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CONTAINERS AND THE PROBLEM OF INTERPRETATION UNDER COGSA SECTION 4(5)

The extent of an ocean-going carrier's liability for lost or damaged cargo is a major issue in the field of admiralty law. A carrier's liability presently is determined by section 4(5)[1] of the Carriage of Goods by Sea Act [COGSA].[2] This section provides that neither the carrier nor the ship shall be liable for loss or damage to cargo in an amount exceeding $500 per package, or, in the case of goods not shipped in packages, per customary freight unit.[3] The liability issue under this section has been complicated by problems in defining the term "package."

Historically, the carrier's liability fluctuated between absolute liability and nearly absolute immunity for cargo damage. In the middle 1800's, the common carrier was responsible for all loss or damage to cargo except that caused by a public enemy or an act of God.[4] With the introduction of bills of lading as public documents of title,[5] this situation changed rapidly. The

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[1] 46 U.S.C. § 1304(5) (1970) READS IN PERTINENT PART:

> Neither the carrier nor the ship shall . . . 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 . . ., or in case of goods not shipped in packages, per customary freight unit, . . ., unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading . . . By agreement between the carrier . . . and the shipper another maximum amount . . . 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 . . . 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. (emphasis in original)

[2] 49 STAT. 1207 (1936) (current version at 46 U.S.C. §§ 1300-1315 (1970)). COGSA is expressly limited in its coverage to contracts for carriage of goods by sea to or from ports of the United States. 46 U.S.C. § 1300 (1970). Although the statute does not include domestic voyages within its coverage, a bill of lading may validly stipulate for COGSA coverage in such voyages. Such a stipulation is known as the coastwise option. 46 U.S.C. § 1312 (1970).

[3] *See* note 1 *supra.* American courts have interpreted "per customary freight unit" to be the unit of quantity, weight or measurement of the cargo customarily used as the basis of calculation of the freight rate to be charged. General Motors Corp. v. Moore-McCormack Lines, Inc., 451 F.2d 24, 25 (2d Cir. 1971); Stirnimann v. The San Diego, 148 F.2d 141 (2d Cir. 1945); The Bill, 55 F. Supp. 780, 783 (D. Md.) *aff'd mem.* 145 F.2d 470 (4th Cir. 1944).

[4] *See* Propeller Niagara v. Cordes, 62 U.S. (21 How.) 7, 26 (1858). *See* New Jersey Steam Navigation Co. v. Merchants Bank, 47 U.S. (6 How.) 722, 725 (1847) (carrier chargeable as insurer of goods, and accountable for any damage or loss of goods in course of conveyance, except when damage or loss arises from inevitable accident).

[5] A bill of lading is a written contract acknowledging receipt of the described goods by the carrier. A bill of lading renders the carrier responsible as custodian of the goods and is an express written agreement for their transportation and delivery. Centennial Ins. Co. v. Haley Transfer and Storage, Inc., 196 S.E.2d 822, 832, 18 N.C. App. 152 (1973); Illinois Central R. Co. v. Miller, 32 Ill. App. 259 (1889). A bill of lading is also a document of title. An indorsement of such a document enables title to goods to be transferred, or mortgaged as security for an advance. T. SCRUTTON, CHARTERPARTIES AND BILLS OF LADING 2 (18th Ed. 1974). The bill of lading as a document of title evolved out of the English law merchant. The

legal effect given these documents enabled carriers, in the exercise of their superior bargaining powers,[6] to compel shippers to submit to the insertion of exceptions limiting liability in bills of lading drafted by carriers.[7] In 1893, Congress enacted the Harter Act[8] in an attempt to develop a statutory solution that would be fair to both shipper and carrier. Under this act, shipowners were liable for cargo damage caused by negligence, but were exonerated from liability for faults in navigation and management of the vessel.[9] After World War I, further efforts to achieve uniformity culminated in an international conference held in Brussels. The resultant Brussels Convention,[10] which established $500 minimum liability for cargo damage caused by carriers, served as the basis for COGSA and the section 4(5) limitation of liability provision.[11]

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document became important when, in the middle of the nineteenth century, rapid mail-carrying steamers made it possible to bring the shipping documents to a market center far in advance of the slower freight vessel. This development enhanced the negotiable character of bills of lading and led to their commercial acceptance. A. KNAUTH, AMERICAN LAW OF OCEAN BILLS OF LADING 117 (4th Ed. 1953) [hereinafter cited as KNAUTH].

[6] Because groups of carriers could exert monopolistic control in the bargaining process, they often dictated the terms of liability clauses. Shippers either consented to these terms or did not send their freight overseas. Recupero, *The Shipper's Right to Recover Under COGSA For Damage to Containerized Cargo*, 15 B.C. INDUS. & COM. L. REV. 51, 52 (1973) [hereinafter cited as Recupero].

[7] Initially, the exculpatory clauses exempted the carrier from loss due to specifically described hazards such as, for example, faults or errors in navigation and seizure of a ship and cargo under legal process. As they developed, however, such clauses exempted carriers from liability for the effects of their own negligence. Caterpiller Overseas, S.A. v. S.S. Expeditor, 318 F.2d 720, 722 (2d Cir. 1963); Recupero, *supra* note 6, at 52. For examples of early court attempts to control the proliferation of these exculpatory provisions, see Liverpool and Great W. Steam Co. v. Phenix Ins. Co., 129 U.S. 397 (1889); Railroad Co. v. Lockwood, 84 U.S. (17 Wall.) 357 (1873).

[8] Ch. 105, 27 STAT. 445 (1893) (current version at 46 U.S.C. §§ 190-196 (1970)).

[9] Under the Harter Act, shipowners are liable for damage or loss caused by negligence or failure in loading, stowage, custody, care or delivery of lawful merchandise committed to their charge. 46 U.S.C. § 190 (1970). If the shipowner uses due diligence to make his vessel seaworthy before commencement of the voyage, he is exonerated from liability for faults and errors in the navigation or management of the vessel. 46 U.S.C. §§ 190-196 (1970). *See generally* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 147 (2d ed. 1975) [hereinafter cited as GILMORE & BLACK]; KNAUTH, *supra* note 5, at 121.

[10] The Brussels Convention accepted the Hague Rules of 1921, which, in turn had been based on the Harter Act provisions. KNAUTH, *supra* note 5, at 125; H. LONGLEY, COMMON CARRIAGE OF CARGO, § 1.05 (1967) [hereinafter cited as LONGLEY]. The sixteen nations that signed or adhered to the convention intended it to serve the purposes of securing uniformity in the laws of leading commercial countries on the subject of ocean bills of lading, and of establishing greater protection for shippers in the handling of their goods. Recupero, *supra* note 6, at 53. The latter goal, the protection of shippers, was accomplished by barring carriers from limiting their liability to less than $500 per package or the real value of the goods, whichever was the lesser. Crutcher, *The Ocean Bill of Lading—A Study in Fossilization*, 45 TUL. L. REV. 698, 719 (1971); Recupero, *supra* note 6, at 53.

[11] The United States ratified the Brussels Convention in 1935. KNAUTH, *supra* note 5, at 129. Ratification was prompted by the Supreme Court's decision in May v. Hamburg-Amerikanische Packetfahrt Aktiengesellschaft, 290 U.S. 333 (1933). The *May* court held that a shipowner, to be protected by the Harter Act, must either show his vessel to have been

In recent years, controversy has arisen between carriers and shippers concerning the definition of "package" within the meaning of section 4(5). The basic problem stems from the advent of containerization and the resultant changes in the shipping industry.[12] Containerization, which involves the use of large reusable metal containers,[13] offers an efficient means of carrying cargo, and has altered the principles of maritime shipping.[14] Containerization, however, has created difficulties in interpreting "package" under the act.

Congress' original purpose in passing section 4(5) was to set a reasonable figure for damages below which a carrier would not be permitted to limit his liability.[16] Moreover, Congress also sought to prevent adhesion contracts and to secure protection for shippers forced into unequal bargain-

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seaworthy or prove that his servants used due diligence. *Id.* at 342. Carriers realized that this burden of proof would entail more costly pretrial investigation and more extensive and costly testimony at trial, and accordingly moved for the ratification of the convention. KNAUTH, *supra* note 5, at 129. Congress was unsure whether the mere ratification of the treaty would bind the American shipping industry. For example, one Senator questioned whether a treaty between the United States and a foreign country would fully cover issues arising between an American shipper and an American carrier. 79 CONG. REC. 13,341 (1935) (remarks of Sen. White). For this reason Congress enacted COGSA to implement and make effective the terms of the treaty already ratified. Recupero, *supra* note 6, at 54.

[12] For an analysis of the changes in the shipping industry brought about by containerization, see Simon, *The Law of Shipping Containers*, 5 J. MAR. L. & COM. 507, 510-513 (1974) [hereinafter cited as *Shipping Containers*].

[13] The Coast Guard defines a container as "an article of transport equipment other than a vehicle or conventional packaging [that is] . . . strong enough to be suitable for repeated use, [and is] specially designed to facilitate the carriage of goods by one or more modes of transport without intermediate reloading." 49 C.F.R. § 420.3(3) (1976).

[14] Containerization provides an economical method of handling, loading, stowing, discharging and transferring hundreds of cartons simultaneously be means of mechanized equipment. Thus, the need for the slow and costly manual method of individual package handling is eliminated. *Shipping Containers, supra* note 12, at 510.

[15] In Cameco, Inc. v. S.S. American Legion, 514 F.2d 1291, 1297 (2d Cir. 1974), the Second Circuit stated that a court's principal objective must be to search for some degree of certainty and predictability that would enable shippers, carriers, underwriters and courts to determine the difficult question of what is the COGSA package. This search has been complicated by the absence of any meaningful legislative history concerning a possible definition of "package." *See* Aluminios Pozuelo Ltd. v. S.S. Navigator, 407 F.2d 152, 154 (2d Cir. 1968); Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft, 375 F.2d 943, 945 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967).

[16] In discussing the COGSA provision, Senator White 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." 79 CONG. REC. 13,341 (1935). Thus, the objective behind the $500 limitation was to prevent a carrier from stipulating a value for cargo in a lesser amount, and to do away with the then current limits imposed by carriers, usually $100 or less. Jones v. The Flying Clipper, 116 F. Supp. 386, 388 (S.D.N.Y. 1953). The hope was that the $500 figure would insure that carrier liability was always something more than nominal. David Crystal, Inc. v. Cunard Steam-ship Co., 339 F.2d 295, 299 (2d Cir. 1964), *cert. denied*, 380 U.S. 976 (1965); Black, *The Bremen, COGSA and the Problem of Conflicting Interpretation*, 6 VAND. J. TRANSNAT'L L. 365, 367 (1973).

ing positions.[17] The advent of containerization has made these policy objectives difficult to attain. Court decisions holding that a container is a "package" for liability limitation purposes have served to exonerate carriers from liability for damage resulting from negligent carriage.[18] Decisions holding that containers are packages create different standards of liability for containerized cargo than for cargo shipped by less modern means, generate extensive litigation, and allow ocean carriers to insulate themselves from liability.[19]

The prevailing standard for resolving the container/package question was developed in the Second Circuit. The test originated in a dissenting opinion written by Judge Hays in *Encyclopedia Britannica, Inc. v. S.S. Hong Kong Producer.*[20] Hays argued that the container was the package

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[17] *See* Caterpillar Overseas, S.A. v. S.S. Expeditor, 318 F.2d 720, 722 (2d Cir. 1963). *See generally* Comment, 27 TEX. L. REV. 525 (1949).

[18] Rosenbruch v. American Export Isbrandtsen Lines, Inc., 543 F.2d 967 (2d Cir.), *cert. denied*, 429 U.S. 939 (1976) (carrier's liability limited to $500 for negligent loss of container holding goods valued in excess of $100,000); Royal Typewriter Co. v. M/V Kulmerland, 483 F.2d 645 (2d Cir. 1973) (carrier's liability limited to $500 for loss of cargo valued at $29,000). *See generally, Shipping Containers, supra* note 12.

[19] Schmeltzer & Peavy, *Prospects and Problems of the Container Revolution*, 1 J. MAR. L. & COM. 203, 223 (1970).

There can frequently be a different standard of liability limitation for containerized cargo than for cargo shipped by less modern means. If a container were loaded with 120 typewriters valued at $10,000, the maximum liability if the container is considered the package is $500. If, however, the shipper does not use a container, but rather ships his typewriters twelve to the carton, his recovery could reach a maximum of $5,000 if the carton is deemed the package for COGSA purposes.

In Rosenbruch v. American Export Isbrandsten Lines, Inc., 543 F.2d 967 (2d Cir. 1976), the court stated that the shipper gets a 10% reduction in freight rates by using containers instead of independent packaging. *Id.* at 970. This reduction would enable the shipper to obtain additional insurance to cover the decreased liability of the carrier of containerized cargo. *Id.*

One commentator noted that to suggest insurance as the answer to legal problems is an abdication of the judicial function. Simon, *Admiralty Jurisdiction and the Liability of Wharfingers*, 3 J. MAR. L. & COM. 513, 518 (1972). A court must attempt to interpret the meaning of the COGSA package provision instead of circumventing this obligation by suggesting that insurance will cover cargo losses. *Id.* Furthermore, any reduction in freight rates received by the shipper would not be sufficient to compensate for cargo loss above the liability limits of the carrier. E. SELVIG, UNIT LIMITATION OF CARRIER'S LIABILITY § 3.85 (1961).

[20] 422 F.2d 7 (2d Cir. 1969), *cert. denied*, 397 U.S. 964 (1970), *Encyclopedia Britannica* concerned a claim for damages to 1300 cartons of encyclopedias. The cartons were part of a shipment of 4080 cartons packed into eight metal containers, only two of which were stowed below deck. The other six were carried above deck where they were damaged by sea water seepage. The short form bill of lading signed by the shipper contained no notice that the containers were to be carried as deck cargo. *Id.* at 9.

Interpretation of § 1304(5) was not a major issue in *Encyclopedia Britannica.* Instead, the central question dealt with the validity of the carrier's long form bill of lading. *Id.* at 11. This document gave the carrier the option of carrying cargo above or below deck. The longer bill of lading also provided that the carrier would not be liable for damage to goods carried on deck unless the shipper could affirmatively prove the carrier's negligence. *Id.* at 10. The court held this long form invalid for several reasons. First, the bill contained no information as to how the stowage option was exercised. *Id.* at 16. Second, the liability clause was imper-

for limitation of liability purposes since the parties intended that each container be considered a "functional" packing unit.[21] This theory later served as the basis for the Second Circuit's decision in *Royal Typewriter Co. v. M/V Kulmerland.*[22] The court held in *Royal Typewriter* that the container is not the COGSA package when the contents of the container could have been shipped in the individual packages or cartons packed by the shipper.[23] Where, for purposes of overseas shipments the shipper's own packing units are functional,[24] a presumption arises that the container is not the intended "package."[25] The carrier may overcome the presumption by producing evidence that the parties intended to treat the container as the "package."[26] If the packing units were not functional, however, the shipper must show by other evidence that his units were themselves "packages." Such evidence might include custom and usage in the trade,

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missible under COGSA as an agreement in a contract of carriage that attempted to relieve the carrier from liability for lost or damaged goods. *Id.* at 16; *see* 46 U.S.C. § 1303(8) (1970).

The court thus held that the bill of lading designated below deck stowage. Consequently, the placement of containers above deck was held as unreasonable deviation from the contract of carriage, and the carrier was therefore unable to benefit from the $500 per package limitation. 422 F.2d at 18; *see* 46 U.S.C. § 1301(c) (1970). The majority made no mention of what constituted the package for COGSA purposes.

Judge Hays dissented on the basis that the short form bill of lading contained language referring to the longer document. Hays contended that the shipper had an opportunity to study the long bill of lading at the time the contract was made. 422 F.2d at 19 (Hays, J., dissenting). Hence, the shipper should not complain of the document's provisions after the damage had occurred. *Id.* Hays also determined that COGSA provisions applied independently of any contract and that therefore, the contract of carriage could not deny the carrier his rights under the statute. *Id.* at 20.

Hays argued that the intent of the parties indicated that the containers were considered packages. *Id.* The evidence indicated that the containers were delivered to the carrier by the shipper's agents already packed with the cartons. *Id.* On the bill of lading under "No. of pkgs." was marked "(1) one metal container said to contain 536 ctns. of bound books." *Id.* Hays submitted that because the parties intended the containers to be the functional packing units the $500 per package limitation should apply to containers. *Id.* Hays contended that this would promote predictability since the intent of the parties as evidenced by the bill of lading would determine the COGSA package for liability purposes. *Id.*

[21] Hays did not define the term "functional" as used in conjunction with shipping units. Encyclopedia Britannica, Inc. v. S.S. Hong Kong Producer, 422 F.2d 7, 20 (2d Cir. 1969).

[22] 483 F.2d 645 (2d Cir. 1973). In *Royal Typewriter* the shipper sued a carrier for the loss of 350 cartons of adding machines worth $29,000. The court of appeals found that because the cartons were not packed in the container, the parties intended the container to be the package for shipping and liability purposes. *Id.* at 649. Moreover, the shipper had classified the container as the package on the bill of lading. *Id.*

[23] *Id.* at 648.

[24] The court in *Royal Typewriter* defined "functional" as meaning suitable for ocean transportation or handling. *Id.* This definition was derived from the definition of "package" found in BLACK'S LAW DICTIONARY 1262 (4th ed. 1951): a "bundle put up for transportation or commercial handling . . . a thing in form suitable for transportation or handling." The *Royal Typewriter* court found that the typewriter cartons did not fall within this definition because the cartons were too fragile for overseas shipment. 483 F.2d at 649. Thus, the court held the cartons were not functional packing units. *Id.*

[25] 483 F.2d at 649.

[26] *Id.*

the parties' characterizations of the cartons in the contract of carriage, or other factors bearing on the parties' intent.[27] The *Royal Typewriter* court concluded its analysis by stating that its test, labeled the "functional economics test,"[28] was designed to provide a common sense standard[29] under which parties could contractually allocate loss and determine insurance needs.[30]

The Second Circuit later applied the functional economics test in *Cameco, Inc. v. SS American Legion,*[31] a case involving liability for the theft of a quantity of canned hams shipped in a refrigerated container.[32] The court found that the individual cartons, not the container, were the "packages" for COGSA purposes because the hams were shipped in corrugated cartons of the type used for breakbulk shipments.[33] The individual cartons were therefore determined to be functional packing units[34] and the burden of proof shifted to the carrier to supply evidence at trial that the parties intended to treat the container as a package.[35] The carrier was unable to supply such evidence and consequently the liability limitation was calculated at $500 per carton rather than $500 per container.[36] Thus,

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[27] *Id.*

[28] Cameco, Inc. v. S.S. American Legion, 514 F.2d 1291, 1298 (2d Cir. 1974).

[29] 483 F.2d at 649. A better approach to the limitation of liability issue can be derived from Gulf Italia Co. v. American Export Lines, Inc., 263 F.2d 135 (2d Cir.), *cert. denied,* 360 U.S. 902 (1959). *Gulf Italia,* while not a container case, enunciated certain principles that could provide guidance for resolution of the issue of whether containers are packages. In this case, the carrier admitted responsibility for damage to a tractor, but maintained that the tractor was a package and that his liability was limited to $500. The shipper had prepared the tractor for shipment by putting waterproof paper over some of its parts, and by partially encasing the superstructure with wooden planking. *Id.* at 136. The *Gulf Italia* court held that the tractor was not a package and could not be considered a package under any ordinary construction of the word. *Id.* at 137.

Gulf Italia established the rule that cargo that would not be a package within the purview of a layman's understanding does not become a package merely because the cargo was prepared for ocean transport. *Id.; see* text accompanying notes 70-71 *infra.* The rule suggests that a container is not a COGSA package since containers do not fall within the ordinary construction of the term "package." 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, 912 (1971); *accord,* Hartford Fire Ins. Co. v. Pacific Far East Lines, Inc., 491 F.2d 960, 963 (9th Cir.), *cert. denied,* 419 U.S. 873 (1974). *Contra,* Mitsubishi Int'l *cert. denied,* 373 U.S. 922 (1963).

[30] 483 F.2d at 649.

[31] 514 F.2d 1291 (2d Cir. 1974).

[32] *Id.* at 1295.

[33] *Id.* at 1299.

"Break-bulk" refers to packaged, nonfungible cargo. R. DE KERCHOVE, INTERNATIONAL MARITIME DICTIONARY 97 (1948). Break-bulk shipments constituted the traditional precontainer form of cargo shipment. Matsushita Electric Corp. v. S.S. Aegis Spirit, 414 F. Supp. 894, 900 (W.D. Wash. 1976).

[34] Matsushita Electric Corp. v. S.S. Aegis Spirit, 414 F. Supp. 894, 900 (W.D. Whash. 1976); *see* text accompanying notes 22-29 *supra.*

[35] Matsushita Electric Corp. v. S.S. Aegis Spirit, 414 F. Supp. 894, 900 (W.D. Wash. 1976).

[36] *Id.* The *Royal Typewriter* and *Cameco* holdings have been summarized in the following

the *Cameco* court, using the functional economics test, arrived at an equitable and logical result.[37]

Nevertheless, the functional economics test is not an acceptable solution to the limitation of liability problems caused by containerization.[38] Shippers, when using containers, can avoid having their containers deemed packages only if they ship goods in cartons safe enough so that the goods could have been shipped without containers.[39] Any shipper who switches from break-bulk to modern containerization must continue to use the same obsolescent and costly casings he always used, or forego any recovery over $500 for loss or damage to the containerized shipment.[40] The shipper is therefore unable to use cheaper materials in his packaging preparation which is one of the primary advantages of containerization.[41]

Furthermore, the *Royal Typewriter* test affords the shipper no predictability as to what will be the COGSA package and causes confusion in the allocation of cargo insurance costs[42] and in the declaration of excess value.[43]

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manner: "When a shipper containerizes 500 cartons of canned ham, the cartons packages because it is usual for him to ship canned hams in cartons; but when a shipper containerizes 350 cartons of adding machines, the containers are not packages . . . because before containerization, it would have been risky to use cartons without wooden cases." Simon, *More on the Law of Shipping Containers,* 6 J. MAR. L. & COM. 603, 610-11 (1975) [hereinafter cited as *More on the Law of Shipping Containers*].

[37] Judge Feinberg stated in a concurring opinion that although problems arise from the application of the functional economics test, he believed that the court was bound to apply the test, and that in *Cameco* an equitable ruling resulted. 514 F.2d at 1300 (Feinberg, J., concurring). *See generally* text accompanying notes 38-48 *infra.*

[38] DeOrchis, *The Container and the Package Limitation—The Search For Predictability,* 5 J. MAR. L. & COM. 25 (1974) [hereinafter cited as DeOrchis]; *Shipping Containers, supra* note 12.

[39] 483 F.2d at 648. Since a functional carton is one which is suitable for break-bulk shipment without any other protection necessary, there would be no advantage for a shipper to use a container and face restrictive liability limitations. *Id.* at 649. The shipper receives a 10% freight reduction when using containers but this does not offset the risk to a cargo-owner's insurer if the carrier's liability is limited to $500 for a containerful of goods. DeOrchis, *supra* note 38, at 253; Diplock, *Conventions and Morals—Limitation Clauses in International Maritime Conventions,* 1 J. MAR. L. & COM. 525, 528 (1970) [hereinafter cited as Diplock].

[40] *Shipping Containers, supra* note 12, at 520-32.

[41] *Id.* at 512; Note, *Containerization and Intermodal Service in Ocean Shipping,* 21 STAN. L. REV. 1077, 1087 (1969).

[42] Cargo damage suits often involve the question of the allocation of risk between the cargo underwriter, and the carrier's protection and indemnity insurer. *See, e.g.,* Cameco, Inc. v. S.S. American Legion, 514 F.2d 1291 (2d Cir. 1974); Royal Typewriter Co. v. M/V Kulmerland, 483 F.2d 645 (2d Cir. 1973). The gross cost of transportation insurance for the cargo owner includes the premium paid his own underwriter plus the carrier's insurance expense which is incorporated in the freight rate. Diplock, *supra* note 39, at 527. The *Cameco* court asserted that imposing a burden of proof allocating risk according to the manner in which goods initially are packaged would give more predictability to the allocation process. 514 F.2d at 1300. Carriers' insurers could determine from bills of lading how many containers would be used without specification of the contents, and how many would contain a specific number of packages. *Id.* These determinations would enable both shipper and carrier to calculate insurance rates that accurately reflect risks. *Id.*

The distribution of risk, however, is not the major factor in the liability area. A limitation of liability standard should impose upon the carrier liability for loss or damage sufficient to

The carrier has no way of knowing how a shipper's sealed container is packed,[44] and the shipper cannot know whether the package he uses is functional until it is so determined in a law suit.[45] Such suits usually entail lengthy trials with maritime experts testifying as to packaging materials and practices.[46] Therefore, by making the intent of the parties, rather than the policy considerations behind COGSA,[47] the touchstone for applying liability limitations to containerized shipments, the *Royal Typewriter* decision obscures the meaning and purpose of section 4(5).[48]

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provide commercial inducement to undertake precautions. Diplock, *supra* note 39, at 526-28., *cf.*, Note, *Risk Distribution and Seaworthiness*, 75 YALE L.J. 1174, 1188 (1966) (liability standard should be high enough to induce shipowners to maintain seaworthy vessels). The costs of such precautions would be economically justified by the reduction of the risk of loss or damage to the goods. Diplock, *supra* note 39, at 527. This cost would be reflected in the freight charge to the shipper, but would be compensated for by the shipper's reduced insurance premiums. *Id.* If the container is deemed the package and the liability limited to $500 per container, the commercial inducement is absent. *Id.* A carrier has no economic motivation to provide safety precautions for his cargo when he knows that his maximum loss will be $500 per container. *Id; see* cases cited *supra* note 18.

One authority suggests that a no-fault system of liability should exist. Carrier liability would be extended to the full value of the goods on the theory that such liability would motivate carriers to exercise a degree of care costing an amount equal to loss of goods thereby averted. This result would put the economy of cargo carriage in a desirable state of equilibrium. GILMORE & BLACK, *supra* note 9, at 191.

[43] If a shipper wishes to increase liability for a particular item, he may declare the nature and value of the good in the bill of lading. *See* 46 U.S.C. 1304(5) (1970). This declaration of excess value results in an increased freight charge. Hartford Fire Ins. Co. v. Pacific Far E. Line, Inc., 491 F.2d 960 (9th Cir.), *cert. denied*, 419 U.S. 873 (1974); Carribbean Produce Exch., Inc. v. Sea Land Serv., Inc., 415 F. Supp. 88 (D.P.R. 1976). Such procedures would not benefit the shipper if carton is considered a package, because there would be no opportunity for a special declaration at a higher charge. The shipper operates under the assumption that the packages he delivers, and not the container, are the packages for COGSA purposes. Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft, 375 F.2d 943, 946 (2d Cir. 1967) (Feinberg, J., dissenting).

[44] The issue of whether a container is a COGSA package only arises when the shipper packs and seals containers supplied by the carrier. Simon, *Admiralty Jurisdiction and the Liability of Wharfingers*, 3 J. MAR. L. & COM. 513, 517 (1972). A carrier cannot pack a container without the knowledge of the shipper and thereby unilaterally limit his liability by maintaining that the container is the package. *Id.* When the shipper packs a container, however, all the carrier has knowledge of is the "Shippers Load and Count" as it appears in the bill of lading. *Id.* The carrier is unable to verify the number of cartons in a packed and sealed container delivered to it. *Id.* Even though the carrier is unaware of the contents of a sealed container, he is protected by the § 1304(5) provision absolving him from responsibility for loss or damage if the shipper fraudulently completes the bill of lading. *See* 46 U.S.C. § 1304(5) (1970).

[45] Stowage of containers aboard ship takes place under the supervision of the carrier after the cargo has left the control of the shipper or his agent. Angus, *Legal Implications of "The Container Revolution" in International Carriage of Goods*, 14 MCGILL L.J. 395, 408 (1968). Shippers' cartons may fail to be functional when subjected to stressed or which shippers are unaware. *Id.*

[46] *Shipping Containers, supra* note 12, at 523.

[47] *See* note 16 *supra.*

[48] 46 U.S.C. § 1304(5) was passed to protect shippers from being victims of adhesion clauses in bills of lading. *See* text accompanying notes 5-11 *supra.* The intent of the contract-

The Second Circuit's decision in *Leather's Best, Inc. v. S.S. Mormaclynx*[49] also casts doubt on the value of the functional economics test for purposes of determining whether a container is a COGSA package. *Leather's Best* involved a cargo of leather shipped in a carrier's container which was stolen in port while under the control of the carrier.[50] The court of appeals, affirming the district court's finding that the container was not a package for COGSA purposes, held that the COGSA packages were the bales of leather prepared by the shipper.[51] The *Leather's Best* court reasoned that the word "package" was more sensibly related to the unit in which a shipper packed the goods than to containers which are functionally a part of the ship.[52] A broad reading of the *Leather's Best* decision would resolve the interpretive problems generated by the use of containers in ocean-going carriage.[53] The *Leather's Best* analysis, however, is confined to situations where the shipper prepared a large cargo unit such as a bale and does not deal with the question of whether individual cartons packed in a container should be considered COGSA packages.[54]

Another significant attempt to resolve the limitation of liability controversy occurred in *Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschifffahrts - Gesellschaft.*[55] *Standard Electrica,* which dealt with palletized cargo,[56] developed the "bundle put up for transportation"[57] analysis which supports the argument that containers are packages for COGSA

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ing parties should not be allowed to interfere with this objective of COGSA. The parties' intent should not be relevant because of contract of carriage is an adhesion contract in which the shipper has no real intent, *More on the Law of Shipping Containers, supra* note 36 at 615.

[49] 451 F.2d 800 (2d Cir. 1971).

[50] *Id.* at 806. The district court in *Leather's Best* held that a carrier is responsible for the care and custody of a container when discharged before the time the shipment was supposed to be accepted by a shipper or his consignee. Leather's Best, Inc. v. S.S. Mormaclynx, 313 F. Supp. 1373, 1382 (E.D.N.Y. 1970), *modified at* 451 F.2d 800 (2d Cir. 1971).

[51] 451 F.2d at 815; *see* 313 F. Supp. at 1380.

[52] 451 F.2d at 815. The analysis in *Leather's Best* is supported by the Second Circuit's analogous decision in Shinko Boeki Co. v. S.S. Pioneer Moon, 507 F.2d 342 (2d Cir. 1974). The *Shinko Boeki* court held that tanks used to carry liquids were functionally a part of the ship and not subject to the $500 limitation of liability provision. *Id.* at 345. The same factual principles and statutes apply to both packaged and unpackaged goods and therefore they should be treated similarly. If a container is not a package for "bulk" cargo, then the container should not be the COGSA "package" when stuffed with cartons or similar "break-bulk" cargo. *More on the Law of Shipping Containers, supra* note 36, at 608.

[53] Courts, by always viewing the container as an appurtenance of the ship, would eliminate the need for the case-by-case analysis required by the functional economics test. *See* text accompanying 44-46 *supra.*

[54] 451 F.2d at 815; *see* DeOrchis, *supra* note 38, at 263. The *Leather's Best* ruling also left open the question of package limitation under other circumstances such as when containers are owned by a shipper or freight forwarder without passing down a formula or test to guide in filling the vacuum. *Id.*

[55] 375 F.2d 943 (2d Cir.), *cert. denied,* 389 U.S. 831 (1967).

[56] Palletizing is a method of stowing cargo on rectangular trays for handling by fork lift trucks. R. DE KERCHOVE, INTERNATIONAL MARITIME DICTIONARY, 562 (2d ed. 1961).

[57] 375 F.2d at 946.

purposes. In *Standard Electrica* the cargo was characterized as "palletized units" in the dock receipt, the bill of lading, and the letters between the carrier and the shipper.[58] The court determined that such characterizations were entitled to considerable weight because the documents indicated that both parties had the same understanding of what constituted a package, and that the characterizations in the documents further reflected the meaning given "package" by the custom and usage of the trade.[59] Finally the court labeled each pallet a package because the pallet had the physical characteristics of a package and was clearly a "bundle put up for transportation."[60] The test created in the *Standard Electrica* decision requires courts to consider the intent of the parties[61] and whether the shipper prepared the cargo unit in a manner to facilitate transport before ruling on what constitutes a package under section 4(5).[62]

The "bundle put up for transportation" analysis is readily adaptable to the problems of interpretation generated by the use of containers.[63] If facilitation of transport warrants the classification of shipping pallets as packages, the same rationale should apply in the case of containerization. Language in *Standard Electrica* indicates that the developed test is equally applicable to both palletized and containerized cargo shipments.[64] This language strengthens carriers' claims that where a shipper has chosen to use a container and the bill of lading counts each container as one package, the container should be considered the package for purposes of determining a carrier's liability under COGSA.[65]

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[58] *Id.*

[59] *Id.* The *Standard Electrica* court recognized that the shipper could have obtained added protection simply by declaring the nature and value of the goods and paying a higher freight rate. *Id.; see* note 1 *supra.* Thus, the court saw no reason to extend protection to the shipper beyond the $500 limitation. 375 F.2d at 946-47. The shipper should not have to pay an added rate to protect his goods, but rather, COGSA should afford that safeguard since the statute was enacted to protect the shipper. Simon, *Admiralty Jurisdiction and the Liability of Wharfingers,* 3 J. MAR. L. & COM. 513, 518 (1972).

[60] 375 F.2d at 946.

[61] *Id; see* text accompanying note 48 *supra.*

[62] The court in *Standard Electrica* did not deem it important that the drafters of COGSA had not foreseen the development of containerization, and consequently the problems in applying the term "package" to containerized cargo. Rather, the court determined that *Standard Electrica* would elminate confusion over the meaning of the word "package" as used in 46 U.S.C. § 1304(5) (1970). 375 F.2d at 946-47.

[63] The defendant carriers in *Leather's Best* relied on *Standard Electrica* in arguing that the container was the "package" for COGSA purposes. 451 F.2d at 815.

[64] 375 F.2d at 945. The Second Circuit applied the "bundle put up for transportation" analysis to both palletized and containerized shipments. The court wrote that "[f]ew, if any, in 1936 could have foreseen the change in the optimum size of shipping units [and] it is now common for carriers to receive cargo from their shippers in a palletized form or 'containerized' form." *Id.*

[65] The *Leather's Best* court distinguished its decision from *Standard Electrica* on a factual basis, stating that pallets and containers could not be treated the same for liability purposes. The court indicated that the size of the pallet could not be compared to the size of the containers. 451 F.2d at 815.

The *Standard Electrica* analysis raises the issue of whether the description on a bill of lading is important evidence of the parties' understanding, since such documents are drafted by the carrier and completed as a matter of course by the shipper or his agent.[66] A primary purpose for enacting COGSA was to counteract the persistent efforts of carriers to insert all-embracing limitations on their liability in fine print clauses in bills of lading.[67] A disadvantage of the *Standard Electrica* holding is that the test encourages litigation in much the same manner as *Royal Typewriter*.[68] Shippers and carriers often would have opposing views as to what shipping unit was or was not the COGSA package.[69]

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[66] Matsushita Electric Corp. v. S.S. Aegis Spirit, 414 F. Supp. 894, 905 (W.D. Wash. 1976); Chiang, *The Applicability of COGSA and the Harter Act to Water Bills of Lading*, 14 B.C. INDUS. & COM. L. REV. 267, 282 (1972-73).

[67] Tessler Bros., (B.C.) Ltd. v. Italpacific Line, 494 F.2d 438, 444 (9th Cir. 1974); Federal Ins. Co. v. Transconex, Inc., 430 F. Supp. 290, 295 (D.P.R. 1976). *See generally* GILMORE AND BLACK, *supra* note 9.

[68] Enumerating the number of packages in a container on the bill of lading will complicate the litigation process. For example, controversy may arise where the shipper, in preparing the information for the bill of lading, specifies the number of packages, but the carrier, prior to signing and issuing the bill of lading, refuses to include the number of packages in the container on the ground that the carrier cannot verify this number. Simon, *Admiralty Jurisdiction and the Liability of Wharfingers*, 3 J. MAR. L. & COM. 513, 517 (1972).

[69] Courts in suits involving shipments in which some preparations for transportation were made have reached inconsistent results. *See, e.g.*, Nichimen Co. v. M/V Farland, 462 F.2d 319 (2d Cir. 1972) (coils of steel weighing three to nine tons strapped by metal band, held packages); Mitsubishi Int'l Corp. v. S.S. Palmetto State, 311 F.2d 382 (2d Cir. 1962), *cert. denied*, 373 U.S. 922 (1963) (boxed rolls of steel weighing 32 ½ tons, held packages); Petition of Isbrandtsen Co., 201 F.2d 281 (2d Cir. 1953) (locomotives stowed on rail and timber beds and secured by wire lashings held not packages); Island Yachts, Inc. v. Pacific Lakes Line, 345 F. Supp. 889 (N.D. Ill. 1971) (yacht lashed to wooden shipping cradle held package); Middle E. Agency v. The John B. Waterman, 86 F. Supp. 487 (S.D.N.Y. 1949) (rock crusher fastened to wooden skid held package).

Tests for determining what is a package range from applying the plain, ordinary meaning of the term, *see* Hartford Fire Ins. Co. v. Pacific Far E. Lines, Inc., 491 F.2d 960 (9th Cir. 1974); Gulf Italia Co. v. American Export Lines, Inc., 263 F.2d 135 (2d Cir. 1959), to applying the standard that a package includes any class of cargo, regardless of size, shape or weight, to which some packaging preparation has been made, but which does not necessarily conceal or enclose the goods. *See* Aluminios Pozuelo, Ltd. v. S.S. Navigator, 407 F.2d 152 (2d Cir. 1968); Lucchese v. Malabe Shipping Co., 351 F. Supp. 588 (D.P.R. 1972). One authority argues that to be considered a package the cargo must be completely enclosed. *See* LONGLEY, *supra* note 10, at 210. Another court has interpreted "package" to mean the largest single unit delivered to the carrier by the shipper. *See* Omark Indus. v. Associated Container Trans., Ltd., 420 F. Supp. 139, 142 (D. Ore. 1976). An Italian decision interpeting COGSA held that a case containing 25 tons of machinery was not a package for limitation purposes. F.I.A.T. v. American Export Lines, 1960 Ie. Dir. Mar. 197, C.A. Genoa 15, 7, 1959 (July 15, 1959). The court reasoned that cargo was shipped in packages to facilitate handling, but that a preparation for transportation analysis was not applicable when the case weighed 25 tons. *Id.* A survey of these decisions indicates the problems that exist in attempting to achieve a uniform and predictable interpretation of the meaning of the COGSA "package." Comment, *Interpreting COGSA: The Meaning of "Package."* 30 MIAMI L. REV. 169, 180 (1976). One court has stated that judicial manipulations of the meaning of the word "package" has led to a treatment of the term as a sophisticated or esoteric term of art. Omark Indus. v. Associated Container Trans., Ltd., 420 F. Supp. 139, 141 (D. Ore. 1976).

The "bundle put up for transportation" analysis also would serve to penalize the shipper who acts to protect his cargo. Any shipping preparation, to the extent that it protects cargo, facilitates handling.[70] Efforts to minimize risk through the use of outside covering or reinforcement could be characterized as preparations to facilitate transport under the *Standard Electrica* test.[71] Such a characterization would result in the pallet or container being classified as a package for limitation of liability purposes within the meaning of section 4(5).[72]

In a recent case dealing with containers, *Matsushita Electric Corp. v. S.S. Aegis Spirit,*[73] a district court criticized much of what previously had been said on the limitation of liability issue. *Matsushita* involved a suit for damages to a containerized shipment of electrical appliances resulting from concussive forces and the entry of sea water into the containers during the voyage.[74] The court reasoned that any satisfactory test for determing whether a container is a package must reflect the realities of the maritime industry, while adhering to the express language of the COGSA provisions.[75] The *Matsushita* court looked to *Leather's Best* as a guide and concluded that a container is merely part of ship's transport equipment and not a COGSA package.[76]

Concomitantly, the *Matsushita* court rejected the functional economics test developed in *Royal Typewriter* as being commercially impracticable, unwise, and contrary to the language of the statute.[77] The court asserted that section 4(5) distinguishes only between goods shipped in packages and goods not shipped in packages.[78] There is no indication in COGSA that goods shipped in cartons, crates or other receptacles should not be considered packaged goods because shippers' packaging falls below some later established standard of strength and durability.[79] The *Matsushita* court

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[70] Companhia Hidro Elec. v. S.S. Loide Honduras, 368 F. Supp. 289, 291 (S.D.N.Y. 1974).

[71] *Id.* at 292. The court in *Companhia Hidro Elec. v. S.S. Loide Honduras* held that protective covering, whether complete or partial, should be considered as constituting a package within § 4(5) of COGSA. *Id.* The court determined that this holding would prevent a shipper from being limited to a $500 recovery for completely enclosed goods, whereas another shipper could recover on a customary freight unit basis because he had allowed some indestructible part of the cargo to protrude from the package. *Id; see* Aluminios Pozuelo Ltd. v. S.S. Navigator. 407 F.2d 152 (2d Cir. 1968) (skid attached to toggle press, although protecting machine, facilitated delivery making press an article "put up for transportation").

[72] *See* text accompanying notes 64 and 65 *supra.*

[73] 414 F. Supp. 894 (W.D. Wash. 1976).

[74] *Id.* at 898.

[75] *Id.* at 903.

[76] *Id.* at 907.

[77] *Id.* at 906.

[78] *Id.* at 904.

[79] *Id.* The *Matsushita* court reasoned that applying the functional economics test to hypothetical break-bulk carriage conditions compels courts to make conjectural determinations concerning the intent of the parties, and requires evidentiary production of a kind never contemplated by COGSA framers. *Id; see* Angus, *Legal Implications of "The Container Revolution" in International Carriage of Goods,* 14 McGILL L.J. 395, 408 (1968).

determined that the functional economics test penalizes shippers who avail themselves of the more economical packaging made possible through containerization.[80] Such shippers face the prospect of increased liability due to the container being deemed the COGSA package.[81] This result violates the principle that courts should foster good commercial practices and refrain from creating disincentives to mercantile economization.[82] The *Matsushita* court also criticized the intent requirement of the functional economics test by stating that if carriers are allowed to christen an item a "package," when such christening distorts or belies the plain meaning of the word as used in the statute, then the liability floor would become illusory.[83]

A holding that the container is transport equipment and functionally a part of the ship recognizes the plain meaning of "package" as used in section 4(5). If the individual crates or cartons prepared by the shipper can be characterized as "packages," they do not lose that character upon being stowed in a carrier's container.[84] Thus, containers should be regarded as detachable compartments of the ship and not as cargo "packages."[85] The decision in *Matsushita* should effectuate the purpose of COGSA by protecting the shipper and establishing a minimum amount below which carriers subject to COGSA could not reduce their liability for cargo damage.[86]

The workability of the *Matsushita* standard is further evidenced by the manner in which the standard can be applied to reach equitable results in a new area of conflict. To be useful, any test which is developed must deal with the limitation of liability questions surrounding the use of "lighter aboard ship" (LASH) cargo barges. The LASH system involves the use of rectangular steel containers with a cargo capacity of 370 tons.[87] A LASH barge serves a dual function in that it is a barge that can be towed from point to point, and a container designed to be carried aboard a larger vessel

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[80] 414 F. Supp. at 904; *see* text accompanying note 41 *supra*. The court in *Matsushita* submitted that only the shipper's commercial benefits were considered, and, in effect, neutralized by the test in *Royal Typewriter*. The carrier's commercial benefits, such as less time in port and cheaper labor costs, were ignored under the test. *See* 414 F. Supp. at 904; Leather's Best v. S.S. Mormaclynx, 313 F. Supp. 1373, 1376 (E.D.N.Y. 1970), *aff'd* 451 F.2d 800 (2d Cir. 1971).

[81] 414 F. Supp. at 904.

[82] *Id; see* Gulf Italia Co. v. American Export Lines, Inc., 263 F.2d 135, 137 (2d Cir. 1959); DeOrchis, *supra* note 38, at 257; *Shipping Containers, supra* note 12, at 523.

[83] 414 F. Supp. at 903; *see* note 69 *supra*.

[84] Matsushita Electric Corp. v. S.S. Aegis Spirit, 414 F. Supp. 894, 907 (W.D. Wash. 1976).

[85] Cia. Panamena de Seguros v. Prudential Lines, Inc., 416 F. Supp. 641, 643 (D.C.Z. 1976); *cf. In re* Pacific Far E. Line, 314 F. Supp. 1339 (N.D. Cal. 1970), *aff'd per curiam*, 472 F.2d 1382 (9th Cir. 1973) (containers used as carrying receptacles for cargo are part of freighter's appurtenances and value thereof is includable in owner's interest in freighter for liability purposes).

[86] *See* text accompanying note 16 *supra*.

[87] Georgia Ports Auth. v. L/S Bilderdyk, 402 F. Supp. 706, 707 n.1 (S.D. Ga. 1975); Port Royal Marine Corp. v. United States, 378 F. Supp. 345, 349 (S.D. Ga.), *aff'd*, 420 U.S. 901 (1974).

in "piggy back" fashion.[88] Virtually every court decision involving LASH barges has labeled them containers.[89] Consequently, if containers are considered packages, the LASH barges likely will also be deemed COGSA packages. Shippers may thus face the possibility that carriers will be only liable to the extent of $500 for damages to cargo shipments of 370 tons.

The *Matsushita* rationale, however, effectively would preclude this inequitable result. Under the *Matsushita* analysis, the goods within the barge would be "packages" for COGSA purposes and the LASH barge would be considered an appurtenance of the vessel.[90] Such a result protects the shipper more than a holding that the barge is the package under section 4(5).

Current international discussions concerning the limitation of liability issue do not reinforce the *Matsushita* holding that containers are functional parts of a ship.[91] Nevertheless, the United States' position favoring shippers throughout the discussions indicates government policy against categorizing containers as COGSA packages. In February of 1968, the United States, the United Kingdom, and eighteen other countries signed the Brussels Protocol to the 1924 Hague Rules.[92] In negotiating the Protocol, the United States, cognizant of the ramifications of containerization, originally proposed a limitation equal to $3.70 per pound.[93] This position was abandoned as a result of opposition claiming that the per pound provi-

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[88] Armco Steel Corp. v. Stans, 431 F.2d 779, 782 (2d Cir. 1970). *See generally* Hickey, *Legal Problems Relating to Combined Transport and Barge Carrying Vessels*, 45 TUL. L. REV. 863 (1971).

[89] *See, e.g.*, Armco Steel Corp. v. Stans, 431 F.2d 779, 782 (2d Cir. 1970); Georgia Ports Auth. v. L/S Bilderdyk., 402 F. Supp. 706, 707 n.1 (S.D. Ga. 1975); Port Royal Marine Corp. v. United States, 378 F. Supp. 345, 349 (S.D. Ga. 1974); Wirth Ltd. v. S.S. Acadia Forest, 376 F. Supp. 785, 787 (E.D. La. 1974), *aff'd* 537 F.2d 1272 (5th Cir. 1976).

[90] Although courts have not yet considered the problem, the dual function of the LASH barge may complicate the interpretation process. The LASH barge has not been labeled a container, *see* cases cited note 89 *supra*, but the barge also has been deemed a ship for liability limitation purposes. In Wirth Ltd. v. S.S. Acadia Forest, 537 F.2d 1272, 1278 (5th Cir. 1976), the court indicated that LASH barges meet federal design and registry standards and are authorized to engage in foreign trade to and from the United States. Therefore, these barges must be considered ships when determining liability. *Id.* at 1279. Similarly, a Georgia district court, holding that a LASH barge was a ship, pointed out that the barges are documented vessels that carry their own registry papers on board. Port Royal Marine Corp. v. United States, 378 F. Supp. 345, 349 (S.D. Ga. 1974). As yet, no court has addressed the issue of whether a barge is the COGSA "package."

[91] The international discussion of the Hague Rules involved increasing the $500 liability limit, or adding a per pound of cargo rate for limitation of liability purposes. *See* text accompanying notes 103-105 *infra*. The international conferees did not consider treating a container as a transport appurtenance of the vessel and thus not a COGSA "package." *See* Sweeny, *The Uncitral Draft Convention on Carriage of Goods by Sea*, 7 J. MAR. L. & COM. 327, 329 (1976).

[92] Degurse, *The "Container Clause" in Article 4(5) of the 1968 Protocol to the Hague Rules*, 2 J. MAR. L. & COM. 131, 144 (1970) [hereinafter cited as Degurse].

[93] *Id.* at 137. Norway also suggested a limitation amount equal to $3.70 per pound of gross weight. Norway's recommendation was made in an attempt to achieve uniform liability among various if not all modes of transportation. *Id.*

sion could not adequately compensate the shippers of low weight cargo of high value.[94] The United States, however, continued to refuse to support limits of liability that might place containerized cargo in a less favorable position than that enjoyed by break-bulk cargo.[95]

The proposal that finally emerged had a dual unit standard with limits of liability set at $622 per package or 90 cents per pound, whichever produced the greater liability.[96] The United States delegation did not favor this formulation since if the package was the container, the shipper's recovery would be limited at the rate of 90 cents per pound.[97] To prevent this result, the United States proposed the addition of a container clause which the conference accepted as part of the final proposal. The container clause reads:

> "Where a container, pallet or similar article of transport is used to consolidate goods, *the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purposes of this paragraph* as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit."[98] (emphasis supplied)

The solution to the limitation of liability problem with respect to containers, however, probably will not come from an international treaty.[99]

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[94] *Id.* at 138.

[95] The United States delegation supported shippers' interests throughout the conference. Not only was the delegation against any standard which would lead to the container being labeled a COGSA "package," but the delegation also opposed Great Britain's argument for increased rates for particularized bills of lading. REPORT OF THE UNITED STATES DELEGATION TO THE SECOND MEETING OF THE TWELFTH SESSION OF THE DIPLOMATIC CONFERENCE ON MARITIME LAW 4, February 19-23, 1968 [hereinafter cited as REPORT OF THE UNITED STATES DELEGATION].

[96] Degurse, *supra* note 92, at 139.

[97] *Id.* at 141.

[98] REPORT OF THE UNITED STATES DELEGATION, *supra* note 95, at 13. The "container clause" requirement of a statement in a bill of lading regarding the number of packages in a container is unworkable, and should be rejected. Recupero, *supra* note 6, at 68. Ocean carriers usually receive containers that have been sealed at the point of loading and therefore carriers have no knowledge of the actual contents of such containers. *See* note 44 *supra.* Accordingly, the requirements of the container clause will lead to disputes between shipper and carrier concerning the actual contents of a container. Simon, *Admiralty Jurisdiction and the Liability of Wharfingers,* 3 J. MAR. L. & COM. 513, 517 (1972). Also, the container clause, by placing undue significance on language in a bill of lading, would impede obtaining the COGSA objective of reducing the controlling force of fine print clauses in bills of lading. Tessler Bros., (B.C.) Ltd. v. Italpacific Line, 494 F.2d 438, 444 (9th Cir. 1974); Federal Ins. Co. v. Transconex, Inc., 430 F. Supp. 290, 295 (D.P.R. 1976).

[99] The container clause has met with interpretive problems that have prevented the Brussels Protocol from being brought before the Senate for ratification. Degurse, *supra* note 92, at 143. The British have read the container provision to mean that a higher freight rate could be assessed against those shippers who wish to enumerate the number of packages in a container. *Id.* This reading of the statute would allow carriers to charge unacceptably high rates for enumerating the number of packages and put shippers back in a position where the container is the package for liability purposes. The United States argues, however, that the

No treaty has been negotiated and ratified, and the current international conferences[100] on this subject influence the domestic resolution of the "package" problem only in their capacity as a source of guidance to the courts.[101] Meanwhile, the courts are attempting to resolve the issue by defining the container according to its use. If the container is a functional part of the ship, then it is not a package.[102] If the container works as a functional form for overseas transportation of goods, then it is a package.[103] Both functions are fulfilled by the container. Thus, no single workable guide has been established for the purpose of fixing liability under COGSA.

The standard adhered to in *Matsushita* is the most workable in determining the COGSA "package" since under the *Matsushita* rationale, the container is not a package, it is a functional part of the ship. The objectives of uniformity and predictability are realized since both shipper and carrier know that the individual cartons inside the container are the COGSA packages for liability purposes.[104] This resolves the section 4(5) definitional problems brought about by containerization. More importantly, the *Matsushita* standard furthers the goals of COGSA by protecting the shipper. The underlying policy of section 4(5) was that carrier liability should at all times be something more than nominal.[105] *Matsushita* insures this policy by holding that the $500 liability limitation will apply to the individual packages, not the containers. The application of this standard also provides the necessary inducement to the carrier to protect cargo shipments entrusted to him.[106] Consequently, the *Matsushita* decision that

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language of the container revision does not allow this rate adjustment. *Id.* This position is strengthed by the Convention's rejection of a British proposal to permit the charge of additional rates to allow the shippers to enumerate the number of packages in a container. *Id.* at 141.

[100] Revision of the existing liability provision of the Hague Convention has also been extensively discussed by the United Nations Commission on International Trade Law [Unicitral]. Sweeny, *The Uncitral Draft Convention on Carriage of Goods by Sea,* 7 J. MAR. L. & COM. 327 (1976). The Uncitral Working Group has considered several proposals ranging from retention of the dual standard of the Brussels Protocol to the weight alone standard supported by Norway and the United States. *Id.* at 328.

[101] The district court in *Leather's Best* commented that the Brussels Protocol had set limits of liability based on the number of packages enumerated in a bill of lading as packed in a container or similar transport device. Leather's Best v. S.S. Mormaclynx, 313 F. Supp. 1373, 1382 (E.D.N.Y. 1970). Since the shipper in *Leather's Best* had specified the number of cartons on the shipping documents, the court ruled that the packages within the container and not the container itself were the COGSA packages. *Id.* Similarly, a Florida district court stated that the Brussels Protocol makes clear that each unit in palletized or containerized cargo constitutes a package. The court held that each carton within a refrigerated container was the COGSA package. Inter-American Foods, Inc. v. Coordinated Caribbean Transp., Inc., 313 F. Supp. 1334, 1339 (S.D. Fla. 1970).

[102] Rath, *Containers: Their Definition and Implications,* 7 TRANSP. L.J. 53, 59 (1975).

[103] *Id.*

[104] *See* text accompanying note 44 *supra.*

[105] *See* David Crystal, Inc. v. Cunard Steam-ship Co., 339 F.2d 295, 299 (2d Cir. 1964); Jones v. The Flying Clipper, 116 F. Supp. 386, 388 (S.D.N.Y. 1953).

[106] *See* note 42 *supra.*

containers are appurtenances of the ship and not COGSA "packages" should be recognized as providing a solution to the container limitation of liability issue.

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