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1986]

MARITIME LAW—CUSTOM—CARRIAGE OF GOODS BY SEA ACT
PRECLUDES ENFORCEMENT OF OIL SHIPPING INDUSTRY'S 0.5%
CUSTOMARY TRADE ALLOWANCE

Sun Oil Co. v. M/T Carisle (1985)

In 1936, Congress enacted the Carriage of Goods by Sea Act¹ (COGSA) for the purpose of defining the "rights and liabilities of water carriers and shippers in foreign commerce."² Successor to the Harter Act,³ COGSA was drafted in large part to achieve uniformity⁴ in ocean

1. 46 U.S.C. §§ 1300-1315 (1982).

2. H.R. REP. No. 2218, 74th Cong., 2d Sess. 1 (1936). The Harter Act, precursor to COGSA, addresses the same areas for carriers and shippers engaged in domestic commerce. See 46 U.S.C. §§ 190-196 (1982). For a discussion of the Harter Act, see *infra* note 3.

Originally, maritime common law held a carrier strictly liable for cargo losses in all but exceptional cases. See Crutcher, *The Ocean Bill of Lading—A Study in Fossilization*, 45 TUL. L. REV. 697, 701 (1971). In the mid-1800's, the Supreme Court observed that

[t]he general liability of the carrier, independently of any special agreement, is familiar. He is chargeable as an insurer of the goods, and accountable for any damage or loss that may happen to them in the course of the conveyance, unless arising from inevitable accident,—in other words, the act of God or the public enemy.

New Jersey Steam Navigation Co. v. Merchants' Bank of Boston, 47 U.S. (6 How.) 344, 381 (1848). In addition to losses caused by acts of God or the public enemy, some commentators note that carriers at common law were also not responsible for losses due to an inherent vice in the goods. See 2A E. BENEDICT, BENEDICT ON ADMIRALTY § 11, at 2-1 (rev. 7th ed. 1985); Bradley, *Maritime Contracts on the Western Rivers*, 38 INS. COUNS. L.J. 372, 373 (1971).

Soon, however, carriers acquired superior bargaining power, indicative of which was their practice of writing broad exculpatory clauses into shipping contracts. The clauses excepted the carriers from liability in the event of such contingencies as: theft by any person—whether employed by the carrier or not; mold; mildew; rust; sweat; swelling; explosions; and general negligence of master or crew. Note, *The Carriage of Goods by Sea Act*, 23 VA. L. REV. 590, 595 n.27 (1937) (citing H.R. REP. No. 2218, 74th Cong., 2d Sess. 8 (1936)). See also 2A E. BENEDICT, *supra*, § 11, at 2-2 n.4 ("Them Damaged Cargo Blues") (review of then common exceptions to carrier liability). The clauses eventually became pervasive and broad enough to countermand the strict liability imposed on carriers at common law. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 3-23, at 142 (3d ed. 1975). Gilmore and Black note that "[i]nstead of being absolutely liable, irrespective of negligence, [the carrier] enjoyed an exemption from liability, regardless of negligence, as wide as his bargaining position enabled him to contract for." *Id.* (footnote omitted).

3. 46 U.S.C. §§ 190-196 (1982). Disparities between the American and British judiciaries' willingness to enforce the then prevalent, carrier-oriented exculpatory clauses prompted passage of the Harter Act in 1893. See H.R. REP. No. 2218, 74th Cong., 2d Sess. 7 (1936) (Harter Act passed in response to posture of British courts that liability limiting clauses are valid, enforceable contract rights). While British courts upheld many of the clauses, American courts held them to be void as against public policy. G. GILMORE & C. BLACK, *supra* note 2,

(1221)

§ 3-23, at 142. As a result, when litigation arose, "the accidents of accessibility of courts or amenability to service" would largely determine the outcome. *Id.* Moreover, American carriers were at a great disadvantage in comparison to their British competitors since the British were free to continue contracting themselves out of liability for their negligence. H. BAER, ADMIRALTY LAW OF THE SUPREME COURT § 18-3, at 492-93 (3d ed. 1979). Thus, the Harter Act was Congress' attempt to appease the divergent interests of both shippers and carriers by providing some uniformity in contracts for ocean carriage and by statutorily allocating the risk of loss in a more equitable fashion. *Id.* § 18-3, at 493; G. GILMORE & C. BLACK, *supra* note 2, § 3-24, at 142-43.

The Harter Act made it unlawful for a carrier to include exculpatory clauses relieving it of liability for negligence with respect to the cargo. 46 U.S.C. § 190 (1982). In addition, the Act prohibited clauses that limited a carrier's duty to exercise due diligence with respect to the ship. *Id.* § 191. However, the Harter Act also protected the carriers by providing that if the carrier did exercise due diligence in making the ship "seaworthy," it would be shielded from liability for negligent management or navigation of the ship. *Id.* § 192; *cf.* *May v. Hamburg-Amerikanische Packetfahrt Aktiengesellschaft (The Isis)*, 290 U.S. 333 (1933) (carrier not relieved of liability for negligent navigation because it failed to exercise due diligence in making ship seaworthy—notwithstanding absence of causal connection between loss and unseaworthiness).

4. Notwithstanding the passage of the Harter Act, ocean shipping contracts continued to lack uniformity. 2A E. BENEDICT, *supra* note 2, § 15, at 2-9. While the Harter Act did prohibit some exculpatory clauses, it failed to "establish any positive rules of law." *Id.* As a result, carriers were still able to include exculpatory clauses addressing those areas not expressly covered by the Harter Act. *Id.* See generally A. KNAUTH, THE AMERICAN LAW OF OCEAN BILLS OF LADING 107-19 (3d ed. 1947) (discussion of need for uniformity and American response thereto).

To address this problem, the international maritime community promulgated the Hague Rules in the 1920's. H. BAER, *supra* note 3, § 18-4, at 496. For the text of Hague Rules, see A. KNAUTH, *supra*, at 49-73. For all intents and purposes, the Hague Rules incorporated the Harter Act's provisions for compromise. G. GILMORE & C. BLACK, *supra* note 2, § 3-24, at 143; see also Yancey, *The Carriage of Goods: Hague, COGSA, Visby, and Hamburg*, 57 TUL. L. REV. 1238, 1242 (1983). The net effect of these compromise provisions was that

[t]he shipowner could not contract out the duty to use care to put his vessel in good shape for the voyage, or the duty to care properly for the goods while they were in his hands or aboard. On the other hand, if he did use due care to send a seaworthy vessel on the voyage, he could not be held for the defaults of those he put in charge in regard to running her. The rationale of the last provision is fairly easy to see. The safety of his own vessel was taken to be sufficient spur to the owner to lead him to do what he could to bring it about that the people to whom he entrusted her would use care in her navigation and management.

G. GILMORE & C. BLACK, *supra* note 2, § 3-24, at 143. The Hague Rules were first presented as a set of clauses to be voluntarily included in ocean shipping contracts; nations were then invited to adopt them as law. *Id.* The United States was greatly involved in the promulgation of the Hague Rules. 2A E. BENEDICT, *supra* note 2, § 15 at 2-9 to 2-10. However, until the enactment of COGSA in 1936, the United States did not formally adopt the terms of the Hague Rules and only then in a revised form. *Id.* Still, COGSA can be fairly described as the American statutory adoption of the Hague Rules, and as such, it largely supersedes the Harter Act. H. BAER, *supra* note 3, § 18-4, at 496-97; see also 2A E. BENEDICT, *supra* note 2, § 1 (comparison of COGSA with Hague Rules); A. KNAUTH, *supra*, at 107-19 (discussion of history surrounding promulgation of Hague Rules, leading up to American adoption of hybrid form in COGSA). The

bills of lading.⁵ To that end, COGSA's comprehensive regulatory scheme applies *per se* to all contracts for the ocean carriage of goods between foreign and United States ports.⁶

Harter Act still governs domestic shipping unless the parties stipulate that COGSA will govern the contract. 2A E. BENEDICT, *supra* note 2, § 14, at 2-8. Moreover, since COGSA only covers the period of time when the goods are actually on the ship, the Harter Act still applies to the period prior to delivery of the goods to the carrier and after discharge. *Id.*; *see also* 46 U.S.C. § 1301(e) (1982) (scope of COGSA coverage).

The Harter Act and COGSA are similar in many respects; the differences between them have been characterized as "merely verbal or stylistic." G. GILMORE & C. BLACK, *supra* note 2, § 3-25, at 148 ("[E]xcept for unimportant differences in phraseology, the two Acts come down to much the same thing, as to liabilities which might be incurred before loading or after unloading"). *But see* 2A E. BENEDICT, *supra* note 2, § 16, at 2-12 ("COGSA differs from and improves on the Harter Act . . . in several important respects").

5. In general, a bill of lading "is a receipt for goods shipped on board a vessel, signed by the person who contracts to carry them, or his agent, and stating the terms on which the goods were delivered to and received by the ship." M. NORRIS, *THE LAW OF SEAMEN* § 25:5, at 698 (4th ed. 1985) (footnote omitted). However, a bill of lading can serve three functions: (1) a receipt or acknowledgment by the carrier that it has received the goods for shipment; (2) a negotiable document evidencing title to the goods after they are shipped; and (3) evidence of the contract between the shipper and the carrier for carriage of the goods. G. GILMORE & C. BLACK, *supra* note 2, § 3-1, at 93. *See generally* C. POWERS, *A PRACTICAL GUIDE TO BILLS OF LADING* (1966) (extensive discussion on form and functions of bills of lading).

For purposes of this discussion, the terms "shipping contract," "bill," and "bill of lading" are used interchangeably. However, these terms are not synonymous with the term "charter party." "Charter party" refers to the document describing the "arrangements and contractual engagements entered into when one person . . . takes over the whole of a ship belonging to another." G. GILMORE & C. BLACK, *supra* note 2, § 4-1, at 193. While bills of lading are frequently issued under or concomitantly with a charter party, each represents a separate "contractual document covering the contract of carriage." *Id.* § 3-15, at 125. A charter party is usually the more comprehensive and since it is not subject to the dictates of COGSA, it frequently includes more carrier oriented provisions than those found in a bill of lading. *Id.*

6. 46 U.S.C. § 1312 (1982); *see also id.* § 1300. Section 1300, COGSA's "enacting clause," requires that all of the Act's provisions are to be incorporated into ocean bills of lading. *Id.* The "enacting clause" provides: "Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from the ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter." *Id.* *See also* G. GILMORE & C. BLACK, *supra* note 2, § 3-25, at 145 (each bill of lading for ocean carriage, in or out of United States ports, "is to be read as though COGSA were incorporated by reference").

Parties to domestic carriage, however, may agree to COGSA coverage by express provision in their bill of lading. 46 U.S.C. § 1312 (1982). COGSA's definitional section provides that the term "carriage of goods" applies "from the time when the goods are loaded on to the time when they are discharged from the ship." *Id.* § 1301(e). The Act also provides that coverage before loading and after discharge continues to be governed by the Harter Act. *Id.* § 1311. *See* 46 U.S.C. §§ 190-196 (1982).

The Act categorically defines a carrier's responsibilities,⁷ liabilities⁸ and immunities,⁹ and statutorily prescribes a method for litigating cargo loss or shortage claims.¹⁰ Significantly, the Act expressly forbids any contractual stipulations that purport to eliminate or minimize a carrier's negligence liability.¹¹ COGSA does not, however, forbid the implication of trade customs into the bill of lading, and indeed, for some purposes, the Act expressly relies on their use.¹²

In *Sun Oil Co. v. M/T Carisle*,¹³ the Third Circuit recently considered the question of whether, in light of COGSA, the oil shipping industry's 0.5% customary trade allowance can properly be implied into an ocean bill of lading.¹⁴ The controversial allowance, which relieves the carrier of the responsibility of delivering 0.5% of its cargo, has not been uniformly upheld by those district courts that have addressed the issue.¹⁵

7. 46 U.S.C. § 1303 (1982). For a discussion of the carrier's responsibilities as enumerated in § 1303, see *infra* note 18 and accompanying text.

8. 46 U.S.C. § 1304 (1982).

9. *Id.* § 1304(2).

10. For a discussion of COGSA's scheme for litigating loss or shortage claims, see *infra* notes 21-26 and accompanying text.

11. 46 U.S.C. § 1303(8) (1982). The "[l]imitation of liability for negligence" clause provides in pertinent part:

Any clause, covenant, or agreement . . . 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. . . .

Id. However, COGSA does not preclude the parties from contracting for more stringent standards in favor of the shipper. "A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities . . . provided such . . . [changes are] embodied in the bill of lading." *Id.* § 1305.

12. See, e.g., *id.* § 1310 (bill of lading not prima facie evidence of weight of bulk cargo that can be used against carrier if, under trade custom, weight listed in bill is ascertained by party other than carrier or shipper).

13. 771 F.2d 805 (3d Cir. 1985). The case was heard by Circuit Judges Hunter and Sloviter, and District Judge Mitchell H. Cohen of the United States District Court for the District of New Jersey, sitting by designation. Judge Sloviter wrote the majority opinion for the divided panel while Judge Hunter filed a dissenting opinion.

14. The case was brought to the Third Circuit on appeal from the United States District Court for the Eastern District of Pennsylvania. See *Sun Oil Co. v. M/T Mercedes Maria*, 1983 A.M.C. 718 (E.D. Pa. 1982). For a discussion of the district court's opinion, see *infra* notes 16 & 37-43 and accompanying text.

15. Some district court decisions have upheld the customary trade allowance. See, e.g., *Wesco Int'l v. M/V Tide Crown*, 1985 A.M.C. 189, 201 (S.D. Tex. 1983) (crude carrier only liable for shortages in excess of 0.5% due to "internationally recognized" 0.5% oil shipping industry loss allowance); *Palmco, Inc. v. American Presidential Lines*, 1978 A.M.C. 1715, 1722 (D. Or. 1978) (0.5% "tare" allowance not in conflict with COGSA since 0.5% bulk oil "tare" is reasonable notwithstanding exercise of due diligence); cf. *Northeast Petroleum Corp. v. S.S. Prairie Grove*, 1977 A.M.C. 2139 (S.D.N.Y. 1977) (though shipper's shortage claim rejected on other grounds, shortage was, in any event, less than 0.5% customarily allowed).

In reversing the decision of the United States District Court for the Eastern District of Pennsylvania in *Sun Oil Co. v. M/T Mercedes Maria*,¹⁶ the Third Circuit concluded that the 0.5% allowance is inconsistent with both the policy underlying COGSA and its express statutory provisions.¹⁷

Other district courts have refused to recognize the allowance on a variety of grounds. *See, e.g.*, *Amoco Oil Co. v. M/V Lorenzo Halcoussi*, 1984 A.M.C. 1608, 1615-16 (E.D. La. 1983) (insufficient evidence to show that 0.5% industry-wide trade allowance part of contract for shipment of crude; instead, 0.225% allowance recognized); *Kerr-McGee Ref. Corp. v. M/V La Libertad*, 529 F. Supp. 78, 85 (S.D.N.Y. 1981) (although oil shipping industry views shortages of less than 0.5% as *de minimis* in claim settlements and arbitrations, where charter party fails to provide for shortages, allowance is unenforceable); *Esso Nederland v. M.T. Trade Fortitude*, 1977 A.M.C. 2144, 2148 (S.D.N.Y.) (0.5% trade allowance not recognized because not provided for in bill of lading or charter party), *aff'd mem.*, 573 F.2d 1294 (2d Cir. 1977).

16. *Sun Oil Co. v. M/T Mercedes Maria*, 1983 A.M.C. 718 (E.D. Pa. 1982). A three-judge panel consisting of District Judges Ditter, Shapiro, and Weiner heard the case. *Id.* Judge Weiner wrote the opinion for the unanimous panel. *Id.* at 719. The district court held that the 0.5% allowance is valid, enforceable, and consistent with COGSA. *Id.* at 720-27.

In support of its holding, the district court found that the 0.5% allowance had "developed as a reasonable response to the inherent difficulties in measurement and carriage of bulk oil cargoes." *Id.* at 720. With respect to the measurement factor, the court concluded that, although advancements have been made in measurement techniques, measurement "is better characterized as an art [rather] than as an exact science." *Id.*

In terms of possible conflict between the trade custom and § 1303(8) of COGSA, which prohibits contractual reduction of a carrier's negligence liability, the court concluded that § 1303(8) "[c]ertainly . . . does not act as a bar to recognition and application of [a] customary trade allowance." *Id.* at 721. Instead, reasoned the court, the custom affects the shipper's ability to make out a *prima facie* case, "for there is no non-delivery if the cargo is *not contractually obligated to be delivered*." *Id.* (emphasis in original). Moreover, since one of the reasons for the existence of the trade allowance is the "[inherent] inability to deliver 100% of the cargo," enforcement of the custom is consistent with the due diligence requirement of COGSA. *Id.* at 722. Finally, the court noted that recognition of the custom is consistent with § 1304(2)(m) of COGSA, which absolves carriers for losses due to an "inherent defect, quality or vice of the goods," because it is the very inherent defects and vices of crude oil that prompted recognition of the custom in the first place. *Id.* (citing 46 U.S.C. § 1304(2)(m) (1982)).

For a discussion of the Third Circuit's assessment of the district court's analysis, see *infra* notes 45-46, 56 & 71-72 and accompanying text. The district court's opinion is also addressed in a recent law review casenote. *See Note, COGSA: Petroleum Shortage Transit Allowance: Sun Oil Company v. The Mercedes Maria*, 14 J. MAR. L. & COM. 269 (1983).

17. 771 F.2d at 816. For a discussion of the Third Circuit's analysis, see *infra* notes 44-72 and accompanying text. For a critical analysis of the Third Circuit's holding, see *infra* notes 80-114 and accompanying text.

Sun Oil was one of four cases addressing the issue of the existence and applicability of the 0.5% customary trade allowance. The other three cases were: *Sun Oil Co. v. M/T Mercedes Maria*, No. 80-4862; *Sun Oil Co. v. M/T Mercedes Maria*, No. 81-1033; and *Sun Oil Co. v. Robina Shipping*, No. 81-1083, all filed in the Eastern District of Pennsylvania. 771 F.2d at 807 n.3. The cases were consolidated, pursuant to stipulation, and after an evidentiary hearing on this

Under COGSA, the carrier has a duty to exercise due diligence with respect to the cargo as well as to the ship itself.¹⁸ The Act explicitly absolves a carrier for losses due to a variety of causes, including, *inter alia*, “[w]astage in bulk or weight or any other loss or damage arising from [an] inherent defect, quality, or vice of the goods.”¹⁹ In the event

particular issue, the cases were then severed and returned to individual judges for disposition. *Id.* at 807.

18. 46 U.S.C. § 1303(1)-(2) (1982). With regard to the cargo, the carrier has a general duty to “properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.” *Id.* § 1303(2). The carrier’s duty to the ship is one of seaworthiness. *Id.* § 1303(1). The Act provides that

[t]he carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

- (a) Make the ship seaworthy;
- (b) Properly man, equip, and supply the ship;
- (c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

Id. In the event that unseaworthiness does cause a loss of cargo, the shipper can only recover if the carrier’s lack of due diligence caused the particular condition that made the vessel unseaworthy. *Id.* § 1304(1). The Act further provides that the burden of proving that due diligence was indeed exercised is “on the carrier or other persons claiming exemption under this section.” *Id.* For a discussion of the general concept of due diligence with respect to vessels, equipment, and crew, see Villareal, *The Concept of Due Diligence in Maritime Law*, 2 J. MAR. L. & COM. 763, 767-77 (1971).

19. 46 U.S.C. § 1304(2)(m) (1982). The rights and immunities section also provides that:

[n]either the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

- (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;
- (b) Fire, unless caused by the actual fault or privity of the carrier;
- (c) Perils, dangers, and accidents of the sea or other navigable waters;
- (d) Act of God;
- (e) Act of war;
- (f) Act of public enemies;
- (g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;
- (h) Quarantine restrictions;
- (i) Act or omission of the shipper or owner of the goods, his agent or representative;
- (j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, that nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier’s own acts;
- (k) Riots and civil commotions;
- (l) Saving or attempting to save life or property at sea;
-
- (n) Insufficiency of packing;
- (o) Insufficiency or inadequacy of marks;
- (p) Latent defects not discoverable by due diligence; . . .

of cargo loss or damage, the shipper is required to promptly notify the carrier and initiate suit within one year of the actual or anticipated date of delivery.²⁰

In order to make out a prima facie case, the shipper must demonstrate that (1) the cargo was delivered to the carrier in good condition, and (2) there was damage or a shortage upon arrival at the port of destination.²¹ Once a shipper has made out a prima facie case, the burden

Id. § 1304(2)(a)-(l), (n)-(p). In addition, the Act includes a catchall clause that shields the carrier from liability for losses due to

[a]ny other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

Id. § 1304(2)(q). As one commentator points out, the immunities enumerated in § 1304 are arguably inconsistent with the general duty mandated in § 1303(2) with respect to cargo. See G. GILMORE & C. BLACK, *supra* note 2, § 3-28, at 155 (though immunities enumerated in § 1304(2) may be inconsistent with duty to cargo mandated in § 1303(2), "the [two] sections must be read together").

20. 46 U.S.C. § 1303(6) (1982). Section 1303(6) provides in pertinent part: Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof . . . , such removal shall be prima facie evidence of [proper] delivery . . . of the goods as described in the bill of lading. [However], [i]f the loss or damage is not apparent, the notice must be given within three days of the delivery.

. . .

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

Id. The notice requirement is waived if "at the time of their receipt [the goods are] the subject of joint survey or inspection." *Id.* Moreover, even if notice is required and not given, that fact will not preclude the shipper from bringing suit if it does so within the one year period. *Id.*

21. *Nissho-Iwai Co. v. M/T Stolt Lion*, 719 F.2d 34 (2d Cir. 1983); *Terman Foods v. Omega Lines*, 707 F.2d 1225 (11th Cir. 1983); *Vana Trading Co. v. S.S. "Mette SKOU"*, 556 F.2d 100 (2d Cir.), *cert. denied*, 434 U.S. 892 (1977); *United States v. Lykes Bros. S.S. Co.*, 511 F.2d 218 (5th Cir. 1975).

A bill of lading is prima facie evidence that a carrier received the quantity of goods described therein. 46 U.S.C. § 1303(4) (1982); see, e.g., *Westway Coffee Corp. v. M.V. Netuno*, 528 F. Supp. 113 (S.D.N.Y. 1981), *aff'd*, 675 F.2d 30, 32 (2d Cir. 1982) (bill of lading is prima facie evidence of quantity received by carrier notwithstanding such notations as "said to weigh," "shipper's load and count," or "contents of packages are shipper's declarations"); *George F. Pettinos, Inc. v. American Export Lines*, 68 F. Supp. 759, 764 (E.D. Pa. 1946) (same), *aff'd*, 159 F.2d 247 (3d Cir. 1947). Moreover, a "clean" bill, i.e., one without notation of damage, creates a rebuttable presumption that the goods were delivered to the carrier in good condition and thus satisfies the initial element of the shipper's case. *Emmco Ins. Co. v. Wallenius Caribbean Line*, 492 F.2d 508, 512-13 (5th Cir. 1974); *Van Muching [sic] & Co. v. M/V Star Mindanao*, 630 F. Supp. 433, 439 (E.D. Pa. 1985).

shifts to the carrier to demonstrate that it exercised due diligence or that the source of the loss falls within one of the immunities enumerated in the Act.²² Should the carrier successfully claim one of the specified exceptions, the burden shifts back to the shipper to prove that the loss was at least partly caused by the carrier's negligence.²³ If, on the other hand, the carrier's evidence shows that the loss was caused by either the unseaworthiness of the vessel or a cause covered by the "catchall" exception,²⁴ the burden of proof remains with the carrier; if unable to meet the burden, the carrier is responsible for the entire loss.²⁵ Thus, with few exceptions under COGSA's complex liability scheme, it is the carrier who "sooner or later [has] the burden of establishing his own freedom from fault."²⁶

The *Sun Oil* case arose as a result of a charter party contract entered into by Sun Oil Company of Pennsylvania, Sun International Ltd. (Sun) and the M/T Carisle, whereby Sun chartered the M/T Carisle to carry a shipment of crude oil from Tunisia to Marcus Hook, Pennsylvania.²⁷ The vessel left Tunisia on October 13, 1980, carrying 540,401 barrels of crude.²⁸ Upon arrival in Pennsylvania on October 31, the vessel had only 537,566 barrels on board.²⁹ Consequently, Sun filed suit for the

22. 2A E. BENEDICT, *supra* note 2, § 56, at 6-17; see 46 U.S.C. § 1303(1)-(2) (1982) (requiring that carrier exercise due diligence with respect to ship and cargo); *id.* § 1304(2) (specifying circumstances in which carrier is immune from liability).

23. G. GILMORE & C. BLACK, *supra* note 2, § 3-43, at 184.

24. 46 U.S.C. § 1304(2)(q) (1982). For the text of § 1304(2)(q), see *supra* note 19.

25. G. GILMORE & C. BLACK, *supra* note 2, § 3-43, at 184-85.

26. *Id.* at 185. See, e.g., *Nissho-Iwai Co. v. M/T Stolt Lion*, 719 F.2d 34, 38 (2d Cir. 1983) (shipper not required to prove that carrier was at fault or to explain how damage may have occurred).

The complexity of COGSA's system for allocating burden of proof has been acknowledged with some consternation by at least two courts. See, e.g., *Quaker Oats Co. v. M/V Torvanger*, 734 F.2d 238, 240 (5th Cir. 1984) ("To enforce their respective rights under the Act, litigants must engage in the ping-pong game of burden shifting mandated by sections 3 and 4 [46 U.S.C. §§ 1303 and 1304]") (quoting *Nitram, Inc. v. Cretan Life*, 599 F.2d 1359, 1373 (5th Cir. 1979)), *cert. denied*, 105 S. Ct. 959 (1985). See generally Comment, *Cargo Damage at Sea: The Ship's Liability*, 27 TEX. L. REV. 525, 529-37 (1949) (discussing burden of proof problems under COGSA).

27. 771 F.2d at 807. The parties' prior course of dealing, if any, is not discussed in either the district court or Third Circuit opinions.

28. *Id.*

29. *Id.* This represents a "ullage-to-ullage" loss, i.e., the difference between a measurement taken in the ship's tank after loading and a subsequent measurement before unloading. *Id.* at 811 n.11. COGSA, by its terms, only covers the cargo while it is on board ship. See 46 U.S.C. § 1301(e) (1982). However, as a general matter, the quantity of oil is measured four times: (A) on shore, (B) on the ship after loading, (C) on the ship prior to unloading, and (D) on shore after unloading. 771 F.2d at 811 n.11.

The district court pointed out that "ullaging" (measuring the amount of oil in the ship's tanks) involves dropping a tape measure into the tank and measur-

2,835 barrel shortage.³⁰

As an affirmative defense, the defendants successfully argued that the industry's customary trade allowance of 0.5% was an implied term in the contract.³¹ As such, the defendants reasoned that they were not liable for unexplained losses of less than 0.5%; indeed, unless the loss could be attributed to a specific known cause, the defendants maintained that they were only obligated to deliver 99.5% of the oil.³²

ing the distance from the top of the oil to the top of the tank to see the degree to which the tank is *not* full. *Mercedes Maria*, 1983 A.M.C. at 720. The district court went on to state that precise measurement by this method is "difficult, if not impossible" since the ship may be rolling or not level in the water. *Id.* Moreover, added the court, temperature changes, human error, and physical changes in the tanks themselves may all skew measurements. *Id.* Correction tables and temperature conversion tables do not completely rectify these measurement problems. *Id.*

In *Sun Oil*, measurements taken at the required points differed significantly: 540,068 barrels at point (A), 540,401 at point (B), 537,566 at point (C), and 535,646 at point (D). Brief for Appellee at 3 n.5, *Sun Oil Co. v. M/T Carisle*, 771 F.2d 805 (3d Cir. 1985).

30. 771 F.2d at 807. Sun's complaint sounded in admiralty against the M/T Carisle *in rem* and against the time charter owner, Ore Sea Transport, S.A. of Panama, *in personam*. *Id.* The district court dismissed Ore Sea Transport with prejudice pursuant to stipulation; thus, Ore Sea Transport was not a party to the Third Circuit appeal. *Id.* n.1. Sun did, however, later amend its complaint to include the owner of the ship, *in personam*. *Id.* at 807.

31. *Id.* The district court granted the defendants' motions for summary judgment. *Id.* As a result, it awarded Sun damages for 133 barrels of oil, i.e., the amount by which the total loss exceeded 0.5% of the cargo. *Id.* at 807-08.

Commercial law recognizes that, unless contractually eliminated, usages of trade become part of the parties' contract. *See, e.g.*, U.C.C. § 2-202(a) (1976). The Code provides that agreements "are to be read on the assumption that . . . usages of trade were taken for granted when the document was phrased. Unless carefully negated they have become an element of the meaning of the words." *Id.* comment 2; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 222(3) (1981) ("[u]nless otherwise agreed, a usage of trade . . . gives meaning to or supplements or qualifies [the parties'] agreement").

32. 771 F.2d at 807. If, for example, the loss was due to a collision with another vessel, the trade allowance would be inapplicable. *Id.* Cf. G. GILMORE & C. BLACK, *supra* note 2, § 3-39 at 173-76 (discussing allocation of liability for loss or damage in "both-to-blame" collisions).

In its brief, the defendant carrier maintained that the controlling issue is "not what is in the four corners of a statute . . . or contract . . . but what the parties to a transportation agreement necessarily had to consider in completing the arrangements made to move a bulk oil cargo." Brief for Appellee at 2-3, *Sun Oil*. The carrier pointed out that while COGSA employs the term "discharge" and the charter party uses "deliver," neither term is defined in the statute or contracts. *Id.* at vii n.1, 3. Accordingly, argued the carrier, "discharge" and "deliver" "must take on their generally understood and accepted meaning" which, in the oil shipping industry, "[was] never intended to have a precise correspondence between the amount loaded and the amount discharged." *Id.* at 3-4. After citing a number of circumstances in which custom is utilized in the oil shipping industry, the carrier concluded that the 0.5% allowance is simply another example, to wit, a customary definition of the term "deliver," necessitated by the technological difficulties inherent in measuring and transporting bulk crude. *Id.* at 6-8, 21-22.

Sun challenged the validity of the custom,³³ arguing that even if recognized by the oil shipping industry, the custom violates the provisions of COGSA by affording the carrier a 0.5% *carte blanche* exoneration from liability.³⁴ Sun also argued that, in addition to violating COGSA's mandate against limiting a carrier's negligence liability,³⁵ enforcing the custom would alter COGSA's scheme for allocating the burdens of proof.³⁶

The district court employed principals of the Uniform Commercial Code³⁷ and Restatement (Second) of Contracts³⁸ in making its factual

33. 771 F.2d at 807. At least one commentator also denies the validity of the 0.5% allowance. See Thomajan, *Tanker Problems in Arbitration: The 0.5% Allowance*, 14 J. MAR. L. & COM. 225, 241 (1983) (0.5% allowance "lacks the certainty and uniformity necessary to give it legally binding effect as a custom"). In any event, the allowance has enjoyed more recognition in arbitrated rather than litigated bulk oil shortage disputes. Compare *Melanol Corp. v. London and Overseas Freighters, S.M.A. No. 1396* at 12 (N.Y. Arb. 1979) (0.5% allowance "has almost universally been applied by arbitration panels, thereby giving it the full effect of charter party law") and *Excomm Ltd. v. Sun Oil Trading, S.M.A. No. 1348* at 9 (N.Y. Arb. 1978) ("allowance has been in effect for so many years it may be considered as a custom of the trade having the full force of law") with *Kerr-McGee Ref. Corp. v. M/V La Libertad*, 529 F. Supp. 78, 85 (S.D.N.Y. 1981) (though bulk oil shipping industry recognizes 0.5% allowance in claim settlements and arbitrations, allowance is unenforceable absent express provision in charter party).

For a discussion of the district court's analysis, which concluded that the allowance was indeed a custom, see *infra* notes 37-41 and accompanying text. For a discussion of the Third Circuit's adoption of the district court's factual determination, see *infra* note 45 and accompanying text.

34. 771 F.2d at 811. For a discussion of the Third Circuit's analysis of this argument, see *infra* notes 44-47 and accompanying text.

35. 771 F.2d at 808. See 46 U.S.C. § 1303(8) (1982) (expressly prohibiting contractual elimination or limitation of carrier's negligence liability). For the text of § 1303(8), see *supra* note 11.

36. Reply Brief for Appellant at 8-9, *Sun Oil*. For an explanation of how COGSA allocates the burden of proof, see *supra* notes 21-26 and accompanying text. For a discussion of the Third Circuit's response to this argument, see *infra* note 55 and accompanying text.

37. Section 1-205 of the Uniform Commercial Code defines usage of trade as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts." U.C.C. § 1-205(2) (1976). The Code further provides that "any usage of trade in the vocation or trade in which [the parties] are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement." *Id.* § 1-205(3). Finally, in its parol evidence section, the U.C.C. provides that the particular terms embodied in a contract that are "intended by the parties [to be] a final expression of their agreement . . . may be explained or supplemented by . . . usage of trade." *Id.* § 202(a).

38. The *Restatement (Second) of Contracts* defines usage of trade as "a usage having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to a particular agreement." RESTATEMENT (SECOND) OF CONTRACTS § 222(1) (1981). The Restatement point of view further mirrors the Uniform Commercial Code position that both the exist-

determinations that the 0.5% trade custom did exist and that the custom impliedly supplemented contracts for carriage of bulk crude.³⁹ The court pointed out that although commercial law principles do not govern in a federal maritime action, their use by analogy was appropriate in the instant case, which the district court characterized as “essentially a commercial dispute.”⁴⁰ The court had “little difficulty” in concluding that there was both a “regularity of observance” of the 0.5% allowance and a “concurrent justified expectation” in the industry that the allowance would be observed.⁴¹ In finding that disavowal of the custom is a matter of contractual negotiation, the court relied on evidence suggesting that Sun had attempted to negotiate a 0.25% allowance as an express term in the charter party contract.⁴² The court concluded that enforcement of the custom did not conflict with COGSA since, in light of the allowance, Sun would be unable to make out a prima facie case of nondelivery for an amount less than 0.5%.⁴³

On appeal, the Third Circuit in *Sun Oil* began its discussion by focusing on the applicability of the 0.5% customary trade allowance to transactions covered by COGSA.⁴⁴ With some reservation, the court ac-

ence and scope of a trade usage are questions of fact. *Id.* § 222(2). Finally, the Restatement is also in accord with the Uniform Commercial Code in stating that trade usages are part of the agreement. *Compare id.* § 222(3) (“[u]nless otherwise agreed”) with U.C.C. § 2-202 comment 2 (1976) (“[u]nless carefully negated”).

39. *Mercedes Maria*, 1983 A.M.C. at 722-24.

40. *Id.* at 723. *But cf.* U.C.C. § 7-103 (1976). Section 7-103 states: “[t]o the extent that any treaty or statute of the United States, regulatory statute of this State or tariff, classification or regulation filed or issued pursuant thereto is applicable, the provisions of this Article are subject thereto.” *Id.* Thus, in light of COGSA, the district court’s adoption of the Uniform Commercial Code in the instant context is arguably inappropriate. *See* Reply Brief for Appellant at 23, *Sun Oil*.

In its analysis, the Third Circuit acquiesced to the district court’s use of commercial law principles. *See* 771 F.2d at 811-12. However, the court emphasized that the district court’s finding that the trade allowance should be an implied term in the contract notwithstanding COGSA was subject to its plenary review. *Id.* at 812.

41. *Mercedes Maria*, 1983 A.M.C. at 724. The court cited the continued inherent difficulties in measuring and transporting oil, as well as the illusive properties of oil itself, as evidence of the establishment and continued viability of the custom. *Id.*

42. *Id.* at 725. Although acknowledging that other inferences might be drawn, the court reasoned that Sun’s efforts to negotiate a 0.25% allowance were made in an attempt to supplant the 0.5% allowance that already existed “unless otherwise expressly bargained for.” *Id.* In addition, the court refused to consider Sun’s assertion that 0.5% is a “price of peace” figure employed in the industry to settle short delivery claims. *Id.* n.2.

43. *Id.* at 721, 726-27. For a discussion of the requirements of a prima facie case for cargo loss under COGSA, see *supra* note 21 and accompanying text. For a discussion of the Third Circuit’s analysis of the burden of proof issue, see *infra* notes 49-55 and accompanying text.

44. 771 F.2d at 811.

cepted the district court's factual finding that the oil shipping industry recognized a 0.5% customary trade allowance.⁴⁵ The court noted, however, that in light of the dramatic increases in both the price of crude and the size of tankers, shippers were now more inclined to question the validity of the previously accepted 0.5% allowance.⁴⁶ The court concluded that a determination of whether the 0.5% trade usage was enforceable notwithstanding COGSA must turn on the history, underlying policy, and construction of the Act.⁴⁷

After citing to the district courts that have had an opportunity to consider the issue,⁴⁸ the Third Circuit assessed the impact that enforc-

45. *Id.* Although the court expressly noted that it was not concluding that the factual finding was "clearly erroneous," it pointed out that Sun had raised "substantial challenges to the qualifications of all three [expert witnesses]" who testified for the carrier that there is a prevailing 0.5% customary allowance. *Id.* n.12. The court also stated that the force of the experts' testimony had been "significantly weakened" by cross examination and rebuttal witnesses. *Id.* Finally, the court alluded to Sun's steadfast contentions that a custom neither exists nor is recognized in the industry. *Id.* at 809 n.7, 811 n.12.

46. *Id.* at 812. The court cited figures presented in the *amicus curiae* brief of Koch Industries, suggesting that a 0.5% loss today might cost \$325,000 as compared to \$2,500 in the 1960's. *Id.*; see also Thomajan, *supra* note 33, at 226 n.3 (comparing value of 0.5% today with same loss in 1880's).

47. 771 F.2d at 812. The court stated that, absent consideration of these factors, the district court's conclusion that the trade allowance was not inconsistent with COGSA, since it is an implied term of the contract, "hardly advances the analysis." *Id.* For an account of the legislative history behind the passage of COGSA, see H.R. REP. No. 2218, 74th Cong., 2d Sess. 4-6 (1936).

48. 771 F.2d at 812. The court pointed out that some district courts have refused to enforce the allowance because it was not included in the charter party or bill of lading. *Id.* (citing *Amoco Oil Co. v. M/V Lorenzo Halcoussi*, 1984 A.M.C. 1608 (E.D. La. 1983); *Kerr-McGee Ref. Corp. v. M/V La Libertad*, 529 F. Supp. 78 (S.D.N.Y. 1981); *Esso Nederland v. M.T. Trade Fortitude*, 1977 A.M.C. 2144 (S.D.N.Y.), *aff'd mem.*, 573 F.2d 1294 (2d Cir. 1977)). The court in *Esso* rejected the carrier's argument that the 0.5% allowance should be enforced because "[n]either the bill of lading nor the charter party makes reference to any such allowance, and . . . [t]he fact that an allowance may be used in settlement of cargo disputes does not entail that it should be treated as a rule of law." *Esso Nederland*, 1977 A.M.C. at 2148.

The court further noted that other district courts have honored the allowance without considering its potential conflict with COGSA. 771 F.2d at 812. See, e.g., *Wesco Int'l v. M/V Tide Crown*, 1985 A.M.C. 189, 201 (S.D. Tex. 1983) (0.5% allowance upheld where shipper "fail[s] to present any evidence to suggest that some lesser percentage should apply"). However, the Third Circuit pointed to one case where the district court both honored the allowance and ruled it to be consistent with COGSA. 771 F.2d at 812 (citing *Palmco, Inc. v. American Presidential Lines*, 1978 A.M.C. 1715 (D. Or. 1978)). *Palmco* involved multiple shipments of crude palm oil where the shipper claimed that shortages arose due to the unseaworthiness of the carrier's ships. *Palmco*, 1978 A.M.C. at 1716-17. But after finding that the shipper had made out a prima facie case in accordance with COGSA, the *Palmco* court concluded that the carrier had successfully rebutted it by proving that 0.5% of the loss was normal and to be expected. *Id.* at 1722. The court stated that "the carrier is not an insurer of the cargo [since] COGSA imposes liability only if the carrier fails to exercise due diligence." *Id.* (citing 46 U.S.C. § 1304(1)).

ing the custom would have on the allocation of burdens of proof.⁴⁹ To reiterate, a prima facie case for cargo loss under COGSA requires delivery of a specified amount to the carrier and subsequent short delivery by the carrier at destination.⁵⁰ Once a shipper establishes a prima facie case, the burden shifts to the carrier to demonstrate that it exercised due diligence to prevent the loss,⁵¹ or that the loss is attributable to one of the statutorily excepted causes.⁵² If the 0.5% trade usage was enforced, noted the court, a carrier would rely on the trade usage as a safe harbor to escape liability.⁵³ The court noted further that such a scenario would, in effect, alleviate a carrier's burden to rebut the prima facie case prescribed by COGSA.⁵⁴ Hence, the court opined that a construction affording a safe harbor in the form of the 0.5% trade usage would offend the express policy of COGSA's statutory scheme, since the Act "places the risk of unexplained losses on the carrier."⁵⁵

For a list of other relevant district court cases, see *supra* note 15.

49. 771 F.2d at 812-13. For an extensive discussion enumerating the burdens of proof mandated by COGSA in litigating a cargo shortage claim, see *supra* notes 21-26 and accompanying text.

50. 771 F.2d at 810 (citing *Quaker Oats Co. v. M/V Torvanger*, 734 F.2d 238, 240 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 959 (1985)). The court pointed out that enforcement of the 0.5% allowance would have no effect on this stage of the COGSA mandated litigation scheme. 771 F.2d at 812.

COGSA governs only from the time the goods are loaded onto the vessel to the time when they are unloaded at the point of destination. 46 U.S.C. § 1301(e). Accordingly, any loss that, for example, would be attributable to retention in the pumping lines is irrelevant for the purpose of assessing liability under COGSA. See, e.g., Reply Brief for appellant at 2-3, *Sun Oil*.

51. See 46 U.S.C. § 1304(1) (1982).

52. See *id.* § 1304(2)(a)-(p). For the text of § 1304(2), see *supra* note 19.

53. 771 F.2d at 813.

54. *Id.* The court pointed out that the M/T *Carisle* "offered no evidence as to the cause of loss, existence of a statutory exception, or its exercise of due diligence." *Id.*

55. *Id.* The court found that "it is clear that the effect of enforcing the trade custom alters the statutorily prescribed method of litigating claims. The district court placed on the shipper the burden of proving that some specific cause, such as carrier's negligence, was responsible for the loss, rather than following COGSA's scheme." *Id.*; see also *Thomajan*, *supra* note 33, at 227 ("COGSA precludes reference to any predetermined allowance and places the burden squarely on the carrier to establish the extent of any exemption"); cf. *GILMORE & C. BLACK*, *supra* note 2, § 3-43, at 185 (carrier has "burden of explaining [the] loss . . . in almost all cases in which [it] has not . . . demonstrated that at least a part of the fault lies with somebody else"). For a discussion of the policy underlying COGSA that seeks to avoid a carrier's excessive use of exculpatory provisions, see *supra* notes 3-4 and accompanying text.

The court added that it would be difficult, if not impossible, for the shipper to sustain the burden of demonstrating the carrier's liability since the carrier is likely to have control over the necessary evidence. 771 F.2d at 813. Under COGSA, the carrier's escape from negligence liability "depend[s] upon [it] sustaining the burden of proving that the loss . . . resulted from a cause without the actual fault or privity of the carrier or the fault or neglect of [its] agents." *Id.* (quoting H.R. REP. No. 2218, 74th Cong., 2d Sess. 8-9 (1936)) (emphasis in original). The burden of proof COGSA places on the carrier is, concluded the

Contrary to the district court's conclusion, the Third Circuit found that application of the custom is not a contractual matter amenable to negotiation by the parties.⁵⁶ In addition, the court noted that COGSA's section 1303(8), prohibiting exculpatory clauses, has been broadly construed by several courts.⁵⁷ The court approved, for example, the decision of the Second Circuit in *Indussa Corp. v. S.S. Ranborg*,⁵⁸ which held that a jurisdictional clause requiring a shipper to litigate in a foreign jurisdiction violated COGSA's prohibition against contractual limitation of liability.⁵⁹ In *Indussa*, the Second Circuit reasoned that the jurisdictional clause "might lessen the carrier's liability" and COGSA "can well be read as covering a potential [as well as] a demonstrable lessening of liability."⁶⁰ The Third Circuit viewed the *Indussa* court's language as an

court, "a major weapon in the shipper's arsenal." 771 F.2d at 813 (quoting Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer, 422 F.2d 7, 16 (2d Cir. 1969), cert. denied, 397 U.S. 964 (1970)).

56. 771 F.2d at 813-15. The district court opined that "[s]hould the 0.5% customary trade allowance be unacceptable to carriers or charterers, alternative arrangements surely may be sought at the time agreements between them are made and charter parties executed." *Mercedes Maria*, 1983 A.M.C. at 727. Considered apart from any possible conflict with COGSA, this conclusion is consistent with general principles of commercial law. See RESTATEMENT (SECOND) OF CONTRACTS § 222(3) (1981) ("[u]nless otherwise agreed," usage of trade gives meaning, supplements, or qualifies agreements); U.C.C. § 2-202 comment 2 (1976) (usage of trade may be excised from agreement if "carefully negated").

However, the Third Circuit pointed out that judicial sanctioning of such freedom of contract in the instant context would frustrate both the express provisions and underlying policy of COGSA. 771 F.2d at 815. Moreover, added the court, if the custom is enforced, carriers will have "no incentive . . . to negotiate a lower figure for claims settlement purposes even in the face of markedly improved technology to measure and discharge oil." *Id.* The court also referred to the oft quoted statement of Gilmore and Black that "COGSA allows a freedom of contracting out of its terms, but only in the direction of increasing the shipowner's liabilities, and never in the direction of diminishing them." 771 F.2d at 813 (quoting G. GILMORE & C. BLACK, *supra* note 2, § 3-45, at 145 (emphasis in original)).

57. *Id.* at 813-14; see, e.g., *United States v. Atlantic Mut. Ins. Co.*, 343 U.S. 236, 239-42 (1952) ("both-to-blame" clause in bill of lading stipulating that shipper indemnify carrier for carrier's losses due to recovery by noncarrying ship void as per COGSA); *Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer*, 422 F.2d 7, 16 (2d Cir. 1969) (clause in bill of lading absolving carrier from liability for damage to goods carried on deck void as per COGSA § 1303(8)), cert. denied, 397 U.S. 964 (1970).

58. 771 F.2d at 814 (citing *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967) (en banc)).

59. *Indussa*, 377 F.2d at 204. In *Indussa*, plaintiff *Indussa Corp.* was consignee for a shipment of nails and barbed wire carried by defendant carrier. *Id.* at 200. The bill of lading, governed by COGSA, contained a clause requiring disputes to be settled in Norway—the carrier's principal place of business. *Id.* at 201. When the goods arrived damaged by rust, *Indussa Corp.* brought a libel *in rem* action against the carrier in the District Court for the Southern District of New York. *Id.* The district court upheld the jurisdictional clause and declined jurisdiction. *Id.* at 200.

60. *Id.* at 203-04 (emphasis in original).

appropriate construction of COGSA's strong policy against limiting a carrier's negligence liability, and thus concluded that section 1303(8) is the mechanism by which the Act's policy should be enforced.⁶¹

The Third Circuit next addressed the carrier's argument that, due to the inherent qualities of crude oil and the technological problems associated with its measurement, it would be unreasonable to require a 100% delivery.⁶² While acknowledging the difficulties peculiar to the transport and measurement of oil, the court pointed out that COGSA anticipates these problems with its "inherent vice" exception.⁶³ This exception provides for a carrier's exculpation if the loss should "aris[e] from [an] inherent defect, quality, or vice of the goods."⁶⁴ In addition,

61. 771 F.2d at 814 (citing A. KNAUTH, *supra* note 4, at 137; G. GILMORE & C. BLACK, *supra* note 2, § 3-46, at 189 n.156). Gilmore & Black state that § 3(8) is in a sense the key to the Act, for it assures that the cargo interest will receive the broad benefits granted to it without gradual erosion by carefully contrived clauses in the bills of lading drawn up by carriers in concert. The only way it can fulfil this function is by being construed to mean what it says, without too great attention to arguments based on a 'convenience' which usually turns out to be carrier's convenience.

G. GILMORE & C. BLACK, *supra* note 2, § 3-46, at 189 n.156. Another commentator points out that the protection afforded by § 1303(8) is often emphasized by the insertion of a "clause paramount" proviso, i.e., a stipulation that the parties' rights and liabilities will be governed by COGSA. See 2A E. BENEDICT, *supra* note 2, § 43, at 5-3.

62. 771 F.2d at 815 (citing Brief for Appellee at 4-5, *Sun Oil*). The measurement problems include: (1) the imprecision of the very process of measurement on board ("ullaging"), (2) distorted readings due to the vessel not being level in the water, (3) human error, (4) fluctuations in the dimensions of the cargo holds due to a variety of reasons and (5) fluctuations in the volume of oil as a result of changing temperatures. *Mercedes Maria*, 1983 A.M.C. at 720. There is also the likelihood that some of the crude will be lost in the process due to evaporation, clingage, settling, and sedimentation. *Id.* at 720-21; see also Thomajan, *supra* note 33, at 230-37 (discussion of arbitration cases, several of which acknowledge inevitable loss and/or inherent vice difficulties).

63. 771 F.2d at 815; see 46 U.S.C. § 1304(2)(m) (1982). In addition to its use in cases involving shipment of petroleum products, COGSA's inherent vice exception has been invoked with respect to a variety of other cargoes. See, e.g., *Quaker Oats Co. v. M/V Torvanger*, 734 F.2d 238 (5th Cir. 1984) (shipment of chemical tetrahydrofuran alleged to form peroxides when exposed to oxygen), *cert. denied*, 105 S. Ct. 959 (1985); *Caemint Food, Inc. v. Brasileiro*, 647 F.2d 347 (2d Cir. 1981) (mold damage alleged to be inherent vice of canned beef); *Roman Crest Foods, Inc. v. S.S. Delta Columbia Ex S.S. Santa Clara*, 574 F. Supp. 440 (S.D.N.Y. 1983) (spoilage of fruit held to be due to inherent vice of cargo).

Regardless of the type of cargo, in order to claim the benefit of the "inherent vice" exception, the carrier has the burden of demonstrating that the damage or shortage is due to an "inherent vice" of the goods. *Quaker Oats*, 734 F.2d at 241 n.3 (citing *Horn v. Cia de Navegacion Fruco*, 404 F.2d 422, 435 (5th Cir. 1969)); *Caemint*, 647 F.2d at 352; cf. *Blasser Bros. v. Northern Pan-Am. Line*, 628 F.2d 376, 381 (5th Cir. 1980) (once plaintiff has presented prima facie case, carrier has burden of proving its exercise of due diligence or that harm was due to one of excepted causes in § 1304(2)). But see *American Tobacco Co. v. Goulardris*, 281 F.2d 179, 182 (2d Cir. 1960) (no reason to shift from shipper its burden of proving that cargo was free from inherent vice).

64. See 46 U.S.C. § 1304(2)(m) (1982).

the court maintained that “the ‘inherent vice’ of most oil on most voyages, . . . encompass[ing] both actual loss and measurement imprecision, is considerably less than 0.5%.”⁶⁵ Therefore, the court concluded that enforcement of the 0.5% allowance would obviate COGSA’s “inherent vice” proviso and effectively limit the carrier’s liability beyond the dictates of the Act.⁶⁶

The Third Circuit acknowledged that customs not expressly prohibited by nor in direct conflict with COGSA’s provisions may indeed be implied into bills of lading.⁶⁷ However, the court maintained that a custom that has the potential to or does in fact lessen a carrier’s liability may not be implied because it would be incompatible with either the purposes or express provisions of the Act.⁶⁸ The court reasoned,

[i]f clauses which relieve the carrier from liability for loss or damage to goods arising from negligence, fault or failure in fulfilling obligations specified in COGSA cannot be enforced, it follows that clauses, whether originating in trade custom or otherwise, cannot be implied if they would have the same effect.⁶⁹

Therefore, the court held that the carrier cannot be given “a legally enforceable right to a customary trade allowance” where the contract is covered by COGSA.⁷⁰

Finally, the Third Circuit found that the district court properly characterized the 0.5% trade allowance as a “loss allowance” within the am-

65. 771 F.2d at 815. Though not required to do so under the Act, Sun introduced expert testimony to show that “the expected loss due to the ‘inherent vice’” of the crude shipped on the M/T Carisle would total 704 barrels. *Id.* at 812. The Third Circuit garnered additional support for its statement from an arbitration panel’s conclusion that the 0.5% figure is “arbitrary.” *Id.* (citing Thomajan, *supra* note 33, at 233).

66. *Id.* at 815. In contrast, the district court used COGSA’s “inherent vice” proviso to support its conclusion that enforcement of the allowance posed no conflict with the Act. *Mercedes Maria*, 1983 A.M.C. at 722.

67. 771 F.2d at 814-15. As the court pointed out, COGSA expressly authorizes the use of custom in some instances. *Id.* at 814; *see* 46 U.S.C. § 1310 (1982). However, the court stated that a custom may be implied “only if the matter is not governed directly by COGSA or is left open by the statutory language.” 771 F.2d at 815. For a discussion of § 1310, *see supra* note 12.

68. 771 F.2d at 815. The court took particular notice of the purpose underlying § 1303(8), namely, to alleviate the inequities imposed on shippers and their insurers by the carriers’ adhesive, liability-limiting clauses. *Id.* at 814-15 (citing *Spartus Corp. v. S/S Yafo*, 590 F.2d 1310, 1316 (5th Cir. 1979)). For a discussion of the issues prompting enactment of COGSA, as reflected in the history preceding its passage, *see supra* notes 2-4 and accompanying text. For a discussion of the relevant express provisions, *see supra* notes 7-11 & 18 and accompanying text.

69. 771 F.2d at 814.

70. *Id.* at 816.

bit of COGSA.⁷¹ Moreover, noted the court, even if properly characterized as a “mismeasurement allowance,” the 0.5% trade allowance would still be within the “inherent vice” proviso and therefore be inconsistent with the Act.⁷²

In a brief dissenting opinion, Judge Hunter disagreed with the majority’s characterization of the 0.5% trade allowance as a “loss” allowance.⁷³ Judge Hunter conceded that if the purpose of the trade allowance was indeed to accommodate inevitable, inexplicable losses, implying such a custom into a bill of lading would be a procedural and substantive affront to COGSA.⁷⁴ Judge Hunter argued, however, that the overriding purpose of the allowance is to accommodate “imprecision of measurement.”⁷⁵ As such, the allowance poses no conflict with section 1303(8) of the Act since that section only prohibits disclaimers of liability for losses due to negligence.⁷⁶

Judge Hunter further argued that the allowance is reconcilable with the burden of proof allocations set out in COGSA.⁷⁷ Relying on the district court’s finding that measurement problems alone could account for a 0.5% deviation, Judge Hunter explained that if the “measurement dif-

71. *Id.* The court relied on the district court’s finding that the allowance “arose from factors of ‘inexact measurement and inevitable loss associated with the transportation of liquid cargoes.’” *Id.* (emphasis in original) (citing *Mercedes Maria*, 1983 A.M.C. at 719). The court further found that the experts who testified as well as the carrier itself attributed the allowance to both factors. *Id.*

72. *Id.* at 816 n.13.

73. *Id.* at 817-18 (Hunter, J., dissenting). At the outset, Judge Hunter indicated that the record amply supported the finding that “taking ullages is likely to be accurate only to within plus or minus 0.5%.” *Id.* at 817 (Hunter, J., dissenting) (citing *Mercedes Maria*, 1983 A.M.C. at 720).

74. *Id.* at 817 (Hunter, J., dissenting). With respect to whether there is indeed such a bona fide custom recognized in the oil shipping industry, Judge Hunter summarily concluded that such a determination is dependent on the district court’s findings of fact which, in his view, were not clearly erroneous. *Id.* at 818 (Hunter, J., dissenting).

75. *Id.* at 817 (Hunter, J., dissenting). Judge Hunter maintained that this is a more accurate characterization even though it takes “clingage” and other “inevitable” problems into account. *Id.* While conceding that the allowance is attributable to both “inevitable loss” and measurement problems, Judge Hunter posited that “this ‘loss’ is [not] the kind of fault-based loss addressed by COGSA.” *Id.* at 817 n.1 (Hunter, J., dissenting). Instead, “inevitable loss,” just like measurement problems, is a product of the “inherent characteristics of the oil and the nature of the carriage.” *Id.*

76. *Id.* at 817 (Hunter, J., dissenting). Judge Hunter acknowledged that § 1303(8) also prohibits disclaimers for losses resulting from a breach of the duties mandated in § 1303. *Id.*; see 46 U.S.C. § 1303(1), (2) & (8) (1982). Subsections (1) and (2) impose duties of care to be exercised with respect to the ship and cargo. For a discussion of § 1303(1)-(2), see *supra* note 18 and accompanying text. Subsection (8) prohibits the contractual elimination or limitation of the carrier’s liability. For a discussion of § 1303(8), see *supra* note 11 and accompanying text.

77. 771 F.2d at 817 (Hunter, J., dissenting). For a discussion of COGSA’s burden of proof requirements, see *supra* notes 21-26 and accompanying text.

ferential” amounted to less than 0.5%, the shipper would have to demonstrate an actual loss due to a specific cause in order to make out a prima facie case for short delivery.⁷⁸ Judge Hunter therefore concluded that the 0.5% allowance does not offend the statutory burden of proof mandated by COGSA.⁷⁹

In reviewing *Sun Oil*, it is submitted that the Third Circuit’s refusal to enforce the 0.5% allowance is not mandated by either the statutory provisions or underlying policy of COGSA.⁸⁰ COGSA, via its express language⁸¹ and as evidenced by its legislative history,⁸² precludes limitation of a carrier’s negligence liability.⁸³ By contrast, the trade usage at issue in *Sun Oil* is not a fault-based concept, and therefore is fully reconcilable with the statute.⁸⁴

In making its factual determination that the 0.5% allowance is an

78. 771 F.2d at 817 (Hunter, J., dissenting). Requiring that the shipper attribute the loss to a specific cause if the differential is less than 0.5% does not, argued Judge Hunter, relieve a carrier of its burden of proving its freedom from fault. *Id.* Instead, Judge Hunter opined that

[the trade allowance’s requirement] merely recognizes that unless a shipper of crude oil can show a shortfall or more than 0.5% of its cargo, or that a measurement differential of less than 0.5% is due to actual loss from a specific cause, it cannot make out a *prima facie* case against the carrier.

Id. For an explanation of the requirements necessary to make out a prima facie case, see *supra* note 21 and accompanying text.

79. 771 F.2d at 817 (Hunter, J., dissenting). In short, concluded Judge Hunter, “COGSA has nothing to do with the 0.5% trade allowance.” *Id.*

80. For a discussion of the Third Circuit’s holding that enforcement of the 0.5% customary trade allowance is barred by COGSA, see *supra* notes 44-72 and accompanying text.

81. Section 1303(8) is titled “[l]imitation of liability for negligence.” 46 U.S.C. § 1303(8) (1982). It prohibits elimination of a carrier’s liability for losses “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.” *Id.* (emphasis added).

82. See H.R. REP. NO. 2218, 74th Cong., 2d Sess. 6-9 (1936). The House Report states that one of the purposes of COGSA is to “den[y] . . . the carrier [the] power to exempt itself from various classes of liability by . . . exempting clauses in bills of lading.” *Id.* at 6-7. Further, the House Report enumerates several common exceptions to a carrier’s liability that were typically included in pre-COGSA bills of lading. *Id.* at 8. The enumerated exceptions include exculpation from the “fault or barratry of the master or crew or other servants of the shipowner.” *Id.*

83. See 46 U.S.C. § 1303(8) (1982). For a discussion of limitations on a carrier’s ability to restrict its negligence liability, see *supra* note 11. On the other hand, Gilmore and Black state that, with the enactment of COGSA, “the carrier’s ‘insurer’s’ liability is a thing of the past. His liability . . . must now be predicated on fault only.” G. GILMORE & C. BLACK, *supra* note 2, § 3-26, at 150. The authors note that subsections 1303(1) and (2) impose liability only in the event of negligence, and that § 1304(2)(q) “nails the point down by providing [a] . . . general immunity from liability without fault.” *Id.* For the text of § 1304(2)(q), see *supra* note 19.

84. See 2A E. BENEDET, *supra* note 2, § 88, at 8-13 (“Such [0.5%] *de minimis* losses support a finding that the crew discharged all the oil it possibly could have and

established usage of trade, the district court noted that, in the oil shipping industry, shortage claims are not made for less than 0.5%.⁸⁵ The obvious implication, so expounded by the district court, is that “there is no non-delivery if the [oil] is *not contractually obligated to be delivered*” in the first place.⁸⁶ It is submitted that, having recognized the 0.5% allowance as a valid trade usage,⁸⁷ the Third Circuit’s refusal to reach a similar conclusion is untenable.⁸⁸

The Third Circuit’s insistence on requiring the carrier to deliver 100% of the oil shipped was based, in part, on its finding that enforcement of the trade allowance would violate COGSA’s “statutorily prescribed method of litigating [shortage] claims.”⁸⁹ The court expressed particular concern that enforcement of the allowance would shift the burden of proof of negligence to the shipper—contrary to COGSA’s scheme that places the burden squarely on the carrier.⁹⁰ However, it is submitted that, assuming the trade usage is not intended to minimize a carrier’s negligence liability, the burden of proof remains the same notwithstanding its enforcement.⁹¹ Specifically, once the shipper has made out a prima facie case, the burden remains on the carrier to establish the applicability of an exception as enumerated in section 1304(2), or demonstrate that its own conduct did *not* contribute to the loss.⁹²

that due diligence was exercised”) (citing *Mercedes Maria*, 1983 A.M.C. 718) (emphasis added).

85. *Mercedes Maria*, 1983 A.M.C. at 725. *But see generally* Thomajan, *supra* note 33, at 230-37 (discussing several New York arbitration cases in which shortages of less than 0.5%, or first 0.5% of larger shortages, were contested). The Third Circuit cited the Thomajan article in support of its argument that the 0.5% allowance is inconsistent with COGSA. *See* 771 F.2d at 815.

86. *Mercedes Maria*, 1983 A.M.C. at 721 (emphasis in original).

87. For a discussion of the Third Circuit’s acceptance of the 0.5% allowance as a valid usage of trade, see *supra* note 45 and accompanying text.

88. Of course, the court’s position is untenable only if COGSA does not preclude enforcement of the trade usage. Both the statute and its legislative history clearly indicate that a carrier’s negligence liability is not to be compromised—contractually or otherwise. *See* 46 U.S.C. §§ 1303(8), 1304(1)-(2) (1982); H.R. REP. NO. 2218, 74th Cong., 2d Sess. 1, 6-7 (1936). However, it is submitted that this 0.5% customary allowance is not intended to accommodate losses incurred as a result of a carrier’s negligence. Since COGSA only prohibits limitation of a carrier’s negligence liability, a compromise is indeed palatable, i.e., the Act’s mandate poses no conflict with the trade allowance.

89. 771 F.2d at 813. For a discussion of the COGSA scheme for litigating shortage claims, see *supra* notes 20-25 and accompanying text.

90. 771 F.2d at 813.

91. *But cf.* Brief for Appellee at 19, *Sun Oil*. The carrier’s counsel maintained that the fact “the ordinary and expected consequences of burden of proof do not apply is not sufficient to overrule a custom. That is the custom’s very purpose.” *Id.*

92. *See* *The Vizcaya*, 63 F. Supp. 898 (E.D. Pa. 1945), *aff’d sub nom.* *Beck v. The Vizcaya*, 182 F.2d 942 (3d Cir.), *cert. denied*, 340 U.S. 877 (1950); *see also* *Van Muching [sic] & Co. v. M/V Star Mindanao*, 630 F. Supp. 433 (E.D. Pa. 1985). In *Van Muching [sic]*, the court concluded that to rebut a shipper’s prima facie case, the burden is indeed on the carrier to “show either that the [shortage] was

The trade usage, it is submitted, “merely recognizes that unless [the] shipper . . . can show a shortfall of more than 0.5% . . . , or that a measurement differential of less than 0.5% is due to actual loss from a specific cause, it cannot make out a *prima facie* case against the carrier.”⁹³

Assuming that the trade allowance is valid, it is submitted that the Third Circuit properly considered the ramifications of characterizing it as one of either “loss” or “measurement.”⁹⁴ If, for example, the allowance accommodated shortages due exclusively to measurement discrepancies, it would be nearly impossible for a shipper to establish a *prima facie* case.⁹⁵ However, since the allowance apparently encompasses shortages due to loss as well as measurement,⁹⁶ the majority in *Sun Oil* abstrusely concluded that it is *a fortiori* violative of COGSA.⁹⁷ On the contrary, it is submitted that to the extent the allowance is attributable to loss rather than measurement, the critical issue becomes whether the loss portion is a result of the carrier’s negligence or the difficulties in-

not caused by its *negligence* or that the [shortage] resulted from one of the ‘excepted causes’ ” of § 1304(2). *Id.* at 439 (citing *Vana Trading Co. v. S.S. “Mette SKOU,”* 556 F.2d 100, 105 (2d Cir.), *cert. denied*, 434 U.S. 892 (1977); *Nichimen Co. v. M/V Farland*, 333 F. Supp. 691, 697 (S.D.N.Y. 1971), *modified and aff’d on appeal*, 462 F.2d 319, 325 (2d Cir. 1972)) (emphasis added).

93. 771 F.2d at 817 (Hunter, J., dissenting) (emphasis in original).

94. *Id.* at 816. The majority’s consideration of the measurement/loss distinction responded to the dissent’s assertion that the allowance accounted for measurement peculiarities rather than “loss.” *Id.* Judge Hunter, in dissent, specifically objected to the majority’s characterization of the 0.5% allowance as one of “loss.” *Id.* at 817 (Hunter, J., dissenting). At the same time, Judge Hunter conceded that the majority had properly acknowledged the district court as having attributed the trade usage to problems of both measurement and “inevitable loss.” *Id.* n.1 (Hunter, J., dissenting). However, Judge Hunter maintained that, like problems of measurement, “inevitable loss” results from the inherent characteristics of bulk crude and the problems attendant to its carriage and it is therefore not the type of “fault-based loss addressed by COGSA.” *Id.*

The dispute over the proper characterization of the loss expressed between the *Sun Oil* majority and Judge Hunter is endemic of the widespread disagreement existing among district courts that have considered the question. *Compare Wesco Int’l v. M/V Tide Crown*, 1985 A.M.C. 189, 200 (S.D. Tex. 1983) (0.5% allowance is for loss of cargo in transit) with *Northeast Petroleum Corp. v. S.S. Prarie Grove*, 1977 A.M.C. 2139, 2142-43 n.2 (S.D.N.Y. 1977) (0.5% allowance recognized because measurement of petroleum cargo is “inexact, at best”).

95. In order to establish a *prima facie* case for shortage, the shipper must prove delivery of a particular quantity to the carrier and subsequent short delivery at the port of destination. *Nissho-Iwai Co. v. M/T Stolt Lion*, 719 F.2d 34, 38 (2d Cir. 1983). The *Sun Oil* shipment is indicative of the discrepancies generally attendant to measuring crude oil. See Brief for Appellee at xiii, *Sun Oil* (four measurements taken during the course of shipping bulk crude differ “without exception”).

96. *Sun Oil*, 771 F.2d at 816; *Mercedes Maria*, 1983 A.M.C. at 719.

97. 771 F.2d at 816. The court added that even if the 0.5% allowance could be characterized as solely a “mismeasurement allowance,” it would fall within the “inherent vice” exception of § 1304(2)(m). *Id.* n.13. For a discussion advocating enforcement of the allowance notwithstanding § 1304(2)(m), see *infra* notes 106-10 and accompanying text.

herent in transporting the goods shipped, in this case, bulk crude oil.⁹⁸ While the origin of the trade allowance is not clear,⁹⁹ nothing in *Sun Oil* or in the evolution of the trade usage suggests that its purpose is to accommodate losses resulting from a carrier's negligence.¹⁰⁰ Accordingly, it is submitted that regardless of whether the custom addresses loss or measurement deviations, its enforcement is reconcilable with the mandates of COGSA.¹⁰¹

Indeed, it is submitted that, consistent with the district court's opinion, recognition of the 0.5% allowance as a valid trade usage obligates a carrier to deliver only 99.5% of the goods shipped.¹⁰² The contracts for carriage in *Sun Oil* did not define either the terms "deliver" or "discharge."¹⁰³ Commercial law, the applicability of which both the district court and the Third Circuit noted,¹⁰⁴ recognizes that, in agreements

98. For a discussion of the importance of whether "loss" is attributable to a carrier's negligence, see *supra* notes 81-84 and accompanying text.

On one hand, the *Sun Oil* majority apparently equates the customary trade allowance, whether encompassing loss or measurement, with a limitation on liability clause. See 771 F.2d at 814 (since COGSA forbids express clauses limiting carrier's negligence liability, implied clauses having same effect, "whether originating in trade custom or otherwise," are also forbidden). With respect to this reasoning, it is submitted that the court mistakenly presumes that the 0.5% allowance is indeed intended to accommodate the carrier's negligence. At the same time, the court appears to acquiesce to the district court's finding that the allowance encompasses both "inexact measurement and inevitable loss." *Id.* at 816 (emphasis added). Arguably, the Third Circuit ultimately remanded the case to determine whether in fact the loss was unavoidable. See *id.* at 816-17 (on remand, carrier will have opportunity and burden of proving that loss or portion thereof falls within COGSA exception).

99. See Thomajan, *supra* note 33, at 226. Thomajan suggests that the insurance industry developed the figure as a standard deductible "to cover the inevitable unexplained loss or evaporation of cargoes in transit." *Id.*; see also Reply Brief for Appellant at 22, *Sun Oil* (0.5% allowance is "settlement device" used to compromise disputed shortage claims); cf. Brief for Appellee at 21, *Sun Oil* (0.5% allowance is customary definition of term "deliver" (as typically used in charter parties); allowance is "method to resolve the impossible—to carry and account for each and every drop of bulk oil cargoes").

100. The majority characterized the allowance as a "loss" allowance to accommodate "unexplained losses." 771 F.2d at 816. The dissent countered that the allowance was not intended to accommodate a carrier's negligence. *Id.* at 817 n.1 (Hunter, J., dissenting) ("inevitable loss,' like problems of measurement, follows from the inherent characteristics of the oil and the nature of the carriage").

101. This position is consistent with that taken by Judge Hunter in dissent. See 771 F.2d at 817 (Hunter, J., dissenting) (whether intended to accommodate loss or measurement, "trade allowance in no way implicates any provision of COGSA").

102. See *Mercedes Maria*, 1983 A.M.C. at 721-22, 724-25. The district court stated that recognition of the trade allowance is an "important factor in determining just what quantity of [oil] is contractually obligated to be delivered." *Id.* at 721-22 (emphasis added).

103. See Reply Brief for Appellant at 13, *Sun Oil*.

104. See 771 F.2d at 811-12 (assuming maritime law would adopt general commercial law principles in defining "custom"); *Mercedes Maria*, 1983 A.M.C. at

subject to a bona fide trade usage, performance that deviates from the lay meaning of express contractual terms may nonetheless constitute perfect tender.¹⁰⁵ Hence, commercial law affirmatively endorses application of the trade usage in this type of situation.

723 (no reason not to adopt U.C.C. by analogy in federal maritime case that is "essentially a commercial dispute").

105. See, e.g., Sun Ref. and Mktg. Co. v. Goldstein Oil Co., 620 F. Supp. 121 (E.D. Mo. 1985). *Sun Refining* involved a contract for the sale of toluene (a chemical antiknock agent for gasoline) between Sun Refining and Marketing Company (SRMC) and Goldstein Oil Company (GOC). *Id.* at 125. Pursuant to the contract, SRMC delivered approximately 937,000 gallons of toluene into GOC's off-shore barge. *Id.* at 125. The contract was silent, however, on how to conduct the inspection or measurement of the loaded toluene. *Id.* The court noted that Uniform Commercial Code principles may be analogously employed by a federal court when analyzing an admiralty contract. *Id.* at 126 (citing *Mercedes Maria*, 1983 A.M.C. at 723). As such, the court held that a trade usage requiring the buyer to pay for the loaded quantity based upon independent inspection of barge measurements was an implied term in the contract. *Id.* (citing 1965 Mo. Legis. Serv. § 400.2-202(a) (Vernon) (the Missouri codification of U.C.C. § 2-202(a))); see also *Nanakuli Paving and Rock Co. v. Shell Oil Co.*, 664 F.2d 772 (9th Cir. 1983) (applying U.C.C. directly, trade usage to accommodate fluctuations in price of raw materials held to control fixed express price term); *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3 (4th Cir. 1971) (applying U.C.C. directly, contract price, as per usage of trade, was "mere projection" to be adjusted according to market forces); *Michael Schiavone & Sons v. Securallloy Co.*, 312 F. Supp. 801 (D. Conn. 1970) (applying U.C.C. directly, express quantity term specifying 500 tons interpreted, as per trade usage, to mean as many tons as possible with 500 being upper limit); cf. *Mellon Bank v. Aetna Business Credit*, 619 F.2d 1001 (3d Cir. 1980) (in contract construction case, plaintiff unable to demonstrate that parties intended to vary, via usage of trade, commercially recognized meaning of trade term "insolvent"); *Carter Baron Drilling v. Badger Oil Corp.*, 581 F. Supp. 592 (D. Colo. 1984) (in contract construction case, trade usage admitted to address contingency unaddressed by express terms); *Frigalment Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960) (in pre-Code contract construction case, buyer failed to demonstrate that express term "chicken" means "broiling" or "frying" but not "stewing" chicken as per trade usage); J. MURRAY, MURRAY ON CONTRACTS § 123, at 253 (2d ed. 1974) ("[T]rade usage which has 'regularity of observance' may indicate that the plain meaning of '50%' should be changed to the presumably intended meaning of '49.5%'") (emphasis added) (citing *Hurst v. W.L. Lake & Co.*, 141 Or. 306, 16 P.2d 627 (1932)).

It should be noted that a perfunctory reading of the Uniform Commercial Code suggests that a seller is required to tender delivery in exact conformity with the express terms of the contract. See U.C.C. § 2-601 (1977) (describing remedies available if goods or tender of delivery fail to conform to contract "in any respect"). However, it is suggested that the better interpretation is that nonconformity with express terms, as dictated by a valid trade usage, is acceptable. See J. MURRAY, *supra*, § 176, at 343 ("'perfect tender rule' suggested by [§ 2-601] of the Code cannot be literally accepted because it is surrounded by express as well as implied qualifications which substantially diminish its thrust"); see also U.C.C. § 1-201(3), (11) (1976) (defining "agreement" to include usage of trade, and "contract" as the "total legal obligation which results from the parties' agreement"); RESTATEMENT (SECOND) OF CONTRACTS § 222 comment b, illustration 1 (1981) (with regard to usage of trade, express numerical quantity term does not mean exact number).

Therefore, in *Sun Oil*, even though the parties' contract called for delivery of

Finally, it is submitted that the existence of section 1304(2)(m) of the Act, which exculpates the carrier for losses attributable to an “inherent vice” of the goods,¹⁰⁶ does not support the majority’s argument for refusing to enforce the trade allowance.¹⁰⁷ The Third Circuit majority concluded that, even if the trade usage could correctly be characterized as a measurement allowance, it would still be inconsistent with COGSA since section 1304(2)(m) encompasses shortages of this nature.¹⁰⁸ If, however, the carrier is only obligated to deliver 99.5% because of a valid trade usage, the “inherent vice” proviso would apply precisely as contemplated by COGSA: once a shipper made out a prima facie case by proving a shortfall, a carrier could avoid liability by proving that the loss resulted from an inherent vice in the goods.¹⁰⁹ Since, in the instant case, the shipper did not satisfy the prima facie threshold of proving a 0.5% shortfall, the inherent vice proviso does not apply and would only have been relevant to that portion of the loss that exceeded 0.5%.¹¹⁰

In conclusion, the Third Circuit’s decision in *Sun Oil* is one of broad impact and questionable utility. It is submitted that the court improperly refused to honor the trade usage at issue. The Third Circuit’s limited interpretation of the shipping industry’s customary trade allowance,¹¹¹ together with its strict construction of COGSA,¹¹² dictates

a specified number of barrels and the number actually received was 2835 barrels short, applicable principles of commercial law could deem this a perfect tender.

106. For the text of § 1304(2)(m), see *supra* text accompanying note 19. Section 1304(2)(m) has often been invoked as a defense in cases involving shipments of food or chemicals. See cases cited *supra* at note 63.

107. See 771 F.2d at 816 & n.13.

108. *Id.* n.13. But see A. KNAUTH, *supra* note 4, at 173. Knauth reasons that, under § 1304(2)(m), the carrier is not responsible for the inherent character of the cargo carried. *Id.* At the same time, the “carrier is bound to know the characteristics of the cargo which it accepts, and to do whatever is reasonably necessary . . . [to ensure that] the cargo [will be] carried safely.” *Id.* To reconcile these inherently conflicting doctrines, the author suggests a “[compromise] so arrived at by custom [which] becomes a standard the Court will read into the contract of carriage; it thus becomes the measure of the carrier’s liability.” *Id.*

109. It should also be noted that, should the entire shortage not be attributable to an “inherent vice,” the carrier has the burden of proving what portion thereof is so attributable. *Harbert Int’l Establishment v. Power Shipping*, 635 F.2d 370, 375 (5th Cir. 1981).

110. *Cf.* Brief for Appellee at 20, *Sun Oil* (“[carrier] pays without question all unexplained losses exceeding . . . 0.5%”). In the instant case, Sun’s shortage totaled 133 barrels after the 0.5% allowance had been taken into account. 771 F.2d at 807-08. While not required by COGSA to do so, Sun presented expert testimony that a loss of only 704 barrels would reasonably be attributable to the “inherent vice” of the oil carried by the M/T Carisle—without taking the 0.5% allowance into account. *Id.* at 812. However, counsel for the M/T Carisle asserted that, at the same time, Sun’s witnesses acknowledged the 0.5% allowance and did not rebut its continued viability. Brief for Appellee at 12-16, *Sun Oil*.

111. For an analysis of the Third Circuit’s interpretation of the 0.5% allowance, see *supra* notes 44-47 and accompanying text.

112. For an analysis of the Third Circuit’s construction of COGSA in relation to the 0.5% allowance, see *supra* notes 80-93 and accompanying text.

a result that, in effect, allows a shipper to unilaterally disavow an accepted custom of the oil shipping industry.¹¹³ Moreover, the court's decision places an onerous and arguably inequitable burden on future carriers.¹¹⁴ Accordingly, it is hoped that if presented with a second opportunity to address the issue, the Third Circuit would reevaluate its decision in light of the relevant principles of commercial law that compel a different result. The usage of trade, it is submitted, is indeed compatible with COGSA, and is a vital means of injecting fairness and flexibility into a broad realm of ocean carriage transactions.

Kenton Deem Longaker

113. As was asserted by counsel for the M/T Carisle, it is submitted that the continued viability of the 0.5% allowance is an issue more appropriately addressed by the cargo and carrier interests themselves. See Brief for Appellee at 8, *Sun Oil*. Counsel argued that

[t]he after the fact unilateral elimination or modification of . . . customs [such as] the 0.5% trade allowance should not be the responsibility of [the Third Circuit] or any other court. It is obviously a problem for the industry itself to solve based on whatever can be agreed upon [as] the technological advances permit.

Id. This is, it is suggested, the most viable point of view since those in the oil shipping industry are more likely to be aware of the technological advances and their practical ramifications. In addition, the fluctuating state of technological developments may be tailored to suit the transaction via contractual negotiation.

114. To comply with the Third Circuit's decision, carriers will now have to completely account for all oil loaded onto a vessel or affirmatively demonstrate that the loss is either a result of an "inherent vice," or at a minimum, *not* a result of their own conduct. Given the illusive properties of crude oil and the problems attendant to its measurement, it is suggested that the impracticality of such a burden is apparent—especially on a case-by-case basis. Moreover, given the apparent margin for disagreement concerning what is an acceptable level of "inevitable loss," it is submitted that the court's decision will be burdensome for carriers and shippers alike. Finally, the *Sun Oil* decision will promote what the 0.5% trade usage so effectively minimized: excessive litigation.