

THE SHIPPER'S RIGHT TO RECOVER UNDER COGSA FOR DAMAGE TO CONTAINERIZED CARGO

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Modern advances in the technology of shipping have benefited carriers by reducing the time and expense involved in the handling of cargo. The shippers have shared in this reduction of shipping expenses by paying reduced freights. However, problems have developed in applying laws enacted prior to World War II to the new methods of cargo handling developed since 1940. This article will examine one aspect of the problem: containerization and the carrier's right to limit his liability.

Under the Carriage of Goods by Sea Act¹ (COGSA), the carrier is entitled under certain circumstances to claim a \$500 limitation of liability on each package he carries. If the shipper thinks that the value of its goods exceeds the applicable limitation, it may declare the higher value and obtain greater protection by paying increased freight. This pattern of operation worked fairly well when both shipper and carrier used the same concept of package. However, technological innovations have radically altered the size, shape and value of the units in which goods are shipped. The container, in particular, is capable of holding many of the traditional cardboard boxes once thought of as "packages." Thus, while both shipper and carrier formerly were content to limit the carrier's liability per cardboard package to \$500, carriers' recent attempts to limit their liability to \$500 per container have met with opposition from shippers. This article will chronicle the growth of this dispute and will offer a suggestion for its resolution.

Historically, under the traditional shipping agreement, the carrier was absolutely responsible for the safe delivery of the goods which it carried.² However, concomitantly with the expansion of shipping during the nineteenth century, ship owners began to limit their liability for damage to or loss of cargo.³ Generally, the carriers

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¹ 46 U.S.C. §§ 1300 et seq. (1970).

² *The Propeller Niagara v. Cordes*, 62 U.S. 7, 28 (1858).

³ G. Gilmore & C. Black, *The Law of Admiralty* 119 et seq. (1957). American shipowners had an extensive list of excepted perils:

Exceptions to liability. The excepted perils now include restraints of governments, seizure of goods or vessel under legal process, acts of God, enemies, privateers, letters of marque or reprisal, rising of passengers, pirates, robbers, thieves, vermin, barratry, collisions or fire at sea or in port, fire on wharf, in warehouse or lighters, accidents to or from machinery, boilers or steam, explosions at sea or in port from any cause whatever, desertion or revolt of the crew, strikes,

avoided any liability by the insertion of exculpatory clauses in the contract of carriage.

Due to the monopolistic control which could be exerted by a group of carriers, the shippers were to a great extent at the mercy of the carriers. Thus, the exculpatory clauses grew more common in bills of lading. As the incidence of exculpatory clauses increased, so did their scope. Initially, the clauses operated to exempt the carrier from loss due to specifically described hazards. In their heyday, however, the exculpatory clauses relieved the carrier from the effects of his own negligence.⁴ These expanded clauses gradually became contracts of adhesion forced upon shippers by the carriers.

In 1893, Congress sought to adjust this difference in bargaining power by passage of the Harter Act.⁵ In essence, the act removed the carrier's negligence and the unseaworthiness of the vessel from the scope of any permissible exculpatory clause. This represented a compromise between the English and American approaches to the problems arising between the shippers and carriers: the English courts had endeavored to allow for the greatest possible freedom of contract between the parties, while the American courts, although in favor of the freedom of contract, had traditionally taken an unfavorable view toward exculpatory clauses.⁶ By 1919, the Harter Act's restrictions on the scope of an effective exculpatory clause had also been adopted by Australia, New Zealand and Canada.

After World War I, a drive for uniformity in ocean bills of lading resulted in an international conference at The Hague, to which twenty-four nations sent delegates.⁷ The International Convention for the Unification of Certain Rules Relating to Bills of Lading⁸ was signed or adhered to by sixteen of the twenty-four

ice, stranding or any other accidents, lighterage, disasters or dangers of the seas, rivers, land or of sail or steam navigation of what nature or whatever kind soever, errors of navigation or in the management of said vessels, or any act, neglect or default whatsoever of the pilot, masters or mariners. . . .

Crutcher, *The Ocean Bill of Lading—A Study in Fossilization*, 45 Tul. L. Rev. 698, 709 (1971). See also T. Scrutton, *The Contract of Affreightment as Expressed in Charterparties and Bills of Lading* 234-41 (1923), wherein six pages of exclusions are listed.

⁴ *Caterpillar Overseas, S.A. v. S.S. Expedito*, 318 F.2d 720, 722 (2d Cir. 1963).

⁵ 46 U.S.C. §§ 190 et seq. (1970).

⁶ J. Lucas, *Cases and Materials on Admiralty* 598 (1969).

⁷ The first diplomatic conference regarding the regulation of ocean bills of lading was held in Brussels in October 1922. Twenty-four nations sent duly appointed delegates and sixteen nations signed or adhered to the convention in 1924. They were: Belgium; Chile; Danzig; Estonia; France; Germany; Great Britain; Hungary; Italy; Japan; Yugoslavia; Netherlands; Poland; Portugal; Rumania; and the United States (signed by the United States Ambassador at Brussels on June 23, 1925). When the convention was considered by the Senate in 1935, six nations (Great Britain, Belgium, Netherlands, Spain, Portugal and Hungary) had ratified the convention. 79 Cong. Rec. 4757 (1935) (remarks of Sen. Thomas).

⁸ Reprinted at 79 Cong. Rec. 4754 et seq. (1935) [hereinafter cited as *International Convention*].

nations attending the conference. The dual purpose of the agreement was the securing of uniformity⁹ in the laws of the leading commercial countries on the subject of ocean bills of lading and the establishment of greater protection for shippers in the handling of their goods.¹⁰ The latter goal—the protection of shippers—was accomplished by lengthening the applicable statute of limitations for suits for damage to cargo,¹¹ and by barring carriers from limiting their liability below \$500 per package or the real value of the goods, whichever was the lesser.¹² However, the aims, though clearly stated, were not easily achieved, since the United States Senate did not ratify the treaty until 1935.¹³

Although Article 10 of the convention provided that "[t]he provisions of this convention shall apply to all bills of lading issued in any of the contracting States,"¹⁴ Congress was unsure whether

⁹ See *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 301 (1959).

¹⁰ Bissell, *The Operational Realities of Containerization and Their Effect on the "Package" Limitation and the "On-Deck" Prohibition: Review and Suggestions*, 45 Tul. L. Rev. 902, 903 (1971). See also 79 Cong. Rec. 4757 (1935) (remarks of Sen. Thomas); *W. Tetley, Marine Cargo Claims* 234-35 (1965); *Pan-Am Trade & Credit Corp. v. The Campfire*, 156 F.2d 603, 605-06 (2d Cir.), cert. denied, 329 U.S. 774 (1946).

¹¹ Article 3(6) of the International Convention, *supra* note 8, at 4754, provides:

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.

¹² The limitation on exculpation from liability provides:

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 [\$500] 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.

Article 4(5) of the International Convention, *supra* note 8, at 4755. Bracketed material reflects conversion into American currency.

¹³ For a discussion of the congressional treatment of the Convention and COGSA, see A. Knauth, *The American Law of Ocean Bills of Lading* 128-31 (4th ed. 1953).

¹⁴ 79 Cong. Rec. at 4755.

mere ratification of the treaty made its provisions binding on the American shipping industry.¹⁵ For this reason,¹⁶ the Carriage of Goods by Sea Act¹⁷ was enacted¹⁸ in 1936 to "implement and make effective the terms of the treaty already ratified."¹⁹ In Senate debate, protection of shippers was advanced as the purpose of the bill. It was noted that: "[O]ne of the outstanding purposes of the proposed legislation [was] to increase the character and degree of responsibility of the carriers; and the bill was designed in large measure in the interest of the shippers rather than of the carriers."²⁰ Four major changes in the current law were envisioned; all favored the shipper.²¹ The first was the limitation of liability provision with which this article is concerned:

Amount of liability; valuation of cargo.

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

¹⁵ There are two questions which are left somewhat in doubt by the treaty. The treaty is between this and other nations. The question arises—it is not suggested by me, but by others—whether a treaty between this country and a foreign country covers in the fullest degree questions arising between an American shipper and an American carrier; in other words, whether an American citizen shipping on an American vessel comes within the purview of the treaty provisions. This proposed legislation is desirable to make certain that the general rules and regulations laid down in this international undertaking apply to an American shipping upon an American vessel. Then, another question arises as to whether this treaty covers the case of an American shipper utilizing the vessel of a nation which is not a signatory to the treaty. That question is left doubtful in the treaty. The proposed legislation will remove those two doubts.

79 Cong. Rec. 13,341 (1935) (remarks of Sen. White).

¹⁶ Parenthetically, it is interesting to note that Australia, Belgium, Netherlands, India, Italy, Great Britain and 53 British possessions had also enacted the terms of the convention by national legislation. However, the effective date of the Italian decree was postponed to await similar action by other countries. 79 Cong. Rec. 4757 (1935) (remarks of Sen. Thomas).

¹⁷ 46 U.S.C. §§ 1300 et seq. (1970).

¹⁸ 49 Stat. 1210 et seq. (1936).

¹⁹ 79 Cong. Rec. 13,340 (1935) (remarks of Sen. White).

²⁰ *Id.* at 13,341 (remarks of Sen. White). See text at notes 72-77 *infra*.

²¹ The legislation was viewed as working four principal changes in the law: The first one has reference to the limit of liability. Under this provision I should say generally that the limit of liability of the carrier is substantially increased.

The second change in the law is with respect to notice of a loss. Under the Harter Act, the carrier may require as a condition precedent to liability notice of loss within a very limited period of time. This bill very substantially restricts the right of the carrier with respect to the requirement of notice.

The present law imposes a very limited restriction on the right to bring suits against the carrier for defaults of one sort or another. This enlarges the time within which a shipper who has suffered damage may bring his suit against the carrier.

The fourth change relates to the burden of proof, and here, again, the change is so made that the shipper, the owner of the goods, is given great advantage over that now accorded him under present law.

79 Cong. Rec. 13,341 (1935) (remarks of Sen. White).

\$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.²²

This limitation has considerable value as a means of maintaining a proper balance between the rights and liabilities of the carrier and the rights and responsibilities of the shipper. However, its application has not been without problems of interpretation. One question which has arisen repeatedly is whether the cargo involved was a "package"²³ within the meaning of COGSA—a matter consistently declared to be a question of fact for resolution by the court.²⁴ The determination may not be easy.²⁵ Certain cases are clear; conventional packages—bale, barrel, carton, etc.—pose no problem. However, when a relatively large self-contained object is being shipped, the problems of construction become more difficult. In *Studebaker v. Charlton, S.S. Co.*,²⁶ the King's Bench was faced

²² 46 U.S.C. § 1304(5) (1970) (emphasis added). Protection of the shipper is secured by 46 U.S.C. § 1303(8) (1970), which states:

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 chapter, shall be null and void and of no effect. . . .

²³ W. Tetley, *supra* note 10, at 235.

²⁴ Traditionally, there has been no right to a jury trial in most admiralty cases; this is particularly true in actions in rem. G. Gilmore & C. Black, *supra* note 3, at 31.

²⁵ See the collection of authorities interpreting the term "package" in Annot., 94 A.L.R.2d 1412 (1962).

²⁶ 59 Lloyd's List L.R. 23, 27 (K.B. 1937). Note, however, that this case was decided by the King's Bench while interpreting the Harter Act. Mr. Justice Goddard stated:

[T]he cars were put on board without any covering, or, to state it in another way,

with the question of whether an automobile which was not enclosed in any wrapping was a package under the Harter Act. Since no packing had taken place, the automobile was not considered a package. Similarly, in *Gulf Italia Co. v. S.S. Exiria*,²⁷ a tractor, the superstructure of which was partially boxed and covered with waterproofing paper but the base of which was left exposed, was held not to be a package.²⁸

However, in *India Supply Mission v. S. S. Overseas Joyce*,²⁹ a locomotive was considered to be a package although no wrapping whatsoever was applied to the engine. The shipper had argued that the carrier's limit on liability should be computed not on the basis of a package, but by the alternative rule of multiplying \$500 by the number of freight units, e.g., cubic feet. However, the trial judge rejected this method of computing the carrier's liability because it would result in a judgment far in excess of the freights charged.³⁰ This reasoning was relied upon in a subsequent case in which heavy machinery was shipped on skids to facilitate handling.³¹ Nevertheless, in this case the justification for characterization of the machinery as a package emerges more clearly from the fact that the machinery was put on skids to aid in handling.³²

These conceptual problems are magnified in the consideration of the appropriate measure of liability where the goods are enclosed in a modern type of transportation equipment. The interaction of the old laws and the new shipping technology will now be consid-

just as they came from the works. I confess I do not see how I can hold that there is any package to which the clause can refer. "Package" must indicate something packed.

Id.

²⁷ 160 F. Supp. 956 (S.D.N.Y. 1958), aff'd sub nom. *Gulf Italia Co. v. American Export Lines, Inc.*, 263 F.2d 135 (2d Cir. 1959).

²⁸ Although the tractor did have some of the qualities of a bundle put up for transportation, the trial judge did not wish to penalize a prudent shipper and encourage the shipper "who cavalierly makes no effort to reduce the possibility of loss" 160 F. Supp. at 960.

²⁹ 246 F. Supp. 536 (S.D.N.Y. 1965).

³⁰ Note, however, that Judge Tyler in *India Supply Mission* views COGSA as having been enacted to protect carriers. Id. at 539. It is submitted that the legislative history specifically contradicts this view. See notes 20-22 supra and accompanying text. Judge Tyler took a similar view in a more recent case, *Rosenbruch v. American Export Isbrandtsen Lines, Inc.*, 357 F. Supp. 982 (S.D.N.Y. 1973), where the issue was whether a container or the packages within the container were to be considered a package under COGSA. Id. at 984-85.

³¹ *Middle East Agency, Inc. v. The John B. Waterman*, 86 F. Supp. 487 (S.D.N.Y. 1949).

³² Id. at 488. A dismantled rock crusher was also in the same cargo. It was in twenty-one parts, of which eleven were crated, five were mounted on skids, four were in cases, and one piece was unboxed. Twenty of the items were held to be packages. The unboxed piece was not, and liability was based on the customary freight unit. See generally A. Knauth, supra note 13, at 270-71. A discussion of liability under the customary freight unit clause is beyond the scope of this article.

ered with particular emphasis on the recovery of damages by shippers.

Traditionally, the handling of cargo in package form required numerous individual transfers to and from various vehicles.³³ A shipment of 100 television sets required 100 separate transfers from plant to van, from van to ship, and at destination, from ship to pier. Thus, a minimum of 300 individual handlings was required. This mode of operation was costly, time consuming and dangerous.³⁴ It became clear to shippers and carriers that a method of consolidation of cargo would generate great savings. Ideally, the consolidated piece or container could be moved once at each transfer point.

The beginnings of containerization can be seen in an early English case, *Whaite v. Lancashire and Yorkshire Ry.*,³⁵ in which ten oil paintings were packed in a wagon which was open on the top. The wagon was placed on a truck and transported to the railroad. The train on which the wagon was placed was involved in a collision, damaging the paintings. The defendant relied on the Carriers Act,³⁶ which limited the carrier's liability for the contents of any "parcel or package" to 10£. The court ruled that the wagon was a package within the meaning of the act, since the shipper had prepared or packed the paintings for transportation.³⁷

During the twentieth century, the consolidation of cargo became more sophisticated than the informal use of large objects to hold or protect several smaller items.³⁸ One advancement, for example, was the adoption of palletization, a method of stowing cargo on rectangular trays designed to be transported by fork-lift trucks.³⁹ In the example used above,⁴⁰ four or eight of the 100 television sets might have been lashed together on a pallet and thereafter moved as a unit rather than individually.

In *Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft*,⁴¹ seven pallets of cargo, each of

³³ This method of operation has been described as break-bulk. Comment, Legal and Regulatory Aspects of the Container Revolution, 57 Geo. L.J. 533, 535 (1969). "To break-bulk" has been defined as "to destroy the entirety of a ship's cargo considered as a unit by opening the hatches and commencing to unload." R. De Kerchove, International Maritime Dictionary 95 (2d ed. 1961).

³⁴ Bissell, *supra* note 10, at 910.

³⁵ L.R. 9 Ex. 67 (1874).

³⁶ 11 Geo. 4 & 1 Wm. 4, c. 68, § 1 (1830).

³⁷ L.R. 9 Ex. at 69-70.

³⁸ The United States Army utilized a "Conex" box during and following World War II. It was usually 8' x 8' x 8'. McDowell, Containerization: Comments on Insurance and Liability, 3 J. Mar. L. & Com. 503, 503-04 (1972).

³⁹ R. De Kerchove, *supra* note 33, at 565.

⁴⁰ See text at notes 33-34 *supra*.

⁴¹ 375 F.2d 943 (2d Cir. 1967). The pallets were formed by placing three tiers of two

which contained six cartons of forty television tuners, failed to be delivered by the carrier. The ensuing litigation raised the question of carrier liability under COGSA for such a shipment.⁴² The carrier computed the amount of its admitted liability for the undelivered pallets at seven packages times \$500, or \$3500.⁴³ Claiming that the pallets were merely mechanical devices, and in light of the fact that the goods were collectively valued at \$16,800, the consignee contended that each of the cartons on a pallet should be considered a package.⁴⁴ The carrier's liability would thereby be increased. The Court of Appeals for the Second Circuit ruled that each pallet was a package under COGSA since each of the pallets had the characteristics of a "bundle put up for transportation."⁴⁵ In support of its view, the court cited the bill of lading and correspondence between the parties in which they referred to the pallets as packages.⁴⁶ The court further supported its decision by noting that the pallets were made up by the shipper,⁴⁷ who thus by his very action indicated an intention to form a package. A vigorous dissent argued that since the pallets were not enclosed on the sides, they should not be considered packages.⁴⁸ This should be so, reasoned the dissenting judge, because the pallets only provided minimal protection and the carrier could easily count the individual packages in each pallet. Furthermore, since both shipper and carrier benefit from palletiza-

cartons on a platform, covering the cartons with a wooden deck to protect the cartons from other cargo and from the metal straps which were placed around the unit. When bound with the metal straps, the dimensions of the pallets were 39" x 33" x 42". Id. at 944-45.

⁴² Prior to *Standard Electrica*, three cases had dealt with issues of palletized cargo in the context of COGSA's limitation of liability: *Middle East Agency, Inc. v. The John B. Waterman*, 86 F. Supp. 487 (S.D.N.Y. 1949); *Gulf Italia Co. v. S.S. Exiria*, 160 F. Supp. 956 (S.D.N.Y. 1958), *aff'd* on other grounds sub nom. *Gulf Italia Co. v. American Export Lines, Inc.*, 263 F.2d 135 (2d Cir. 1959); *Mitsubishi Int'l Corp. v. S.S. Palmetto State*, 311 F.2d 382 (2d Cir. 1962), cert. denied, 373 U.S. 922 (1963). In *The John B. Waterman*, parts of a rock crusher were placed individually on skids; all of the pieces were deemed to be packages although some were not encased. 86 F. Supp. at 492. *The Exiria* limited *The John B. Waterman* to articles placed on skids to facilitate transport of the item rather than to protect it. 160 F. Supp. at 959. *The Palmetto State* involved a completely encased 32½ ton roll of steel; it was held to be a package within the statutory meaning of the word. 311 F.2d at 384. It is important to note, however, that these cases do not determine the outcome in *Standard Electrica* since in each of these cases the pallet held one item, while in *Standard Electrica* each pallet held six cartons. See Bissell, *supra* note 10, at 910.

A similar result was later reached in *Aluminos Pozuelo Ltd. v. S.S. Navigator*, 407 F.2d 152 (2d Cir. 1968). A three ton press on skids was held to be a package within COGSA.

⁴³ 375 F.2d at 944.

⁴⁴ Id. at 947 (dissenting opinion).

⁴⁵ Id. at 946.

⁴⁶ Id. The dissent noted, however, that the carrier's agent referred to the loss as one of "42 cartons." Id. at 948 (dissenting opinion).

⁴⁷ Id. at 944.

⁴⁸ Id. at 947-48 (dissenting opinion). However, the dissenting judge reserved the question of containers, preferring to focus for the moment on the minimum requirements of a "package." Id. at 948. (dissenting opinion).

tion, the dissent dismissed as irrelevant the fact that the shipper himself had palletized the cargo.⁴⁹

Today, advances in shipping have proceeded far beyond palletization. The concept of what constitutes a package which was current at the time of passage of COGSA in 1935⁵⁰ is rapidly being replaced by the concept of a container.⁵¹ Consequently, many new problems have arisen in the area of carrier liability. The Coast Guard has defined a container as:

[A]n article of transport equipment (liftvan, portable tank, or other similar structure including normal accessories and equipment when imported with the container), other than a vehicle or conventional packaging—

- (1) Of a permanent character and accordingly strong enough to be suitable for repeated use;
- (2) Specifically designed to facilitate the carriage of goods by one or more modes of transport, without intermediate reloading;
- (3) Fitted with devices permitting its ready handling, particularly its transfer from one mode of transport to another;
- (4) So designed as to be easy to fill and empty; and
- (5) Having an internal volume of 1 cubic meter (35.3 cubic feet) or more.⁵²

A standard size container has dimensions of 8' x 8' x 20',⁵³ although the length of the container might vary up to forty feet.⁵⁴ Thus, one container can accommodate many individual pack-

⁴⁹ Id. (dissenting opinion).

⁵⁰ The *Standard Electrica* court noted:

No doubt the drafters had in mind a unit that would be fairly uniform and predictable in size, and one that would provide a common sense standard so that the parties could easily ascertain at the time of contract when additional coverage was needed, place the risk of additional loss upon one or the other, and thus avoid the pains of litigation.

Id. at 945 (footnote omitted).

⁵¹ "[M]ore than half of all general cargo moving over the docks at the Port of Oakland, for example, was in containers." Crutcher, *The Ocean Bill of Lading—A Study in Fossilization*, 45 Tul. L. Rev. 697, 721 (1971); 72 Am. Import & Export Bull. 242 (April 1970).

⁵² 49 C.F.R. § 420.3(c) (1972).

⁵³ Lyons, *Some Thoughts on General Average in the Container Age*, 2 J. Mar. L. & Com. 165 n.1 (1970). See also *Rosenbruch v. American Export Isbrandtsen Lines, Inc.*, 357 F. Supp. 982 (S.D.N.Y. 1973), where a container measuring 40' x 8' x 8' was characterized by the court as "standard." Id. at 983.

⁵⁴ Hickey, *Legal Problems Relating to Combined Transport and Barge Carrying Vessels*, 45 Tul. L. Rev. 863 n.2 (1971). S. 2419, 90th Cong., 2d Sess. (1969) would have provided for the standardization of containers in order to promote intermodal transportation systems. A bill enacted on March 16, 1968, however, provided that "the United States shall not give preference as between carriers upon the basis of length, height, or width of cargo containers

ages while affording them greater protection during shipping than could the average pallet.⁵⁵ If, to return to the example used earlier,⁵⁶ the 100 television sets had been loaded into a container at the warehouse, only the container itself would have to be handled at any transfer point. The result would be great savings in both handling expenses and shipping costs.⁵⁷

As the modes of shipping changed, the question of the carrier's liability under COGSA remained unclear. The *Standard Electrica* decision seemed⁵⁸ to indicate that the container would be viewed as a package for purposes of computing carrier liability. A fully enclosed shipment of numerous packages was certain to be considered a "package" under the majority's reasoning. Yet when presented with the question in *Leather's Best, Inc. v. S.S. Mormaclynx*,⁵⁹ the Second Circuit resolved the issue in favor of the owner of the goods. In that case, Leather's Best, Inc., purchased approximately eleven tons of leather from a German firm. The leather was wrapped into 99 bales averaging four feet in length, two feet in width, and one-and-one-half feet in height.⁶⁰ This was done to qualify the cargo as "bales" under the applicable tariff, which had a fixed rate per kilogram for leather in bales or rolls. The carrier dispatched a truck with a 40' x 8' x 8' container to the seller's plant. The truck driver watched the seller's employees load the bales into the container and issued a receipt for 99 bales of leather.⁶¹ The carrier's agent later issued a bill of lading which described the goods: "Number and kind

... ." 46 U.S.C. § 1122(f) (1970). Earlier, the House Committee on Merchant Marine and Fisheries had concluded that standardization of the sizes of containers was not essential. H.R. Rep. No. 991, 90th Cong., 1st Sess. 6-7 (1967).

⁵⁵ One commentator has catalogued some advantages of containerization:

The theory of intermodal transport is based on the consolidation of several break-bulk units into a single interchangeable transportation unit that can be carried via a combination of several modes of transportation, under a single shipping document and a single freight charge, from the shipper's warehouse to the consignee's warehouse. The container is the interchangeable transportation unit which it was hoped would prove to be the integrating element of an intermodal transportation system.

Bissell, *supra* note 10, at 910.

⁵⁶ See text at notes 33-34 *supra*.

⁵⁷ Increased speed in the handling of containers in loading and discharge makes it possible for ships to run four days at sea for one day in port, as opposed to the former 1:1 ratio. Costs in stevedoring are reduced by 50%. Crutcher, *supra* note 51, at 721. A highly productive containership has five times the earning capacity of the traditional break-bulk cargo ship. *Id.*, citing Cong. Info. Bur. Bull. 7 (May 19, 1970). See also 73 Am. Import & Export Bull. 485 (July 1970).

⁵⁸ Note that the *Standard Electrica* court was not faced with the problems of containerization. 375 F.2d at 943.

⁵⁹ 451 F.2d 800 (2d Cir. 1971), *aff'd* in part and *rev'd* in part 313 F. Supp. 1373 (E.D.N.Y. 1970).

⁶⁰ 451 F.2d at 804. However, the district court reported that the bales were 46 feet long. 313 F. Supp. at 1374. This would seem to be impossible if the container was only 40 feet long.

⁶¹ 313 F. Supp. at 1374.

of packages; description of goods: 1 container s.t.c. 99 bales of leather."⁶² Also on the bill of lading was a provision limiting liability to \$500 per container.⁶³

The container reached the United States aboard the vessel *Mormaclynx*, where it was unloaded and placed in a large terminal area. When the consignee arrived to pick up the container, it could not be located.⁶⁴ Leather's Best thereupon filed suit against the ship, the carrier, and the operator of the terminal. The district court ruled that each of the 99 bales shipped in the sealed container was a "package" for purposes of computing the carrier's liability.⁶⁵

On appeal, the Second Circuit ruled that the container was not a package under COGSA's limitation of liability provision. Rather, the 99 bales which had been placed inside were considered to be the measure of liability.⁶⁶ In reaching its decision, the appellate court was faced with the precedent of *Standard Electrica*.⁶⁷ However, it found the facts of the case at bar distinguishable:

Several factors distinguish *Standard Electrica* from this case. The pallets were nothing like the size of the container here; they had been made up by the shipper; and the dock receipt, the bill of lading, and libellant's claim letter all indicated that the parties regarded each pallet as a "package." . . . Indeed, there seems to have been nothing in the shipping documents in that case that gave the carrier any notice of the number of cartons.⁶⁸

The court further reasoned that the purpose of the limitation of liability provision in COGSA was "to set a reasonable figure below which the carrier should not be permitted to limit his liability"⁶⁹ The imposition of a \$500 limit of liability for all the goods enclosed in a container would nullify the purposes of COGSA. This is especially true where the carrier was informed of the general nature of the cargo—valuable leather in bales—and knew the total weight and quantity. Finally, the court noted the meaning ascribed to the word "package" in *Standard Electrica*: "a unit that would be fairly uniform and predictable in size, and one that would provide a

⁶² 451 F.2d at 804.

⁶³ The clause 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" *Id.*

⁶⁴ The empty container was later found abandoned in Freeport, Long Island. The details of the theft were never reconstructed. 313 F. Supp. at 1375-77.

⁶⁵ *Id.* at 1380-82.

⁶⁶ 451 F.2d at 815-16.

⁶⁷ 375 F.2d 943 (2d Cir. 1967).

⁶⁸ 451 F.2d at 815 (citation omitted).

⁶⁹ *Id.*

common sense standard so that the parties could easily ascertain . . . when additional coverage was needed⁷⁰ The court ultimately concluded that the units in which the shipper had packed the goods—the bales—corresponded more closely to the concept of package as used in COGSA than did the large metal container.⁷¹

A number of factors, not discussed in the Second Circuit's opinion, nevertheless urge the court's conclusions. First, there is the purpose of COGSA itself—to protect shippers against the superior bargaining position of the carrier.⁷² As has been noted,⁷³ this view was advanced in the congressional debates on COGSA.⁷⁴ In that light, COGSA has been construed as designed to avoid great inequality of bargaining power and resulting adhesion contracts.⁷⁵ In *Leather's Best*, the carrier provided the bill of lading. No bargaining as to its terms took place; in fact, it might be inferred that the bill was a standard one customarily employed by all carriers on the North Atlantic.⁷⁶ To give effect to the clause deeming the container to be a package would defeat the protective aims of COGSA.

Secondly, foreign⁷⁷ courts faced with this issue have likewise concluded that liability should be determined by the contents of the container rather than by the container itself. The Supreme Court of France ruled that where fifty-nine parcels were stolen from several containers while in the hands of the carrier, the individual parcels were the units of liability rather than the containers.⁷⁸ A similar result was reached by a Moroccan court in dealing with a van of

⁷⁰ Id. at 814, quoting 375 F.2d at 945.

⁷¹ 451 F.2d at 815.

⁷² "This apparent oneness is a common sense recognition of the inequality in bargaining power which [COGSA was] designed to redress" G. Gilmore & C. Black, *The Law of Admiralty* 125 (1957).

⁷³ See notes 20-22 *supra* and accompanying text.

⁷⁴ See 79 Cong. Rec. 13,341 (1935) (remarks of Sen. White), quoted in text at note 20 *supra*.

⁷⁵ *Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft*, 375 F.2d 943, 945 (2d Cir. 1967); *Caterpillar Overseas, S.A. v. S.S. Expedito*, 318 F.2d 720, 722 (2d Cir. 1963).

⁷⁶ The bill of lading specifically referred to the tariff of the relevant freight conference. 451 F.2d at 804.

⁷⁷ A United States district court, when faced with an almost identical fact pattern as that presented in *Leather's Best*, also reached a similar result. *Inter-American Foods, Inc. v. Coordinated Caribbean Transport, Inc.*, 313 F. Supp. 1334 (S.D. Fla. 1970). There, the carrier dispatched a van when requested by the shipper. At the shipper's plant, the van was loaded under the driver's supervision. The van was then driven to the seaport and loaded on board a ship for transportation to Miami. Id. at 1336. The court ruled that the individual cartons were the proper units of liability under COGSA since the carrier had actual knowledge of the number of cartons in the container which the carrier itself had provided. Id. at 1339.

⁷⁸ *Ste. Navale Caennaise v. Gastin* (S.S. Isee), *Jurisprudence Française*, Oct. 12, 1964, at 18, digested in *Inter-American Foods, Inc. v. Coordinated Caribbean Transport, Inc.*, 313 F. Supp. 1334, 1338 (S.D. Fla. 1970), and *Leather's Best, Inc. v. S.S. Mormaclynx*, 313 F. Supp. 1373, 1382 (E.D.N.Y. 1970).

furniture. The Court of Original Jurisdiction of Casablanca, interpreting the Moroccan Maritime Code, stated in *Perregaux v. Lignes Franco-Marocaines* that:

A furniture van is not to be considered a single package for the application of the legal limit of liability of the maritime carrier stipulated in Art. 266 of the Moroccan Maritime Code. It is obviously intended to contain numerous packages or objects.⁷⁹

The district court's reliance on the *Perregaux* case in *Leather's Best* would seem to indicate that the statement of the number of bales of leather inside the container was not necessary, since a furniture van's inventory would be diverse, and would not be recorded on the bill of lading. However, when *Leather's Best* reached the Second Circuit, the court reserved decision on this issue as well as on the issue of whether the ownership of the container would require a different outcome.⁸⁰

In *Royal Typewriter Co. v. M/V Kulmerland*,⁸¹ the issues reserved in *Leather's Best* were squarely raised, since the container was provided by the shipper's agent, and the bill of lading provided simply: "1 container said to contain machinery."⁸² The facts of *Royal Typewriter* are as follows. On December 1, 1967, the Royal Typewriter Company ordered and paid for 1050 adding machines from a manufacturer in Berlin, West Germany. The adding machines were delivered in cardboard boxes to Royal's international freight forwarding agents, Kuhne & Nagel.⁸³ At Kuhne & Nagel's West Berlin warehouse, the individually wrapped machines were divided into three groups of 350 cartons each. Each group was then placed in a single container for railroad transportation to Hamburg and subsequent delivery to Hapag/Lloyd A.G., a shipping line, for ocean transportation to New York. The three containers arrived at the Port of Hamburg intact. They were loaded aboard Lloyd's

⁷⁹ Jurisprudence, May 25, 1957, at 52, digested in *Leather's Best*, 313 F. Supp. at 1382. The *Perregaux* decision can be contrasted with the approach taken in *Rosenbruch v. American Export Isbrandtsen Lines, Inc.*, 357 F. Supp. 982 (S.D.N.Y. 1973), where a container loaded with household goods was held to be a package under COGSA. *Id.* at 985. This view was adopted although the bill of lading indicated that the contents of the container were used household goods. *Id.* at 984.

⁸⁰ 451 F.2d at 815. In the course of its decision, the court noted that the container was functionally a part of the ship. *Id.* However, while it is true that a container ship carries only containerized cargo, the containers are interchangeable. There was apparently no showing that this container was the only one which could be used by the Mormaclynx. Thus, since both parties benefit from containerization, *id.* at 815 n.19, this notation ought not to be considered a basis of the court's decision.

⁸¹ 346 F. Supp. 1019 (S.D.N.Y. 1972).

⁸² *Id.* at 1024.

⁸³ *Id.* The statement of facts in the text is derived from Judge Tyler's opinion.

vessel, the M/V Kulmerland. A clean bill of lading was issued acknowledging receipt of the containers. The bill provided for transport of the containers to New York, where they were to be delivered to Royal Typewriter's customs broker.

On December 20, 1967, the Kulmerland arrived in New York and began discharging its cargo at the 17th Street Terminal. The containers were placed in a farm area, an enclosed field within the pier complex which is used for storage. Approximately two weeks later, a watchman, while making his rounds, noticed that one of the containers had been broken into and that its contents were missing. The adding machines were never recovered.

Royal filed a suit in admiralty against Lloyd and the M/V Kulmerland to recover damages for the loss of the 350 adding machines. Three companies were joined as third-party defendants: Pioneer Terminal Corporation (Pioneer), International Terminal Operating Company, Inc. (International) and Sullivan Security Services, Inc. (Sullivan). Pioneer is a New York corporation which contracted with Lloyd to provide terminal and stevedoring services and facilities in connection with the discharging and loading of Lloyd's vessels in the Port of New York. Pioneer, however, subcontracted with International to provide these services at the 17th Street Terminal in Brooklyn. Sullivan had a contractual agreement with International to guard and protect cargo at the terminal. The trial judge found in favor of Royal against Lloyd and its vessel, but held that the limitation of liability in COGSA was applicable, and thus the carrier was only liable for \$500 damages.⁸⁴ The trial judge reasoned that the facts of *Royal Typewriter* were beyond the scope of the Second Circuit's decision in *Leather's Best*:

In my view, therefore, this case squarely presents what Chief Judge Friendly described as a "left open" matter in his discussion in *Leather's Best, Inc.* To track his language, ". . . it leaves open, for example, what the result would be if Freudenberg had packed the bales in a container already on its premises and the bill of lading had given no information with respect to the number of bales." Here Feiler, the shipper, through its agent Kuhne & Nagel, packed the adding machines in a container on the agent's premises in West Berlin. Further, the ocean bill recited only "1 Container said to contain Machinery."⁸⁵

He therefore concluded that since the shipper chose the container,

⁸⁴ *Id.* at 1025.

⁸⁵ *Id.* at 1024 (citation omitted).

the shipper "must accept the result, which is a recovery . . . of \$500."⁸⁶

That the bill of lading in *Royal Typewriter* did not declare the number of packages within the container should not be considered controlling on the issue of the amount of the carrier's liability. The *Royal Typewriter* court's reliance on the bill of lading was perhaps adapted from *Standard Electrica*, wherein the court considered determinative the fact that the bill of lading referred to "9 pallets" rather than to 54 cartons.⁸⁷ For the *Standard Electrica* court, the notations on the bill of lading controlled liability despite the fact that the naked eye could count the number of cartons involved. It is regrettable that the court in *Royal Typewriter* extended the ruling in *Standard Electrica* beyond the very particular facts to which it was attuned.

In its business operations, the relevant factors for the carrier are the weight and contents of the container. For example, in *Leather's Best* the freight was based on the weight multiplied by the applicable rate per kilogram for leather in bales;⁸⁸ the number of bales was irrelevant. *Royal Typewriter*, in which the container was sealed before delivery to the carrier, serves as another example: the carrier showed no concern for the contents of the container in determining freight.⁸⁹

In *Rosenbruch v. American Export Isbrandtsen Lines, Inc.*,⁹⁰ Judge Tyler, who authored the *Royal Typewriter* opinion, had occasion to address himself to the issue of notation of the contents of a container and subsequent proof at trial. Rosenbruch had arranged for carriage of his household goods from New York to Germany. A container was delivered to Rosenbruch's agent in New York; it was loaded and transmitted to the carrier by the agent. The container was lost at sea. In the ensuing litigation, Judge Tyler noted that predictability could best be achieved by treating the container as a package wherever the shipper loads the container with only his own goods.⁹¹ He further opined: "The accident of notations on the bill of lading as to package count is too uncertain to govern. Problems of proof would inhere"⁹² It is submitted that this approach unnecessarily burdens shippers.

⁸⁶ Id. at 1025.

⁸⁷ 375 F.2d at 946.

⁸⁸ 451 F.2d at 804.

⁸⁹ 346 F. Supp. at 1021-22. The court noted that this was not the standard aluminum container. However, since it must have been large enough to hold 350 adding machines, the container is herein treated as one customarily used on container ships. See note 80 supra.

⁹⁰ 357 F. Supp. 982 (S.D.N.Y. 1973).

⁹¹ Id. at 985.

⁹² Id.

The carrier is under an obligation to indicate the number of packages received on the bill of lading, but he need not do so if he has no way of verifying the number.⁹³ Even if the unverified number is shown on the bill, however, the shipper is not bound by the figure; it is not even *prima facie* evidence of the contents of the container.⁹⁴ This conclusion is further reinforced by the practice of noting "1 container, s.t.c. [said to contain]" The requirement of indicating number of packages received, like so much of COGSA, should be seen as intended to protect the shipper,⁹⁵ who, absent such notation, would have to rely solely on traditional methods of proof to establish the make-up of the shipment. To disregard the contents and to determine liability on a container basis would be to controvert the major purpose of COGSA by granting undue advantage to the carrier. Except in the rare cases where the carrier has actual knowledge of the contents,⁹⁶ \$500 would be the sole liability for a container load of goods. Furthermore, the realities of containerized shipping are such that most carriers would never note the contents of the container. Since inland shippers must, for their own protection, seal containers prior to through transportation,⁹⁷ the carrier will have no means of verifying the contents of the container and thus will have an added reason not to note the contents on the bill.

In containerization disputes, that which should be controlling is the proof at trial. If the shipper or its consignee adequately proves

⁹³ The Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300 et seq. (1970), provides in part: 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.

46 U.S.C. § 1303(3) (1970).

⁹⁴ Simon, Admiralty Jurisdiction and the Liability of Wharfingers, 3 J. Mar. L. & Com. 514, 517 (1972).

⁹⁵ See text at notes 20, 73-75 *supra*.

⁹⁶ See, e.g., *Inter-American Foods, Inc. v. Coordinated Caribbean Transport, Inc.*, 313 F. Supp. 1334 (S.D. Fla. 1970), noted in 2 J. Mar. L. & Com. 438 (1971).

⁹⁷ In *Royal Typewriter Co. v. M/V Kulmerland*, 346 F. Supp. 1019 (S.D.N.Y. 1972), a railway refused to accept an unsealed container, thus indicating the shipper's dilemma. The container in *Rosenbruch* was also sealed prior to transport to the carrier. 557 F. Supp. at 983.

the contents of the container, it should have its recovery measured accordingly. This procedure would not prejudice the carrier since it need not generally concern itself with the number of packages in any shipment.⁹⁸ His needs are fully met by disclosure of weight, size and descriptive terms. Arguably, it would promote uniformity and predictability⁹⁹ if the container were treated as a package whenever possible. Yet the strong congressional intent to protect shippers must be seen as overriding the mere desire for simplicity. Similarly, to advocate that the shipper may protect itself by declaring the contents of the container and paying higher freight in return for greater carrier liability¹⁰⁰ totally negates the purpose of "per package" limitation; the shipper should not be forced to pay for the protection which is rightfully its under COGSA.

Moreover, the ownership of the container should not be considered controlling.¹⁰¹ Thus, the fact that the container in *Royal Typewriter* was owned by the shipper's agent should not be equated with an intention that the container be considered a package. Ownership of the container is irrelevant to the handling of goods, in that a container is equipment to be used in transport by various carriers. Surely a railroad car belonging to Georgia Pacific is the responsibility of Penn Central while on Penn Central tracks and in Penn Central trains. If the car and its contents are switched to another line, the responsibility would also shift. In *Royal Typewriter*, the container was used in rail and ocean transport. Thus, it can be seen that the important factor is the interchangeability of containers, not their ownership. No savings result to either party if a series of containers must be used, as this procedure would necessitate an interchange of the cargo. Therefore, containers owned by different individuals should be adaptable for transportation by any type of

⁹⁸ "The carrier's freight rates depend on various factors, such as, the nature of the goods and their weight or cubic displacement in the ship. Package limitations have never been a consideration in arriving at freight rates." Simon, *supra* note 94, at 517. This would seem true in light of the carrier's status as a common carrier.

⁹⁹ See *Encyclopedia Britannica, Inc. v. S.S. Hong Kong Producer*, 422 F.2d 7, 20 (2d Cir. 1969) (dissenting opinion).

¹⁰⁰ This was the approach ultimately taken by Judge Tyler in *Rosenbruch*.

More important, however, is the question of insurance. Viewing the issue from the insurance vantage point, the choice is between requiring the carrier to increase its coverage and pass on the costs of same to all shippers, even those who prefer cheaper rates and higher risks, and granting the option to the shipper to obtain that coverage he requires. COGSA, while pre-dating containers, did not pre-date marine insurance. This choice was before the Congress, and, on examination of the terms of § 4(5), I conclude that the legislature opted for the second alternative.

357 F. Supp. at 985 (footnote omitted).

¹⁰¹ Judge Tyler observed in *Rosenbruch*: "Ownership or possession in and of itself, cannot be dispositive. . . . It, along with the entire record must be considered, and inferences drawn as to the knowledge of the shipper and carrier—and the mutual understanding of the parties." *Id.* at 984.

carrier. Hampering the interchange of containers by penalizing shippers for providing their own containers would be ill-advised because the entire shipping industry benefits from the use of containers.

In conclusion, containerized operations can afford great advantages to both shipper and carrier. However, if the container is used to measure the per package liability of carriers under COGSA, the shipper's risks are substantially increased by the use of this new technology. Fairness demands a more flexible approach than knee-jerk application of \$500 liability per 8' x 8' x 40' container, even where the bill of lading fails to disclose the contents of the container. The carrier can be presumed to have notice that the contents of such a large item are worth more than \$500, and thus would not be prejudiced by taking unexpected risks. It is therefore unfortunate that in February 1968, a Protocol was issued which modified the 1924 Convention. It is to become effective three months after ten countries, including five major shipping nations, ratify or accede to its terms. It provides:

(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 10,000 francs per package or unit or 30 francs per kilo of gross weight of the goods lost or damaged whichever is the higher. . . . (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.¹⁰²

It is submitted that the Protocol's requirement of a statement in the bill of lading regarding the number of packages in the container is unworkable, and ought to be rejected.¹⁰³ The effective use of containers requires that ocean carriers receive containers which have been sealed at the point of loading. This loading may take place far inland. Thus, the carrier will have no knowledge of the actual

¹⁰² The development of this clause is chronicled in De Gurse, *The "Container Clause" in Article 4(5) of the 1968 Protocol to the Hague Rules*, 2 J. Mar. L. & Com. 131 (1971).

¹⁰³ The United States has not ratified the Protocol. See Correspondence, 3 J. Mar. L. & Com. 209-11 (1972).

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contents of a container when it reaches the harbor; and the contents of the container will not be noted on the bill of lading. Under such circumstances, the operation of the Protocol will be thwarted. A more workable solution would be to allow the shipper to prove the contents of the container at trial without regard to the notations on the bill of lading.