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## THE CONTAINER REVOLUTION AND THE \$500 PACKAGE LIMITATION—CONFLICTING APPROACHES AND UNREALISTIC SOLUTIONS: A PROPOSED ALTERNATIVE

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Section 4(5) of the Carriage of Goods by Sea Act (COGSA) limits a carrier's liability for damages incurred in the transportation of cargo to \$500 per "package" or "customary freight unit."<sup>1</sup> Unfortunately, in enacting section 4(5),<sup>2</sup> Congress provided little guidance

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<sup>1</sup> The Carriage of Goods by Sea Act (COGSA) § 4(5), 46 U.S.C. § 1304(5) (1970), provides in pertinent part:

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

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

<sup>2</sup> COGSA is in essence a verbatim adoption of a 1921 international agreement known as the "Hague Rules." See notes 17-23 and accompanying text *infra*. Its central purpose is to "establish international uniformity in certain matters relating to ocean bills of lading, on a basis fair to ocean carriers, cargo owners, insurers and bankers." Hartford Fire Ins. Co. v. Pacific Far E. Line, Inc., 491 F.2d 960, 962 (9th Cir.), cert. denied, 419 U.S. 873 (1974). While the agreement was a compromise among these varying interests, see notes 33-35 and accompanying text *infra*, it is generally agreed that COGSA was intended to correct a perceived inequity in bargaining power between carriers and cargo interests. This was accomplished by establishing a minimum amount of liability which cannot be contracted away. Since this ensures that the cargo interests have certain enforceable rights against carriers, the value and negotiability of ocean bills has been enhanced. See G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 145, 147 (2d ed. 1975) [hereinafter cited as GILMORE & BLACK]; Simon, *The Law of Shipping Containers*, 5 J. MAR. L. & COM. 507, 518-19 (1974) [hereinafter cited as Simon].

as to the meaning of the term package. As a result, the courts have been left to grapple with the problem of fashioning an intelligible, understandable, and rationally acceptable definition of this term.<sup>3</sup> This formidable judicial task has been further complicated by the container revolution which has taken place in the shipping industry.<sup>4</sup> By virtue of this occurrence, ever-increasing demands have been made upon the courts to resolve the question whether a container is a package within the meaning of section 4(5) and thereby subject, as a single unit, to the \$500 limitation of liability.<sup>5</sup>

This narrow but significant issue in admiralty law was recently addressed by a district court in the Ninth Circuit. In *Matsushita Electric Corp. of America v. S.S. Aegis Spirit*,<sup>6</sup> the plaintiff, a con-

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*See also Hearings on S. 1152 Before the Senate Comm. on Commerce, 74th Cong., 1st Sess. (1935).*

<sup>3</sup> For a discussion of the confusion and conflict which has arisen concerning the meaning of the term package see DeOrchis, *The Container and the Package Limitation—The Search for Predictability*, 5 J. MAR. L. & COM. 251 (1973) [hereinafter cited as DeOrchis]; Simon, *supra* note 2; van Wageningen, *Interpreting COGSA: The Meaning of "Package"*, 30 U. MIAMI L. REV. 169 (1975) [hereinafter cited as van Wageningen].

<sup>4</sup> Containerization is a method of shipping cargo which became popular in the 1960's as a means of eliminating time-consuming and expensive manual loading and unloading of cargo at dockside and as a more efficient method of on-board stowage. Briefly, a container is a permanent reusable article of transport equipment usually provided by the carrier which may be up to 40 feet long by 8 feet high and 8 feet wide. It permits the loading of goods at inland points with the container being moved by truck or rail to shipside and loaded on board by giant cranes, ultimately to be delivered by truck or rail to another inland destination and unloaded there. See GILMORE & BLACK, *supra* note 2, at 14; Simon, *supra* note 2, at 510-14. For a detailed discussion of the mechanics of containerization in the shipping industry see notes 26-27 and accompanying text *infra*.

<sup>5</sup> Carriers using containers, joined by virtually all ocean conferences, maintained that the container is a package within the meaning of COGSA and the Hague Rules and limited their liability to \$500 per container, thereby virtually insulating themselves from liability. As a result, the issue has been extensively litigated. See Schmeltzer & Peavy, *Prospects and Problems of the Container Revolution*, 1 J. MAR. L. & COM. 203, 222-23 (1970) [hereinafter cited as Schmeltzer & Peavy].

The only court of appeals to have specifically addressed the container-package question is the Second Circuit. See *Rosenbruch v. American Export Isbrandtsen Lines, Inc.*, 1976 A.M.C. 487 (2d Cir. 1976); *Cameco, Inc. v. S.S. American Legion*, 514 F.2d 1291 (2d Cir. 1974); *Shinko Boeki Co., Ltd. v. S.S. "Pioneer Moon"*, 507 F.2d 342 (2d Cir. 1974); *Du Pont de Nemours Int'l S.A. v. S.S. Mormacvega*, 493 F.2d 97 (2d Cir. 1974); *Royal Typewriter Co. v. M/V Kulmerland*, 483 F.2d 654 (2d Cir. 1973); *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800 (2d Cir. 1971); *Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer*, 422 F.2d 7 (2d Cir. 1969).

Many district courts, however, have been confronted with the issue. See, e.g., *Matsushita Elec. Corp. of America v. S.S. Aegis Spirit*, 414 F. Supp. 894 (W.D. Wash. 1976); *Baby Togs, Inc. v. S.S. American Ming*, 1975 A.M.C. 2012 (S.D.N.Y. 1975); *Lucchese v. Malabe Shipping Co.*, 351 F. Supp. 588 (D.P.R. 1972); *Truck Ins. Exch. v. American Export Freight Inc.*, 1972 A.M.C. 2509 (N.D. Ill. 1972); *Inter-American Foods, Inc. v. Coordinated Caribbean Transp., Inc.*, 313 F. Supp. 1334 (S.D. Fla. 1970).

<sup>6</sup> 414 F. Supp. 894 (W.D. Wash. 1976).

signee of a cargo of color televisions and stereophonic equipment, entered into a contract with the defendant carrier, Tokai Shipping Company, for transportation of the goods from Japan to the United States. In preparation for shipment, the electrical equipment was first packed in durable cardboard cartons by the shipper and then loaded into eleven large reusable containers which had been provided by the carrier. Upon arrival in the United States, it was discovered that the goods had been materially damaged during the voyage, apparently due to the seepage of seawater into the containers.<sup>7</sup> Relying upon earlier Ninth Circuit precedent involving noncontainerized packages,<sup>8</sup> the District Court for the Western District of Washington held that the \$500 per package limitation applied to the individual cartons stored within the Tokai containers and not to the containers as separate units.<sup>9</sup> Finding that this interpretation best comports with the legislative policy embodied in COGSA and "reflects the plain, ordinary meaning of [the] term [package],"<sup>10</sup> the *Matsushita* court refused to follow two recent decisions of the United States Court of Appeals for the Second Circuit which had ruled that the intent of the parties is the touchstone of COGSA liability.<sup>11</sup>

These divergent results are illustrative of the widespread judicial disagreement concerning the proper construction of the word package. To understand the judicial conflict surrounding the applicability of section 4(5) to containerized cargo, it will be helpful to briefly examine COGSA's legislative background and the history of containerization in the shipping industry.

## BACKGROUND AND HISTORY

### *Legislative Background*

Under general maritime law, the carrier was regarded as an insurer of the goods it carried and was absolutely liable for all cargo

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<sup>7</sup> *Id.* at 898.

<sup>8</sup> *Id.* at 907 (citing *Hartford Fire Ins. Co. v. Pacific Far E. Line, Inc.*, 491 F.2d 960 (9th Cir.), *cert. denied*, 419 U.S. 873 (1974), *discussed in* notes 61-64 and accompanying text *infra*).

<sup>9</sup> 414 F. Supp. at 907. For a more detailed discussion of the *Matsushita* decision see notes 108-29 and accompanying text *infra*.

<sup>10</sup> 414 F. Supp. at 908.

<sup>11</sup> The two decisions of the Second Circuit are *Cameco, Inc. v. S.S. American Legion*, 514 F.2d 1291 (2d Cir. 1974), *discussed in* notes 92-99 and accompanying text *infra*, and *Royal Typewriter Co. v. M/V Kulmerland*, 483 F.2d 645 (2d Cir. 1973), *discussed in* notes 77-91 and accompanying text *infra*.

losses and damages, with the exception of those occasioned by an act of God or the public enemy.<sup>12</sup> During the nineteenth century, American carriers, following the example of their English counterparts, began to insert exculpatory clauses in their bills of lading exonerating them from all liability for cargo damage.<sup>13</sup> In an attempt to remedy this situation, Congress enacted the Harter Act in 1893,<sup>14</sup> which made it unlawful for any bill of lading to contain provisions relieving a carrier from liability for its own lack of care.<sup>15</sup> This statute is silent, however, with respect to package limitation clauses. Consequently, carriers inserted provisions in their bills of lading limiting their liability to nominal amounts and thereby thwarted the statutory objective.<sup>16</sup> As a result of outcries from the international maritime community,<sup>17</sup> a voluntary agreement was drafted at the Hague in 1921.<sup>18</sup> Designed to protect cargo interests in international shipping trade, the Hague Rules, as amended by the Brussels Convention of 1924, provide for a monetary per package limitation which cannot be decreased by carefully drafted clauses in bills of lading.<sup>19</sup> The Hague Rules were adopted in substantial

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<sup>12</sup> See GILMORE & BLACK, *supra* note 2, at 139 and cases cited therein.

<sup>13</sup> See Simon, *supra* note 2, at 517-18.

<sup>14</sup> Harter Act, ch. 105, 27 Stat. 445 (1893) (codified at 46 U.S.C. §§ 190-196 (1970)).

<sup>15</sup> The Harter Act provides in part:

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 . . . any clause . . . whereby . . . he . . . 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 . . . shall be null and void and of no effect.

46 U.S.C. § 190 (1970).

The primary purpose of the Harter Act is to protect cargo interests from damages due to negligence or fault on the part of the carriers by preventing carriers from contracting away potential liability. The Act is not totally one-sided, however, since it does stipulate that vessel owners who use due diligence in making a ship seaworthy and ensuring that it is properly manned and equipped are relieved from liability for damage caused by errors in navigation or management of the vessel. *Id.* § 192. See GILMORE & BLACK, *supra* note 2, at 143.

<sup>16</sup> See Simon, *supra* note 2, at 518.

<sup>17</sup> By limiting their liability to nominal amounts, carriers created a situation where an ocean bill of lading became virtually worthless as commercial paper. International shippers and importers, as well as the bankers who financed such shipments, were anxious to have this situation remedied. See *id.*

<sup>18</sup> This voluntary agreement was made mandatory to all signatories in the revised version promulgated in Brussels in 1924. *Id.*

<sup>19</sup> The relevant portions of the Hague Rules state:

Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault, or failure in the duties and obligations provided in this article, or lessening such liability otherwise than as provided in this convention,

part by the United States with the passage of COGSA in 1936.<sup>20</sup>

In essence, COGSA is a verbatim enactment of the Hague Rules, but there is one significant difference between the two: the Hague Rules limit carrier liability to \$500 per package or unit, in contrast to COGSA's per package or customary freight unit limitation. Under the Hague Rules, it apparently makes little difference whether an item is considered a package or an unpackaged unit since the terms have been construed to have essentially the same meaning.<sup>21</sup> Conversely, under COGSA there is a significant difference between a package and a customary freight unit.<sup>22</sup> In general, a customary freight unit is the unit of quantity, weight, or measurement upon which the shipping price is based.<sup>23</sup> Thus, if the shipping

shall be null and void and of no effect.

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding [\$500] per package or unit . . . unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

Hague rules, art. 3, § 8, art. 4, § 5, 51 Stat. 233, at 250-52 (1924), *reprinted in* A. KNAUTH, OCEAN BILLS OF LADING (4th ed. 1953).

An international protocol revising the Hague Rules was passed in Brussels in 1968 by the Twelfth Session of the Diplomatic Conference on Maritime Law. In addition to adopting a limitation of liability of \$662 per package or unit or 90 cents per pound, whichever is higher, the protocol contains a provision stipulating:

[w]here a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the Bill of Lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph . . . .

1968 Protocol to the Hague Rules, *reprinted in* Schmeltzer & Peavy, *supra* note 5, at 224. This protocol has not as yet been ratified by the United States.

<sup>20</sup> Carriage of Goods by Sea Act, Pub. L. No. 521, 49 Stat. 1207 (1936) (codified in 46 U.S.C. §§ 1300-1315 (1970)).

<sup>21</sup> See van Wageningen, *supra* note 3, at 170. In a relatively recent case, the Supreme Court of Canada stated that the term unit was intended to cover cargo such as a log of wood or bar of metal which, while generally similar to a package, is not "packed up" in the precise sense of a package. Accordingly, it held that an unpackaged tractor and generator were each one unit and limited recovery to \$1000. *Falconbridge Nickel Mines Ltd. v. Chimo Shipping Ltd.*, 37 D.L.R.3d 546 (Sup. Ct. Can. 1973). The European courts are in accord with this interpretation. See, e.g., *Judgement of Feb. 7, 1949, [1950] DMF 126 Oran F.2d 1949 (Fr.)* (where 500 casks of wine each contained six hectoliters, the French court held the relevant unit to be the cask).

<sup>22</sup> As a general rule, a customary freight unit is a unit of quantity, weight, or measurement upon which the shipping price is based. See *Brazil Oiticica, Ltd. v. The Bill*, 55 F. Supp. 780 (D. Md.), *aff'd sub nom. Lorentzen v. Brazil Oiticica, Inc.*, 145 F.2d 470 (4th Cir. 1944). When customary freight units are involved, a carrier's liability can be quite extensive. See *van Wageningen, supra* note 3, at 171. For example, if the shipper's rate is based on the ton, the ton would be the customary freight unit, and the carrier's liability would be the number of tons multiplied by \$500. Consequently, an expansive interpretation of the word package favors carriers; conversely, a restrictive use of the term is beneficial to shippers.

<sup>23</sup> See, e.g., *Isbrandtsen Co. v. United States*, 201 F.2d 281 (2d Cir. 1953); *Brazil Oiticica*,

rate is per ton, the ton is the customary freight unit for section 4(5) purposes, and the dollar liability under the Act is calculated by multiplying the number of customary freight units by \$500.

### *The History of Containerization in the Shipping Industry*

COGSA was directed at the shipping procedures that were prevalent at the time of its enactment. During that period most freight was shipped either as breakbulk<sup>24</sup> or reefer cargo.<sup>25</sup> These procedures are both time consuming and costly since the cargo has to be loaded manually onto the ship, protected from adverse movement during voyage, and individually discharged on arrival.<sup>26</sup> Increased mechanization and a desire to reduce costs motivated carriers to invest in the construction of large container ships. By stowing cargo in permanent metal containers, which are lifted and moved with giant cranes, carriers are able to facilitate the loading, handling, and discharging of goods. Moreover, since containerization eliminates the manual handling of cargo, it results in cost savings to the carrier and helps to ensure the safe transportation of cargo.<sup>27</sup>

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Ltd. v. The Bill, 55 F. Supp. 780, 783 (D. Md.), *aff'd sub nom.* Lorentzen v. Brazil Oiticica, Inc., 145 F.2d 470 (4th Cir. 1944). In *General Motors Corp. v. S.S. Mormacoak*, 327 F. Supp. 666 (S.D.N.Y.), *aff'd sub nom.* *General Motors Corp. v. Moore-McCormack Lines, Inc.*, 451 F.2d 24 (2d Cir. 1971) (per curiam), an entire power plant was held to be a customary freight unit since the freight tariff was computed on a flat rate for each plant.

<sup>24</sup> "Break-bulk" is the term used to refer to the method of loading and stowing cartons or packages of cargo individually in the hold of the vessel. Sometimes these packages initially will be stacked on a flat wooden tray or pallet and then moved by a forklift truck. See Simon, *supra* note 2, at 510-11.

<sup>25</sup> The transportation of perishable cargo requires special refrigerated compartments on board the vessel, known as reefer compartments. Even where this is available, however, the carrier has the problem of determining what kinds of perishable goods can be stored together in the same compartment. There is also the additional problem of proper on-shore storage facilities before and after loading. See C. POWERS, A PRACTICAL GUIDE TO BILLS OF LADING 64-65 (1966).

<sup>26</sup> In a typical carriage-by-sea transaction, the shipper transports his goods to port by whatever means he chooses. Upon delivery at dockside, he receives a dock receipt. The carrier then loads the goods aboard the vessel and issues a bill of lading. Next, the goods are shipped to the port of destination and delivered to the holder of the bill of lading. Sometimes a shipper will engage a freight forwarder who books space on the vessel, takes charge of the goods on their arrival at port, sees them aboard the ship, and turns the bill of lading over to the shipper. See GILMORE & BLACK, *supra* note 2, at 13-14.

Not only is this manual handling costly in terms of the amount of labor and time consumed, but at each step it increases the likelihood of damage to the cargo due to human carelessness. See *id.*; Simon, *supra* note 2, at 510-11.

<sup>27</sup> By utilizing containers, carriers have been able to reduce the time required to load and unload general cargo on a conventional vessel from 3 days to 8 hours. See Schmelzter & Peavy, *supra* note 5, at 208. In addition, there are other advantages: container terminals can be

When goods are shipped in intermodal containers, carriers often will deliver the container to the shippers' premises and have the shipper stow the cargo. This differs significantly from conventional stowage where the shipper delivers the goods to the pier for loading by the carrier. In addition, containerization permits the shipper to know the exact environment in which the goods will be shipped so he can package the goods accordingly. This often will lead to an economic benefit for the shipper because he can forego the expensive protective packaging required for breakbulk shipping.<sup>28</sup>

With the advent of containerization, many carriers amended their bills of lading to limit liability to \$500 per container on the theory that the container is a package under COGSA. The validity of these clauses in bills of lading and the meaning of the word package in section 4(5) is at the root of the container controversy.

#### THE PRECONTAINER CONTROVERSY

The Second Circuit, which has jurisdiction over an extensive part of the shipping industry on the East Coast, and the Ninth Circuit, which has similar jurisdiction over the West Coast, have expounded almost entirely different interpretations of the term package.<sup>29</sup> On balance, the Second Circuit decisions appear more favorable to the carrier and its economic privies, while the Ninth Circuit determinations are supportive of the shipper and its associates. The differences between these two courts stem from conflict-

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located away from the congested inner city port areas; carriers do not need to maintain sheds for storing cargo prior to loading; and the opportunity for pilferage is decreased. *See id.* at 206-09. Foreign commerce generally is simplified by the use of a "single interchangeable transportation unit that can be carried via a combination of several modes of transportation, under a single shipping document and a single freight charge, from the shipper's warehouse to the consignee's warehouse." 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, 910 (1971) [hereinafter cited as Bissell].

<sup>28</sup> Containers are specially constructed to permit stacking one on top of another without putting extraneous vertical stress on the packages within. Since the shipper often loads the goods into the container himself, he need not worry about careless handling by the carrier. Accordingly, since he knows and controls the physical environment and risks to which his goods are to be subjected, he can eliminate the costly and superfluous packaging which was once standard and employ a more economical but less sturdy method. *See Simon, supra* note 2, at 513.

<sup>29</sup> *See* notes 36-64 and accompanying text *infra*. Compare *Aluminios Pozuelo Ltd. v. S.S. Navigator*, 407 F.2d 152, 156 (2d Cir. 1968) (toggle press weighing 3 tons bolted to a skid considered a package), with *Hartford Fire Ins. Co. v. Pacific Far E. Line, Inc.*, 491 F.2d 960 (9th Cir.), *cert. denied*, 419 U.S. 873 (1974) (electrical transformer weighing 18 1/2 tons bolted to wooden skid not a package).



ing views as to the legislative intent of COGSA, the commercial practicability of the legal tests being applied, and the importance of the intention of the parties. Thus, to determine why these courts have arrived at such divergent results, it is necessary to discuss the purpose of COGSA and the precontainer definition of the word package.

### *The Purpose of COGSA*

It has been widely acknowledged that COGSA was not intended to relieve a carrier of its normal responsibility for just claims.<sup>30</sup> Indeed, the Act nullifies any clause in a contract which purports to reduce the liability of a carrier or a ship below the \$500 per package minimum.<sup>31</sup> This rule reflects "a commonsense recognition of the inequality in bargaining power" between carriers and shipping interests and helps "to prevent the impairment of the value and negotiability of the ocean bill of lading."<sup>32</sup> In short, COGSA apparently was enacted as a compromise between shipper and carrier interests.<sup>33</sup> Its major objective is to protect carriers from excessive claims,<sup>34</sup> while discouraging negligence or indifference on the part of carriers by establishing an irreducible minimum liability of \$500

<sup>30</sup> See *Hartford Fire Ins. Co. v. Pacific Far E. Lines, Inc.*, 491 F.2d 960 (9th Cir.), *cert. denied*, 419 U.S. 873 (1974); *Stirnemann v. The San Diego*, 148 F.2d 141, 143 (2d Cir. 1945).

<sup>31</sup> Section 3(8) of COGSA, 46 U.S.C. § 1303(8) (1970), states in pertinent part: Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect . . . .

This language is quite similar to that employed in the Harter Act. See note 15 *supra*. The Harter Act, however, is silent with respect to package limitation clauses and thus allows carriers to limit liability in bills of lading to as little as \$10 per package. See *Hartford Fire Ins. Co. v. Pacific Far E. Line, Inc.*, 491 F.2d 960, 962 n.3 (9th Cir.), *cert. denied*, 419 U.S. 873 (1974); *Simon*, *supra* note 2, at 518. The Hague Rules and COGSA closed this loophole by the addition of a monetary per package limitation. See notes 1 & 19 *supra*. It should be noted that the maximum per package liability under COGSA may be increased by agreement of the parties. See 46 U.S.C. § 1304(5) (1970).

<sup>32</sup> GILMORE & BLACK, *supra* note 2, at 147.

<sup>33</sup> According to one authority, the key element of COGSA is the balance it strikes between the responsibilities and liabilities of the carrier and the rights and immunities under which the carrier can avoid liability. *Id.* at 149-50; see *Hartford Fire Ins. Co. v. Pacific Far E. Line, Inc.*, 491 F.2d 960, 962 (9th Cir.), *cert. denied*, 419 U.S. 873 (1974); *Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer*, 422 F.2d 7, 11 (2d Cir. 1969); *van Wageningen*, *supra* note 3, at 175.

<sup>34</sup> *Caterpillar Americas Co. v. S.S. Sea Roads*, 231 F. Supp. 647 (S.D. Fla. 1964), *aff'd per curiam*, 364 F.2d 829 (5th Cir. 1966). See also *Nichimen Co. v. M.V. Farland*, 462 F.2d 319, 335 (2d Cir. 1972) (one purpose of COGSA is to protect carriers from liability for small packages of great value).

per package.<sup>35</sup> Unfortunately, due to the recent inflationary spiral, this dollar limitation has become quite unrealistic.

### *Precontainer Decisions Defining Package*

In the early decision of *Gulf Italia Co. v. The Exiria*,<sup>36</sup> a judge within the Southern District of New York accepted the layman's interpretation of the word package and held that a 43,319 pound tractor which had been "prepared for shipment by putting waterproof papering about some of the more vital parts . . . [and partially covering its] superstructure with wooden plankings"<sup>37</sup> was not a package within the meaning of COGSA.<sup>38</sup> On appeal, the Second Circuit affirmed,<sup>39</sup> concluding that the method of preparing cargo for shipment does not "[convert] the goods into a 'package.'"<sup>40</sup> The court stated that a contrary holding would place a shipper who attempts to protect his cargo in a far "worse position than a shipper who makes no effort to reduce the possibility of loss from inclement weather or pilfering."<sup>41</sup> In *Mitsubishi International Corp. v. S.S. Palmetto State*,<sup>42</sup> however, the Second Circuit determined that the \$500 limitation was applicable to three large fully enclosed

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<sup>35</sup> See note 2 *supra*.

<sup>36</sup> 160 F. Supp. 956 (S.D.N.Y. 1958), *aff'd sub nom.* *Gulf Italia Co. v. American Export Lines, Inc.*, 263 F.2d 135 (2d Cir.), *cert. denied*, 360 U.S. 902 (1959).

<sup>37</sup> 160 F. Supp. at 957.

<sup>38</sup> *Id.* at 959. The *Gulf Italia* court discussed *Middle E. Agency, Inc. v. The John B. Waterman*, 86 F. Supp. 487 (S.D.N.Y. 1949), which determined that tractors shipped without any shipping preparation were not COGSA packages, but a rock crusher subject to minimal shipping preparations was a package. In distinguishing *Waterman*, the court pointed out that the rock crusher involved therein had been prepared to facilitate handling while the tractor in the present case was enclosed only for protection. 160 F. Supp. at 959.

<sup>39</sup> 263 F.2d at 137. In a dissenting opinion, Judge Moore refused to construe the word package in accordance with its common meaning. Emphasizing that the tractor appeared carefully packaged and that it was described as a package in the bill of lading, the Judge concluded that the tractor should be deemed a package. *Id.* (Moore, J., dissenting).

<sup>40</sup> *Id.* See also *Isbrandtsen Co. v. United States*, 201 F.2d 281, 286 (2d Cir. 1953) (locomotive not a package); *Waterman S.S. Corp. v. United States Smelting, Refining & Mining Co.*, 155 F.2d 687, 693 (5th Cir.), *cert. denied*, 329 U.S. 761 (1946) (13 pieces of steel shackled to the deck of a ship not packages); *Stirnemann v. The San Diego*, 148 F.2d 141, 143 (2d Cir. 1945) ("crane was hardly to be regarded as shipped in packages"); *Middle E. Agency, Inc. v. The John B. Waterman*, 86 F. Supp. 487, 491-92 (S.D.N.Y. 1949) (word package printed on a bill of lading not a stipulation that tractors were packages but disassembled and crated parts of a rock crusher were packaged). *But see* *The Margaret Lykes*, 57 F. Supp. 466, 471 (E.D. La. 1944) (description on bill of lading constituted a stipulation that items, including a truck, were packages).

<sup>41</sup> 263 F.2d at 137. Both the district court and the court of appeals reasoned that poor commercial practices would be fostered if shippers were penalized for protecting their goods.

<sup>42</sup> 311 F.2d 382 (2d Cir. 1962), *cert. denied*, 373 U.S. 922 (1963).

rolls of steel.<sup>43</sup> Noting that "the field of admiralty law is not an area in which the layman should venture to tread,"<sup>44</sup> the court indicated that any article completely enclosed in a box, regardless of size and weight, is a package within the scope of section 4(5).<sup>45</sup>

Seven years after *Gulf Italia*, a divided Second Circuit panel, in *Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft*,<sup>46</sup> held that pallets containing 60-pound cardboard boxes filled with television tuners were packages under COGSA.<sup>47</sup> In so ruling, the court observed that the parties had characterized the pallets as packages in various documents, including the bill of lading, and that the shipper himself had palletized the cargo "for the reasons of greater convenience and safety in handling."<sup>48</sup> The Second Circuit concluded that any other definition of package would lack predictability and force the carrier to look beyond the bill of lading and outer packaging in determining the contents of a shipment for insurance coverage purposes.<sup>49</sup>

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<sup>43</sup> 311 F.2d at 384. In *Mitsubishi*, the carrier's liability was limited to \$500 per roll notwithstanding the fact that the actual amount of loss was \$31,000. *Id.* at 382-83. The court was not swayed by plaintiff's argument that the purpose of COGSA is to prevent excessive claims on small packages, rather than to insulate carriers from liability for fair claims. In support of its position the court noted that a shipper wishing to avoid the \$500 limitation need only state the actual cargo value in the bill of lading and pay for greater coverage. *Id.* at 384-85. *But see* *Stirnemann v. The San Diego*, 148 F.2d 141, 143 (2d Cir. 1945) (COGSA was intended to achieve these two objectives).

<sup>44</sup> 311 F.2d at 383.

<sup>45</sup> *Id.* at 384. *Cf.* *Lucchese v. Malabe Shipping Co.*, 351 F. Supp. 588 (D.P.R. 1972) (trailer fully enclosing household goods was a package because freight was computed on a flat rate and bill of lading referred to it as a single unit); *John Deere & Co. v. Mississippi Shipping Co.*, 170 F. Supp. 479 (E.D. La. 1959) (since shipper had not declared the value of a fully boxed tractor, liability was limited to \$500). *See generally* *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297 (1959), wherein the Court, in holding that COGSA does not limit the negligence liability of a stevedore, assumed that a fully encased 19-ton press was a package. *Id.* at 307-08. *But see* *Gulf Italia Co. v. American Export Lines, Inc.*, 263 F.2d 135 (2d Cir.), *cert. denied*, 360 U.S. 902 (1959) (court rejected definition of package dependent upon the "extent of external covering" as provocative of litigation). 263 F.2d at 138.

<sup>46</sup> 375 F.2d 943 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967).

<sup>47</sup> 375 F.2d at 944.

<sup>48</sup> *Id.* at 946.

<sup>49</sup> *Id.* at 947. The court rejected the libellant's contentions that the pallet should be disregarded because it is merely a loading device. *Id.* at 945-46. In so ruling, the court considered the parties' characterization of the cargo embodied in the dock receipt, bill of lading, and claim letter to be of great importance. *Id.* at 946. The court also was influenced by the fact that the shipper could have avoided the limitation by declaring the true value of the goods. *Id.*

The majority opinion has been harshly criticized. One commentator is of the opinion that the court failed to implement the remedial intent of the legislature, and was "unjustified in relying on the carrier's bill of lading terms in applying the statute." Simon, *Containers—Are They a "Package"?*, 4 J. MAR. L. & COM. 441, 444 (1973). Other authors have asserted that

In a dissenting opinion, Judge Feinberg asserted that the majority decision ignored the policies underlying section 4(5).<sup>50</sup> He noted the Second Circuit in the past had indicated that an article would not be considered a package unless it "completely enclose[d] the goods in question."<sup>51</sup> Therefore, Judge Feinberg urged, each carton should be deemed a package under the statute.<sup>52</sup> While conceding that the majority's decision might result in a more predictable definition of the term package, the dissent nevertheless suggested that "certainty at the expense of legislative policy and equity is undesirable and often turns out to be ephemeral."<sup>53</sup>

Departing further from the "fully enclosed" requirement, the Second Circuit, in *Aluminios Pozuelo Ltd. v. S.S. Navigator*,<sup>54</sup> decided that an unboxed 6200-pound press bolted to a skid<sup>55</sup> was a package.<sup>56</sup> The court emphasized that the skid was used primarily by the shipper to facilitate the transportation of the press, even

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the decision does not promote predictability but instead creates additional confusion. See Bissell, *supra* note 27, at 910.

<sup>50</sup> 375 F.2d at 947 (Feinberg, J., dissenting). One of the policies behind § 4(5) is to protect cargo interests from severe liability disclaimers. See text accompanying notes 2 & 35 *supra*. Accordingly, Judge Feinberg reasoned that a close case should be resolved in the shipper's favor. 375 F.2d at 947. This suggestion has been praised by at least one commentator. See Bissell, *supra* note 27, at 909.

<sup>51</sup> 375 F.2d at 947 (Feinberg, J., dissenting) (citing *Mitsubishi Int'l Corp. v. S.S. Palmetto State*, 311 F.2d 382, 384 (2d Cir. 1962), *cert. denied*, 373 U.S. 922 (1963)). At the time, there seemed to be conflicting opinions in the Second Circuit regarding whether an item must completely enclose the goods in order to be considered a package. Compare *Mitsubishi Int'l Corp. v. S.S. Palmetto State*, 311 F.2d 382, 384 (2d Cir. 1962), *cert. denied*, 373 U.S. 922 (1963) ("We think that an article completely enclosed in a wooden box prepared for shipment is a 'package' . . ."), with *Gulf Italia Co. v. American Export Lines, Inc.*, 263 F.2d 135, 137 (2d Cir.), *cert. denied*, 360 U.S. 902 (1959) ("Any test [for a package] dependent upon extent of external covering would lead to uncertainty and increase litigation.").

<sup>52</sup> 375 F.2d at 947-48 (Feinberg, J., dissenting).

<sup>53</sup> *Id.* at 948 (Feinberg, J., dissenting). It has been stated that the majority opinion does not foster predictability. See note 49 *supra*.

<sup>54</sup> 407 F.2d 152 (2d Cir. 1968), *aff'g* 277 F. Supp. 1008 (S.D.N.Y. 1967) (mem.).

<sup>55</sup> The skid, a low wooden platform used to facilitate handling and storage of merchandise, was made from two 130-inch pieces of lumber which were perpendicular to and bolted to three 96-inch pieces of lumber. 407 F.2d at 153.

<sup>56</sup> This package was 11 feet high, measured 55 by 46 inches at the base and 98 by 67 inches at the top. It was affixed to a wooden skid approximately twice the area of its base. *Id.* The court stated that the word package embraces any cargo which has been prepared in such a manner as to ease its handling during shipment, regardless of whether it is completely or partially enclosed. *Id.* at 155. A possibly irreconcilable opinion was expressed in *Gulf Italia Co. v. American Export Lines, Inc.*, 263 F.2d 135, 137 (2d Cir.), *cert. denied*, 360 U.S. 902 (1959), where a partially enclosed but unskidded tractor was held not to be a package. The *Gulf Italia* court expressly rejected appellant's argument that the preparation of cargo for shipment may transform it into a COGSA package. 263 F.2d at 137. It is interesting to note that Judge Moore, who authored a vigorous dissent in *Gulf Italia*, wrote the majority opinion in *Aluminios*.

though it did to some extent protect the machinery from damage.<sup>57</sup> Additionally, the Second Circuit panel noted that the parties had described the press as a package in the bill of lading.<sup>58</sup> In concluding, the court tacitly overruled its prior decisions,<sup>59</sup> stating:

The meaning of "package" which has evolved from the cases can therefore be said to define a class of cargo, irrespective of size, shape or weight, to which some packaging preparation for transportation has been made which facilitates handling, *but which does not necessarily conceal or completely enclose the goods.*<sup>60</sup>

The foregoing is true even though the partial packaging serves a purpose in addition to facilitating transportation.

As can be gleaned from these decisions, the Second Circuit has slowly departed from its initial practice of construing the word package in accordance with the term's common meaning. Presently, in determining liability for damage or loss to noncontainerized cargo, the court considers such factors as the intent of the parties as evidenced by the bill of lading, and the shipper's interest in the method of transporting the cargo.

In contrast to the decisions of the Second Circuit, the Ninth Circuit, in *Hartford Fire Insurance Co. v. Pacific Far East Lines, Inc.*,<sup>61</sup> held that a 36,700-pound unboxed electrical transformer attached by bolts to a wooden skid was not a package.<sup>62</sup> The court

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<sup>57</sup> 407 F.2d at 155.

<sup>58</sup> *Id.* at 153.

<sup>59</sup> See notes 51 & 56 *supra*.

<sup>60</sup> 407 F.2d at 155 (emphasis added). In *Companhia Hidro Electrica v. S/S "Loide Honduras,"* 368 F. Supp. 289 (S.D.N.Y. 1974), the district court found that the language in the *Aluminios* opinion established the standard applicable to partially-packaged cargo. The packages involved in *Companhia* were 239 1/3-cubic-foot circuit breakers, each mounted on a steel base and partially protected by wooden crating. The parties disputed whether the metal base of each circuit breaker was a skid or a permanent part of the instrument. *Id.* at 290-91. In holding that each circuit breaker constituted a package for the purposes of § 4(5), the court did not resolve this dispute, but instead stated that the parties were bound by the description in the bill of lading. *Id.* at 291. Disagreeing with the reasoning of *Gulf Italia Co. v. American Export Lines, Inc.*, 263 F.2d 135 (2d Cir.), *cert. denied*, 360 U.S. 902 (1959), that a distinction exists between packaging that protects cargo and packaging that facilitates handling, the court found that "[p]ackaging, to the extent that it protects the cargo, also facilitates its handling." 368 F. Supp. at 291. See *General Motors Corp. v. S.S. Mormacoak*, 327 F. Supp. 666, 668 (S.D.N.Y.), *aff'd sub nom. General Motors Corp. v. Moore-McCormack Lines, Inc.*, 451 F.2d 24 (2d Cir. 1971) (per curiam), where the court, employing the *Aluminios* standard, held that a generator which was not on skids and which had no preparation designed to facilitate shipment was not a COGSA package.

<sup>61</sup> 491 F.2d 960 (9th Cir.), *cert. denied*, 419 U.S. 873 (1974).

<sup>62</sup> 491 F.2d 960, 965 (9th Cir. 1974), *rev'g* 320 F. Supp. 324 (N.D. Cal. 1970). The district court found no distinction between the skidded toggle press in *Aluminios* and the skidded transformer in *Hartford*; consequently, it held that the electrical transformer was a package

reasoned that if Congress had intended palletized cargo to be considered a package, it would have expressly so stated.<sup>63</sup> Accordingly, the Ninth Circuit rejected the facilitation-of-transport test utilized by the Second Circuit and concluded that the term package should be interpreted with reference to its common meaning.<sup>64</sup>

Thus, both the Second and Ninth Circuits apparently would agree that an item completely enclosed in a box or carton is a package under COGSA. The Second Circuit goes beyond this, however, and includes within its definition of package, goods partially enclosed or placed on skids or pallets by the shipper to facilitate transportation. As might be expected, these principles have had a significant effect upon courts confronted with the difficult problem whether a container is a package within the meaning of COGSA.

#### CONTAINER CASES AND THE EMERGENCE OF THE FUNCTIONAL ECONOMICS TEST

Although it was presented with an opportunity to consider the container problem in *Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer*,<sup>65</sup> the Second Circuit was able to bypass the question because it found an unreasonable deviation from the terms of the

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for the purposes of § 4(5). 320 F. Supp. at 325. On appeal, however, the shipper urged that a distinction did exist in that the skids in *Aluminios* were attached to the toggle press to facilitate handling while the transformer in *Hartford* could be moved on its own as it had metal lugs attached to its corners. The Ninth Circuit found it unnecessary to rely on this distinction; instead, the court rejected the facilitation-of-transport test as being without merit and reversed the district court decision. 491 F.2d at 965.

<sup>63</sup> 491 F.2d at 963. See generally *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800 (2d Cir. 1971); *Matsushita Elec. Corp. of America v. S.S. Aegis Spirit*, 414 F. Supp. 894 (W.D. Wash. 1976).

<sup>64</sup> 491 F.2d at 963-65. The common-meaning test also was applied in *Omark Indus., Inc. v. Associated Container Transp. (Austl.), Ltd.*, 420 F. Supp. 139 (D. Ore. 1976), where the court explained that

Congress, from all that can be gathered from the statute and its legislative history, never intended the word "package" to be treated as a sophisticated or esoteric term of art. Giving due recognition to this fact, the analytical framework within which the instant case must be decided becomes clear and uncomplicated. This Court's task, simply stated, is to determine whether the palletized unit or the cartons contained therein best comports with the "plain, ordinary meaning" of the word "package."

*Id.* at 141-42. Nevertheless, the *Omark* court held that a palletized bundle rather than its component cartons was a "package." *Id.* at 142. The bundle was a rectangular mass enclosed by heavy corrugated cardboard on three sides and thin cardboard employed as a buffer between the pallet and the bundle on the fourth side. The underside of the cargo was well protected by the pallet board itself. The court concluded that "the heavy cardboard outer shell served to consolidate, protect and restrain the smaller, thinner cartons and their contents—thus creating a concededly compound but nonetheless bona fide 'package.'" *Id.*

<sup>65</sup> 422 F.2d 7 (2d Cir. 1969), cert. denied, 397 U.S. 964 (1970).

bill of lading by the carrier which destroyed the \$500 package limitation.<sup>66</sup> Judge Hays dissented and argued that the deviation was too insignificant to deprive the carrier of the benefits of section 4(5).<sup>67</sup> Relying upon the Second Circuit's earlier decision in *Standard Electrica*, he contended that the \$500 per package limitation applied to each of the containers.<sup>68</sup> In support of this conclusion, Judge Hays observed that the bill of lading characterized the containers as packages and the shipper had delivered the sealed containers to the carrier. Therefore, it was his view that the "parties intended [that] each individual container . . . be considered as the functional packing unit" for the purposes of the \$500 per package limitation.<sup>69</sup> Judge Hays' language probably was the genesis of the "functional economics test," a standard later adopted and now employed by the Second Circuit in container cases.<sup>70</sup>

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<sup>66</sup> The shipper in *Britannica* had loaded 4080 cartons of books in eight separate metal containers which were delivered to the S.S. Hong Kong Producer for shipment to Japan. A short form bill of lading was issued which incorporated by reference a provision in the carrier's regular form bill of lading. In essence, the incorporated clause stated that under-deck stowage would not be required unless the shipper requested it in writing. Pursuant to this provision, six of the containers were stowed on the weather deck. As a result, 13 hundred cartons were damaged by sea water en route. 422 F.2d at 9-10. In holding that the shipper could properly have assumed it was receiving a clean bill of lading requiring below-deck stowage, *id.* at 18, the court emphasized that the provision in this carrier's bill of lading, of which the shipper had no actual knowledge, was "a new and ingenious device" to lessen the carrier's liability in violation of the clear intent and purpose of COGSA. *Id.* at 12-13. Since on-deck stowage was an unreasonable deviation from the terms of a clean bill of lading, the court held, the carrier was liable for the full amount of the damage without the benefit of COGSA's \$500 per package limitation. *Id.* at 18.

<sup>67</sup> *Id.* at 20 (Hays, J., dissenting).

<sup>68</sup> *Id.* In holding that nine pallets, each of which contained six cartons of television tuners, were packages, the court in *Standard Electrica* had emphasized the intent of the parties as evidenced by the descriptions in the documents and the fact that the shipper had chosen to use pallets to facilitate transportation. 375 F.2d at 946. Judge Hays believed that a similar situation existed in *Encyclopaedia Britannica* as the shipper had delivered packed containers to the carrier and listed the number and description of packages on the bill of lading. 422 F.2d at 20.

<sup>69</sup> 422 F.2d at 20 (Hays, J., dissenting). Judge Hays did not explain his concept of a functional packing unit. It is suggested that he did not intend to create a new test, but was simply following the facilitation-of-transport test laid down in *Standard Electrica*. See *Truck Ins. Exch. v. American Export Freight, Inc.*, 1972 A.M.C. 2509 (N.D. Ill. 1972) wherein the court, citing *Standard Electrica*, held that a container was a package where it had been loaded, sealed and delivered to the carrier by the shipper and the bill of lading referred to the number of packages as one container. *Id.* at 2509-10. See also *Sperry Rand Corp. v. Nordeutscher Lloyd*, 1973 A.M.C. 1392, 1398 (S.D.N.Y. 1973) (container held to be package where bill of lading stated number of packages as "1 container" and the shipper had procured and loaded the container without any involvement of the carrier). See generally *DeOrchis*, *supra* note 3, at 256; *van Wageningen*, *supra* note 3, at 180-81.

<sup>70</sup> See notes 80-86 and accompanying text *infra*.

The court did not, however, immediately adopt Judge Hays' reasoning. In *Leather's Best, Inc. v. S.S. Mormaclynx*,<sup>71</sup> a container owned by the carrier was delivered to a German shipper, at the shipper's request, for loading. The shipper's employees stowed ninety-nine bales of leather into the container and sealed it in the presence of the carrier's agent.<sup>72</sup> Although the cargo had been delivered to port undamaged, the sealed container was stolen from the carrier's terminal. The container later was located, but the contents were gone.<sup>73</sup> The Second Circuit, in an opinion authored by Judge Friendly, held that the container was not a package under section 4(5). Attempting to distinguish the court's earlier decision in *Standard Electrica*, which held that pallets containing cardboard boxes were packages, Judge Friendly stated that "[t]he pallets [in *Standard Electrica*] were nothing like the size of the container here; they had been made up by the shipper; and the 'dock receipt, the bill of lading, and libellant's claim letter all indicated that the parties regarded each pallet as a package.'"<sup>74</sup> In the present case, the carrier was on notice as to exactly how many cartons had been loaded into the container.<sup>75</sup> Judge Friendly left for future consideration the question whether a different result would be reached if the shipper "had packed the bales in a container already on its premises and the bill of lading had given no information with respect to the number of bales."<sup>76</sup>

Confronted with this precise situation in *Royal Typewriter Co. v. M/V Kulmerland*,<sup>77</sup> the Second Circuit fashioned the functional economics test<sup>78</sup> and held that a container stowing 350 adding ma-

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<sup>71</sup> 451 F.2d 800 (2d Cir. 1971).

<sup>72</sup> *Leather's Best, Inc.* had purchased 11 tons of leather from a seller located in Weinheim, Germany. The seller requested that a container be delivered to its plant and the carrier engaged a truckman to perform this task. The truckman, deemed an agent of the carrier by the court, watched as the leather was loaded into the container and then delivered the sealed container to the vessel. *Id.* at 804.

<sup>73</sup> *Id.* at 806.

<sup>74</sup> *Id.* at 815 (quoting *Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft*, 375 F.2d 943, 946 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967)). The court reasoned that the purpose of COGSA, which is "to set a reasonable figure below which the carrier should not be permitted to limit his liability," would be thwarted if a large metal container which is functionally a part of the ship is considered a package for purposes of the \$500 liability. 451 F.2d at 815.

<sup>75</sup> See note 72 and accompanying text *supra*.

<sup>76</sup> 451 F.2d at 815.

<sup>77</sup> 483 F.2d 645 (2d Cir. 1973).

<sup>78</sup> *Id.* at 648. See notes 67-69 and accompanying text *supra*. A number of cases have since employed the functional economics test. See, e.g., *Baby Togs, Inc. v. S.S. American Ming*, 1975 A.M.C. 2012 (S.D.N.Y. 1975) (individual cartons of clothing stored within containers



chines packed in cartons is a COGSA package.<sup>79</sup> Apparently, the *Kulmerland* court relied upon Judge Hays' concept of the functional packing unit in creating the functional economics test.<sup>80</sup> The avowed purpose of this test is to ensure predictability by permitting the "parties concerned [to] allocate responsibility for loss at the time of contract, purchase additional insurance if necessary, and thus 'avoid the pains of litigation.'" <sup>81</sup> Therefore, it has been labeled a "common sense" approach.<sup>82</sup> Explaining the mechanics of the functional economics test, the *Kulmerland* court pointed out that the critical factor is "whether the contents of the container could have feasibly been shipped overseas in the individual packages or cartons in which they were packed by the shipper."<sup>83</sup> If so, a presumption is created that the container is not a package. To rebut this presumption, the carrier must come forward with evidence establishing the parties' intention to treat the container as a package.<sup>84</sup> In the event that the shipper's packaging is determined to be inadequate for overseas shipment, a presumption arises that the container is a package. The shipper has the burden of overcoming this presump-

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held to be a package); *Eastman Kodak Co. v. S/S Transmariner*, 1975 A.M.C. 123 (S.D.N.Y. 1974) (container holding photographic supplies and chemicals held to be a package); *Insurance Co. of N. America v. S/S Brooklyn Maru, Japan Line, Ltd.*, 1974 A.M.C. 2443 (S.D.N.Y. 1974) (container consisting of 636 boxes constitutes a package).

<sup>79</sup> 483 F.2d at 649.

<sup>80</sup> In formulating the functional economics test, the *Kulmerland* court referred to Judge Hays' use of the words functional packing unit in his *Encyclopaedia Britannica* dissent. *Id.* at 648 n.9. See notes 67-69 and accompanying text *supra*. The *Kulmerland* court went on to state that the new test is not inconsistent with its earlier decisions under the facilitation-of-transport test. *Id.* For a discussion of the facilitation-of-transport test, see notes 46-60 and accompanying text *supra*.

<sup>81</sup> 483 F.2d at 649 (quoting *Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft*, 375 F.2d 943, 945 (2d Cir.), cert. denied, 389 U.S. 831 (1967)). According to one authority, the *Kulmerland* court overlooked the fact that the carrier has no way of knowing how the goods inside a sealed container are packed, which knowledge is crucial if the carrier is to predict whether and to what extent it will be held liable for cargo damage or loss. See DeOrchis, *supra* note 3, at 257.

<sup>82</sup> 483 F.2d at 649.

<sup>83</sup> *Id.* at 648.

<sup>84</sup> *Id.* at 649. See *Eastman Kodak Co. v. S/S Transmariner*, 1975 A.M.C. 123 (S.D.N.Y. 1974). There, the shipper loaded the container at its premises with cases suitable for independent shipment. A presumption therefore arose that the cases were packages under COGSA. The carrier was able to rebut this presumption, however, by showing that the cases were taken out of inventory without any further preparation for shipping and that it had no notice as to the contents of the container. *Id.* at 127-28. In *Baby Togs, Inc. v. S.S. American Ming*, 1975 A.M.C. 2012 (S.D.N.Y. 1975), the shipper established that the containerized cartons could have been independently shipped. Accordingly, each carton was presumed to be a COGSA package. The carrier was unable to rebut this presumption since the bill of lading enumerated the container's contents and the freight rate was not figured per container. *Id.* at 2021.

tion by demonstrating the parties did not intend that the container be a package.<sup>85</sup> Thus, factors such as trade custom and usage, characterization of the cargo by the parties in the documentation or other papers, and other considerations touching upon the parties' intent are relevant only for purposes of *rebutting* the initial presumption that arises.<sup>86</sup>

Turning to the facts before it, the *Kulmerland* court observed that the plaintiff had ordered adding machines from a German manufacturer, who delivered them to an international freight forwarder. Pursuant to the shipper's directions, the freight forwarder, who was the manufacturer's agent, loaded the individually crated machines into containers at its West Berlin warehouse.<sup>87</sup> Thereafter, the containers were shipped by rail to the port of Hamburg where they were delivered to the carrier. The carrier issued a clean ocean bill of lading, which acknowledged receipt of the containers without making reference to the number of cartons.<sup>88</sup> The machinery had been packed in single-wall corrugated cartons measuring 15" x 10" x 10" and sealed with paper tape. Prior to containerization, similar machinery had been shipped in large wooden crates or cases.<sup>89</sup> Therefore, the court reasoned, in the absence of containerization the machinery could not have been shipped overseas in the corrugated

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<sup>85</sup> 483 F.2d at 649. One commentator has argued that instead of reducing the "pains of litigation," see text accompanying note 81 *supra*, the procedure for rebutting the initial presumption may lead to lengthy interrogatories and depositions. See DeOrchis, *supra* note 3, at 258.

<sup>86</sup> 483 F.2d at 649. Courts consider the information contained in dock receipts, bills of lading, and other documents indicative of the parties' intent. See, e.g., *Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft*, 375 F.2d 943, 946 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967). Thus, if a bill of lading lists the number of packages as "1 container" this tends to establish that the parties intended the container to be the package. This viewpoint overlooks the nature of a bill of lading, however, which is drawn up by the carrier, often in such a way that the shipper has very little leeway with respect to the information contained in it. Cf. *Tessler Bros. (B.C.) v. Italpacific Line*, 494 F.2d 438 (9th Cir. 1974) (bill holder cannot escape contractual limitation simply by claiming that bill of lading is adhesion contract).

Another factor considered by courts to be important in determining the parties' intent is whether it was the shipper or carrier who chose to use the container. See, e.g., *Rosenbruch v. American Export Isbrandtsen Lines, Inc.*, 1976 A.M.C. 487, 489 (2d Cir. 1976); *Standard Electrica, S.A. v. Hamburg Sundamerikanische Dampfschiffahrts-Gesellschaft*, 375 F.2d 943, 946 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967).

Finally, whether an agent or employee of the carrier observed the loading of the container and thereby ascertained the number of cartons placed in it has been considered important by courts in determining the parties' intent. See, e.g., *Cameco, Inc. v. S.S. American Legion*, 514 F.2d 1291, 1299 (2d Cir. 1974).

<sup>87</sup> 483 F.2d at 646.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

cartons.<sup>90</sup> Consequently, pursuant to the functional economics test, a presumption arose that the containers were packages for the purposes of section 4(5). The Second Circuit found that the shipper had failed to introduce evidence sufficient "to show why the container should not be treated as the 'package.'"<sup>91</sup>

Recently, in *Cameco, Inc. v. S.S. American Legion*,<sup>92</sup> the Second Circuit was presented with another opportunity to apply the functional economics test. There, a quantity of canned hams packed in corrugated cartons, some of which were strapped on pallets, was shipped in a container from Denmark to New York.<sup>93</sup> The container, which was owned by the carrier, was loaded by the shipper at the shipper's place of business. An agent of the carrier was present at the tally and count, and may have participated in it. Prior to delivery in New York the cargo was stolen.<sup>94</sup>

At the outset, the *Cameco* court determined that the container was presumed not to be a package since cans of ham had customarily been shipped in corrugated cartons before the advent of containerization.<sup>95</sup> Hence, the burden of proof rested on the carrier to show that the parties intended to treat the container as a package.<sup>96</sup> Noting various factors which indicated that a container was used for the mutual benefit of the parties,<sup>97</sup> the court held that the carrier had not met this burden; therefore, the \$500 per package limitation did not apply to the container as a unit.<sup>98</sup> By way of dicta, the Second Circuit stated that if the carrier had not been present at the container loading and had not otherwise obtained "information as to what [was] inside the container . . . he might then [have been] able to overcome the burden of proof imposed upon him."<sup>99</sup>

Another case recently decided by the Second Circuit,

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> 514 F.2d 1291 (2d Cir. 1974).

<sup>93</sup> *Id.* at 1292.

<sup>94</sup> *Id.* Due to a mix-up, no arrangements had been made to pick up the container in New York. The container remained on the pier for several days during which time it was stolen. *Id.* at 1294.

<sup>95</sup> *Id.* at 1294, 1299.

<sup>96</sup> *Id.* at 1299.

<sup>97</sup> The court noted that since the ship itself contained no internal refrigeration, the goods could not have been shipped on it without the refrigerated container. In addition, the shipper received a 10% discount for using the container. *Id.*

<sup>98</sup> *Id.* Other factors which persuaded the court that the carrier had not rebutted the initial presumption were the presence of the carrier's agent during loading and the enumeration of the number of cartons in the bill of lading. *Id.* at 1299-1300.

<sup>99</sup> *Id.* at 1300.

*Rosenbruch v. American Export Isbrandtsen Lines, Inc.*,<sup>100</sup> purported to answer the question left open in *Leather's Best*, viz. whether a container loaded by the shipper on his premises is a package when the bill of lading does not indicate the number of units in it.<sup>101</sup> In *Rosenbruch*, the plaintiff shipper contracted with an international freight forwarder for the shipment of his household goods from Norwood, New Jersey to Hamburg, Germany.<sup>102</sup> The freight forwarder prepared the bill of lading, packed the goods for the shipper, and obtained a container, without charge, from the carrier. At Norwood, New Jersey, the container was stuffed and sealed, and then redelivered to the carrier in Staten Island. The bill of lading stated that one package was being shipped and described the contents as "'used household goods,'"<sup>103</sup> Due to inclement weather, the entire shipment was lost at sea.<sup>104</sup>

Faced with a situation in which the container was loaded at the shipper's premises and the bill of lading was silent as to the number of units shipped, the Second Circuit reaffirmed the applicability of the functional economics test and held that the container was a package under COGSA.<sup>105</sup> In so holding, the court placed particular emphasis on the carrier's lack of involvement in the loading of the container and its unawareness as to the number of units within the container.<sup>106</sup> Finding that the household goods could not have been shipped in their present packaging absent a container and that the carrier had not participated in the loading of the container or the preparation of the bill of lading, the court concluded that the container should be deemed a package under the functional economics test.<sup>107</sup>

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<sup>100</sup> 1976 A.M.C. 487 (2d Cir. 1976).

<sup>101</sup> See text accompanying note 76 *supra*.

<sup>102</sup> 1976 A.M.C. at 489.

<sup>103</sup> *Id.* at 491.

<sup>104</sup> The container loaded with plaintiff's goods, as well as 31 other containers, was stowed on the weather deck and consequently lost at sea. *Id.* at 490.

<sup>105</sup> *Id.* at 491.

<sup>106</sup> *Id.* The fact that the carrier or its agent was in a position to know the actual number of cartons or items loaded in a container frequently has been an important consideration in finding that such items are packages. See, e.g., *Cameco, Inc. v. S.S. American Legion*, 514 F.2d 1291, 1297, 1299 (2d Cir. 1974).

<sup>107</sup> 1976 A.M.C. at 492. Interestingly, in applying the functional economics test the court did not treat the test as creating a presumption that the container was or was not a package which may be rebutted by other evidence of the parties' actual intent. Rather, the court appears to have interpreted the test as giving the shipper a choice in advance of shipment; the shipper may either package the items so as to be suitable for shipment without containers and have the \$500 limitation applied to each carton, or it may use containers, receive the

The Court of Appeals for the Ninth Circuit has not yet had the opportunity to address the container issue. In fact, *Matsushita Electric Corp. of America v. S.S. Aegis Spirit*<sup>108</sup> is the only decision within the circuit involving this question. The *Matsushita* court, relying upon earlier Ninth Circuit authority, applied the common-meaning standard and concluded that a container is not a package within the ambit of section 4(5).<sup>109</sup> To highlight the disparate approaches utilized by the Second Circuit and the *Matsushita* district court in resolving the container issue, the significant aspects of the *Matsushita* decision will be discussed.

In *Matsushita*, electrical equipment slated for exportation to the United States had been wrapped in plastic bags, fitted with styrofoam padding, and packed in durable cardboard cartons.<sup>110</sup> These cartons were then stuffed into containers belonging to the carrier by the shipper's employees at the shipper's place of business.<sup>111</sup> Accordingly, the court found that the carrier did not possess first hand knowledge of the quality and quantity of the contents of the containers.<sup>112</sup> It is important to note, however, that the bills of lading did indicate the number of cartons said to be packed within each container.<sup>113</sup>

Judge Beeks, pointing out that this was a case of first impression within the Ninth Circuit, began his analysis by examining the Second Circuit cases dealing with containerization. Observing that these decisions "have not been altogether congruous in approach and result,"<sup>114</sup> he detected two discernible trends in the Second Circuit's treatment of the problem. In the earlier decisions, Judge Beeks ascertained a clear indication by the Second Circuit that a

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10% rate reduction allowed for containerized goods, and submit to the \$500 per container limitation. *Id.* at 491-92.

<sup>108</sup> 414 F. Supp. 894 (W.D. Wash. 1976).

<sup>109</sup> *Id.* at 907. See notes 8-10 and accompanying text *supra*.

<sup>110</sup> 414 F. Supp. at 899.

<sup>111</sup> *Id.* Under the usual carriage contract, it is the responsibility of the shipper to load the containers. This is advantageous to the shipper because he has control over the handling of his goods and can insure a tight stow. *Id.* at 901.

<sup>112</sup> *Id.* at 899.

<sup>113</sup> *Id.* at 898. The various bills of lading showed the number of containers or packages as "2" containers, but under the "Description of Goods" heading listed the number of individual cartons, the gross weight, and the measurement. The freight rate was calculated per container, and the bills of lading contained a clause incorporating an express agreement to treat each container as a package or unit. However, the carrier also issued a "letter of guaranty" stating that its liability for loss or damage was limited to \$500 for each package in the containers. *Id.* The court decided the package limitation issue without reference to this letter, indicating in dictum that it might be invalid. *Id.* at 905.

<sup>114</sup> *Id.* at 902.

carrier-owned container would not be considered a package under COGSA.<sup>115</sup> According to Judge Beeks, these cases emphasized that the term package as used in section 4(5) refers to the method in which a shipper packs his cargo and not to a metal container which is a “ [functional] part of the ship.’ ”

The *Matsushita* court found that a vastly different approach was taken by the Second Circuit in the later cases, where the functional economics test was applied.<sup>117</sup> By employing this test, the Second Circuit adopted a judicially neutral position, since it made the determination whether the container is to be viewed as a package contingent upon the type of packaging employed by the shipper. Ultimately, however, the intent of the parties is controlling under the test because it may be introduced to rebut the initial presumption that arises from the type of packaging used. Judge Beeks criticized the functional economics test as “contrary to the statute, commercially impracticable and unwise.”<sup>118</sup> In his opinion, to be satisfactory a test “must reflect the realities of the maritime industry of today while remaining faithful to the express language and legislative policy embodied in the pertinent COGSA provisions.”<sup>119</sup> It was Judge Beeks’ belief that the functional economics test failed to meet these criteria. He was unable to detect anything in the statute which justified a presumption based upon whether the packaging em-

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<sup>115</sup> *Id.* Judge Beeks cited both *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800 (2d Cir. 1971) and *Shinko Boeki Co. v. S.S. "Pioneer Moon,"* 507 F.2d 342 (2d Cir. 1974) for the proposition that a container should never be considered a package. *Shinko Boeki* involved the shipment of liquid latex in 2000-gallon movable containers which were stowed on deck. In holding that the containers were not packages, the court analogized them to a ship's deep tanks which, as functional parts of the ship, clearly would not have been considered packages. *Id.* at 345. The *Shinko Boeki* court, however, distinguished bulk shipment of liquids from packaged goods shipped in containers and stated that the functional economics test was not applicable to the former. Nonetheless, it has been argued that the same purpose underlies the use of containers for packaged and nonpackaged cargo, *i.e.*, efficiency and economy, and therefore, the same legal principles ought to apply to both. According to this view, the carrier's equipment, whether it is used for stowing packaged cargo or nonpackaged bulk cargo such as crude oil, grain, or automobiles, would never be considered a COGSA package. See Simon, *More on the Law of Shipping Containers*, 6 J. MAR. L. & COM. 603 (1975).

<sup>116</sup> 414 F. Supp. at 902.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 906. Judge Beeks regarded the functional economics test as contrary to both the language of COGSA section 4(5) which makes no distinction between packaging that falls above or below a certain standard of strength or durability, and the policy of that section which is to establish a minimum level below which a carrier can not limit its liability. *Id.* at 904. Further, Judge Beeks believed that by penalizing shippers who employ the economical packaging made possible by containerization, the test serves as a disincentive to “mercantile economization.” *Id.* See note 122 and accompanying text *infra*.

<sup>119</sup> 414 F. Supp. at 903-04.

ployed is functional. Section 4(5) distinguishes between cargo shipped in packages and cargo not so shipped, but does not differentiate goods transported in cartons from those shipped in cases or other receptacles.<sup>120</sup> Additionally, since the test requires a determination as to whether the packaging used was suitable for a hypothetical overseas shipment, Judge Beeks asserted, it compels courts to make conjectural determinations and consider evidence not even remotely contemplated by the framers of section 4(5).<sup>121</sup> Further, the test penalized shippers who take advantage of the more economical packaging methods available when containers are employed because, in the event of loss or damage, they will have the burden of overcoming the presumption that the container is a COGSA package.<sup>122</sup> In this regard, the court opined, the test fosters economic waste since it forces shippers to employ sturdier packaging than would otherwise be necessary in order to avoid giving rise to an unfavorable presumption.<sup>123</sup>

Interestingly, Judge Beeks considered the most serious flaw of the test to be its dependence upon the intent of the parties. He believed that the package limitation becomes totally illusory when "the courts' function in applying it is to merely identify and uphold the parties' private definition of [a] COGSA package."<sup>124</sup> The *Matsushita* court went on to state that "[t]he better and more traditional approach . . . is to conscientiously construe the legislation in the factual context seeking to effectuate the *legislative*, not the parties', intent and purpose."<sup>125</sup>

Having rejected the functional economics test, Judge Beeks was faced with the task of formulating a suitable alternative. Accordingly, he turned to the Second Circuit's decision in *Leather's Best, Inc. v. S.S. Mormaclynx*<sup>126</sup> for guidance and found that containers are more analogous to "detached stowage compartments of the ship" which serve to divide up the available cargo stowage space than they are to COGSA packages.<sup>127</sup> Consequently, the court con-

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<sup>120</sup> See note 118 *supra*.

<sup>121</sup> 414 F. Supp. at 904. Presumably, courts would have to consider lengthy testimony concerning customary packaging methods prior to containerization, or rely on expert testimony to determine whether a particular mode of packaging could withstand a voyage absent the container.

<sup>122</sup> *Id.* See Simon, *supra* note 2, at 522-24.

<sup>123</sup> 414 F. Supp. at 906.

<sup>124</sup> *Id.* at 905.

<sup>125</sup> *Id.* at 904 (emphasis in original).

<sup>126</sup> 451 F.2d 800 (2d Cir. 1971), discussed at notes 71-76 and accompanying text *supra*.

<sup>127</sup> 414 F.2d at 907. See *Shinko Boeki Co., Ltd. v. S.S. "Pioneer Moon,"* 507 F.2d 342, 345 (2d Cir. 1974); *Leather's Best, Inc. v. S.S. Mormaclynx,* 451 F.2d 800, 815 (2d Cir. 1971).

cluded that the \$500 package limitation is not applicable to a container as a single unit. A contrary holding, in Judge Beeks' view, would distort the meaning of the statutory term package.

In the course of his discussion, Judge Beeks dismissed the argument that it is unfair to base a carrier's liability upon the number of packages inside a container since the carrier often does not possess such information. To rectify this situation, the judge suggested, carriers could require that this data be included in the bill of lading as a precondition to shipment.<sup>128</sup> He observed that "[c]arriers are hardly helpless to secure [such] information and will not be heard to argue their self-imposed ignorance as a countervailing consideration."<sup>129</sup>

Before an attempt is made to formulate a solution to the container problem, it should prove interesting to consider how *Matsushita* would have been resolved by the Second Circuit. Quite possibly, in deciding the case, that court would have applied the functional economics test.<sup>130</sup> Under this test, a rebuttable presumption arises that a container is or is not a COGSA package based upon whether the shipper's own cartons or units are considered functional.<sup>131</sup> In determining whether to override the initial presumption, the court looks to the intent of the parties as manifested by, *inter alia*, their characterization of the container in the documentation accompanying the transaction.<sup>132</sup>

Pursuant to these principles, the containers in the *Matsushita* case apparently would be deemed COGSA packages. These containers had been loaded with packages suitable for independent shipment.<sup>133</sup> Accordingly, under the functional economics test, it would be presumed that each individual carton was a COGSA package.

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*Cf. Simon, More on the Law of Shipping Containers*, 6 J. MAR. L. & COM. 603, 604 (1975), wherein the author quotes part of a speech by a spokesman for a consortium of containerships:

The real meaning of the container revolution is the fact that with the container the ship was coming to the cargo at the point of origin, wherever it was, however many miles from the sea . . . for the first time in history.

<sup>128</sup> 414 F. Supp. at 908. As the drafter of the bill of lading, which is essentially a contract of adhesion, a carrier can easily ensure that shippers describe the number, nature, and value of the packages transported in containers. See Simon, *supra* note 2, at 535.

<sup>129</sup> 414 F. Supp. at 908.

<sup>130</sup> See notes 78-99 and accompanying text *supra*.

<sup>131</sup> See notes 83-85 and accompanying text *supra*.

<sup>132</sup> See *Rosenbruch v. American Export Isbrandtsen Lines, Inc.*, 1976 A.M.C. 487 (2d Cir. 1976); *Cameco 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); *Sperry Rand Corp. v. Norddeutscher Lloyd*, 1973 A.M.C. 1392 (S.D.N.Y. 1973); *Truck Ins. Exch. v. American Export Freight Inc.*, 1972 A.M.C. 2509 (N.D. Ill. 1972); note 86 *supra*.

<sup>133</sup> 414 F. Supp. at 900.



The bill of lading, however, contained an express provision stating that each container is to be considered a package for liability purposes.<sup>134</sup> Thus, the terms of the bill of lading seemed to evince an intent on the part of the carrier and shipper to treat each container as a package. Moreover, since the cargo consisted of fragile electrical equipment, the containerization of it was probably for the benefit of the shipper. Taken together, these factors would appear to present a sufficient basis for concluding that the initial presumption had been rebutted. Consequently, the \$500 package limitation would be applied to the containers as single units.

#### AN ANALYSIS OF THE FUNCTIONAL ECONOMICS TEST

Commentators generally have expressed disapproval of the functional economics test. M. A. DeOrchis has taken the position that the functional economics test does not afford the parties an opportunity to allocate responsibility for loss at the time of contract since the carrier cannot ascertain the manner in which the goods inside the sealed container are packaged.<sup>135</sup> As an alternative, DeOrchis recommended a return to the approach employed by the Second Circuit in *Standard Electrica*,<sup>136</sup> where it was held that nine pallets, each containing six cartons of electrical equipment, were packages under COGSA.<sup>137</sup> Apparently, the key factors in this determination were that the shipper had chosen to use pallets to facili-

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<sup>134</sup> See note 113 *supra*.

<sup>135</sup> DeOrchis, *supra* note 3, at 279. DeOrchis views the limitation of liability area as essentially an insurance problem. Accordingly, he calls for a rule which would permit the parties to arrange for adequate insurance coverage at the time of contract. His major criticism of the functional economics test is that the carrier usually receives containers from the shipper in a sealed form and therefore has no way of knowing whether the goods inside are packed in units suitable for shipment. Such knowledge is needed to obtain proper insurance coverage because the carrier's potential liability is far greater if the units are suitable for shipment than it would be if the goods were packed in less durable units. *Id.*

The shipper is in a position to know the manner in which goods are packed and thus can theoretically predict whether they will be considered COGSA packages under the test. DeOrchis nevertheless believes that the shipper also is placed at a disadvantage by the functional economics test in that the shipper is forced to use expensive and unnecessary packaging to avoid having the \$500 per package limitation applied to the container. *Id.* at 277-79. If, as DeOrchis suggests, the problem is merely one of determining allocation of risk for insurance purposes, the shipper could simply use less expensive packaging and use the savings to purchase additional insurance. It is important, however, to determine which party should bear the burden of obtaining the additional insurance. As one authority has stated, "relegation of an injured property owner to insurance is . . . an abdication of [the] legal process." Simon, *supra* note 2, at 534.

<sup>136</sup> DeOrchis, *supra* note 3, at 258.

<sup>137</sup> 375 F.2d at 946. See notes 46-49 and accompanying text *supra*.

tate handling and the bill of lading had described the pallets as packages.<sup>138</sup> Therefore, DeOrchis suggested that the following test be applied to determine whether a container is a package for the purpose of the \$500 per package limitation:

Where the use of a container is chosen by the shipper . . . and the bill of lading counts each container as one package, the limitation should apply to the container. Where the goods are packed in the container by the carrier . . . and the number of cartons or bales is tallied by the carrier and receipt of their number is acknowledged in the bill of lading, the package limitation should be applied to the number of cartons or bales, . . . placed in the container.<sup>139</sup>

According to DeOrchis, this suggestion could be implemented by allowing the shipper to choose whether a container is to be used in the first instance and noting this choice on the face of the bill of lading. By permitting the parties alone to decide what is to be deemed a package under their contract of carriage, DeOrchis contended, "the pains of litigation and the search for predictability would both be ended."<sup>140</sup>

Seymour Simon has also concluded that the functional economics test is unsound.<sup>141</sup> He asserted that it unjustly penalizes the shipper for taking advantage of the economic benefits derived from containerization while leaving the carrier, who reaps far greater rewards, unscathed.<sup>142</sup> Simon criticized the test as bottomed in "an

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<sup>138</sup> 375 F.2d at 946.

<sup>139</sup> DeOrchis, *supra* note 3, at 258. DeOrchis feels that this "choice and description test" is the best possible solution to the container problem. Under it, the shipper may choose to load the goods into the container itself and thereby maintain control over how the goods are packed. Alternatively, the shipper may elect to ship the goods to the pier to be packed in the container by the carrier. In the former situation the package limitation would be applied to the container as a unit while in the latter the limitation would apply to the individual items shipped. Predictability is ensured under the test since the parties' intended characterization of the container is determined by looking to the bill of lading. *Id.* DeOrchis dismissed the objection that a bill of lading is in actuality a contract of adhesion favoring the carrier by stating that usually the shipper supplies the description of the goods contained in the document. *Id.*

<sup>140</sup> *Id.* at 279.

<sup>141</sup> Simon, *supra* note 2, at 530.

<sup>142</sup> *Id.* at 531. It is Simon's contention that the carrier realizes enormous savings by the use of containerization, at times amounting to 90% of the cost of loading and unloading ships. In contrast, the shipper's only saving is that produced by the utilization of less expensive and less durable packaging. According to Simon, the functional economics test penalizes the shipper by applying the \$500 liability limitation to the container when the shipper employs an economical form of packaging, but permits the carrier to retain the benefits it receives from containerization. *Id.* at 521. Thus, Simon concluded that the economic impact of the test is inequitable. *Id.* at 521-22.

obsolescent mode of transport [of] days past."<sup>143</sup> Further, he argued that limiting damages to \$500 per container in effect exonerates the carrier from liability and thereby contravenes a key objective of section 4(5) which is to prevent carriers from limiting their liability to unconscionable amounts.<sup>144</sup> In concluding, Simon took issue with the position adopted by Mr. DeOrchis, characterizing it as "untenable,"<sup>145</sup> and recommended the analysis of *Leather's Best*, wherein the Second Circuit indicated that a container is a part of the ship and cannot be considered a COGSA package.<sup>146</sup>

Another viewpoint is espoused by Henry J. van Wageningen who observed that the balance between carrier and cargo interests which COGSA was designed to strike has not been achieved as the decisions presently are tilted in favor of the carrier.<sup>147</sup> Contrary to the Second Circuit's view, van Wageningen urged that the term package clearly is not a word of art; if it were, there would not be such confusion as to its meaning.<sup>148</sup> The differing interpretations of the Second and Ninth Circuits concerning the definition of the term package,<sup>149</sup> coupled with the fact that it may be unknown to the

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<sup>143</sup> *Id.* at 531. Simon pointed out that there are practical difficulties that courts will encounter in future years if the standard for determining whether a package is functional relies upon the tensile strength, composition, and dimensions of packaging used years before. *Id.* at 522.

<sup>144</sup> *Id.* at 531. See *Hartford Fire Ins. Co. v. Pacific Far E. Lines, Inc.*, 491 F.2d 960, 962 (9th Cir.), cert. denied, 419 U.S. 873 (1974); *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 815 (2d Cir. 1971).

<sup>145</sup> Simon, *supra* note 2, at 536. Simon rejected DeOrchis' claim that the package limitation issue was merely a question of allocation of risk which could be resolved by ensuring that proper insurance coverage is procured. If the shipper's insurance coverage is relied upon to abrogate carrier liability, Simon claimed, the objectives of COGSA as well as the common law principle of holding a bailee responsible for loss or damage to another's property would be thwarted. The shipper also would be paying extra insurance premiums to recover that which should rightfully belong to it under COGSA. *Id.* at 533-34. Moreover, Simon disagreed with the wisdom of allowing the bill of lading to influence whether a container is deemed a package, stating that the COGSA provision should be interpreted to effectuate the legislative intent and not that of the parties. *Id.* at 535-36.

<sup>146</sup> 451 F.2d at 815. See notes 71-76 and accompanying text *supra*.

<sup>147</sup> Van Wageningen, *supra* note 3, at 195.

<sup>148</sup> *Id.* at 196.

<sup>149</sup> Liability for goods shipped in containers may differ significantly depending upon which circuit is the forum for the litigation. For example, in *Matsushita* 11 containers, each holding approximately 600 cartons of electrical equipment, suffered water damage with the total loss stipulated at \$21,749.75. 414 F. Supp. at 898-99. The district court held that each individual carton was a package to which the \$500 limitation was applicable. Accordingly, the carrier was held liable for almost the entire loss. *Id.* at 907. If the action were brought in the Second Circuit, however, the containers probably would be deemed COGSA packages, see notes 132-34 and accompanying text *supra*, and the carrier's maximum liability would be \$5500.

parties at the outset which circuit will have jurisdiction over a dispute,<sup>150</sup> lead that commentator, with some justification, to express concern that both the carrier and the shipper will be forced to procure insurance coverage for the same cargo.<sup>151</sup>

As a solution to the problem, van Wageningen suggested that the judiciary construe the term package to include shipping units and "leave the 'customary freight unit' measurement to apply exclusively to bulk and similar cargoes."<sup>152</sup> In this manner, the courts in the United States would reach uniform results and be in harmony with the courts of those countries that adhere to the Hague Rules.<sup>153</sup> Under this interpretation, each item shipped, regardless of its outer package, would be a shipping unit to which the \$500 limitation would apply.<sup>154</sup> Secure in their expectations, the parties could allocate insurance risks accordingly.<sup>155</sup>

It is submitted that, as the aforementioned authorities have concluded, the functional economics test is unsound and should be discarded. Although the test was adopted to provide a uniform solution for the container problem, it has not only failed to achieve this objective, but has shown itself to be commercially impractical as well.<sup>156</sup> In assessing the effectiveness of the test, one must bear in mind that the primary purpose of containerization is to promote

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<sup>150</sup> Since admiralty jurisdiction is in rem, either circuit ultimately may possess jurisdiction over an action. See GILMORE & BLACK, *supra* note 2, at 186-87. Therefore, to protect themselves, both the shipper and carrier would have to insure the cargo.

<sup>151</sup> Van Wageningen, *supra* note 3, at 196.

<sup>152</sup> *Id.* at 197. See note 153 *infra*. In addition to this judicial solution, van Wageningen suggested certain legislative remedies, the most significant of which is an amendment to conform COGSA to the package or unit terminology of the Hague Rules, see note 19 *supra*, and to render the maximum liability provision inflation-proof by converting it from a dollar to a percentage limitation. Van Wageningen, *supra* note 3, at 198.

<sup>153</sup> The Hague Rules limit a carrier's liability to a specific monetary amount per package or unit. It is this terminology which was adopted by Canada and most European countries. See notes 19 & 21 *supra*. Since the courts of these countries have interpreted the word unit to mean virtually the same as package, it makes little difference how an article is characterized under the Hague Rules. In the United States, however, the distinction between a package and a customary freight unit may result in a carrier being held liable for \$500 if an item is considered a package and thousands of dollars if it is determined to be several customary freight units. See notes 22-23 and accompanying text *supra*.

<sup>154</sup> Van Wageningen, *supra* note 3, at 197-98.

<sup>155</sup> *Id.* at 198. In actuality, the shipper would ultimately bear the risk of loss since the freight rate would reflect the carrier's insurance costs. The shipper would insure against loss in excess of the carrier's liability either through his own underwriter or by paying a higher freight rate in return for increased liability on the part of the carrier. *Id.* at 200.

<sup>156</sup> Under the functional economics test, the mere fact that the shipper did not use packaging suitable for overseas shipment may result in the carrier's liability being limited to \$500 even though the actual damage incurred by the shipper exceeds \$40,000 or \$50,000. See, e.g., *Royal Typewriter Co. v. M/V Kulmerland*, 483 F.2d 645 (2d Cir. 1973).

efficiency in the shipping industry.<sup>157</sup> Although the largest benefits under containerization accrue to the carrier in the form of time savings and labor cost reductions, the shipper is also rewarded because the expensive packaging formerly required for overseas break-bulk shipment may be avoided.<sup>158</sup> Presumably, this benefit will be passed on to the consumer through the market mechanism. In the interest of predictability, however, the Second Circuit has eliminated this latter advantage by basing a presumption upon the hypothetical and seemingly irrelevant consideration of whether the individual packaging used by the shipper would have been suitable for shipment. Since an unfavorable presumption arises if the packaging is determined to be unfit for such a shipment, the shipper is unjustly penalized for taking advantage of a cost saving device made possible by modern container technology. The test thus promotes economic waste, as the shipper is compelled to use heavier protective packaging to avoid the burden of an adverse presumption. Recent cases suggest that this presumption can rarely be overcome.<sup>159</sup>

Moreover, although an avowed goal of the functional economics test is the attainment of predictability by permitting the carrier and shipper to allocate risk of loss at the time of contract,<sup>160</sup> in practical effect it has left the parties uncertain of their respective rights. Instead of providing a solution applicable to every situation, the test results in liability being imposed on a case-by-case basis. In each situation, two issues always must be resolved. First, a determination must be made regarding whether the individual packaging was functional. This leads to a presumption that the container is or is not a COGSA package. Second, the intent of the parties must be ascertained to determine whether it rebuts the presumption. In light of the fact that thousands of dollars of potential liability hinge on these questions, it is quite likely that the parties would resort to extensive and costly litigation for a resolution of them.<sup>161</sup> Thus, the functional economics test, which was intended to reduce the likelihood of suit, actually may lead to increased litigation.

Interestingly, in determining the parties' intent, the Second

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<sup>157</sup> See notes 27-28 and accompanying text *supra*.

<sup>158</sup> See note 28 and accompanying text *supra*.

<sup>159</sup> See, e.g., *Royal Typewriter Co. v. M/V Kulmerland*, 483 F.2d 645 (2d Cir. 1973) (shipper did not rebut presumption that parties intended the container to be the COGSA package); cf. *Baby Togs, Inc. v. S.S. American Ming*, 1975 A.M.C. 2012 (S.D.N.Y. 1975) (carrier unable to rebut presumption that cartons were COGSA packages).

<sup>160</sup> See *Royal Typewriter Co. v. M/V Kulmerland*, 483 F.2d 645, 649 (2d Cir. 1973).

<sup>161</sup> See *DeOrchis*, *supra* note 3, at 258.

Circuit has relied upon the characterization of the container appearing in the bill of lading. Previously, however, the court had observed that these documents often are contracts of adhesion drafted and issued by the carrier, and, as such, are hardly indicative of the parties' mutual intent.<sup>162</sup> By placing such importance upon the parties' private definition of the term package as evidenced by the bill of lading, the Second Circuit has thus departed from its prior recognition that a major purpose of COGSA "is to protect shippers from the overreaching of carriers through contracts of adhesion . . . ."<sup>163</sup>

#### AN ALTERNATIVE TO THE FUNCTIONAL ECONOMICS TEST

In view of the realities of today's maritime industry, it is suggested that the \$500 COGSA package limitation should operate against the party deriving the greatest benefits from containerization. Containerization evolved primarily due to carriers' beliefs that the procedure is more economical and efficient than older methods.<sup>164</sup> Indeed, carriers who resisted containerization were eliminated, or, at the very least, have opted for more specialized cargo or decided to transport breakbulk and containerized cargo on the same vessel.

Clearly, where the container is owned and supplied by the carrier, it is the carrier who benefits most from containerization.<sup>165</sup> Even if the container is loaded at the shipper's premises, the shipper is merely using the tools of the carrier's trade and, in effect, assisting the carrier in reducing overall costs. The shipper's primary advantage is the convenience of having the container available when it is ready to load, rather than awaiting delivery by the carrier.

In considering the situation where the container is owned and supplied by the shipper or freight forwarder, it is important to note

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<sup>162</sup> See *Cameco, Inc. v. S.S. American Legion*, 514 F.2d 1291, 1300 (2d Cir. 1974); *Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer*, 422 F.2d 7, 11-13 (2d Cir. 1969); *Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft*, 375 F.2d 943, 945 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967).

<sup>163</sup> *Cameco, Inc. v. S.S. American Legion*, 514 F.2d 1291, 1300 (2d Cir. 1974). See note 162 and accompanying text *supra*. By providing a standard and uniform set of provisions for ocean bills of lading, COGSA attempted to redress the imbalance in bargaining power which existed between the carrier interests and cargo owners. See *Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer*, 422 F.2d 7, 11 (2d Cir. 1969); note 2 *supra*.

<sup>164</sup> By reducing operating costs and increasing efficiency, containerization has enabled carriers which formerly were marginal money-makers to become highly profitable enterprises. See *FORBES*, Sept. 1, 1977, at 47.

<sup>165</sup> See *Schmeltzer & Peavy*, *supra* note 5, at 208; *Simon*, *supra* note 2, at 521; note 27 *supra*.

that the number of such containers is exceedingly small. Should these containers be considered packages simply because the shipper is using a "non-vessel" container? It is submitted that this factor should have no effect in most cases. The carrier is in business to carry container cargo. Containers, like railroad cars, are interchangeable when they are the proper size. Whether the carrier uses its own container or that of a freight forwarder makes little difference to it. In fact, use of the shipper's container allows the carrier added flexibility, especially if some of its own containers are lagging at some inland point or are in a state of disrepair. Although the shipper may benefit by having the container at its warehouse earlier, or by receiving a discount rate, the carrier still obtains the major savings.

There are situations, however, in which the container should be deemed a package. In some instances, for example, the shipper uses the container as a *substitute* for its own packaging. This occurred in *Rosenbruch v. American Export Isbrandtsen Lines, Inc.*,<sup>166</sup> where, absent a container, the household goods would not have been shipped in separate boxes. They would have been shipped in large wooden crates or cartons approximately the size of the metal container that was actually used. In such a situation, where the normal packaging is rendered unnecessary by the metal container and containerization is primarily for the benefit of the shipper, it would be unfair to treat each separately boxed item as a COGSA package.

Thus, regardless of ownership, a container should not be considered a package except when it is used by the shipper as a true substitute for packaging or in other instances when containerization is primarily for the benefit of the shipper.<sup>167</sup> Adherence to this rule would result in the predictability desired by all concerned without discouraging mercantile efficiency on the shipper's part or overlooking the carrier's equities. Although not completely developed, the *Matsushita* approach is a positive and encouraging step toward achieving such a result.

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<sup>166</sup> 1976 A.M.C. 487 (2d Cir. 1976), *discussed in notes 100-107 and accompanying text supra*.

<sup>167</sup> Other instances could conceivably exist in which containerization is primarily for the benefit of the shipper. For example, if a shipper intentionally contracts on a per container basis to obtain a significantly lower rate or rejects the carrier's offer of breakbulk shipment, it might be possible to argue that the container should be considered a package.