

THE APPLICABILITY OF COGSA AND THE HARTER ACT TO WATER BILLS OF LADING

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INTRODUCTION

Water bills of lading have been statutorily regulated in the United States for more than three quarters of a century.¹ A single water bill of lading may be, like its issuer, simultaneously subject to the regulation of several statutes as well as to the common law. This article is concerned with the tort liability of water carriers under bills of lading issued by them as regulated by two federal statutes, the Harter Act of 1893² and the Carriage of Goods by Sea Act (Cogsa) of 1936.³ Despite the age of both statutes, the scope of each has never been decisively defined. Uncertainty as to when each act is properly applicable has been aggravated by the fact that courts have considered it necessary in certain situations to characterize a carrier either as common or private⁴ in order to determine which statute governs. It will be the purpose of this article to examine those areas where major questions arise concerning the application of the Harter Act and Cogsa and to present the currently prevailing view—where one exists—regarding each area.

I. APPLICABILITY OF THE ACTS TO COMMON CARRIERS

A. *The Harter Act*

It is settled judicial interpretation that the primary target of the Harter Act is the freighter operating as a common carrier.⁵ As a matter

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¹ In the United States, the first statute which regulated water bills of lading was the Harter Act of 1893, 46 U.S.C. §§ 190-96 (1970), which dealt with the tort liability of the issuers.

² Harter Act of 1893, 46 U.S.C. §§ 190-96 (1970).

³ The Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-15 (1970).

⁴ At common law, courts often found the distinction between the common carrier and the private carrier or "bailee" relevant with respect to the nature of the liability which might attach to the particular carrier for damage to cargo and with respect to burdens of proof. Although the Harter Act nowhere provides that it applies only to common carriers, court decisions now so hold. See discussion in text at notes 5 et seq. *infra*. The applicability of Cogsa also depends, under certain circumstances, on the character of the issuer of the bill of lading involved. See discussion in text at notes 107 et seq. *infra*.

⁵ Section 1 of the Harter Act, 46 U.S.C. § 190 (1970), provides:

of fact, courts now generally hold that common carriers are the only target of the Act, a conclusion with which the author humbly disagrees and with which he will deal later.

The Harter Act applies to all domestic shipping, including all coastwise and inland water shipping, both in interstate commerce⁶ and, in some instances, in intrastate commerce.⁷ Even though shipping is carried on wholly within one state, so long as it takes place upon the

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.

Section 2, 46 U.S.C. § 191 (1970), provides:

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 [to] properly 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.

Section 3, 46 U.S.C. § 192 (1970), provides:

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.

For a brief history of the Act, see A. Knauth, *Ocean Bills of Lading* 118-32 (4th ed. 1953) (hereinafter cited as Knauth).

⁶ The term "interstate" as used in this paper refers to carriage or transportation from one state to another. That the Harter Act applies to domestic shipping via various bodies of water is evident from the case law in the various areas:

(a) On rivers: *Mississippi Valley Barge Line Co. v. Inland Waterways Shippers Ass'n*, 289 F.2d 374 (8th Cir.), cert. denied, 368 U.S. 876 (1961).

(b) On lakes: *The E.A. Shores, Jr.*, 73 F. 342 (E.D. Wis. 1896).

(c) Coastwise: *The Tampico*, 151 F. 689 (N.D. Cal. 1907).

⁷ On rivers: *Sacramento Navigation Co. v. Saltz*, 273 U.S. 326 (1927); *The Nettie Quill*, 124 F. 667 (S.D. Ala. 1903); *Sevier v. Mitchell*, 72 Ore. 483, 142 P. 780 (1914); *I.C. Levy's Son & Co. v. Gibson Line of Steamers*, 130 Ga. 581, 61 S.E. 484 (1908).

On bays: *In re Piper Aden Goodall Co.*, 86 F. 670 (N.D. Cal. 1898).

On canals: *The Alberta M.*, 60 F.2d 154 (E.D.N.Y. 1932).

navigable waters of the United States, Congress has jurisdiction to regulate it and the Harter Act will apply.⁸ The only times when the Harter Act does not regulate domestic shipping on navigable waters of the United States by common carrier is when one or both end points of the voyage are not "ports" within the meaning of the Act⁹ or when the voyage takes place wholly within one port.¹⁰ Otherwise regulation of domestic common carrier tortious liability by the Harter Act is complete. Further, the Harter Act has limited applicability even to foreign shipping: since the Cogsa provisions, which ordinarily govern foreign shipping, apply only to the period from "the time when the goods are loaded on to the time when they are discharged from the ship,"¹¹ the Harter Act governs the period after the goods are delivered to the foreign carrier but before they are "loaded on" the ship, and the period after the goods are "discharged" from the ship but before they are delivered to the consignee.¹²

B. Cogsa

No question arises as to the applicability of Cogsa to foreign common carriers.¹³ However, it too has limitations: not only does it control only foreign shipping,¹⁴ but it applies only "to the period from the time when goods are *loaded on* to the time when they are *discharged from the ship*."¹⁵ Thus a series of problems arises concerning the scope of the period from "loading" to "discharge." The narrower interpretations of that scope limit application of Cogsa and expand the application of the Harter Act, while broader definitions have the opposite effect. A derivative question concerns lighterage: that is, when are goods being loaded or discharged upon a lighter

⁸ See, e.g., *The Robert W. Parsons*, 191 U.S. 17 (1903) (barge operating on Erie Canal, which is wholly within New York State, held subject to federal regulations); *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871) (steamer engaged solely in intrastate commerce on Grand River in Michigan held subject to congressional control).

⁹ "Ports" are defined as "a place for arriving and loading and unloading of ships in a manner prescribed by law, and near to which is a city or town for the accommodation of mariners and the securing and vending of their merchandise." *State ex rel. Mitchell v. United States Fidelity & Guaranty Co.*, 144 Ore. 535, 548, 24 P.2d 1037, 1042 (1933).

¹⁰ *Tice Towing Line v. James McWilliams Blue Line*, 51 F.2d 243 (S.D.N.Y. 1931), modified on other grounds, 57 F.2d 183 (2d Cir. 1932).

¹¹ Section 1(e), 46 U.S.C. § 1301(e) (1970), provides, "When used in this chapter— . . . (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."

¹² *The Monte Iciar*, 167 F.2d 334 (3d Cir. 1948).

¹³ See, e.g., *Jefferson Chemical Co. v. M/T Grenada*, 413 F.2d 864 (5th Cir. 1969).

¹⁴ 46 U.S.C. § 1300 (1970) provides: "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 chapter."

¹⁵ See note 11 *supra*.

within the scope of the Cogsas loading-to-discharge requirement? Other major problems arise from the "coastwise option"¹⁶ in Cogsas, which permits parties in certain situations to stipulate that the Harter Act rather than Cogsas governs, and from provisions in Cogsas excluding from the scope of that act goods carried on deck under a particular contractual arrangement. The latter problem is responsible for current uncertainty regarding containerized shipping. Since Cogsas contains a minimum limit of liability provision¹⁷ and the Harter Act does not, and since it is possible in certain instances for parties to stipulate to take a transaction out of the scope of one act but not the other, the decision as to which law governs is of major practical import. The following discussion, then, will undertake a brief examination of each problem area.

1. Loading Problems

In determining the exact scope of the Cogsas loading-to-discharge requirement, the language of the Act has not been given literal interpretation by the courts. When a ship moors at a pier for the purpose of loading, the term "loaded on" has been interpreted to mean the moment when the tackle is hooked on to lift the item onto the ship.¹⁸ The best articulation of this definition is to be found in *Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd.*,¹⁹ an English opinion—recognized as authoritative by American case law and scholars²⁰—treating the term "loading" in the context of the English Cogsas. In that case, the shippers' fire tender was received at the dock to be carried by the shipowners' general ship from London to India. While in London port, the tender was being lifted by the ship's tackle onto the vessel, and before it crossed the rail of the ship it was dropped and damaged. To claim damages free from the limitation imposed by the English version of Cogsas, the shippers argued first that since no bill of lading was issued at the time of the accident that Act would not apply, and secondly that even if a bill of lading incorporating Cogsas had been issued, Cogsas would not apply because it covered only the period "from the time when the goods are loaded

¹⁶ See note 47 *infra*.

¹⁷ 46 U.S.C. § 1304(5) (1970) states:

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 . . . unless the nature and value of such goods have been declared by the shipper and inserted in the bill of lading . . .

¹⁸ *The Monte Iciar*, 167 F.2d 334, 336 (3d Cir. 1948).

¹⁹ [1954] 2 Q.B. 402.

²⁰ See, e.g., *Mackey v. United States*, 83 F. Supp. 14 (S.D.N.Y. 1948), *aff'd*, 197 F.2d 241 (2d Cir. 1952) (case law); Knauth, *supra* note 5, at 145 (scholars).

on . . . the ship," and that the fire tender here had not been loaded on the ship when it was dropped. In rejecting the argument of the shippers, the court concluded that Cogsa applied. "In my judgment," it reasoned,

this argument is fallacious, the cause of the fallacy perhaps lying in the supposition inherent in it that the rights and liabilities under the rules attach to a period of time. I think that they attach to a contract or part of a contract. I say "part of a contract" because a single contract may cover both inland and sea transport; and in that case the only part of it that falls within the rules is that which, to use the words in the definition of "contract of carriage" in article 1(b) [of the English Cogsa], "relates to the carriage of goods by sea." Even if "carriage of goods by sea" were given by definition the most restricted meaning possible, for example, the period of the voyage, the loading of the goods (by which I mean the whole operation of loading in both its stages and whichever side of the ship's rail) would still *relate* to the carriage on the voyage and so be within the "contract of carriage."²¹

Thus, a liberal definition of the term "loading" is given by the courts and the scope of applicability of Cogsa is therefore expanded.

2. Unloading Problems:

Often a seaport is too shallow for a sea-going ship to moor at the pier and goods must be carried by lighters between the ship and pier or dock. When, either under the contract of carriage or under a court's construction of it,²² a shipowner has undertaken to carry goods to dock and is responsible for the operation of lighterage, problems arise in determining the point at which goods placed in the lighter have been "discharged" from the ship—that is, the point at which Cogsa ceases to apply. The United States District Court for the Southern District of New York held, in *Federal Insurance Co. v. American Export Lines, Inc.*,²³ that an item was discharged from the ship as soon as it was put on a lighter and left the ship's tackle, notwithstanding the fact that other goods still remained to be loaded on the same lighter. There, the bill of lading provided, among other

²¹ *Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd.*, [1954] 2 Q.B. 402, 415.

²² For a case in which the court held invalid a clause contained in a bill of lading purporting to relieve the liability of a shipowner as soon as goods had been unloaded to a lighter, see *Isthmian Steamship Co. v. California Spray-Chemical Corp.*, 290 F.2d 486 (9th Cir. 1961).

²³ 113 F. Supp. 540 (S.D.N.Y. 1953).

things; that "the carrier may discharge the goods directly when they come to hand at or onto any wharf, craft or place that the carrier may select."²⁴ The ship was unloading her cargo in an Italian port onto a lighter as arranged by the consignee of the cargo. After the goods in question had been deposited on the lighter, but while other cargo was still being unloaded into the lighter, some pipe fell from a sling and struck the lighter. The lighter commenced shipping water, but was salvaged. The goods in question were later delivered in the same good physical condition as when loaded but were subject to a general salvage lien. The subrogee of the consignee brought a libel proceeding for damages against the ship. Rejecting the contention of the shipowner that the action was time-barred by Cogsa, the court held that since the goods had left the tackle, Cogsa did not apply at the time of the accident. The court concluded that under the provision of the bill of lading quoted above, the contractual relations between the parties had come to an end when the goods were deposited on the lighter. The decision of the district court was not appealed.

However, the definition of discharge relied upon in that case was explicitly rejected by the Ninth Circuit in *Hoegh Lines v. Green Truck Sales, Inc.*²⁵ In that case, the court held that "discharge" of goods from a ship to a lighter alongside was not completed when they were put into the lighter as long as other goods were being discharged into the same lighter to make up the lighter load. Although the holding is in accord with the English viewpoint,²⁶ the American courts remain in controversy.

It is submitted that the view in the *Federal Insurance Co.*—that goods are *discharged* as soon as they are loaded on a lighter, notwithstanding that some other goods are to be loaded on the same lighter—is the better one. Under Scrutton's view that the lighterage operation is part of loading or discharging,²⁷ it is arguable that the discharge process is not finished when goods are put into a lighter so long as other goods are being loaded into the same lighter load. The courts in the United States, however, do not regard lighterage operation as part of loading or discharging.²⁸ It may be concluded, therefore, that once goods are unloaded from the ship, there is no justification for making a distinction between unloading them on a pier and unloading them on a lighter.

²⁴ Id. at 543.

²⁵ 298 F.2d 240 (9th Cir. 1962).

²⁶ See *Goodwin, Ferreira & Co. v. Lamport & Holt, Ltd.*, 34 Lloyd's List L.R. 192 (1929).

²⁷ See discussion in text at note 29 *infra*.

²⁸ See discussion in text at notes 30 et seq. *infra*.

The next issue is whether Cogsa or the Harter Act applies during the period after the lighter is fully loaded with goods and before the goods are discharged on the dock. One possible answer was suggested by Scrutton: "If the carrier undertakes to perform these [lighterage] operations it seems possible that they might be considered as part of the loading and discharging respectively [and therefore governed by Cogsa]."²⁹ In other words, the carrier extends the period of discharge by assuming responsibility for lighterage operations.³⁰ However, a different answer to this question was given by the United States District Court for the Southern District of New York in *Remington Rand, Inc. v. American Export Lines*.³¹ In that case, several shippers who had delivered goods to a shipowner in New York for transportation to Bombay, India, sought to recover from the shipowner for damage to the goods incurred after they were discharged at Bombay into lighters. Part of the cargo included drums of film, and after a long exposure to the sun, fire occurred while the lighters were moored alongside the ship, resulting in damage to the cargo. The bills of lading issued by the shipowner contained a provision which stated that Cogsa "shall govern before the goods are loaded on and after they are discharged from the ship and throughout the entire time the goods are in the custody of the carrier."³² In other words, a "custody" rather than strict "discharge" test was to determine whether Cogsa applied. The court found that the shipowner failed to exercise the care required under Section 3(2) of Cogsa.³³ The shipowner contended that he was nevertheless released from liability under the fire exception of Cogsa³⁴ which was made applicable to the time of the fire by the provision in the bill of lading. In rejecting the contention, the court in effect said that the Harter Act applied after goods were discharged from the ship to the lighters as "the lighters served [only] as a floating deck or temporary floating storage place"³⁵ and that "lighters are not ships within the

²⁹ T. Scrutton, *Scrutton on Charterparties & Bills of Lading* 409 (17th ed. 1964).

³⁰ Scrutton's opinion is not in conflict with the ruling in *Goodwin, Ferreira & Co. v. Lamport & Holt, Ltd.*, 34 Lloyd's List L.R. 192 (1929). In that case, the court stated that "in my judgment the discharge of these goods was not finished when they were put into a lighter when other goods were being discharged into the same lighter load which was to start for the shore." *Id.* at 194. It did not say *when* discharge took place.

³¹ 132 F. Supp. 129 (S.D.N.Y. 1955).

³² *Id.* at 137.

³³ 46 U.S.C. § 1303(2) (1970) provides: "The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."

³⁴ 46 U.S.C. § 1304(2)(b) (1970). Section 1304(2) provides in part: "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . . (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 . . ."

³⁵ 132 F. Supp. 129, 137 (1955).

purview of Cogsa."⁸⁶ Thus the court concluded that the lighterage operation was not within the scope of Cogsa.

This proposition, that the Harter Act rather than Cogsa applies while goods are on lighters, was affirmed by the Ninth Circuit in *Isthmian Steamship Co. v. California Spray Chemical Corp.*⁸⁷ The suit was brought against the shipowner for injury to cargo during lighterage operations. Holding for the shippers, the court in effect ruled that Cogsa applied to the contract of carriage while the goods were on the ship but that "the Harter Act applies . . . as soon as the cargo has left the ship's tackle"⁸⁸ and continues to apply until it is delivered. The same position was taken by the Second Circuit in *Caterpillar Overseas, S.A. v. S.S. Expedito*.⁸⁹ Thus American courts have resolved the problem of the definition of the Cogsa term "discharge" in lighterage operations to mean the point at which the goods are first physically placed in the lighter and not the time when the goods leave the custody of the shipper.

In the cases discussed above, the term tackle was used to refer to the ship's own tackle or crane. When the tackle or crane used in loading or unloading the cargo does not belong to the ship, the application of the previously delineated rule regarding discharge is in dispute. That is, the determination of when goods are "discharged" from a vessel for purposes of applying the Harter Act rather than Cogsa is dependent upon the ownership of the tackle or crane used in unloading the cargo.

In *Krawill Machinery Corp. v. Robert C. Herd & Co.*,⁴⁰ an action was brought by the shipper of machines against a stevedore and the owner of a floating crane, to recover for damage caused to one of the machines when it fell into the harbor while being loaded from a railroad car onto the ship. The stevedore and the owner of the floating crane had been hired by the shipowner to load the machines. In the process of loading, the stevedore found that the regular wire sling of the crane was too thick to fit under the case and he decided to use a thinner wire to lift the case high enough to permit him to slide the regular sling under the case. During the process of lifting by the thinner wire, the case fell into the harbor. Finding the stevedore liable for the damage, the federal district court expressed the opinion that the stevedore could limit its liability to the shippers if it could show that either the contract or Cogsa limited the shipowner's liability and hence the stevedore's derivative liability. In its

⁸⁶ *Id.*

⁸⁷ 290 F.2d 486 (9th Cir. 1961).

⁸⁸ *Id.* at 489.

⁸⁹ 318 F.2d 720 (2d Cir. 1963).

⁴⁰ 145 F. Supp. 554 (D. Md. 1956).

discussion of the matter, the court concluded that the damage in the instant case did not occur during the Cogsa period. The court's reasoning hinged upon the tackle in use:

The damage did not occur while the goods were being lifted onto the ship, but during a preliminary stage of the loading operation prior to the actual lift. The goods had not been placed in a sling attached to the ship's tackle or to the tackle of the floating derrick, to be lifted onto the ship. The lift which caused the damage was a preliminary lift to enable the longshoremen to place a sling under the case.⁴¹

Even had the goods been placed in a sling attached to the tackle of the floating derrick, the court would probably have held the same, for the court continued:

Moreover, the tackle was not the ship's tackle but the tackle of the floating derrick. Knauth . . . makes a distinction between (a) where the cargo is hoisted by the ship's tackle and (b) where it is hoisted by a pier-side crane or a floating derrick not controlled by the ship. In the latter case, he says that "the loading on occurs when the draft of cargo is first laid down at a point within the boundaries of the hull of the ship." . . . It is necessary to draw the line somewhere.⁴²

The viewpoint of the *Herd* court was rejected by the Ninth Circuit in *Hoegh Lines v. Green Truck Sales*.⁴³ In that case, the shipowner employed a floating derrick to unload goods into a lighter hired by the shipper. While unloading, some of the goods were dropped from the crane into the lighter, causing damage both to the goods dropped and to the goods already loaded on the lighter. A federal district court in California held that the shipowner was responsible for the damage and that the amount of damages was not limited by Cogsa provisions because that Act was not applicable. In reaching the conclusion that Cogsa did not apply, the court reasoned: "The cargo which had been carried in the vessel's holds had been removed from the ship in sound condition."⁴⁴ It then quoted the view of Knauth, an authority relied upon by the *Herd* court: "If shore side cranes or floating derricks are used, the moment [of discharge] would seem to be when such apparatus lifts the draft from the ship's hold or deck."⁴⁵ On appeal, the Ninth Circuit, while agree-

⁴¹ Id. at 562.

⁴² Id. at 563.

⁴³ 298 F.2d 240 (9th Cir. 1962), reversing 179 F. Supp. 562 (S.D. Cal. 1960).

⁴⁴ 179 F. Supp. at 564.

⁴⁵ Id., citing Knauth, *supra* note 5.

ing that the shipowner was responsible for the accident, reversed the position of the trial court as to the applicability of Cogsa. Rejecting the view of Knauth, the court cited no cases to support its holding and held that Cogsa was applicable notwithstanding that substitute tackle had been used to unload the vessel. In other words, the court defined discharge to mean the moment that the goods are safely released from the substitute tackle and in the lighter. Thus the present judicial position of the Ninth Circuit is that the loading and unloading processes involving tackle should be included within the period governed by Cogsa, even though the tackle does not belong to the ship.⁴⁶

3. *The Coastwise Option*

Another problem area in the implementation of Cogsa concerns the scope of its "coastwise option" provision. It is clear that this provision allows a bill of lading issued for transportation between two ports of the United States or its possessions to stipulate that Cogsa should govern instead of the Harter Act, which would normally apply in these cases.⁴⁷ However, it is unsettled whether the "coastwise option" provision permits stipulation out of the relevant sections of the Harter Act in a bill of lading for foreign commerce.

Gilmore and Black have suggested that stipulation out of Harter in bills of lading issued for foreign commerce is acceptable:

There is no provision for contracting out of Harter and into Cogsa as to the period prior to loading and between [un]loading and delivery. Such a stipulation is, however, often included

⁴⁶ It is submitted that this view adopted by the Ninth Circuit is the better one. As pointed out in *Pyrene Co. v. Scindia Navigation Co. Ltd.*, [1954] 2 Q.B. 402, the rights and liabilities under Cogsa attach to a contract of carriage, instead of to a period of time, and the loading or unloading of the goods relate to *the carriage on the voyage*. Cogsa should equally apply whether it is done by a crane installed on the ship or a pier-side crane or a crane of a floating derrick.

⁴⁷ 46 U.S.C. § 1312 (1970) provides:

This chapter 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 chapter the term "United States" includes its districts, territories, and possessions. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this chapter 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 chapter, shall be subjected hereto by the express provisions of this chapter: *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 chapter.

in Cogsa bills. It is hard to see how there could be any public policy objection to it or what difference it makes.⁴⁸

The courts, however, have not settled the issue. For instance, in *Mackey v. United States*,⁴⁹ a federal district court applied Cogsa to a period during which it did not apply of its own force but was held to apply on the grounds of an agreement which designated Cogsa as the governing statute. In *Mackey*, goods suffered damage after being loaded into lighters before transportation from Haiti to New Orleans. Clause 1 of the bill of lading provided that Cogsa "shall govern before the goods are loaded on and after they are discharged from the ship, and throughout the entire time the goods are in custody of the carrier."⁵⁰ The District Court for the Southern District of New York held the shipowner liable under Cogsa. The court remarked:

[The shippers'] cargo having been damaged on the lighters, while secured alongside the [steamer] but before the goods had reached the ship's tackles, the provisions of [Cogsa] are not applicable *proprio vigore*. The provisions of [Cogsa] are made applicable and control the relations of the parties by virtue of [Clause 1].⁵¹

The district court also noted: "The relations of the parties in respect of liability for the loss and damage to the goods occurring on the lighters after they were secured to the [steamer] are governed also by the provisions of Sections 1 and 2 of the Harter Act."⁵² It did not discuss the validity of Clause 1 to the extent that it stipulated that Cogsa should apply to the period before the goods were loaded on the ship but were in custody of the shipowner. The Second Circuit, affirming the judgment below, did not elaborate this point, but stated that the shipowner was not exonerated under Section 4(2)(c) of Cogsa.⁵³ The statement implied that Cogsa applied at least by virtue of the stipulation. Therefore the *Mackey* case seems to stand for the proposition that in some cases it is permissible to stipulate the applicability of Cogsa where the Harter Act would normally apply.

However, the view that it is permissible to stipulate the applicability of Cogsa, as expressed by Gilmore and Black and recognized by the *Mackey* court, was later contradicted by the same court that

⁴⁸ G. Gilmore & C. Black, *The Law of Admiralty* 127 (1957) (hereinafter cited as Gilmore & Black).

⁴⁹ 83 F. Supp. 14 (S.D.N.Y. 1948), aff'd, 197 F.2d 241 (2d Cir. 1952).

⁵⁰ 83 F. Supp. at 19.

⁵¹ Id. at 18-19.

⁵² Id. at 19.

⁵³ 197 F.2d at 243-44. For 46 U.S.C. § 1304(2)(c), see note 34 supra.

decided *Mackey*. In *Remington Rand, Inc. v. American Export Lines, Inc.*,⁵⁴ the court ruled that a bill of lading provision which stipulated that Cogsca was to govern the period after goods left the ship's tackle was invalid. The court reasoned that the character of proof required by Cogsca violated the basic character of proof required by Harter. Perhaps the fact that in *Remington* the stipulation of Cogsca would mean, in effect, the adoption of a policy contrary to the Harter Act,⁵⁵ is the factor which distinguishes the case from *Mackey*. In *Mackey* the outcome would have been the same under either act. However, at present the *Remington* decision means that the scope of the "coastwise option" provision is still in doubt.

4. *The Liberty Clause, Section 1(c), and Containerization*

Another difficulty in the application of Cogsca concerns the status of the liberty clause. A liberty clause is a provision in a bill of lading which reserves the right of the shipowner to stow goods on deck. However, to complicate matters, Section 1(c) of Cogsca explicitly exempts from the application of the Act "cargo which by the contract of carriage is stated as being carried on deck and is so carried."⁵⁶ The issue then becomes whether a liberty clause puts the goods which it governs within the meaning of the Cogsca exemption, therefore making Cogsca inapplicable, or whether the liberty clause does not fall within the scope of the Section 1(c) exception, since it merely reserves the right of the shipowner to carry cargo on deck.

The significance of this question has become more immediate through the rise of containerization.⁵⁷ The "container revolution" has been accompanied by two changes relevant to water carriage. The first is the use of metal or pallet boxes instead of the conventional methods of packaging. Since these containers are tightly sealed and weather-proof, they are stowed on the weather deck of a conventional freighter; the under deck is used to store conventional packages or bulk cargo. The second change is the newly-designed containership for carrying the new type of container. Some containerships are so constructed that there is no under-deck storage at all; the containers are simply piled up by a crane inside the ship in open air.

This brief description of the containerization phenomenon is sufficient to suggest why it has had a troublesome impact upon the implementation of Cogsca. Since a clean bill of lading indicates that

⁵⁴ 132 F. Supp. 129 (S.D.N.Y. 1955).

⁵⁵ *Id.* at 138.

⁵⁶ 46 U.S.C. § 1301(c) (1970).

⁵⁷ For an excellent discussion of the container revolution, see Angus, Legal Implications of "The Container Revolution" in *International Carriage of Goods*, 14 McGill L.J. 395 (1968), and the materials suggested therein.

cargo is stowed below deck,⁵⁸ it has often become necessary for conventional freighters to utilize the liberty clause in order to accommodate containers, and, since containerships have no below deck storage, it has increasingly become the custom for containership owners to issue conventional bills of lading including liberty clauses. In both situations the practice of utilizing the liberty clause introduces the problem described above concerning the application of Cogsa—that is, whether use of a liberty clause activates Section 1(c) of the Act so as to preclude application of Cogsa.

The problem of whether the section 1(c) exception applies when a shipowner reserves the right to stow goods on deck and later does so stow them was squarely met by the Second Circuit in *Encyclopaedia Britannica, Inc. v. SS Hong Kong Producer*.⁵⁹ The vessel involved in that case was a conventional freighter, and six of eight containers covered by a specific bill of lading were stowed on the weather deck. The bill of lading contained a liberty clause, Clause 13, under which it was provided that:

The shipper represents that the goods covered by this bill of lading need not be stowed under deck and it is agreed that it is proper to and they may be stowed on deck unless the shipper informs the carrier in writing before delivery of the goods to the carrier that under deck stowage is required.

. . . In no event shall the carrier be liable for any loss of damage to goods so carried on deck arising or resulting from any cause whatsoever, including unseaworthiness, unless affirmatively proved to be due to lack of due diligence or to the fault or the neglect of the carrier or those for whom it may otherwise be responsible, but the carrier shall not in any event be liable for any act, neglect or default in the navigation or the management of the ship.⁶⁰

The cargo in two of the containers stowed on deck sustained damage during the voyage. The shipper brought suit to recover from the shipowner. The shipowner urged that Cogsa did not govern because Clause 13, which gave him the option to carry goods either above or below decks, put the goods within the scope of Section 1(c) and so precluded application of Cogsa.

The court rejected the shipowner's argument:

⁵⁸ *St. Johns Corp. v. Companhia Geral Commercial Do Rio De Janeiro*, 263 U.S. 119 (1923); *The Delaware*, 81 U.S. (14 Wall.) 579 (1871); *Propeller Niagara v. Cordes*, 62 U.S. (21 How.) 7 (1858).

⁵⁹ 422 F.2d 7 (2d Cir. 1969).

⁶⁰ *Id.* at 10.

Turning to Clause 13 of the bill of lading issued by [the shipowner] in the case now before us, we see a new and ingenious device which carries with it the strong likelihood of not only lessening the liabilities of the carrier but also stripping the shipper of all the protection afforded it by [Cogsa].⁶¹

In ruling that the liberty clause did not put the goods within the exception of Cogsa and that accordingly Cogsa did apply, the court reasoned:

In the present case the bill of lading stated that option, but it contained no information or declaration whatever as to how it was exercised. . . . [T]he option could not be left to be exercised by the actual placing of the cargo on deck or below deck.⁶²

The court then went on to say that Clause 13 of the bill of lading could not be invoked by the carrier for two reasons: first, the exculpatory clause in Clause 13 was contrary to a provision of Cogsa and therefore void; second, the shipowner was estopped from invoking the provisions of the bill of lading because the goods had been put on board before the issuance of the bill of lading and therefore the shipper had had no chance to request under-deck stowage. The court then turned to the effect of on-deck stowage in this case, and concluded that on-deck stowage was not permissible under the bill of lading because, according to the court the parties had regarded it as a clean bill of lading, and hence it must be deemed to have imported below-deck stowage.⁶³ The court therefore concluded that stowage of the goods on deck constituted an unreasonable deviation, and that such deviation rendered the shipowner liable for the full amount of damages sustained without the benefit of the Cogsa limitation of five hundred dollars per package. Thus, in the final analysis, although the court found certain parts of the liberty clause to be violative of Cogsa, it did not find the liberty clause itself to come within the scope of Section 1(c) of the Act.

The ruling of the Second Circuit that a liberty clause does not exclude goods from protection by Cogsa is in agreement with that of the English courts. In *Svenska Traktor Akt. v. Maritime Agencies (Southampton) Ltd.*,⁶⁴ for example, the bill of lading involved contained this clause: "Steamer has liberty to carry goods on deck and ship-

⁶¹ Id. at 13.

⁶² Id. at 16.

⁶³ However, for a case in which the court held that a bill of lading containing a liberty clause was not a clean bill of lading see *Peter Helms*, 1938 A.M.C. 1220 (W.D. Wash.).

⁶⁴ [1953] 2 Q.B. 295.

owners will not be responsible for any loss, damage, or claim arising therefrom."⁶⁵ Here the bill of lading contained, on its face, no statement that the goods would be or had actually been stowed on deck. Holding that the first part of the clause, the liberty clause, did not exclude the goods carried from the definition of "goods" in the English Cogsa, the Queen's Bench reasoned:

[T]he Act . . . [left] the shipowner free to carry deck cargo on his own conditions, and unaffected by the obligations imposed on him by the Act in any case in which he would, apart from the Act, have been entitled to carry such cargo on deck, provided that that cargo in question was in fact carried on deck and that the bill of lading covering it contained on its face a statement that the particular cargo was being so carried A mere general liberty to carry goods on deck is not in my view a statement in the contract of carriage that the goods are in fact being carried on deck.⁶⁶

The court then ruled that the second part of the clause was violative of the English Cogsa, but that the first part of the clause remained valid since it was separable from the second part. It meant that the carrier had liberty to carry cargo on deck, always subject, of course, to its obligation under the English Cogsa to properly handle and care for the goods in question. Therefore, stowage by the shipowner on deck was not deviation or negligence per se; the shipowner bore the burden under the Act of proving that he had used the care required by the Act in stowing the tractor on deck. The court, then, found that the liberty clause did not remove the goods from Cogsa's governance.

Thus, while it is true that both American and English courts have found that the liberty clause itself is not within the 1(c) exception of Cogsa, the grounds on which they reached that conclusion showed significant differences. The English court in *Svenska Traktor*, for example, found the liberty clause separable from the exculpatory clause and held Cogsa operative. It found the shipowner liable only for failure to exercise the due diligence required by Cogsa. The American court in *Encyclopaedia Britannica*, on the other hand, found the liberty clause inseparable from, and hence invalid on account of, the exculpatory clause. Further, the court held that the shipowner was estopped to invoke the liberty clause because it contained a statement which mandated that the shipper inform the carrier in writing *before* delivery of the goods to the carrier, and the bill of lading in question had been issued *after* the goods had been delivered. It appears, then, that even

⁶⁵ Id. at 297.

⁶⁶ Id. at 300.

though the American court, like the English, found the shipowner liable and ruled that the liberty clause itself was not within the Section 1(c) exception to Cogsa, the American rationale raised two further problems regarding the application of Cogsa.

The first problem is the finding that the validity of the liberty clause was tainted by the exculpatory clause. It is submitted that this reasoning is somewhat fallacious, for it cannot be said that the sole purpose of inserting a liberty clause is to evade liability. A shipowner can profit only when efficient management is maintained, and this entails full utilization of space, including deck space, and flexibility of stowage arrangements. It is true that at the time of receiving goods the booking department has in most cases determined where the goods will be stowed. At times, however, it is impossible to tell whether a particular container will be stowed on or under deck. Even if it has been decided at the time of receiving goods, it is occasionally desirable or necessary to change the stowage plan after the receipt of the cargo. Moreover, since neither the Harter Act nor Cogsa prohibits on-deck stowage,⁶⁷ a liberty clause should be upheld notwithstanding that another part of the same clause is violative of the Act. In any case, the *Encyclopaedia Britannica* court did not need to find the liberty clause invalid in order to reach its holding that Cogsa was applicable, since that holding could rest upon the finding that Section 1(c) did not apply to the liberty clause.

A second problem is inherent in another part of the *Encyclopaedia Britannica* rationale. When the Second Circuit held that the shipowner was estopped to invoke the liberty clause, it reasoned that the shipper must be notified explicitly or implicitly at or before the time of delivery of goods. However, practically speaking, a shipowner will not issue a bill of lading before receiving the goods, since he may be liable to a holder of the bill even though he has not actually received the goods covered by the bill.⁶⁸ Perhaps the only way to satisfy the court's requirement would be to issue and deliver bills of lading at the same time the goods are received. This method, however, would impose an unreasonable hardship on both parties, for it would require their simultaneous action. It is impracticable to change the present practice of issuing bills of lading after goods are received.⁶⁹ Another alternative, however, seems workable: to insert such liberty clauses into the dock receipt or mate's receipt, which are issued at the dock, as well as into the bills of lading.

⁶⁷ For applicability of Harter Act in this regard, see *The Carriso*, 1929 A.M.C. 213 (9th Cir.). For Cogsa's applicability, see *Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer*, 422 F.2d 7 (2d Cir. 1969).

⁶⁸ See Uniform Commercial Code § 7-301(1).

⁶⁹ For an example of the present practice, see *Remington Rand, Inc. v. American Export Lines, Inc.*, 132 F. Supp. 129 (S.D.N.Y. 1955).

In that way, the shipper has a chance of learning of the existence of the clause at the time of delivery. A positive statement to that effect would be a Section 1(c) clause rather than a liberty clause and hence would be sufficient to take the contract out of the domain of Cogsa. As a result, there would be little difficulty in ascertaining exactly which goods are governed by the provisions of Cogsa and which are not so governed.

Another problem regarding the section 1(c) clause has developed as the use of containerships has grown: where the containership has no under-deck stowage and where all the containers are piled up in the ship under the open sky, does the stowage of containers constitute on-deck stowage? If the bills of lading issued by the shipowners are silent as to the place of stowage and therefore are regarded as clean bills, will stowage of containers on the weather deck constitute an unreasonable deviation? If the answer is in the affirmative, shipowners will be forced to insert a statement that the goods *will* be stowed on deck, in order to avoid being guilty of unreasonable deviation. Should the use of such a statement take the contract out of the domain of Cogsa, as it would in the case of conventional freighters? If the answer is again in the affirmative, the net result would be that no cargoes carried by these containerships would be subject to Cogsa, since all would fall under the Section 1(c) exception. Finally, the risk arises that shipowners will want to take the opportunity to remove container cargoes from the Cogsa domain by inserting such clauses in their bills of lading. Although there is the hope that shipowners will voluntarily assent to the regulation of Cogsa by not utilizing such clauses, the implementation of a law expressing such important public policy as Cogsa represents should not be left to the whim of the shipowners.

The English court in the *Svenska Traktor* case commented that:

The policy of the [English Cogsa], 1924, was to regulate the relationship between the shipowner and the owner of goods along well-known lines. In excluding from the definition of "goods," the carriage of which was subject to the Act, cargo carried on deck and stated to be so carried, the intention of the Act was, in my view, to leave the shipowner free to carry deck cargo on his own conditions, and unaffected by the obligations imposed on him by the Act in any case in which he would, apart from the Act, have been entitled to carry such cargo on deck⁷⁰

The reason for the exemption of on-deck cargo from the application of Cogsa seems to be that conventional freighters are so constructed that

⁷⁰ *Svenska Traktor Akt. v. Maritime Agencies (Southampton) Ltd.*, [1953] 2 Q.B. 295, 300.

the deck is "not a usual or proper place of stowage."⁷¹ Goods stowed on deck are subject to higher risks, especially weather risks; to subject such cargo to the Act would require that the shipowners be held to a higher degree of care than that required for below-deck stowage. Therefore, the Act by its own terms exempts such situations from its application and permits the parties to agree on their own terms.⁷²

Many of the risks to which goods stowed on the deck of a conventional freighter are subject do not exist for goods packed in sealed containers and stowed on such containerhips. As a matter of fact, "on-deck" is the only place of stowage. To apply the Act to containers stowed on such containerhips would not impose extra hardship on the shipowners, and accordingly the owners of these containerhips should not be allowed to take their contracts out of the domain of Cogsa. One solution would be to make it a legal principle in the interpretation of Cogsa that stowage of containers on a modern containerhip is not within the meaning of the "on-deck" exemption as conceived by the drafters of Cogsa. However, legislative reform appears to be the better solution; a statute making it clear that goods stowed in the ordinary places on a containerhip are within the purview of Cogsa would eliminate much of the doubt which surrounds the application of that Act to containerhips.

Finally, in cases where it has been determined that Cogsa is not applicable to a particular factual situation because the goods carried qualify within the 1(c) exception and thereby render Cogsa inapplicable, there remains the problem of the selection of the correct governing law. Prior to the enactment of Cogsa, the Harter Act was applied to the type of water carriage situation presented in *Encyclopaedia Britannica*. However, although the Harter Act was not repealed by the enactment of Cogsa,⁷³ it is submitted that it is not necessarily true that the Harter Act remains in force where Cogsa is rendered inapplicable. The Harter Act would impose a greater burden on the shipowners than Cogsa,⁷⁴ and hence such imposition would contravene the intention of Congress to limit the liability of risk imposed on the shipowners in on-deck water-carriage operations. Therefore it is submitted that where Cogsa is inapplicable, either common law or general maritime law should be the governing law.

⁷¹ Scrutton, *supra* note 29, at 409.

⁷² The most common condition employed by the parties is "shipped on deck at shipper's risk." See, e.g., *The Ponce*, 1946 A.M.C. 1124 (D.N.J.).

⁷³ *The Monte Iciar*, 167 F.2d 334 (3d Cir. 1948).

⁷⁴ For a good example of such an imposition see *Remington Rand, Inc. v. American Export Lines, Inc.*, 132 F. Supp. 129 (S.D.N.Y. 1955), discussed in text accompanying note 31 *supra*.

II. APPLICABILITY OF THE HARTER ACT AND COGSA TO BILLS OF LADING ISSUED BY PRIVATE CARRIERS

A. *The Harter Act*

The question whether the Harter Act applies to bills of lading issued by the private carrier is a confusing one. A survey shows that for thirty years following the passage of the Harter Act both the Supreme Court and the Court of Appeals for the Second Circuit⁷⁵ held that the Act applies to bills of lading issued by private as well as by common carriers. This rule was seemingly supported by the legislative history behind the Act. Then, after that thirty-year period, the courts selectively applied the provisions of the Harter Act to private carriers. Finally, through a reversal of reasoning, they found the Harter Act totally inapplicable to bills of lading issued by private carriers.

1. *Case Law Holding the Act Applicable to Private Carriers*

In the early case of *The Carib Prince*,⁷⁶ the Second Circuit found the Harter Act applicable to a bill of lading issued by a private carrier. In that case, the consignee of a bill of lading issued by a shipowner sought to recover from the latter for damage caused to cases of bitters carried on board by water leaking through a defective rivet. The vessel involved was under a time charter; thus the shipowner acted as a private carrier. The issue was whether the duty of care under which the shipowner was responsible was that imposed by the Harter Act or that imposed by the provisions of the bill of lading. In holding the shipowner liable under the Harter Act, none of the judges, either majority or dissenting, questioned the applicability of the Harter Act to a bill of lading issued by a private carrier.

In *The Silvia*,⁷⁷ a charter shipper sought to recover for damage to his sugar after water entered through open portholes during the voyage from Cuba to Philadelphia. The main issues were whether the Harter Act applied to incoming foreign vessels and, if so, whether the vessel was seaworthy at the time that the voyage commenced so that Section 3 of the Harter Act exonerated the carrier. In holding affirmatively on both issues, the Supreme Court applied the Act without regard to the fact that the shipowner acted as a private carrier and that neither the charter-party nor the bills of lading issued by the shipowner incorporated the Act by reference. That the *Silvia* was a private carrier at

⁷⁵ The Second Circuit, which has appellate jurisdiction over cases arising from the City of New York, is regarded as the most important federal court of appeals in admiralty cases.

⁷⁶ 170 U.S. 655 (1898).

⁷⁷ 171 U.S. 462 (1898).

the time is evident from the circumstances: there was a charter-party between the shipper and the shipowner, and the shipper furnished a full cargo to the vessel.

The proposition that the Harter Act applies to private carriers as well as to common carriers was confirmed in 1908 by the Second Circuit in *Sun Co. v. Healy*.⁷⁸ The libellant in that case chartered a vessel from the libelee in order to carry a cargo of molasses from Puerto Rico to New York. A bill of lading was issued by the master. The cargo of molasses was damaged by sea water while being pumped out at the port of destination. Holding for the libelee shipowner, the court reasoned that Section 3 of the Harter Act protected the vessel owner whether he was acting as a private carrier or as a common carrier.⁷⁹ As the first quarter of the century ended, then, there seemed to be a strong trend holding the Harter Act applicable to private carriers.

2. Cases Holding the Act Inapplicable to Private Carriers

The first case holding that the Harter Act did not apply to a private carrier was *The Fri*.⁸⁰ In *The Fri*, handed down in 1907 by the Second Circuit, the vessel was under a charter-party to carry cattle from Colombia to Cuba—i.e., between two foreign ports—when she grounded on a reef and the cattle had to be thrown overboard. While the bill of lading incorporated the Harter Act by reference, the charter-party did not. The court held that so far as the relationship between the original parties was concerned, a bill of lading cannot modify the contract of affreightment embodied in the charter-party, and that the Harter Act was not applicable by its own force because the voyage had been between two foreign ports. The remaining issue was whether a negligence clause in the charter-party was repugnant to the public policy of the forum. In deciding the question, the court noted that under federal decisions, a negligence clause in a contract between a common carrier and a shipper of goods is invalid. It continued:

In this case, however, a common carrier was not a party to the contract. When a charter party gives to the charterer the full capacity of the ship, the owner is not a common carrier, but a bailee to transport as a private carrier for hire It has not yet been decided by any court that a condition in such a contract, to which the Harter [A]ct has no application, relieving a shipowner from liability on account of the carelessness of its employees, is contrary to public policy.⁸¹

⁷⁸ 163 F. 48 (2d Cir. 1908).

⁷⁹ The proposition was also followed by a federal district court in *In re Steamship Norden*, decided in 1925, citing the *Sun Company* case. 6 F.2d 883, 887 (D. Md. 1925).

⁸⁰ 154 F. 333 (2d Cir. 1907), cert. denied, 210 U.S. 431 (1908).

⁸¹ *Id.* at 338.

The court concluded that the negligence clause was not repugnant to public policy and was therefore valid.

The decision of the court indicated a turning point in the treatment of bills of lading issued by private carriers. Admittedly, the Second Circuit's phrase, "to which the Harter Act has no application," possibly referred to the particular contract involved in that case rather than to *every* contract made by a private carrier. However, it should be noted that the court's statement was dictum. Further, the court not only cited no authority to support its statement but also ignored the fact that it conflicted with the contrary holdings of the *Sun Co.* case and Supreme Court cases. It should also be noted that the Supreme Court's denial of certiorari for *The Fri* may not be viewed as indicating that the Court approved the Second Circuit's change of position regarding the applicability of the Harter Act to private carriers, since the Harter Act was inapplicable to the carriers here on the ground that the voyage was between two foreign ports,⁸² a factor that provided ample ground for the circuit court's decision. Hence *The Fri* might have been viewed at the time as an isolated aberration.

However, the decision was not to remain isolated, and indeed was to serve as precedent. Sixteen years after *The Fri*, the Second Circuit handed down the landmark case of *The G.R. Crowe*.⁸³ Here the vessel was operating under a voyage charter-party and bills of lading which were issued by the master to cover a cargo of gas oil. The libellant charterer sought to recover for oil that was lost due to a leaking tank. Under Article 1 of the charter-party, the owners warranted that the steamer was "tight, staunch, and strong, and every way fitted for the voyage, and to be maintained in such condition during the voyage, perils of the sea excepted"⁸⁴ Article 16 of the same charter provided that "[t]he steamer is not to be accountable for leakage."⁸⁵ The bills of lading contained a provision that "[t]his shipment is subject to all terms and provisions of . . . [the Harter Act]."⁸⁶ The court held that Article 16 was a modification of or an exception to the warranty of seaworthiness provided in Article 1. To the libellant's contention that Article 16 violated the Harter Act, the court stated that the suit had not been brought upon the bill of lading and that even had it been so brought, that fact would not have helped the libellant because, as between the original parties, a bill of lading signed by the master cannot modify the charter-party. The court then continued: "In section 1 and 2 [of the Harter Act], it will be noted that the reference is solely to

⁸² See § 1 of the Act in note 5 supra.

⁸³ 294 F. 506 (2d Cir. 1923), cert. denied, 264 U.S. 586 (1924).

⁸⁴ 294 F. at 506.

⁸⁵ Id. at 507.

⁸⁶ Id. at 508.

'any bill of lading or shipping document' and a charter is neither. These sections manifestly refer to *common carriers* . . .⁸⁷ Finally, in supporting its dicta that the Harter Act referred to common carriers, the court quoted the dicta in *The Fri* discussed above.

It would appear that *The G.R. Crowe* dicta were no more soundly based than *The Fri* dicta had been. It is true that a charter is neither "any bill of lading nor a shipping document," and hence that if neither had been issued by the shipowner in *The G.R. Crowe*, the Harter Act would not apply to the charter. But here a bill of lading had in fact been issued. If the suit was not brought on the bill of lading, as the court said, the court may well have been right in refusing to apply the Harter Act. The court, however, went a step further when it said that a suit brought upon the bill of lading would not have helped the libellant because the Harter Act was not applicable between a charterer and the shipowner whenever there was a charter-party. This portion of the opinion is difficult to reconcile with the case of *The Silvia*, in which bills of lading were issued to a charterer-shipper who had contracted for the full capacity of the ship and in which the Supreme Court applied the Harter Act.

The court in *The G.R. Crowe* also said that the history and purposes of the Act confirmed its view. An investigation of the legislative history, however, reveals no support for such a position, since it gives no indication that Congress intended to regulate only common carriers. On the contrary, the Congressional Record indicates otherwise. The original bill was introduced in 1892 by Representative Harter⁸⁸ as "a bill (H.R. 9176) relating to contracts of *common carriers* and certain obligations, duties, and rights in connection with the carriage of property."⁸⁹ While sections 2-5⁹⁰ of the original bill referred to "any vessel," section 1 dealt with "any common carrier or manager, agent, master, or owner of any common carrier, whether by land or sea."⁹¹

⁸⁷ *Id.* (emphasis added).

⁸⁸ 23 Cong. Rec. 5228 (1892).

⁸⁹ See reading of the original bill at 24 Cong. Rec. 147 (1892) (emphasis added).

⁹⁰ The wording of §§ 2-5 was substantially the same in the original form as at present, so far as our purposes are concerned. Compare text of present act in note 5, *supra*, with that of the original bill, 24 Cong. Rec. 147 (1892).

⁹¹ Section 1 of the original bill reads as follows:

[I]t shall not be lawful for any common carrier or manager, agent, master, or owner of any common carrier, whether by land, or water, 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 in transport, or proper delivery of any and all lawful merchandise or property committed to its or their charge, nor shall it be lawful to limit its or their liability to less than a full indemnity to the legal claimant for any loss or damage therefrom, and any

When the bill was passed in the House, the phrase in section 1 quoted above was amended to read "any common carrier or manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports . . ."⁹² Later, when the bill was passed in the Senate, the phrase "any common carrier or" was stricken out.⁹³ Section 1, therefore, was amended to its present construction.⁹⁴

When in February, 1893, the House debated and accepted the Senate amendments, it changed the title to conform to the prior substantive amendments: "An act relating to navigation of vessels, bills of lading, and to certain obligations, duties and rights in connection with the carriage of property."⁹⁵ Although no discussion regarding the deletion of the term "common carrier" is recorded, it would be naïve to conclude that the Congress amended the bill without intending to change its applicability. On the contrary, the purpose of the Senate's change is clear. As is generally recognized, at common law a carrier, common or private, may contract away its liability. Immediately prior to the introduction of the bill, American shippers had become annoyed with the abuse of this freedom, and the situation was exacerbated by the fact that American foreign trade relied substantially upon foreign ships and especially upon English ships.⁹⁶ Congress was in sympathy with American shippers vis-à-vis these carriers. Therefore it is not hard to understand that when Congress amended the bill, it intended to restrict not only the freedom of common carriers to limit their liability but also that of foreign private carriers.

Seen in this perspective, then, the interpretation of legislative history upon which the Second Circuit based its decision in *The G.R. Crowe* is questionable. It is rather unfortunate that the case was cited by many later courts to support holdings that the Harter Act does not apply to bills of lading issued by private carriers.

3. *Selective Application of the Harter Act to Private Carriers*

The conclusion that the Harter Act was inapplicable to private carriers was indeed a tenuous one. Since the judicial logic behind that proposition was questionable and since the legislative history seemed to indicate a contrary result, later courts felt it sound to hold only certain

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.

24 Cong. Rec. 147 (1892).

⁹² Id. at 147-48 (emphasis added).

⁹³ 24 Cong. Rec. 1180 (1893).

⁹⁴ Section 1 is quoted in note 5 supra.

⁹⁵ 24 Cong. Rec. 1291-92 (1893).

⁹⁶ A. Knauth, *Ocean Bills of Lading* 120 (4th ed. 1953).

provisions of the Act inapplicable. In *The Fort Gaines*,⁹⁷ for example, the main issue was whether a chartered vessel was seaworthy. The United States District Court for the District of Maryland first noted that Section 2 of the Harter Act does not *ex proprio vigore* reduce the shipowner's obligation to the mere use of due diligence—that is, it does not remove his obligation to provide an absolute seaworthy vessel. It then went on to hold that “in any event section 2 does not apply, because it is applicable to common carriers only,” and cited *The G.R. Crowe*.⁹⁸ The court further concluded that the shipowner in this case was not exonerated under Section 3 of the Act. The court seemed to be saying, then, that while section 2 does not apply to a private carrier, section 3 does apply, but that the latter section did not operate in the case at bar to exonerate the carrier from liability. On appeal, the Fourth Circuit, in affirming the judgment below, noted only that the Harter Act did not operate to exempt the owner from negligence since the unseaworthiness in question could not be considered as a fault or error in navigation or management of the vessel. Thus *The Fort Gaines* case began a line of confusing precedents regarding the application of select provisions of the Harter Act to private carriers.

The problem became further entangled in a series of cases in the district and appellate courts of the Second Circuit. In *Warner Sugar Refining Co. v. Munson S.S. Line*,⁹⁹ the District Court for the Southern District of New York held that the Harter Act applied to a private carrier because the bill of lading incorporated the Act by reference: that is, the court implied that the Act will not apply by its own force to bills of lading issued by private carriers. The Second Circuit affirmed the decision per curiam. In *Elizabeth Edwards*, the Second Circuit held that the Act did not apply, “because concededly the vessel was a private, not a common, carrier,” and cited *The Fri* and *The G.R. Crowe*.¹⁰⁰ The District Court for the Eastern District of New York was logically correct in holding in *Norris Grain Co. v. Empire Canal Corp. (The Herkimer)*¹⁰¹ that if Sections 1 and 2 of the Act do not apply automatically to a private carrier under *The G.R. Crowe*, then Section 3 will not apply to relieve the shipowner from negligence. On appeal, the Second Circuit reversed the decision on the ground that the shipowner was not negligent at all and concluded that this disposition “renders it unnecessary to consider the questions which have been argued as to the

⁹⁷ 24 F.2d 849 (D. Md. 1928), aff'd sub nom. *Federal Forwarding Co. v. Lanaza*, 32 F.2d 154 (4th Cir. 1929).

⁹⁸ 24 F.2d at 851.

⁹⁹ 23 F.2d 194 (S.D.N.Y. 1927), aff'd per curiam, 32 F.2d 1021 (2d Cir. 1929).

¹⁰⁰ 27 F.2d 747, 748 (2d Cir. 1928).

¹⁰¹ 42 F.2d 482 (E.D.N.Y. 1930), rev'd, 52 F.2d 41 (2d Cir. 1931).

application of the Harter Act."¹⁰² The language suggests a sense of relief on the part of the court, arising from an awareness that the question was not as simple as the lower court saw it.

By setting the problem aside, however, the court did not solve it. Two years later, in *The Alberta M.*,¹⁰³ the same district court that had decided *The Herkimer* further muddled an already confusing situation by reversing its own position with regard to Section 3 of the Act. Thus section 3 for the first time was divorced from sections 1 and 2 with regard to their applicability to private carriers. In *The Alberta M.*, the question was again the applicability of section 3 to a private carrier. Remarking that the "language of the [Act] itself seems not to require that the first three sections shall be governed by one process of reasoning,"¹⁰⁴ the court ruled that section 3 applies to a private carrier even if sections 1 and 2 do not. The court reasoned that since section 3 refers to "the owner of any vessel" and to "the vessel," to read the terms as not applicable to a private carrier is a "process of amendment which lies beyond the judicial province."¹⁰⁵ Thus the court in effect overruled its own holding in *The Herkimer*. It is submitted that the reasoning of the court with respect to the applicability of section 3 is sound. It is hard to understand, however, why the same reasoning is not applicable to sections 1 and 2, which also refer to "the owner of any vessel" and to "any vessel." Since no appeal was made, the Court of Appeals for the Second Circuit had no occasion to review the point. However, in *The Nat Sutton*¹⁰⁶ and *The Westmoreland*,¹⁰⁷ that court reaffirmed its holding in *The G.R. Crowe* that Sections 1 and 2 of the Act do not apply to private carriers.

Finally, in *Koppers Connecticut Coke Co. v. James McWilliams Blue Line, Inc.*,¹⁰⁸ the Second Circuit was directly confronted with the applicability of section 3. In that case, the libellant sought to recover for the loss of its coke which was carried by a barge after the barge was involved in a collision and sank. It was not disputed that the shipowner acted as a private carrier or that the tug owned by the same shipowner was negligent at the time of the collision. The issue was whether the shipowner was exonerated under Section 3 of the Act. Holding that section 3, as well as sections 1 and 2, does not apply to private carriers, the court remarked:

¹⁰² 52 F.2d at 44.

¹⁰³ 60 F.2d 154 (E.D.N.Y. 1932).

¹⁰⁴ Id. at 156.

¹⁰⁵ Id. at 157.

¹⁰⁶ 62 F.2d 787 (2d Cir. 1933).

¹⁰⁷ 86 F.2d 96 (2d Cir. 1936).

¹⁰⁸ 89 F.2d 865 (2d Cir.), cert. denied, 302 U.S. 706 (1937).

Verbally. [the language of section 3] is broad enough to include private carriers by water as well as common carriers. But the words of a statute are not to be read in vacuo; all the sections of the Act must be studied together and the words must be interpreted in the light of the purpose of the legislation.¹⁰⁹

The court cited *The Westmoreland*, *The Fri*, *The G.R. Crowe*, *The Elizabeth Edwards* and *The Nat Sutton*. It completely forgot or ignored not only those cases that over a thirty-year period had held a contrary view, but also the legislative history and purpose of the Harter Act. It is hard to understand why the court bypassed that history and why the Supreme Court subsequently denied certiorari.

Thus, at this point the reversal of the initial position that the Harter Act is applicable to private carriers appears complete. The turnabout is due to dubious interpretations of dicta in previous cases, of legislative history and of statutes. In sum, it seems well accepted now that the Harter Act does not apply to private carriers.¹¹⁰

B. *Cogsa*

Turning to the applicability of *Cogsa* to private carriers, it is clear from Section 5 of *Cogsa* that when a vessel is chartered and when no bill of lading is issued *Cogsa* will not apply by its own force.¹¹¹ However, when a shipowner does issue bills of lading, either to a charterer shipper or to a non-charterer shipper, the language of Section 5 of *Cogsa* renders the applicability of the Act unclear. It may be argued, reasoning solely from the language of that provision, that whenever a shipowner issues a bill of lading, whether to a charterer shipper or to a non-charterer shipper, the bill of lading "shall comply with the terms of this chapter," and that therefore it should be subject to the Act. Section 5, however, must be read in conjunction with section 1.¹¹² Under Section 1(a), a shipowner or a charterer

¹⁰⁹ 89 F.2d at 866.

¹¹⁰ See, e.g., *Commercial Transport Corp. v. Martin Oil Service Inc.*, 374 F.2d 813 (7th Cir. 1967); *The Monarch of Nassau*, 155 F.2d 48 (5th Cir. 1946); *O. F. Nelson & Co. v. United States*, 149 F.2d 692 (9th Cir. 1945).

¹¹¹ Paragraph 2 of § 5 of *Cogsa* provides: "The provisions of this chapter 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 chapter" 46 U.S.C. § 1305 (1970).

It should be noted, however, that a few courts have found *Cogsa* applicable; see *The Raleigh*, 50 F. Supp. 961 (D. Md. 1943); *Mente & Co. v. Isthmian S.S. Co.*, 36 F. Supp. 278 (S.D.N.Y. 1940), *aff'd*, 122 F.2d 266 (2d Cir. 1941).

¹¹² Section 1 provides:

When used in this chapter—

is not a "carrier" by the terms of the Act and therefore not subject to it unless or until the shipowner or the charterer enters into a *contract of carriage*. Under Section 1(b), *contracts of carriage* covered by the Act are, in turn, limited to those covered by bills of lading; and in the case those bills of lading issued under or pursuant to a charter-party, the Act governs only from the moment at which such a bill of lading "regulates the relations between a carrier and a holder of the bill of lading." The term "holder" is not defined, but under general concepts of common law, any person to whom a negotiable bill of lading is issued or indorsed, including a charterer, is a holder. Thus far in the argument, then, it could appear that under Sections 5 and 1 of Cogsa, that Act should be applicable to the bill of lading held by the charterer shipper just as it is to bills held by shippers on common carriers.

However, it is also a settled rule of the common law that as between a shipowner and a shipper, even though a bill of lading is issued to the latter, the charter-party, rather than the bill of lading, governs the contract of carriage.¹¹³ As long as the charterer shipper to whom a bill of lading is issued retains possession of the bill, then, it will not regulate the relation between the shipowner and the charterer shipper. Hence the bill of lading is not "a contract of carriage" as defined by the Act as long as it remains in the possession of the charterer shipper. Under this construction, the conclusion appears inevitable that Section 1(b) of Cogsa does not apply to bills of lading issued to a charterer shipper so long as they remain in his possession, and accordingly that those bills are not covered by Section 5 and so remain outside the scope of Cogsa. It would appear, then, that only when the bills of lading issued by a shipowner pursuant to a charter-party are issued to non-charterer shippers, or indorsed by a charterer shipper to other persons,¹¹⁴ are they within the scope of Cogsa and subject to compliance with the 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.

46 U.S.C. § 1301 (1970).

¹¹³ See, e.g., *The G.R. Crowe*, 294 F. 506 (2d Cir. 1923), cert. denied, 264 U.S. 586 (1924); *The Fri*, 154 F.2d 333 (2d Cir. 1907), cert. denied, 210 U.S. 431 (1908); *The Iona*, 80 F. 933 (5th Cir. 1897); *Ministry of Commerce v. Marine Tankers Corp.*, 194 F. Supp. 161 (S.D.N.Y. 1960); *In re Steamship Co. Norden*, 6 F.2d 883 (D. Md. 1925).

¹¹⁴ For a discussion on this point, see T. Scrutton, *Scrutton on Charterparties and Bills of Lading* 429-30 (17th ed. 1964).

The crucial question then becomes whether Cogsa governs the contract of carriage between a shipowner and a charterer where a bill of lading originally issued to a non-charterer shipper has been indorsed to the charterer and the latter bases his claim against the shipowner on the bill of lading. In *Albert E. Reed & Co. v. M/S Thackeray*,¹¹⁵ the charterer sought to recover from the shipowner for damage to cargo carried on board on a bill of lading which was issued by the shipowner to a non-charterer shipper, who in turn indorsed it to the charterer. The bill of lading incorporated the terms of Cogsa. The charterer argued that between him, as a transferee of the bill of lading, and the shipowner, the bill of lading which incorporated Cogsa governed. He also argued that under the Act the clause contained in the charter-party limiting liability was invalid. Rejecting these arguments, the federal district court held that the charter-party rather than the bill of lading governed. The court quoted the following statement from *Ministry of Commerce v. Marine Tankers Corp.*:

In cases in which the relevant provisions of the charter and bill of lading are inconsistent, the courts have looked to the identity of the contending parties to determine which document controls. If a transferee of the bill of lading is one of the parties, the bill and not the charter is treated as the governing instrument. Since the transferee of the negotiable bill is not a party to the charter, that original contractual document does not constitute a contract of carriage upon which his rights are based. *On the other hand, in cases where the bill of lading remains in possession of the charterer himself, i.e., in a controversy between charterer and shipowner, the bill of lading has been regarded as a mere receipt which does not supersede the charter provisions.*¹¹⁶

The result of *Albert E. Reed & Co. v. M/S Thackeray* is unfortunate. The rule that the charter-party rather than the bill of lading governs between a charterer and the shipowner had been applied only to the situation where the bill of lading which was issued to a charterer shipper *remained* in his possession. *Ministry of Commerce v. Marine Tankers Corp.*, on which the court relied, was itself such a case. It is submitted that even if the rule applies to a situation where the charterer reacquired a bill of lading which had been issued to him and he had indorsed it to a third person, it should not

¹¹⁵ 232 F. Supp. 748 (N.D. Fla. 1964).

¹¹⁶ 232 F. Supp. 748, 750 (N.D. Fla. 1964), quoting *Ministry of Commerce v. Marine Tankers Corp.*, 194 F. Supp. 161, 162 (S.D.N.Y. 1960) (citations omitted).

be extended to the situation where the charterer is an indorsee of a negotiable bill of lading which was issued to a non-charterer shipper, for in this situation the charterer should acquire the rights of a transferor. There is no doubt that Cogsa would have been found to govern had the consignor of the bill of lading, instead of the consignee—the charterer—brought the action in *The M/S Thackeray* case under the bill of lading. The conclusion cannot be avoided that the unsoundness of the decision in *The M/S Thackeray* is another example of the ambiguity that surrounds the scope and applicability of Cogsa.

C. *Proposal*

The common law characterization of vessels and their owners as common and private carriers is still significant today in determining the applicability of the Harter Act and Cogsa. Such characterization is probably too well-entrenched to be abolished. It does not follow, however, that Congress must incorporate common law characterization into its regulatory legislation unless such incorporation is dictated by legislative purpose, or that the courts should automatically read common law doctrines into congressional acts.

The present-day regulation of bills of lading is unsatisfactory due to the persistence of characterization. An assignee of a bill of lading often has no way of knowing whether the issuer was a common or private carrier, yet the liability of the issuer may be dependent upon this fact. Judicial interpretation of Harter is today as well-entrenched as characterization itself. Therefore, what is probably needed is an amendment to the Act in order to make it clearly applicable to bills of lading issued by private carriers, as well as by common carriers, at least between the shipowners or indorsees of the bills of lading. This was most likely the aim of the framers of the original act. Such an amendment would bring about a desirable result, that is, the subjection of all water bills of lading to the same regulation regardless of the characterization of the particular business operation of its issuer. Similarly, an amendment to Cogsa indicating that charter parties—and consequently private carriers—are to be governed by its provisions would eliminate confusion as to that Act's applicability. Congressional action, then, seems to be the most appropriate means to define decisively the scope of each statute.

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