other valuation is declared and so expressed in the Bill of Lading."
The court made no attempt to discover which valuation the carrier had intended -- $100 or $1000/package -- because it found no evidence that the carrier had offered the shipper a higher rate to increase the carrier's liability. The carrier was found liable for the full amount of damage, $269/package.

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1926 A.M.C. 379. Here, a clause limiting carrier liability to 1000 francs (about $40.00) per package was not upheld because the shipper was not offered a chance to declare a higher value. This entitled the shipper to full compensation for the short delivery of 332 cases of furs.

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234 N.Y.S. 622 (1929), reduced and affirmed 238 N.Y.S. 50, 1930 A.M.C. 18. Three bales of silk were stolen while in the custody of the carrier, with the carrier's employees suspected of the theft. The bill of lading contained a clause exonerating the carrier of liability for losses due to theft even if committed by an employee of the carrier. The bill of lading also contained a clause limiting carrier liability to $100/package. On final appeal, the limitation clause was struck down because it attempted to establish an absolute limitation of carrier liability, which would remain the same regardless of the freight rate paid. In addition, the carrier was not entitled to exonerate himself from liability caused by his negligence or by the wilful wrongdoing of his employees. The carrier was found liable for the market value of the silk at destination plus interest, $567/package.

47

1928 A.M.C. 1672. The carrier had included in his bill of lading the following clause: "The value of each package . . . does not exceed the sum of one hundred dollars, unless otherwise stated herein on which basis the rate of freight is adjusted."

Since it was clear to the court that the shipper had been given the opportunity to declare a higher value, the shipper claimed that he was not bound by the limitation clause because the ship had made a deviation by overcarrying his cargo. Infra, note 49. The court found no evidence that the cargo had been carried beyond the port of destination and allowed the carrier to limit his liability to $100 per package.

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31 F. Supp. 948 (1940). The carrier claimed that he was only liable for $1000 for the short delivery the two packages under section 4(5) of COGSA. The shipper asserted that the carrier lost his right to limit because the vessel had undertaken an unreasonable deviation, overcarrying his cargo beyond the port of destination. Again, the court could find no evidence that the cargo had been overcarried and that by not
declaring a higher value in the bill of lading, the shipper had to bear any loss above $500 per package.

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Where the ship had deviated from the customary course of the voyage, or the carrier had deviated from the agreed method of transportation of the cargo, resulting in damage to the cargo, the carrier forfeited the right to limit his liability to the value stated in the bill of lading. A deviation clause was included in section 4(4) of COGSA as well: "Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this act or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: Provided, however, That if the deviation is for the purpose of securing or delivering cargo or passengers it shall, prima facie, be regarded as unreasonable." Under COGSA, any unreasonable deviation deprives the shipowner of the right to limit his liability to $500 per package.

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49 F. Supp. 559, 64 F. Supp. 529, 138 F.2d 907, 159 F.2d 654. In this case, the shipper contracted with the carrier for shipment of 1867 boxes of lily of the valley pips (rootstocks) from Rotterdam to New York. Since refrigerated space was not available, the carrier agreed to stow the boxes on top of hatch covers on deck, covered by tarpaulins to protect the pips from seawater. Instead, the carrier stowed the boxes uncovered in the wings of the hatches. On arrival in New York, the pips were found worthless, having been soaked by seawater on the voyage. The court determined that the carrier had deviated from the agreed method of transportation and therefore forfeited his right to limit his liability.

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116 F. Supp. 386. Here, the Ford Motor Co. delivered 20 packages of automobiles and automobile parts to the Flying Clipper for shipment to Guam. The carrier issued a clean bill of lading, obligating him to stow the cargo below decks. (A clean bill of lading is issued by the carrier when the cargo is received by him in apparent good condition and indicates that the cargo will be shipped below deck.) Instead, the carrier stowed the crates on deck, resulting in $16,794 in damages to eight of the packages, or approximately $2100/package. The carrier claimed that he was entitled to limit to $500 per package because although unreasonable deviation invalidated limitation of liability clauses under the Harter Act, the $500 per package limitation under COGSA was absolute except where the shipper has declared a higher value. The Court disagreed and stated:

There is nothing in the history of the Act to indicate
that Congress by fixing the limitation at $500 intended to displace the doctrine of unjustifiable deviation which was so firmly entrenched in maritime law. .. [M]ere negligence with regard to stowage or handling of the cargo has never constituted deviation. Deck stowage where under deck stowage is required is more than negligence - it is deviation with resulting abrogation of the contract.

To uphold the carrier's contention that the limitation of liability is absolute, regardless of a fundamental breach which goes to the very essence of its undertaking, would permit any carrier with recklessness to violate the terms of the bill of lading, knowing that it cannot be called upon to pay more than $500 per package. Such a policy, if upheld, would immunize the carrier against the consequences of its own willful actions at the expense of an innocent party. (pp. 389-390)

52

136 N.Y.S.2d 574. In a total shipment of 222 bales of goatskins, with 300-350 skins per bale valued at $260/bale, sixty bales were found damaged to about one-half their value by being infested and eaten by beetle larvae. The bales were packed so that the skins were folded in half along the animals' spines and bound together, with a skin used as a cover on both ends. This kind of skin was usually treated with arsenic soap to prevent infestation by beetles during shipment. The carrier claimed that because the arsenic treatment in the damaged bales had obviously been insufficient, the damage had actually been caused by an inherent vice in the nature of the goods, one of the exceptions to liability under COGSA. The court disagreed, stating that the shipper was under no obligation to treat them at all and that the infestation must have begun while the skins were being shipped from Brazil to New York. Under COGSA, the carrier has the burden of proving that damage was caused by one of the exceptions to liability and that he had not been negligent in the care of the cargo. Since the carrier failed to prove that the damage was caused by one of the exceptions, the court found the carrier liable for the full value of the damage less the 5% normally lost in the curing process, about $130 per bale.

53

156 F.2d 603. The shipper sustained $676.94 in damages to a package of rayon goods worth $1619.47, a loss of 41.8% of the value of the shipment. The carrier claimed he was entitled to limit his liability to $500 for the entire package under COGSA and that his actual liability to the shipper should be 41.8% of $500, or $209, because of the pro-rating clause.
The court stated that under section 4(5) of COGSA carrier is liable for any amount of loss sustained up to $500 per package, unless a higher value in declared. The court felt that allowing pro-rata clauses would be contrary to the intention of the Hague Rules and COGSA, which was to prevent carriers from limiting their liability below $500 per package. As to the carrier's contention that the carrier is cheated out of receiving a higher freight rate when the shipper does not declare a higher value, the court stated that "[i]f the shipper is willing to bear the risk of loss above that sum [$500], he is privileged to ship at the normal rate; he owed the carrier no duty to declare the value and pay a higher rate." (p. 605)

55 F. Supp. 798, affirmed 148 F.2d 141 (1945). Here, a giant amusement crane was shipped from France to San Francisco in 126 parts, only twenty of which were crated. During shipment, twenty-two of the pieces, all unboxed, suffered damage by being bent, kinked, and twisted. It was clear to the court that the crane had been received by the carrier in good condition and that the carrier had been negligent in the care of the cargo. The carrier claimed that the pieces were not packages and because the crane was shipped as a single freight unit with freight charged as a lump sum, he was only liable for a total of $500 for all of the damage. The bill of lading stated that the shipment consisted of 126 "colis" (packages) and each piece of the crane had been weighed and inspected before shipment. On that basis, and despite the single freight paid for the entire unit, the court decided that each piece of the crane was a COGSA package entitled to the $500 limit.


The freight for various parts of the tractor was calculated in three different ways -- some on a 100 pound basis, some by the long ton (2240 pounds), and some on a 40 cubic foot basis. With each freight unit covered by $500, the carrier's liability came to $17,300. Judge Swan explained their decision not to consider the tractor a COGSA package as follows:

75
Apparently the appellant [carrier] contends that any preparation of goods for ocean transportation converts the goods into a "package." Such a construction of the section would cause "a shipper who attempts to minimize possible harm to his property by putting protective covering on sensitive parts," to be placed in a worse position than a shipper who makes no effort to reduce the possibility of loss from inclement weather or pilfering. . . . Any test dependent upon extent of external covering would lead to uncertainty and increase litigation. We cannot believe that Congress intended "package" to be defined in a way to produce such a result. (p. 137)

Pointing out that the bill of lading listed "1 semi-boxed" under the heading "No. of Pkgs.", Judge Moore in his dissent stressed that what was written into the bill of lading should not be completely disregarded because it provides evidence as to the parties' intent and the courts should not limit their conception of the term "package" to the layman's definition. He also disagreed with the court's contention that had a skid been used to aid in transporting the tractor, it would have been considered a COGSA package:

To hold a piece of machinery a package simply because it has skids attached and to limit liability for damage to $500, where the same machinery without skids, if large or heavy, would subject the carrier to a much greater liability for loss, seems unreasonably to extend the meaning of "package" and to bring about a result that is highly inequitable. (p. 138)

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407 F.2d 155.

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If liability had been calculated by the customary freight unit ($500 per 40 cubic feet), maximum liability would have come to $6700, more than the actual amount of damages -- $3754. Instead, the shipper received $500 for the entire cargo lost. The distinction between the circumstances in this case and those in Gulf Italia is quite arbitrary and Judge Moore's explanation of this decision was hardly a reasonable response to the shipper's complaint:

If shippers find the $500 per package limitation outdated because of inflationary trends and technological developments, the statute provides that they can obtain at their option full coverage merely by
declaring the nature and value of the goods in the bill of lading and, where necessary, by paying a higher tariff. On the other hand, if they are reluctant to pay the higher charge and chose [sic] instead to gamble on safe delivery, they cannot argue later that the statute is inequitable. (pp. 155-156)

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The court stated: "... based upon the number of customary freight units applicable to the nonpackaged goods, liability could well exceed the statutory limit of $500 per package. It was not the purpose of the act, therefore, to relieve the carrier of its normal responsibility for damage to cargo or to unduly limit its liability for just claims when goods have not been shipped in packages." (p. 962)

63
"Any distinction based upon the subjective purpose for which the skid was attached should not be the test for resolving the issue. The skid certainly protected the transformer to some extent though obviously unsuccessfully, by preventing it from shifting and sliding, and from contact with other cargo during transit. And, the skid could have been utilized to facilitate the transportation of the transformer. Nevertheless, we are unpersuaded that by simply attaching the transformer to a wooden skid the shipper created a "package." ... To hold that somehow a "package" evolved from the mere attachment of the machine to a wooden skid seems a highly unreasonable result." (p. 965)

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65
The following factors led to the trial court's decision limiting the carrier's liability to $500 for the loss of cargo worth $29,400:

1. The container was produced by the shipper's agent in Berlin, not by the carrier.

2. The container had the appearance of a typical general cargo package and did not look like the standard 40'x 8'x 8' container.

3. It was delivered to the carrier in a sealed condition.

4. No markings indicated the number of packages inside.
5. The bill of lading read: "1 Container said to contain machinery."

66 Supra, note 62, at 649.


68 Judge Feinberg's dissenting opinion in Standard Electrica at 375 F.2d 943, 948 in 507 F.2d 342, 346.


70 The bill of lading, under the heading "No. and kind of packages; description of goods" read: "1 container s.t.c. [said to contain] 99 bales of leather." Another clause in the bill of lading read:

SHIPPER HEREBY AGREES THAT CARRIER'S LIABILITY IS LIMITED TO $500 WITH RESPECT TO THE ENTIRE CONTENTS OF EACH CONTAINER EXCEPT WHEN SHIPPER DECLARES A HIGHER VALUATION AND SHALL HAVE PAID ADDITIONAL FREIGHT ON SUCH DECLARED VALUATION . . . (p. 804)

One of the factors the court considered in making its decision was that the 99 cartons of leather had steel straps around them, qualifying them as bales, with the tariff being a fixed price per kilo for leather in bales. A second factor was that the shipper had disclosed the contents of the container in the bill of lading, and a third was that the shipper loaded the container with an agent of the carrier observing the loading process.

71 Ibid., at 815.


73 This means that with containerization, shippers have lost one of their major weapons against carriers -- even if a carrier supplied the shipper with a leaky container and losses resulted from damage caused by rain or seawater because the container had been stowed on deck, the carrier would only be liable for $500 per package even though that damage would not have occurred had the container been stowed below deck.
The bill of lading indicated the number of free cartons and the number of pallets, lending further support to the notion that the container was not a package. Another factor that influenced the court was that the cargo could only have been shipped in a refrigerated container because refrigeration was not otherwise available on the ship. The Court felt that since the shipper had no other choice but to use the container, liability should not be limited to $500 per container. Two other factors were that an agent of the carrier had observed the loading of the container so the carrier had first-hand knowledge of the contents, and that the carrier had also benefited from the shipper loading the container because he was saved the cost of stuffing it himself.

The bill of lading described the cargo as "2 containers s.t.c. 30 bundles of 438 pcs. Grade A Tin Ingot." The full value of the lost ingots was $369,404.40.

Judge Friendly discounted the reasoning behind the functional economics test because in cases such as this where the cargo was not shipped in packages, the test would automatically lead to the presumption that the container was the package:

"Although we have little difficulty with the suggestion that cartons, crates and other units that were treated as COGSA packages when they were shipped breakbulk should ordinarily continue to be so treated when they are shipped in containers, we do not discern a proper basis for the other half of the Kulmerland test, i.e., the rule that the container is presumptively the package where the units inside are not suitable for breakbulk shipment. Even if this might tend to show that each of those units is not a package ... it does not at all follow that the container is. It could just as reasonably, indeed far more reasonably, be the case that the goods are "not shipped in packages" at all -- a class of cargo specifically provided for in [sec.] 4(5)." (p. 818)
"It did not take long for the carriers . . . to realize that if they could persuade the courts to consider a container rather than the smaller units stowed inside to be the "package" for purposes of [sec.] 4(5) of COGSA, they would thereby practically nullify that section, since in today's world a suit for $500 or even, where there were a number of containers, several times that sum, would not warrant the cost . . ." (p. 819)

". . . the shipper who uses carrier-furnished containers may have reason to complain of a rule whereby he "can avoid the 'package' limitation [i.e., a ruling that the container is the package] when using containers only if he ships goods packed in such a way that they need not be shipped in containers" and thereby incurs significant economic waste unless such packaging would be required for subsequent distribution, which is by no means always the case." (p. 819.)

Supra, note 74, at 825.

666 F.2d 746 (1981).

These other factors included the fact that the shipper had stuffed and sealed the container without the carrier verifying the contents, and that the bill of lading mentioned "containers" several times and referred to "cartons" only once. The final factor was that the shipper had the opportunity to ship either break-bulk or by container and chose to ship by container to decrease the risk of pilferage. These three considerations led the Magistrate to determine that the containers constituted packages. Supra, note 81, at note 3 on 747-745.

Ibid., note 5, at 748.

Ibid., at 753.


Article 4(5)c of the 1968 Brussels Protocol reads: "Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units
are concerned. Except as aforesaid such article of transport
shall be considered the package or unit." It appears that this
court has misinterpreted the meaning of the term "unit" here.
In the Protocols amending the rules, "unit" refers to the
shipping unit (such as ingots in Mitsui), not the unit on which
the freight was based. "Customary freight unit" was included
only in COGSA and was originally expected to provide a similar
level of protection to the shipper of unpackaged goods as the
limitation based on the number of packages.

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759 F.2d 1006, 1015-1016.

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Supra, note 80, at 947-948.

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treated as a COGSA package.

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Seymour Simon, "More on the Law of Shipping Con-
tainers," Journal of Maritime Law and Commerce, 6 (1975), 613, 615-619. He writes: "It is time to leave Alice's Wonderland
where tangible objects are seen in reverse through enchanting
esoteric phrases. Only by returning to the real world of the
here and now of ocean transportation can the courts fittingly
effectuate, rather than pervert, the manifest legislative
policy of Sec. 4(5) to protect the cargo owners."

93
M. E. DeOrchis, "The Container and the Package
Limitation -- The Search for Predictability," Journal of

94
U. S. Dept. of Commerce, Survey of Current Business,
vol. 65, no. 3 (1985), p. 5-5, and Historical Statistics,
Series E135-166.

95
Most of the information for this section was obtained
from the very thorough analysis of the legislative history of
the 1968 Protocol by John L. DeGurse in "The 'Container Clause'
in Article 4(5) of the 1968 Protocol to the Hague Rules,"

96
Convention on the Contract for the International Car-
riage of Goods by Road (CMR), 399 U.N.T.S. 189.
97 Conference Diplomatique de Droit Maritime, Douzième Session (1 phase), Bruxelles 1967, at 694 in DeGurse, p. 138.

98 Ibid., at 709, in DeGurse, p. 138.


100 Ibid., at 10, in DeGurse, p. 140.

101 Ibid., at 11, in DeGurse, p. 140.

102 Supra, note 27.

103 Supra, note 95, at 135.

104 Id., at 143.

105 Id., at 142.

106 Id., at 141.

107 See Binladen in the last chapter. The court of appeals used the 1968 Protocol as part of the basis for its decision, but failed to understand that the term "unit" in the amendments is synonymous with "unpackaged object," not customary freight unit.


109 For a complete discussion of the evolution of the

110 Supra, note 107. By April 1984, only Chile, Uganda, Tanzania, Tunisia, Morocco, Lebanon, Rumania, and Barbados had adopted the 1978 convention.

111 See Yancy, supra, note 5.

112 See page 5 of text.

113 Article 5(1) of the Hamburg Rules reads: "The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences."

114 Ibid.

115 Article 5(4)(a)(i) reads: "The carrier is liable for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents."

116 See the Convention for the Unification of Certain Rules Relating to International Carriage by Air (The Warsaw Convention), signed at Warsaw on 12 Oct. 1929, CXXXVII League of Nations T. S. 11, Arts. 18(1) and 20(1); The International Convention Concerning the Carriage of Goods by Rail (CIM), signed at Berne on 25 Oct. 1952, Arts. 27(1) and 27(2); The Convention on the Contract for the International Carriage of Goods by Road (CMR), signed at Geneva on 19 May 1956, Arts. 17(1) and 17(2).

117 Robert Hellawell, "Allocation of Risk between Cargo

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The only substantive change to the Hague Rules in the 1979 Protocol is in Article II 1(a), which replaces the poincare franc in Article 4(5)a with the SDR:

Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is higher.

Article II 2(d) defines the SDR.

120

Article 6 1(a) reads: The liability of the carrier for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.

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Article 6 2(a) reads: Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading, if issued, or otherwise in any other document evidencing the contract of carriage by sea, as packed in such article of transport are deemed packages or shipping units. Except as aforesaid the goods in such article of transport are deemed one shipping unit.
Article 15 1, in part, reads:

The bill of lading must include, inter alia, the following particulars:

(a) the general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper:


Section 30917 reads:
(a) In this section --

(1) "package" means, if goods are consolidated in a container, pallet, or similar article of transportation used to consolidate goods --

(A) each shipping unit enumerated in the bill of lading or contract to transport the goods by sea and packed in the article of transportation; or,

(B) if not enumerated, the container, pallet, or article of transportation.

(2) "unit of account" means a Special Drawing Right (as defined by the International Monetary Fund) converted into United States dollars under the method used by the International Monetary Fund on the date of judgment or a date agreed to by the persons in the action.

Section 30917(c) reads: Unless the shipper declares and inserts in the bill of lading the nature and value of goods being transported under a contract to transport goods before the carrier takes charge of the goods, the carrier or the vessel is liable for loss of, or damage to, the goods of not more than an amount equal to the greater of --

(1) 666.67 units of account for each package; or

(2) 2 units of account for each kilogram of gross weight of the goods lost or damaged.

Section 30945 3(b) reads: The amendment made by subsection (a) of this section is effective when the following have occurred:


(2) the Hamburg Rules have entered into force or, within one year after deposit of the United States Government's instrument of ratification of the Hamburg Rules and notification of denunciation of the International Convention for the Unification of Certain Rules Relating to Bills of Lading, 1924, as amended ("Hague-Visby Rules").

(3) more of the seaborne foreign trade of the United States . . . us with foreign countries that have expressed their consent to be bound by the Hamburg Rules through the deposit of the instruments of ratification, acceptance, approval, or accession, than with foreign countries that are parties to the Hague-Visby Rules and have not expressed their consent to be bound by the Hamburg Rules.
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APPENDIX 1

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this Act.

TITLE I

SECTION 1. When used in this Act—
(a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.
(b) The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.
(c) The term "goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.
(d) The term "ship" means any vessel used for the carriage of goods by sea.
(e) The term "carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

RISKS

SEC. 2. Subject to the provisions of section 6, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.

RESPONSIBILITIES AND LIABILITIES

SEC. 3. (1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—
(a) Make the ship seaworthy;
(b) Properly man, equip, and supply the ship;
(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.
(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.
(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—
(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.
(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.
(c) The apparent order and condition of the goods: Provided, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

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(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3) (a), (b), and (c), of this section: Provided, That nothing in this Act shall be construed as repealing or limiting the application of any part of the Act, as amended, entitled “An Act relating to bills of lading in interstate and foreign commerce”, approved August 29, 1916 (U. S. C., title 49, secs. 81-124), commonly known as the “Pomerene Bills of Lading Act.”

(5) The shipper shall be deemed to have guaranteed to the carrier, the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the carrier shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: Provided, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

(7) After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a “shipped” bill of lading: Provided, That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the “shipped” bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a “shipped” bill of lading.

(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

Evidence of receipt.

Paragraphs.

Proviso.

Existing law not affected.


Accuracy of marks, etc., guaranteed by shipper; indemnity for error.

Removal to be prima facie evidence of delivery; exception.

Notice of loss when damage not apparent.

Exception.

Failure to bring suit; discharge of liability.

Proviso.

Right of shipper.

Manual rights of inspecting, etc., goods, in case of loss.

“Shipped” bill of lading.

Proviso.

Substitution of, for document of title previously taken up, etc.

Covenant relieving from liability for negligence, etc., void.

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RIGHTS AND DUTIES

Sec. 4. (1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 3. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—
   (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;
   (b) Fire, unless caused by the actual fault or privity of the carrier;
   (c) Perils, dangers, and accidents of the sea or other navigable waters;
   (d) Act of God;
   (e) Act of war;
   (f) Act of public enemies;
   (g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;
   (h) Quarantine restrictions;
   (i) Act or omission of the shipper or owner of the goods, his agent or representative;
   (j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: Provided, that nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;
   (k) Riots and civil commotions;
   (l) Saving or attempting to save life or property at sea;
   (m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;
   (n) Insufficiency of packing;
   (o) Insufficiency or inadequacy of marks;
   (p) Latent defects not discoverable by due diligence; and
   (q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

(3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this Act or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: Provided, however, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.
(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: Provided, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

(6) Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

SURRENDER OF RIGHTS AND IMMUNITIES AND INCREASE OF RESPONSIBILITIES AND LIABILITIES

Sec. 5. A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this Act, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this Act shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this Act. Nothing in this Act shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

SPECIAL CONDITIONS

Sec. 6. Notwithstanding the provisions of the preceding sections, a carrier, master or agent of the carrier, and a shipper shall, in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea: Provided. That in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.
Any agreement so entered into shall have full legal effect: Provided. That this section shall not apply to ordinary commercial shipments made in the ordinary course of trade but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

Sec. 7. Nothing contained in this Act shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

Sec. 8. The provisions of this Act shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916, or under the provisions of sections 4281 to 4289, inclusive, of the Revised Statutes of the United States, or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels.

TITLE II

Section 9. Nothing contained in this Act shall be construed as permitting a common carrier by water to discriminate between competing shippers similarly placed in time and circumstances, either (a) with respect to their right to demand and receive bills of lading subject to the provisions of this Act; or (b) when issuing such bills of lading, either in the surrender of any of the carrier's rights and immunities or in the increase of any of the carrier's responsibilities and liabilities pursuant to section 5, title I, of this Act; or (c) in any other way prohibited by the Shipping Act, 1916, as amended.

Sec. 10. Section 25 of the Interstate Commerce Act is hereby amended by adding the following proviso at the end of paragraph 4 thereof: "Provided, however, That insofar as any bill of lading to which this Act applies relates to the carriage of goods by sea, such bill of lading shall be subject to the provisions of the Carriage of Goods by Sea Act."

Sec. 11. Where under the customs of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in this Act, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

Sec. 12. Nothing in this Act shall be construed as superseding any part of the Act entitled "An Act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property", approved February 13, 1893, or of any other law which would be applicable in the absence of this Act, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

Sec. 13. This Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this Act the term "United States" includes its districts, terri-
tion, and possessions: Provided, however, That the Philippine Legislature may by law exclude its application to transportation to or from ports of the Philippine Islands. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this Act shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: Provided, however, That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this Act, shall be subjected hereto as fully as if subject hereto by the express provisions of this Act: Provided further, That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this Act.

Sec. 14. Upon the certification of the Secretary of Commerce that the foreign commerce of the United States in its competition with that of foreign nations is prejudiced by the provisions, or any of them, of title I of this Act, or by the laws of any foreign country or countries relating to the carriage of goods by sea, the President of the United States may, from time to time, by proclamation, suspend any or all provisions of title I of this Act for such periods of time or indefinitely as may be designated in the proclamation. The President may at any time rescind such suspension of title I hereof, and any provisions thereof which may have been suspended shall thereby be reinstated and again apply to contracts thereafter made for the carriage of goods by sea. Any proclamation of suspension or rescission of any such suspension shall take effect on a date named therein, which date shall be not less than ten days from the issue of the proclamation.

Any contract for the carriage of goods by sea, subject to the provisions of this Act, effective during any period when title I hereof, or any part thereof, is suspended, shall be subject to all provisions of law now or hereafter applicable to that part of title I which may have thus been suspended.

Sec. 15. This Act shall take effect ninety days after the date of its approval; but nothing in this Act shall apply during a period not to exceed one year following its approval to any contract for the carriage of goods by sea, made before the date on which this Act is approved, nor to any bill of lading or similar document of title issued, whether before or after such date of approval in pursuance of any such contract as aforesaid.

Sec. 16. This Act may be cited as the "Carriage of Goods by Sea Act."

Approved, April 16, 1936.
APPENDIX 2

[Translation]

INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO BILLS OF LADING, SIGNED AT BRUSSELS, AUGUST 25, 1924

The President of the German Republic, the President of the Argentine Republic, His Majesty the King of the Belgians, the President of the Republic of Chile, the President of the Republic of Cuba, His Majesty the King of Denmark and Iceland, His Majesty the King of Spain, the Chief of the Estonian State, the President of the United States of America, the President of the Republic of Finland, the President of the French Republic, His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Possessions Beyond the Seas, Emperor of India, His Serene Highness the Regent of the Kingdom of Hungary, His Majesty the King of Italy, His Majesty the Emperor of Japan, the President of the Republic of Latvia, the President of the Republic of Mexico, His Majesty the King of Norway, Her Majesty the Queen of the Netherlands, the President of the Republic of Peru, the President of the Republic of Poland, the President of the Portuguese Republic, His Majesty the King of Rumania, His Majesty the King of the Serbs, Croats and Slovenes, His Majesty the King of Sweden and the President of the Republic of Uruguay,

Having recognized the utility of laying down in common accord certain uniform rules relating to bills of lading, have decided to conclude a Convention to that effect and have designated as their Plenipotentiaries, namely:

THE PRESIDENT OF THE GERMAN REPUBLIC:
His Excellency Mr. von Keller, Minister of Germany at Brussels.

THE PRESIDENT OF THE ARGENTINE REPUBLIC:

HIS MAJESTY THE KING OF THE BELGIANS:
Mr. L. Franck, Minister of Colonies, President of the International Maritime Committee;
Mr. A. Le Jeune, Senator, Vice President of the International Maritime Committee;
Mr. F. Sohr, Doctor of Law, Secretary General of the International Maritime Committee; Professor at the University of Brussels.

THE PRESIDENT OF THE REPUBLIC OF CHILE:
His Excellency Mr. Armando Quezada, Minister of Chile at Brussels.

THE PRESIDENT OF THE REPUBLIC OF CUBA:

HIS MAJESTY THE KING OF DENMARK AND ICELAND:
TREATIES

HIS MAJESTY THE KING OF SPAIN:
His Excellency the Marquis of Villalobar and Guimarey, Ambassador of Spain at Brussels.

CHIEF OF THE ESTONIAN STATE:
His Excellency Mr. Pusta, Minister of Estonia at Brussels.

THE PRESIDENT OF THE UNITED STATES OF AMERICA:
His Excellency Mr. William Phillips, Ambassador of the United States of America at Brussels.

THE PRESIDENT OF THE REPUBLIC OF FINLAND:

THE PRESIDENT OF THE FRENCH REPUBLIC:
His Excellency Mr. M. Herbette, Ambassador of France at Brussels.

HIS MAJESTY THE KING OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND AND OF THE BRITISH POSSESSIONS BEYOND THE SEAS, EMPEROR OF INDIA:

HIS SERENE HIGHNESS THE REGENT OF THE KINGDOM OF HUNGARY:
Count Olivier Woracziczky, Baron of Pabienitz, Chargé d'Affaires of Hungary at Brussels.

HIS MAJESTY THE KING OF ITALY:
Mr. J. Daneo, Chargé d'Affaires ad interim of Italy at Brussels.

HIS MAJESTY THE EMPEROR OF JAPAN:
His Excellency Mr. M. Adatci, Ambassador of Japan at Brussels.

THE PRESIDENT OF THE REPUBLIC OF LATVIA:

THE PRESIDENT OF THE REPUBLIC OF MEXICO:

HIS MAJESTY THE KING OF NORWAY:

HER MAJESTY THE QUEEN OF THE NETHERLANDS:

THE PRESIDENT OF THE REPUBLIC OF PERU:

THE PRESIDENT OF THE REPUBLIC OF POLAND AND THE FREE CITY OF DANZIG:
His Excellency Count Jean Szembek, Minister of Poland at Brussels.

THE PRESIDENT OF THE PORTUGUESE REPUBLIC:

HIS MAJESTY THE KING OF RUMANIA:
His Excellency Mr. Henry Catargi, Minister of Rumania at Brussels.

HIS MAJESTY THE KING OF THE SERBS, CROATS AND SLOVENES:
Messrs. Straznicky and Verona.

HIS MAJESTY THE KING OF SWEDEN:

THE PRESIDENT OF THE REPUBLIC OF URUGUAY:
Who, duly authorized therefor, have agreed on the following:

**ARTICLE 1**

In this convention the following words are employed with the meanings set out below:

(a) “Carrier” includes the owner of the vessel or the charterer who enters into a contract of carriage with a shipper.

(b) “Contract of carriage” applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea; it also applies to any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such instrument regulates the relations between a carrier and a holder of the same.

(c) “Goods” includes goods, wares, merchandise, and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) “Ship” means any vessel used for the carriage of goods by sea.

(e) “Carriage of goods” covers the period from the time when the goods are loaded on to the time they are discharged from the ship.

**ARTICLE 2**

Subject to the provisions of Article 6 under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.

**ARTICLE 3**

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

   (a) Make the ship seaworthy;

   (b) Properly man, equip, and supply the ship;

   (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

2. Subject to the provisions of Article 4 the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:

   (a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage;

   (b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper;
Provided that no carrier, master, or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable grounds for suspecting not accurately to represent the goods actually received or which he has had no reasonable means of checking.

4. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b), and (c).

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.

If the loss or damage is not apparent, the notice must be given within three days of the delivery.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

7. After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a “shipped” bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the “shipped” bill of lading. At the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in paragraph 3 of Article 3, it shall for the purpose of this article be deemed to constitute a “shipped” bill of lading.

8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault, or failure in the duties and obligations provided in this article, or lessening such
liability otherwise than as provided in this convention, shall be null and void and of no effect. A benefit of insurance in favor of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

**ARTICLE 4**

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy and to secure that the ship is properly manned, equipped, and supplied and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph 1 of Article 3. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

   (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;
   (b) Fire, unless caused by the actual fault or privity of the carrier;
   (c) Perils, dangers, and accidents of the sea or other navigable waters;
   (d) Act of God;
   (e) Act of war;
   (f) Act of public enemies;
   (g) Arrest or restraint of princes, rulers, or people or seizure under legal process;
   (h) Quarantine restrictions;
   (i) Act or omission of the shipper or owner of the goods, his agent, or representative;
   (j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general;
   (k) Riots and civil commotions;
   (l) Saving or attempting to save life or property at sea;
   (m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;
   (n) Insufficiency of packing;
   (o) Insufficiency or inadequacy of marks;
   (p) Latent defects not discoverable by due diligence;
   (q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.
4. Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pounds sterling per package or unit or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be prima facie evidence but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

6. Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master, or agent of the carrier has not consented with knowledge of their nature and character may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

ARTICLE 5

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities, or to increase any of his responsibilities and liabilities under this convention provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this convention shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter-party they shall comply with the terms of this convention. Nothing in these rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

ARTICLE 6

Notwithstanding the provisions of the preceding articles, a carrier, master, or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such
goods, and as to the rights and immunities of the carrier in respect of such goods, or concerning his obligation as to seaworthiness so far as this stipulation is not contrary to public policy, or concerning the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect:

Provided that this article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

**ARTICLE 7**

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with, the custody and care and handling of goods prior to the loading on, and subsequent to the discharge from, the ship on which the goods are carried by sea.

**ARTICLE 8**

The provisions of this convention shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of seagoing vessels.

**ARTICLE 9**

The monetary units mentioned in this convention are to be taken to be gold value.

Those contracting states in which the pound sterling is not a monetary unit reserve to themselves the right of translating the sums indicated in this convention in terms of pound sterling into terms of their own monetary system in round figures.

The national laws may reserve to the debtor the right of discharging his debt in national currency according to the rate of exchange prevailing on the day of the arrival of the ship at the port of discharge of the goods concerned.

**ARTICLE 10**

The provisions of this convention shall apply to all bills of lading issued in any of the contracting States.

**ARTICLE 11**

After an interval of not more than two years from the day on which the convention is signed, the Belgian Government shall place itself in communication with the governments of the high contracting
Ratifications to be deposited at Brussels; date. First deposit of ratifications.

Subsequent deposits.

Transmitting by Belgian Government of certified copy of proces-verbal and instruments of ratification to signatory, etc., powers.

Accessions by non-signatory States.

Exclusion of dominions, colonies, etc., from provisions.

Separate accessions.

Denunciation.

Effective dates.

parties which have declared themselves prepared to ratify the convention, with a view to deciding whether it shall be put into force. The ratifications shall be deposited at Brussels at a date to be fixed by agreement among the said governments. The first deposit of ratifications shall be recorded in a proces-verbal signed by the representatives of the powers which take part therein and by the Belgian Minister for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification, addressed to the Belgian Government and accompanied by the instrument of ratification.

A duly certified copy of the proces-verbal relating to the first deposit of ratifications, of the notifications referred to in the previous paragraph, and also of the instruments of ratification accompanying them, shall be immediately sent by the Belgian Government through the diplomatic channel to the powers who have signed this convention or who have acceded to it. In the cases contemplated in the preceding paragraph the said Government shall inform them at the same time of the date on which it received the notification.

**ARTICLE 12**

Nonsignatory States may accede to the present convention whether or not they have been represented at the International Conference at Brussels.

A State which desires to accede shall notify its intention in writing to the Belgian Government, forwarding to it the document of accession, which shall be deposited in the archives of the said Government.

The Belgian Government shall immediately forward to all the States which have signed or acceded to the convention a duly certified copy of the notification and of the act of accession, mentioning the date on which it received the notification.

**ARTICLE 13**

The high contracting parties may at the time of signature, ratification, or accession declare that their acceptance of the present convention does not include any or all of the self-governing dominions, or of the colonies, overseas possessions, protectorates, or territories under their sovereignty or authority, and they may subsequently accede separately on behalf of any self-governing dominion, colony, overseas possession, protectorate, or territory excluded in their declaration. They may also denounce the convention separately in accordance with its provisions in respect of any self-governing dominion, or any colony, overseas possession, protectorate, or territory under their sovereignty or authority.

**ARTICLE 14**

The present convention shall take effect, in the case of the States which have taken part in the first deposit of ratifications, one year after the date of the proces-verbal recording such deposit. As respects the States which ratify subsequently or which accede, and also in cases in which the convention is subsequently put into effect in
accordance with Article 13, it shall take effect six months after the notifications specified in paragraph 2 of Article 11, and paragraph 2 of Article 12, have been received by the Belgian Government.

**ARTICLE 15**

In the event of one of the contracting States wishing to denounce the present convention, the denunciation shall be notified in writing to the Belgian Government, which shall immediately communicate a duly certified copy of the notification to all the other States informing them of the date on which it was received.

The denunciation shall only operate in respect of the State which made the notification, and on the expiry of one year after the notification has reached the Belgian Government.

**ARTICLE 16**

Any one of the contracting States shall have the right to call for a fresh conference with a view to considering possible amendments. A State which would exercise this right should notify its intention to the other States through the Belgian Government, which would make arrangements for convening the conference.

Done at Brussels, in a single copy, August 25, 1924.

*For Germany:*  
KELLER.

*For the Argentine Republic:*  

*For Belgium:*  
LOUIS FRANCK.  
ALBERT LE JEUNE.  
SOHR.

*For Chile:*  
ARMANDO QUEZADA.

*For the Republic of Cuba:*  

*For Denmark:*  

*For Spain:*  
The Marquis of VILLALOBAR.

*For Estonia:*  
PUSTA.

*For the United States of America:*  
WILLIAM PHILLIPS.

*For Finland:*  

*For France:*  
MAURICE HERBETTE.

*For Great Britain:*  
GEORGE GRAHAME.

*For Hungary:*  
WORACZICZKY.
For Italy:
GIULIO DANEIO.

For Japan:
M. ADATCI.

Subject to the reservations formulated in the note relative to this treaty and appended to my letter dated August 25, 1925, to His Excellency Mr. Emile Vandervelde, Minister for Foreign Affairs of Belgium.

For Latvia:

For Mexico:

For Norway:

For the Netherlands:

For Peru:

For Poland and the Free City of Danzig:
SZEMBEK.

For Portugal:

For Rumania:
HENRY CATARGI.

For the Kingdom of the Serbs, Croats and Slovenes:
DR. MILORAD STRAZNICKY.

For Sweden:

For Uruguay:

Protocol of Signature

In proceeding to the signature of the international convention for the unification of certain rules relating to bills of lading, the undersigned plenipotentiaries have adopted the present protocol which will have the same validity as if the provisions thereof were inserted in the very text of the convention to which it refers.

The high contracting parties may give effect to this convention either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation, the rules adopted under this convention.

They may reserve the right:
1. To prescribe that in the cases referred to in paragraph 2 (c) to (p) of Article 4, the holder of a bill of lading shall be entitled to establish responsibility for loss or damage arising from the personal fault of the carrier or the fault of his servants which are not covered by paragraph (a);
2. To apply Article 6 insofar as the national coasting trade is concerned to all classes of goods without taking account of the restriction set out in the last paragraph of that article.
APPENDIX 3

PROTOCOL TO AMEND THE INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES OF LAW RELATING TO BILLS OF LADING SIGNED AT BRUSSELS ON 25 AUGUST 1924

Signed at Brussels, 23 February 1968

The Contracting Parties,

Considering that it is desirable to amend the International Convention for the unification of certain rules of law relating to bills of lading, signed at Brussels on 25th August 1924,

Have agreed as follows:

Article 1

1. In Article 3, paragraph 4 shall be added:

"However, proof to the contrary shall not be admissible when the Bill of Lading has been transferred to a third party acting in good faith."

2. In Article 3, paragraph 6, subparagraph 4 shall be replaced by:

"Subject to paragraph 6 bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen."

3. In Article 3, after paragraph 6 shall be added the following paragraph 6 bis:

"An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall be not less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself."

Article 2

Article 4, paragraph 5 shall be deleted and replaced by the following:

(a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of Frs. 10,000 per package or unit or Frs. 30 per kilo of gross weight of the goods lost or damaged, whichever is the higher.

(b) The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged.

The value of the goods shall be fixed according to the commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

(c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the Bill of Lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.
A franc means a unit consisting of 65.5 milligrams of gold of mille...
Each contracting State shall apply the provisions of this Convention to the Bills of Lading mentioned above.

This Article shall not prevent a Contracting State from applying the Rules of this Convention to Bills of Lading not included in the preceding paragraphs.

**Article 6**

As between the Parties to this Protocol the Convention and the Protocol shall be read and interpreted together as one single instrument.

A Party to this Protocol shall have no duty to apply the provisions of this Protocol to Bills of Lading issued in a State which is a Party to the Convention but which is not a Party to this Protocol.

**Article 7**

As between the Parties to this Protocol, denunciation by any of them of the Convention in accordance with Article 15 thereof, shall not be construed in any way as a denunciation of the Convention as amended by this Protocol.

**Article 8**

Any dispute between two or more Contracting Parties concerning the interpretation or application of the Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

**Article 9**

1. Each Contracting Party may at the time of signature or ratification of this Protocol or accession thereto, declare that it does not consider itself bound by Article 8 of this Protocol. The other Contracting Parties shall not be bound by this Article with respect to any Contracting Party having made such a reservation.

2. Any Contracting Party having made a reservation in accordance with paragraph 1 may at any time withdraw this reservation by notification to the Belgian Government.

**Article 10**

This Protocol shall be open for signature by the States which have ratified the Convention or which have adhered thereto before the 23 February 1968, and by any State represented at the twelfth session (1967-1968) of the Diplomatic Conference on Maritime Law.

**Article 11**

1. This Protocol shall be ratified.

2. Ratification of this Protocol by any State which is not a Party to the Convention shall have the effect of accession to the Convention.

3. The instruments of ratification shall be deposited with the Belgian Government.

**Article 12**

1. States, Members of the United Nations or members of the specialized agencies of the United Nations, not represented at the twelfth session of the Diplomatic Conference on Maritime Law, may accede to this Protocol.

2. Accession to this Protocol shall have the effect of accession to the Convention.

3. The instruments of accession shall be deposited with the Belgian Government.
Article 13

1. This Protocol shall come into force three months after the date of the deposit of ten instruments of ratification or accession, of which at least five shall have been deposited by States that have each a tonnage equal or superior to one million gross tons tonnage.

2. For each State which ratifies this Protocol or accedes thereto after the date of the deposit of the instrument of ratification or accession determining the coming into force of such as is stipulated in § 1 of this Article, this Protocol shall come into force three months after the deposit of its instrument of ratification or accession.

Article 14

1. Any Contracting State may denounce this Protocol by notification to the Belgian Government.

2. This denunciation shall have the effect of denunciation of the Convention.

3. The denunciation shall take effect one year after the date on which the notification has been received by the Belgian Government.

Article 15

1. Any Contracting State may at the time of signature, ratification or accession or at any time thereafter declare by written notification to the Belgian Government which among the territories under its sovereignty or for whose international relations it is responsible, are those to which the present Protocol applies.

   The Protocol shall take effect three months after the date of the receipt of such notification by the Belgian Government extend to the territories named therein, but not before the date of the coming into force of the Protocol in respect of such State.

2. This extension also shall apply to the Convention if the latter is not yet applicable to those territories.

3. Any Contracting State which has made a declaration under § 1 of this Article may at any time thereafter declare by notification given to the Belgian Government that the Protocol shall cease to extend to such territory. This denunciation shall take effect one year after the date on which notification thereof has been received by the Belgian Government; it also shall apply to the Convention.

Article 16

The Contracting Parties may give effect to this Protocol either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation the rules adopted under this Protocol.

Article 17

The Belgian Government shall notify the States represented at the twelfth session (1967-1968) of the Diplomatic Conference on Maritime Law, the acceding States to this Protocol, and the States Parties to the Convention, of the following:

1. The signatures, ratifications and accessions received in accordance with Articles 1, 11 and 12.

2. The date on which the present Protocol will come into force in accordance with Article 13.

3. The notifications with regard to the territorial application in accordance with Article 15.

4. The denunciations received in accordance with Article 14.

In witness whereof the undersigned Plenipotentiaries, duly authorised, have signed this Protocol.

Done at Brussels, this 23rd day of February 1968, in the French and English languages both texts being equally authentic, in a single copy, which shall remain deposited in the archives of the Belgian Government, which shall issue certified copies.
APPENDIX 4

PROTOCOL AMENDING THE INTERNATIONAL CONVENTION
FOR THE UNIFICATION OF CERTAIN RULES OF LAW
RELATING TO BILLS OF LADING, 25 AUGUST, 1924,
AS AMENDED BY THE PROTOCOL OF 23 FEBRUARY 1968

THE CONTRACTING PARTIES TO THE PRESENT PROTOCOL,

BEING PARTIES to the International Convention for the
unification of certain rules of law relating to bills of
lading, done at Brussels on 25th August 1924, as amended by
the Protocol to amend that Convention, done at Brussels on
23rd February 1968,

HAVE AGREED as follows:

Article I

For the purpose of this Protocol, "Convention" means the
International Convention for the unification of certain
rules of law relating to bills of lading and its Protocol
of signature, done at Brussels on 25th August 1924, as
amended by the Protocol, done at Brussels on 23rd February,
1968.

Article II

1. Article 4, paragraph 5, a) of the Convention is re-
placed by the following:

"a) Unless the nature and value of such goods have been
declared by the shipper before shipment and inserted in
the bill of lading, neither the carrier nor the ship
shall in any event be or become liable for any loss or
damage to or in connection with the goods in an amount
exceeding 666.67 units of account per package or unit or
2 units of account per kilogramme of gross weight of the
goods lost or damaged, whichever is the higher."

2. Article 4, paragraph 5, d) of the Convention is re-
placed by the following:

"d) The unit of account mentioned in this Article is the
Special Drawing Right as defined by the International
Monetary Fund. The amounts mentioned in sub-paragraph a)
of this paragraph shall be converted into national currency on the date to be determined by the law of the Court seized of the case. The value of the national currency, in terms of the Special Drawing Right, of a State which is a member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of the national currency, in terms of the Special Drawing Right, of a State which is not a member of the International Monetary Fund, shall be calculated in a manner determined by that State.

Nevertheless, a State which is not a member of the International Monetary Fund and whose law does not permit the application of the provisions of the preceding sentences may, at the time of ratification of the Protocol of 1979 or accession thereto or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in its territory shall be fixed as follows:

(i) in respect of the amount of 666.67 units of account mentioned in sub-paragraph a) of paragraph 5 of this Article, 10,000 monetary units;

(ii) in respect of the amount of 2 units of account mentioned in sub-paragraph a) of paragraph 5 of this Article, 30 monetary units.

The monetary unit referred to in the preceding sentence corresponds to 65.5 milligrammes of gold of millesimal fineness 900'. The conversion of the amounts specified in that sentence into the national currency shall be made according to the law of the State concerned. The calculation and the conversion mentioned in the preceding sentences shall be made in such a manner as to express in the national currency of that State as far as possible the same real value for the amounts in sub-paragraph a) of paragraph 5 of this Article as is expressed there in units of account.

States shall communicate to the depositary the manner of calculation or the result of the conversion as the case may be, when depositing an instrument of ratification of the Protocol of 1979 or of accession thereto and whenever there is a change in either.
Article III

Any dispute between two or more Contracting Parties concerning the interpretation or application of the present Protocol, which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organisation of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

Article IV

(1) Each Contracting Party may at the time of signature or ratification of this Protocol or of accession thereto, declare that it does not consider itself bound by Article III.

(2) Any Contracting Party having made a reservation in accordance with paragraph (1) may at any time withdraw this reservation by notification to the Belgian Government.

Article V

This Protocol shall be open for signature by the States which have signed the Convention of 25 August 1924 or the Protocol of 23 February 1968 or which are Parties to the Convention.

Article VI

(1) This Protocol shall be ratified.

(2) Ratification of this Protocol by any State which is not a Party to the Convention shall have the effect of ratification of the Convention.

(3) The instruments of ratification shall be deposited with the Belgian Government.

Article VII

(1) States not referred to in Article V may accede to this Protocol.

(2) Accession to this Protocol shall have the effect of
accession to the Convention.

(3) The instruments of accession shall be deposited with the Belgian Government.

Article VIII

(1) This Protocol shall come into force three months after the date of the deposit of five instruments of ratification or accession.

(2) For each State which ratifies this Protocol or accedes thereto after the fifth deposit, this Protocol shall come into force three months after the deposit of its instrument of ratification or accession.

Article IX

(1) Any Contracting Party may denounce this Protocol by notification to the Belgian Government.

(2) The denunciation shall take effect one year after the date on which the notification has been received by the Belgian Government.

Article X

(1) Each State may at the time of signature, ratification or accession or at any time thereafter declare by written notification to the Belgian Government which among the territories for whose international relations it is responsible, are those to which the present Protocol applies. The Protocol shall three months after the date of the receipt of such notification by the Belgian Government extend to the territories named therein, but not before the date of the coming into force of the Protocol in respect of such State.

(2) This extension also shall apply to the Convention if the latter is not yet applicable to these territories.

(3) Any Contracting Party which has made a declaration under paragraph (1) of this Article may at any time thereafter declare by notification given to the Belgian Government that the Protocol shall cease to extend to such territories. This denunciation shall take effect one year after the date on which notification thereof has been received by the Belgian Government.
Article XI

The Belgian Government shall notify the signatory and acceding States of the following:

1. the signatures, ratifications and accessions received in accordance with Articles V, VI and VII.

2. The date on which the present Protocol will come into force in accordance with Article VIII.

3. the notifications with regard to the territorial application in accordance with Article X.

4. the declarations and communications made in accordance with Article II.

5. the declarations made in accordance with Article IV.

6. the denunciations received in accordance with Article IX.

List of signatories

APPENDIX 5

UNITED NATIONS CONVENTION ON THE CARRIAGE OF GOODS BY SEA, 1978

THE STATES PARTIES TO THIS CONVENTION,

HAVING RECOGNISED the desirability of determining by agreement certain rules relating to the carriage of goods by sea,

HAVE DECIDED to conclude a Convention for this purpose and have thereto agreed as follows:

PART I. GENERAL PROVISIONS

Article 1

Definitions

In this Convention:

1. "Carrier" means any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper.

2. "Actual carrier" means any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted.

3. "Shipper" means any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier; any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea.

4. "Consignee" means the person entitled to take delivery of the goods.

5. "Goods" includes live animals; where the goods are consolidated in a container, pallet or similar article of transport or where they are packed, "goods" includes such
article of transport or packaging if supplied by the shipper.

6. "Contract of carriage by sea" means any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another; however, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purposes of this Convention only in so far as it relates to the carriage by sea.

7. "Bill of lading" means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.

8. "Writing" includes, inter alia, telegram and telex.

**Article 2**

**Scope of application**

1. The provisions of this Convention are applicable to all contracts of carriage by sea between two different States, if:

(a) the port of loading as provided for in the contract of carriage by sea is located in a Contracting State, or

(b) the port of discharge as provided for in the contract of carriage by sea is located in a Contracting State, or

(c) one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a Contracting State, or

(d) the bill of lading or other document evidencing the contract of carriage by sea is issued in a Contracting State, or

(e) the bill of lading or other document evidencing the contract of carriage by sea provides that the provisions of this Convention or the legislation of
any State giving effect to them are to govern the contract.

2. The provisions of this Convention are applicable without regard to the nationality of the ship, the carrier, the actual carrier, the shipper, the consignee or any other interested person.

3. The provisions of this Convention are not applicable to charter-parties. However, where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer.

4. If a contract provides for future carriage of goods in a series of shipments during an agreed period, the provisions of this Convention apply to each shipment. However, where a shipment is made under a charter-party, the provisions of paragraph 3 of this article apply.

Article 3

Interpretation of the Convention

In the interpretation and application of the provisions of this Convention regard shall be had to its international character and to the need to promote uniformity.

PART II. LIABILITY OF THE CARRIER

Article 4

Period of responsibility

1. The responsibility of the carrier for the goods under this Convention covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.

2. For the purpose of paragraph 1 of this article, the carrier is deemed to be in charge of the goods

(a) from the time he has taken over the goods from:

   (i) the shipper, or a person acting on his behalf;  
   or
(ii) an authority or other third party to whom, pursuant to law or regulations applicable at the port of loading, the goods must be handed over for the shipment;

(b) until the time he has delivered the goods:

(i) by handing over the goods to the consignee; or

(ii) in cases where the consignee does not receive the goods from the carrier, by placing them at the disposal of the consignee in accordance with the contract or with the law or with the usage of the particular trade, applicable at the port of discharge; or

(iii) by handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over.

3. In paragraphs 1 and 2 of this article, reference to the carrier or to the consignee means, in addition to the carrier or the consignee, the servants or agents, respectively of the carrier or the consignee.

**Article 5**

**Basis of liability**

1. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

2. Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage by sea within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case.

3. The person entitled to make a claim for the loss of goods may treat the goods as lost if they have not been delivered as required by article 4 within 60 consecutive days following the expiry of the time for delivery according to
paragraph 2 of this article.

4. (a) The carrier is liable

(i) for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;

(ii) for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents, in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.

(b) In case of fire on board the ship afflicting the goods, if the claimant or the carrier so desires, a survey in accordance with shipping practices must be held into the cause and circumstances of the fire, and a copy of the surveyor's report shall be made available on demand to the carrier and the claimant.

5. With respect to live animals, the carrier is not liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage. If the carrier proves that he has complied with any special instructions given to him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it is presumed that the loss, damage or delay in delivery was so caused, unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or neglect on the part of the carrier, his servants or agents.

6. The carrier is not liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea.

7. Where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the carrier proves the amount of the loss, damage or delay in delivery not attributable thereto.
Article 6

Limits of liability

1. (a) The liability of the carrier for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.

(b) The liability of the carrier for delay in delivery according to the provisions of article 5 is limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage of goods by sea.

(c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.

2. For the purpose of calculating which amount is the higher in accordance with paragraph 1 (a) of this article, the following rules apply:

(a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading, if issued, or otherwise in any other document evidencing the contract of carriage by sea, as packed in such article of transport are deemed packages or shipping units. Except as aforesaid the goods in such article of transport are deemed one shipping unit.

(b) In cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the carrier, is considered one separate shipping unit.

3. Unit of account means the unit of account mentioned in article 26.

4. By agreement between the carrier and the shipper,
limits of liability exceeding those provided for in paragraph 1 may be fixed.

Article 7

Application to non-contractual claims

1. The defences and limits of liability provided for in this Convention apply in any action against the carrier in respect of loss or damage to the goods covered by the contract of carriage by sea, as well as of delay in delivery whether the action is founded in contract, in tort or otherwise.

2. If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, is entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

3. Except as provided in article 8, the aggregate of the amounts recoverable from the carrier and from any persons referred to in paragraph 2 of this article shall not exceed the limits of liability provided for in this Convention.

Article 8

Loss of right to limit responsibility

1. The carrier is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the carrier done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

2. Notwithstanding the provisions of paragraph 2 of article 7, a servant or agent of the carrier is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant or agent, done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.
Article 9

Deck cargo

1. The carrier is entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper or with the usage of the particular trade or is required by statutory rules or regulations.

2. If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier must insert in the bill of lading or other document evidencing the contract of carriage by sea a statement to that effect. In the absence of such a statement the carrier has the burden of proving that an agreement for carriage on deck has been entered into; however, the carrier is not entitled to invoke such an agreement against a third party, including a consignee, who has acquired the bill of lading in good faith.

3. Where the goods have been carried on deck contrary to the provisions of paragraph 1 of this article or where the carrier may not under paragraph 2 of this article invoke an agreement for carriage on deck, the carrier, notwithstanding the provisions of paragraph 1 of article 5, is liable for loss of or damage to the goods, as well as for delay in delivery, resulting solely from the carriage on deck, and the extent of his liability is to be determined in accordance with the provisions of article 6 or article 8 of this Convention, as the case may be.

4. Carriage of goods on deck contrary to express agreement for carriage under deck is deemed to be an act or omission of the carrier within the meaning of article 8.

Article 10

Liability of the carrier and actual carrier

1. Where the performance of the carriage or part thereof has been entrusted to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage by sea to do so, the carrier nevertheless remains responsible for the entire carriage according to the provisions of this Convention. The carrier is responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment.
2. All the provisions of this Convention governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him. The provisions of paragraphs 2 and 3 or article 7 and of paragraph 2 of article 8 apply if an action is brought against a servant or agent of the actual carrier.

3. Any special agreement under which the carrier assumes obligations not imposed by this Convention or waives rights conferred by this Convention affects the actual carrier only if agreed to by him expressly and in writing. Whether or not the actual carrier has so agreed, the carrier nevertheless remains bound by the obligations or waivers resulting from such special agreement.

4. Where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several.

5. The aggregate of the amounts recoverable from the carrier, the actual carrier and their servants and agents shall not exceed the limits of liability provided for in this Convention.

6. Nothing in this article shall prejudice any right of recourse as between the carrier and the actual carrier.

Article 11

Through carriage

1. Notwithstanding the provisions of paragraph 1 of article 10, where a contract of carriage by sea provides explicitly that a specified part of the carriage covered by the said contract is to be performed by a named person other than the carrier, the contract may also provide that the carrier is not liable for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in the charge of the actual carrier during such part of the carriage. Nevertheless, any stipulation limiting or excluding such liability is without effect if no judicial proceedings can be instituted against the actual carrier in a court competent under paragraph 1 or 2 of article 21. The burden of proving that any loss, damage or delay in delivery has been caused by such an occurrence rests upon the carrier.

2. The actual carrier is responsible in accordance with the provisions of paragraph 2 of article 10 for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in his charge.
PART III. LIABILITY OF THE SHIPPER

Article 12

General rule

The shipper is not liable for loss sustained by the carrier or the actual carrier, or for damage sustained by the ship, unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents. Nor is any servant or agent of the shipper liable for such loss or damage unless the loss or damage was caused by fault or neglect on his part.

Article 13

Special rules on dangerous goods

1. The shipper must mark or label in a suitable manner dangerous goods as dangerous.

2. Where the shipper hands over dangerous goods to the carrier or an actual carrier, as the case may be, the shipper must inform him of the dangerous character of the goods and, if necessary, of the precautions to be taken. If the shipper fails to do so and such carrier or actual carrier does not otherwise have knowledge of their dangerous character:

(a) the shipper is liable to the carrier and any actual carrier for the loss resulting from the shipment of such goods, and

(b) the goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.

3. The provisions of paragraph 2 of this article may not be invoked by any person if during the carriage he has taken the goods in his charge with knowledge of their dangerous character.

4. If, in cases where the provisions of paragraph 2, subparagraph (b), of this article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where there is an obligation to
part IV. TRANSPORT DOCUMENTS

Article 14

Issue of bill of lading

1. When the carrier or the actual carrier takes the goods in his charge, the carrier must, on demand of the shipper, issue to the shipper a bill of lading.

2. The bill of lading may be signed by a person having authority from the carrier. A bill of lading signed by the master of the ship carrying the goods is deemed to have been signed on behalf of the carrier.

3. The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued.

Article 15

Contents of bill of lading

1. The bill of lading must include, inter alia, the following particulars:

(a) the general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;

(b) the apparent condition of the goods;

(c) the name and principal place of business of the carrier;

(d) the name of the shipper;

(e) the consignee if named by the shipper;

(f) the port of loading under the contract of carriage by sea and the date on which the goods were taken.
over by the carrier at the port of loading;

(g) the port of discharge under the contract of carriage by sea;

(h) the number of originals of the bill of lading, if more than one;

(i) the place of issuance of the bill of lading;

(j) the signature of the carrier or a person acting on his behalf;

(k) the freight to the extent payable by the consignee or other indicating that freight is payable by him;

(l) the statement referred to in paragraph 3 of article 23;

(m) the statement, if applicable, that the goods shall or may be carried on deck;

(n) the date or the period of delivery of the goods at the port of discharge if expressly agreed upon between the parties; and

(o) any increased limit or limits of liability where agreed in accordance with paragraph 4 of article 6.

2. After the goods have been loaded on board, if the shipper so demands, the carrier must issue to the shipper a "shipped" bill of lading which, in addition to the particulars required under paragraph 1 of this article, must state that the goods are on board a named ship or ships, and the date or dates of loading. If the carrier has previously issued to the shipper a bill of lading or other document of title with respect to any of such goods, on request of the carrier, the shipper must surrender such document in exchange for a "shipped" bill of lading. The carrier may amend any previously issued document in order to meet the shipper's demand for a "shipped" bill of lading if, as amended, such document includes all the information required to be contained in a "shipped" bill of lading.

3. The absence in the bill of lading of one or more particulars referred to in this article does not affect the legal character of the document as a bill of lading provided that it nevertheless meets the requirements set out in paragraph 7 of article 1.
Article 16

Bills of lading: reservations and evidentiary effect

1. If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier or other person issuing the bill of lading on his behalf knows or had reasonable grounds to suspect do not accurately represent the goods actually taken over or, where a "shipped" bill of lading is issued, loaded, or if he had no reasonable means of checking such particulars, the carrier or such other person must insert in the bill of lading a reservation specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking.

2. If the carrier or other person issuing the bill of lading on his behalf fails to note on the bill of lading the apparent condition of the goods, he is deemed to have noted on the bill of lading that the goods were in apparent good condition.

3. Except for particulars in respect of which and to the extent to which a reservation permitted under paragraph 1 of this article has been entered:

(a) the bill of lading is prima facie evidence of the taking over or, where a "shipped" bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading; and

(b) proof to the contrary by the carrier is not admissible if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods therein.

4. A bill of lading which does not, as provided in paragraph 1, subparagraph (k) of article 15, set forth the freight or otherwise indicate that freight is payable by the consignee or does not set forth demurrage incurred at the port of loading payable by the consignee, is prima facie evidence that no freight or such demurrage is payable by him. However, proof to the contrary by the carrier is not admissible when the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication.
Article 17

Guarantees by the shipper

1. The shipper is deemed to have guaranteed to the carrier the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading. The shipper must indemnify the carrier against the loss resulting from inaccuracies in such particulars. The shipper remains liable even if the bill of lading has been transferred by him. The right of the carrier to such indemnity in no way limits his liability under the contract of carriage by sea to any person other than the shipper.

2. Any letter of guarantee or agreement by which the shipper undertakes to indemnify the carrier against loss resulting from the issuance of the bill of lading by the carrier, or by a person acting on his behalf, without entering a reservation relating to particulars furnished by the shipper for insertion in the bill of lading, or to the apparent condition of the goods, is void and of no effect as against any third party, including a consignee, to whom the bill of lading has been transferred.

3. Such letter of guarantee or agreement is valid as against the shipper unless the carrier or the person acting on his behalf, by omitting the reservation referred to in paragraph 2 of this article, intends to defraud a third party, including a consignee, who acts in reliance on the description of the goods in the bill of lading. In the latter case, if the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier has no right of indemnity from the shipper pursuant to paragraph 1 of this article.

4. In the case of intended fraud referred to in paragraph 3 of this article the carrier is liable, without the benefit of the limitation of liability provided for in this Convention, for the loss incurred by a third party, including a consignee, because he has acted in reliance on the description of the goods in the bill of lading.

Article 18

Documents other than bills of lading

Where a carrier issues a document other than a bill of lading to evidence the receipt of the goods to be carried,
such a document is *prima facie* evidence of the conclusion of the contract of carriage by sea and the taking over by the carrier of the goods as therein described.

PART V. CLAIMS AND ACTIONS

Article 19

Notice of loss, damage or delay

1. Unless notice of loss or damage, specifying the general nature of such loss or damage, is given in writing by the consignee to the carrier not later than the working day after the day when the goods were handed over to the consignee, such handing over is *prima facie* evidence of the delivery by the carrier of the goods as described in the document of transport or, if no such document has been issued, in good condition.

2. Where the loss or damage is not apparent, the provisions of paragraph 1 of this article apply correspondingly if notice in writing is not given within 15 consecutive days after the day when the goods were handed over to the consignee.

3. If the state of the goods at the time they were handed over to the consignee has been the subject of a joint survey or inspection by the parties, notice in writing need not be given of loss or damage ascertained during such survey or inspection.

4. In the case of any actual or apprehended loss or damage the carrier and the consignee must give all reasonable facilities to each other for inspecting and tallying the goods.

5. No compensation shall be payable for loss resulting from delay in delivery unless a notice has been given in writing to the carrier within 60 consecutive days after the day when the goods were handed over to the consignee.

6. If the goods have been delivered by an actual carrier, any notice given under this article to him shall have the same effect as if it had been given to the carrier, and any notice given to the carrier shall have effect as if given to such actual carrier.

7. Unless notice of loss or damage, specifying the
general nature of the loss or damage, is given in writing by the carrier or actual carrier to the shipper not later than 90 consecutive days after the occurrence of such loss or damage or after the delivery of the goods in accordance with paragraph 2 of article 4, whichever is later, the failure to give such notice is *prima facie* evidence that the carrier or the actual carrier has sustained no loss or damage due to the fault or neglect of the shipper, his servants or agents.

8. For the purpose of this article, notice given to a person acting on the carrier's or the actual carrier's behalf, including the master or the officer in charge of the ship, or to a person acting on the shipper's behalf is deemed to have been given to the carrier, to the actual carrier or to the shipper, respectively.

**Article 20**

**Limitation of actions**

1. Any action relating to carriage of goods under this Convention is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years.

2. The limitation period commences on the day on which the carrier has delivered the goods or part thereof or, in cases where no goods have been delivered, on the last day on which the goods should have been delivered.

3. The day on which the limitation period commences is not included in the period.

4. The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations.

5. An action for indemnity by a person held liable may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if instituted within the time allowed by the law of the State where proceedings are instituted. However, the time allowed shall not be less than 90 days commencing from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against himself.
Article 21

Jurisdiction

1. In judicial proceedings relating to carriage of goods under this Convention the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

(a) the principal place of business or, in the absence thereof, the habitual residence of the defendant; or

(b) the place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(c) the port of loading or the port of discharge; or

(d) any additional place designated for that purpose in the contract of carriage by sea.

2. (a) Notwithstanding the preceding provisions of this article, an action may be instituted in the courts of any port or place in a Contracting State at which the carrying vessel or any other vessel of the same ownership may have been arrested in accordance with applicable rules of the law of that State and of international law. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph 1 of this article for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgment that may subsequently be awarded to the claimant in the action.

(b) All questions relating to the sufficiency or otherwise of the security shall be determined by the court of the port or place of the arrest.

3. No judicial proceedings relating to carriage of goods under this Convention may be instituted in a place not specified in paragraph 1 or 2 of this article. The provisions of this paragraph do not constitute an obstacle to the
jurisdiction of the Contracting States for provisional or protective measures.

4. (a) Where an action has been instituted in a court competent under paragraph 1 or 2 of this article or where judgment has been delivered by such a court, no new action may be started between the same parties on the same grounds unless the judgment of the court before which the first action was instituted is not enforceable in the country in which the new proceedings are instituted;

(b) for the purpose of this article the institution of measures with a view to obtaining enforcement of a judgment is not to be considered as the starting of a new action;

(c) for the purpose of this article, the removal of an action to a different court within the same country, or to a court in another country, in accordance with paragraph 2 (a) of this article, is not to be considered as the starting of a new action.

5. Notwithstanding the provisions of the preceding paragraphs, an agreement made by the parties, after a claim under the contract of carriage by sea has arisen, which designates the place where the claimant may institute an action, is effective.

Article 22

Arbitration

1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to carriage of goods under this Convention shall be referred to arbitration.

2. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charter-party does not contain a special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith.

3. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:
(a) a place in a State within whose territory is situated:

(i) the principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or

(ii) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(iii) the port of loading or the port of discharge; or

(b) any place designated for that purpose in the arbitration clause or agreement.

4. The arbitrator or arbitration tribunal shall apply the rules of this Convention.

5. The provisions of paragraphs 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith is null and void.

6. Nothing in this article affects the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage by sea has arisen.

PART VI. SUPPLEMENTARY PROVISIONS

Article 23

Contractual stipulations

1. Any stipulation in a contract of carriage by sea, in a bill of lading, or in any other document evidencing the contract of carriage by sea is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of the goods in favour of the carrier, or any similar clause, is null and void.

2. Notwithstanding the provisions of paragraph 1 of this article, a carrier may increase his responsibilities
and obligations under this Convention.

3. Where a bill of lading or any other document evidencing the contract of carriage by sea is issued, it must contain a statement that the carriage is subject to the provisions of this Convention which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee.

4. Where the claimant in respect of the goods has incurred loss as a result of a stipulation which is null and void by virtue of the present article, or as a result of the omission of the statement referred to in paragraph 3 of this article, the carrier must pay compensation to the extent required in order to give the claimant compensation in accordance with the provisions of this Convention for any loss of or damage to the goods as well as for delay in delivery. The carrier must, in addition, pay compensation for costs incurred by the claimant for the purpose of exercising his right, provided that costs incurred in the action where the foregoing provision is invoked are to be determined in accordance with the law of the State where proceedings are instituted.

**Article 24**

**General average**

1. Nothing in this Convention shall prevent the application of provisions in the contract of carriage by sea or national law regarding the adjustment of general average.

2. With the exception of article 20, the provisions of this Convention relating to the liability of the carrier for loss of or damage to the goods also determine whether the consignee may refuse contribution in general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid.

**Article 25**

**Other conventions**

1. This Convention does not modify the rights or duties of the carrier, the actual carrier and their servants and agents, provided for in international conventions or national law relating to the limitation of liability of owners of seagoing ships.
2. The provisions of articles 21 and 22 of this Convention do not prevent the application of the mandatory provisions of any other multilateral convention already in force at the date of this Convention relating to matters dealt with in the said articles, provided that the dispute arises exclusively between parties having their principal place of business in States members of such other convention. However, this paragraph does not affect the application of paragraph 4 of article 22 of this Convention.

3. No liability shall arise under the provisions of this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

   (a) under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of 28 January 1964 or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or

   (b) by virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions.

4. No liability shall arise under the provisions of this Convention for any loss of or damage to or delay in delivery of luggage for which the carrier is responsible under any international convention or national law relating to the carriage of passengers and their luggage by sea.

5. Nothing contained in this Convention prevents a Contracting State from applying any other international convention which is already in force at the date of this Convention and which applies mandatorily to contracts of carriage of goods primarily by a mode of transport other than transport by sea. This provision also applies to any subsequent revision or amendment of such international convention.

**Article 26**

**Unit of account**

1. The unit of account referred to in article 6 of this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in article 6 are to be converted into the national currency of
a State according to the value of such currency at the date of judgment or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State which is a member of the International Monetary Fund is to be calculated in a manner determined by that State.

2. Nevertheless, those States which are not members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this article may, at the time of signature, or at the time of ratification, acceptance, approval or accession or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in their territories shall be fixed as:

12,500 monetary units per package or other shipping unit or 37.5 monetary units per kilogramme of gross weight of the goods.

3. The monetary unit referred to in paragraph 2 of this article corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. The conversion of the amounts referred to in paragraph 2 into the national currency is to be made according to the law of the State concerned.

4. The calculation mentioned in the last sentence of paragraph 1 and the conversion mentioned in paragraph 3 of this article is to be made in such a manner as to express in the national currency of the Contracting State as far as possible the same real value for the amounts in article 6 as is expressed there in units of account. Contracting States must communicate to the depositary the manner of calculation pursuant to paragraph 1 of this article, or the result of the conversion mentioned in paragraph 3 of this article, as the case may be, at the time of signature or when depositing their instruments of ratification, acceptance, approval or accession, or when availing themselves of the option provided for in paragraph 2 of this article and whenever there is a change in the manner of such calculation or in the result of such conversion.

PART VII. FINAL CLAUSES

Article 27

Depositary

The Secretary-General of the United Nations is hereby
designated as the depositary of this Convention.

Article 28

Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States until 30 April 1979 at the Headquarters of the United Nations, New York.

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. After 30 April 1979, this Convention will be open for accession by all States which are not signatory States.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 29

Reservations

No reservations may be made to this Convention.

Article 30

Entry into force

1. This Convention enters into force on the first day of the month following the expiration of one year from the date of deposit of the 20th instrument of ratification, acceptance, approval or accession.

2. For each State which becomes a Contracting State to this Convention after the date of the deposit of the 20th instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the deposit of the appropriate instrument on behalf of that State.

3. Each Contracting State shall apply the provisions of this Convention to contracts of carriage by sea concluded on or after the date of the entry into force of this Convention in respect of that State.
Article 31

Denunciation of other conventions

1. Upon becoming a Contracting State to this Convention, any State party to the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924 (1924 Convention) must notify the Government of Belgium as the depositary of the 1924 Convention of its denunciation of the said Convention with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.

2. Upon the entry into force of this Convention under paragraph 1 of article 30, the depositary of this Convention must notify the Government of Belgium as the depositary of the 1924 Convention of the date of such entry into force, and of the names of the Contracting States in respect of which the Convention has entered into force.

3. The provisions of paragraphs 1 and 2 of this article apply correspondingly in respect of States parties to the Protocol signed on 23 February 1968 to amend the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924.

4. Notwithstanding article 2 of this Convention, for the purposes of paragraph 1 of this article, a Contracting State may, if it deems it desirable, defer the denunciation of the 1924 Convention and of the 1924 Convention as modified by the 1968 Protocol for a maximum period of five years from the entry into force of this Convention. It will then notify the Government of Belgium of its intention. During this transitory period, it must apply to the Contracting States this Convention to the exclusion of any other one.

Article 32

Revision and amendment

1. At the request of not less than one-third of the Contracting States to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.

2. Any instrument of ratification, acceptance, approval
Article 33

Revision of the limitation amounts and unit of account or monetary unit

1. Notwithstanding the provisions of article 32, a conference only for the purpose of altering the amount specified in article 6 and paragraph 2 of article 26, or of substituting either or both of the units defined in paragraphs 1 and 3 of article 26 by other units is to be convened by the depositary in accordance with paragraph 2 of this article. An alteration of the amounts shall be made only because of a significant change in their real value.

2. A revision conference is to be convened by the depositary when not less than one-fourth of the Contracting States so request.

3. Any decision by the conference must be taken by a two-thirds majority of the participating States. The amendment is communicated by the depositary to all the Contracting States for acceptance and to all the States signatories of the Convention for information.

4. Any amendment adopted enters into force on the first day of the month following one year after its acceptance by two-thirds of the Contracting States. Acceptance is to be effected by the deposit of a formal instrument to that effect, with the depositary.

5. After entry into force of an amendment a Contracting State which has accepted the amendment is entitled to apply the Convention as amended in its relations with Contracting States which have not within six months after the adoption of the amendment notified the depositary that they are not bound by the amendment.

6. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention, is deemed to apply to the Convention as amended.
Article 34

Denunciation

1. A Contracting State may denounced this Convention at any time by means of a notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at Hamburg, this thirty-first day of March one thousand nine hundred and seventy-eight, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed the present Convention.

ANNEX II

COMMON UNDERSTANDING ADOPTED BY THE UNITED NATIONS CONFERENCE ON THE CARRIAGE OF GOODS BY SEA

It is the common understanding that the liability of the carrier under this Convention is based on the principle of presumed fault or neglect. This means that, as a rule, the burden of proof rests on the carrier but, with respect to certain cases, the provisions of the Convention modify this rule.

ANNEX III

RESOLUTION ADOPTED BY THE UNITED NATIONS CONFERENCE ON THE CARRIAGE OF GOODS BY SEA

"The United Nations Conference on the Carriage of Goods by Sea,

"Noting with appreciation the kind invitation of the Federal Republic of Germany to hold the Conference in
Hamburg,

"Being aware that the facilities placed at the disposal of the Conference and the generous hospitality bestowed on the participants by the Government of the Federal Republic of Germany and by the Free and Hanseatic City of Hamburg, have in no small measure contributed to the success of the Conference,

"Expresses its gratitude to the Government and people of the Federal Republic of Germany, and


"Expresses its gratitude to the United Nations Commission on International Trade Law and to the United Nations Conference on Trade and Development for their outstanding contribution to the simplification and harmonization of the law of the carriage of goods by sea, and

"Decides to designate the Convention adopted by the Conference as the: 'UNITED NATIONS CONVENTION ON THE CARRIAGE OF GOODS BY SEA, 1978', and

"Recommends that the rules embodied therein be known as the 'HAMBURG RULES'."
BIBLIOGRAPHY


Imperial Shipping Committee. "Report of the Imperial Shipping Committee on the Limitation of Shipowner's Liability by Clauses in Bills of Lading, and on Certain other Matters Relating to Bills of Lading," 25 February
1921.


