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ADMIRALTY — INTERNATIONAL SHIPPING — INCREASED TONNAGE ON THE GREAT LAKES: AN INCENTIVE FOR INTERNATIONAL UNIFICATION OF CARRIAGE OF GOODS BY SEA ACTS

Introduction

The opening of the enlarged St. Lawrence Seaway in April, 1959, has brought to the attention of the public, as never before, an awareness of the magnitude of international shipping carried on by the United States with foreign countries, and of interstate shipping carried on by the states among themselves. Unfortunately, however, the legal problems and questions of policy concerning the carriage of goods by sea, which must necessarily arise as a result of the increased tonnage on the Great Lakes and their extensions, have received far less scrutiny. Where they have been discussed, it has been largely in the guise of their effect on national trade policies. And, while it is true that the St. Lawrence Seaway undoubtedly will serve a national purpose, to so narrowly limit the scope of the legal problems and policy decisions is to fall back on the nationalism and isolationism of the nineteenth and early twentieth centuries. A far better and more realistic approach would be to consider the international problems created by the opening of the Seaway, and to utilize "nationalism" only in order to set the pace for the eventual international unification of admiralty and maritime law.

The history of admiralty law is filled with the efforts of maritime nations to achieve some form of international unity, particularly as regards the law to be applied to the carriage of goods by sea. And while some success has been achieved, international unification has remained an elusive goal. It is probably an unrealistic and utopian view to maintain that conflicts of law can be completely abolished through universal adoption of identical Carriage of Goods by Sea Acts. It is more unrealistic, however, to insist that judicial forums, whether foreign or American, cannot so exercise their jurisdictional discretion as to subordinate the concept of "foreign law" to the principle of comity. Indeed, such a step is not only possible, but absolutely necessary, if we are to achieve that "unity" in international maritime law which will substitute facility and certainty for the complexity and disharmony of present-day maritime transactions.

At the present time, both the United States and the majority of the other countries engaged in maritime trade have adopted some type of legislation to regulate the carriage of goods by sea. Unfortunately, the element of international uniformity is not exemplified by such statutes. It is the aim of this Note, therefore, to illustrate the problems involved in attaining unity in the Carriage of Goods by Sea Acts, and to attempt to provide some direction and momentum necessary for such an achievement.

To develop an adequate appreciation of the scope of the problem, the Note will trace the early history and development of American admiralty and maritime jurisdiction, particularly the unique position the Great Lakes have occupied in such development. Since discrepancies in bills of lading provided the impetus for early efforts at unification, these bills will first be explained and then discussed in light of the Harter Act, and the United States Carriage of Goods by Sea Act. The first of these acts was the initial step taken by the United States in attempting to achieve *national* uniformity. It occupies an important position when one speaks of the international unification of Carriage of Goods by Sea Acts because of the influence it exerted as a *model* for subsequent foreign statutes in the same area. The United States Carriage of Goods by Sea Act, which largely replaced the Harter Act, will then be discussed as the United States' answer to the problems of simplifying, modernizing and further expanding the principal of international unification. Its predominant features will be explained in light of, and compared with, the earlier Harter Act and those foreign statutes which have entered the field as of the time of this writing. Finally, the foreign statutes, apparently the farthest-going in striving for international uniformity, will be presented.

The scope of the topic presents problems of organization, limitation and explanation, since it deals with the international unification of certain aspects of admiralty and maritime law. Thus, the sections will contain a discussion of only the most pertinent points, leaving for the future a solution to the smaller areas of disunity. The emphasis and theme of the Note will be directed primarily toward the possibility of achieving international unity in the Carriage of Goods by Sea Acts. That such an accomplishment is possible seems certain; the means to be utilized are far less so. One possible solution rests in a more liberal utilization of existing legal concepts and institutions. A better approach would be to modify and enlarge the present framework in order to erect new methods for expediting the search for international unity. The latter approach calls for awareness, a deep appreciation of the problem, leadership, and legislative skill in promulgating appropriate acts essential to international unity. The challenge is a great one, matched only by the opportunities it offers should it succeed.

I. Nature and Extent of United States Admiralty and Maritime Jurisdiction

To understand the regulations in the United States under which shipping is presently operating in the field of admiralty law, particularly as it applies to the Great Lakes, it is necessary to trace briefly the development of certain aspects of admiralty jurisdiction in this country. The United States Constitution sets down the fundamental grant of jurisdiction to the federal courts, by giving them power in "all cases of admiralty and maritime jurisdiction." [1] Although this grant is very broad, it created numerous problems of judicial interpretation during the first seventy-five years of our Republic. The principal cause of the jurisdictional disputes was the early feeling of loyalty to English precedent advocated by many of the judges. At the time the constitutional grant of admiralty power was given to the federal courts, England already had developed a rather extensive body of admiralty law. Further, since she was the leading maritime country during the eighteenth, and well into the nineteenth centuries, it was little wonder that judges felt they were bound by English precedent in admiralty cases. But, in the leading case of *The Exchange*,[2] Chief Justice Marshall removed all doubt as to our right to impose our own restrictions:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent of the restriction, and an investment of that sovereignty, to the same extent in that power which could impose such restriction.[3]

His opinion was echoed more vigorously in the subsequent case of *Waring v. Clarke*.[4]

The solution of this problem but paved the way for another which appeared,

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1 U.S. Const. art. III, § 2.

2 11 U.S. (7 Cranch) 116 (1812).

3 *Id.* at 136. It is to be noted that the decision in this case was handed down in 1812 — a period in history when the United States was having marked difficulties with England because of altercations occurring on the high seas. This fact is particularly significant when we realize that eight years earlier, Chief Justice Marshall had handed down a decision which appeared, on its face at least, to be somewhat in conflict with the principal case: ". . . an act of congress ought never to be construed to violate the law of nations if any other possible construction remains. . . ." The Charming Betsy, 6 U. S. (2 Cranch) 64, 118 (1804).

4 46 U.S. (5 How.) 441, 457 (1847):

> . . . there is . . . an unanswerable constitutional objection to the limitation of "all cases of admiralty and maritime jurisdiction," as it is expressed in the constitution, to the cases of admiralty and maritime jurisdiction in England when our constitution was adopted. To do so would make the latter a part and parcel of the constitution — as much so as if those cases were written upon its face. It would take away from the courts of the United States the interpretation of what were cases of admiralty and maritime jurisdiction. It would be a denial to Congress of all legislation upon the subject.

to contemporaries at least, even more troublesome — *i.e.*, the test of which waters fell within the language of article III, section 2 of the Constitution. The ultimate development of an adequate and comprehensive test was lengthy and involved. Yet, because of the unique position the Great Lakes and the St. Lawrence Seaway occupy in this Note, that development must be explained at some length. Again the roots of the problem lay in English precedent.

> In England, . . . the decisions in . . . courts of admiralty . . . always speak of the jurisdiction as confined to tide-water. And this definition in England was a sound and reasonable one, because there was no navigable stream in the country beyond the ebb and flow of the tide. . . . In England, therefore, tide-water and navigable water are synonymous terms. . . .[5]

In the United States, however, the "tide-water" test was anything but adequate. Many of our rivers and inland lakes were not tidal waters. Hence, to follow English precedent would remove a vast geographical area from the jurisdictional control of the admiralty courts. The only adequate test, therefore, and the one which was eventually adopted, was that of "navigability." [6] Such a test was easily extended to that category of waters known as "arms of the sea," [7] but there was still much conflict as to what constituted "navigability." The idea gradually developed that for a waterway to be considered navigable, it must be capable of handling "substantial" interstate or foreign commerce.[8] Another theory which was proposed, but which has had far less significance than the "substantial commerce" test, was the requirement that a navigable body of water have both a *terminus ad quem* and a *terminus ad quo*[9] (*i.e.*, "there must be a point of ingress where one enters the waterway, and some other place of egress where one leaves it").[10]

The above discussion is particularly important because of the singular position which the Great Lakes held in American admiralty law. As a practical matter, the early scope of maritime jurisdiction embraced little more than the Atlantic Coast. It was only when the Great Lakes and certain other inland waters began to rise in commercial importance that questions arose as to their status under the law. Foreseeing the future role the Great Lakes would play in the commercial exploitation of what was then still regarded as "the West," Congress, on February 26, 1845, passed an act[11] which "expressly conferred upon the District Courts admiralty jurisdiction on the Great Lakes in matters affecting enrolled or licensed vessels of at least twenty tons burden engaged in commerce between States and Territories as upon the high seas or tide waters. . . ." [12]

It is to be noted that at the time Congress passed this act, the admiralty jurisdiction of the United States was still limited to tidal waters, since the decision in *The Eagle*[13] had not yet been handed down. Without the Act of 1845, therefore,

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5 The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 454-55 (1851).

6 Insurance Co. v. Dunham, 78 U.S. (11 Wall.) 1, 25 (1870): ". . . as to the *locus* or territory of maritime jurisdiction . . . it extends not only to the main sea, but to all navigable waters of the United States, or bordering on the same, whether landlocked or open, salt or fresh, tide or no tide." (This case further explained the earlier holding in The Eagle, 75 U.S. (8 Wall.) 15 (1868). See generally 1 BENEDICT ON ADMIRALTY §§ 38-39 (6th ed. 1940); 7 W. RES. L. REV. 72, 74-75 (1955); *Ex parte* Boyer, 109 U.S. 629 (1884).

7 "Navigable rivers, which empty into the sea, or into the bays and gulfs which form a part of the sea, are but *arms of the sea*, and are as much within the admiralty and maritime jurisdiction of the United States as the sea itself." The Belfast, 74 U.S. (7 Wall.) 624, 640 (1868) (emphasis added); *accord*, *In re* Keller's Petition, 149 F. Supp. 513, 515 (D. Minn. 1956). See generally 1 BENEDICT, *op. cit. supra* note 6, § 42.

8 Leovy v. United States, 177 U.S. 621 (1900).

9 Manigault v. S. M. Ward & Co., 123 Fed. 707 (C.C.S.C. 1903); Chisholm v. Caines, 67 Fed. 285 (C.C.S.C. 1894).

10 7 W. RES. L. REV. 72, 78.

11 5 Stat. 726 (1845).

12 1 BENEDICT, *op. cit. supra* note 6, § 49.

13 75 U.S. (8 Wall.) 15 (1868). In this leading decision the Supreme Court held that the admiralty jurisdiction of the federal courts extended to lakes and navigable waters.

any case arising on the Great Lakes would have been cognizable only at common law, and hence could not be transferred to the admiralty side of a federal court without carrying over the right to a jury trial guaranteed by the seventh amendment. The validity of the Act of 1845 was upheld in *The Genesee Chief*,[14] in which case the Supreme Court specifically referred to the Great Lakes as "inland seas." [15] But, the results reached in two subsequent cases, *The Eagle*,[16] and *Jackson v. Steamboat Magnolia*,[17] rendered the Act of February 26, 1845, superfluous.[18] Today, therefore, the status of the Great Lakes is clear. They are definitely within the admiralty jurisdiction of the federal courts.[19] As a result, it is now uniformly

> . . . established by an impressive body of precedent that when a common law action is brought, whether in a state or in a federal court, to enforce a cause of action cognizable in admiralty, the substantive law to be applied is the same as would be applied by an admiralty court — that is, the general maritime law, as developed and declared, in the last analysis, by the Supreme Court of the United States, or as modified from time to time by Congress.[20]

The inclusion of the Great Lakes within the jurisdiction of the admiralty power of the federal courts was a great step forward in the *national* unification of our admiralty and maritime law. Indeed, it fulfilled one of the fundamental purposes of article III, section 2 of the Constitution.[21]

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14 53 U.S. (12 How.) 443, 453 (1851). In a libel for a collision on Lake Ontario the court held:

> . . . if the validity of the act of 1845 depended upon the power to regulate commerce, it would be unconstitutional, and could confer no authority on the District Courts.
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> If this law . . . is constitutional, it must be supported on the ground that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction, as known and understood in the United States when the Constitution was adopted.

15 *Id.* at 454. ". . . [t]hese lakes are in truth inland seas . . . and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas applies with equal force to the lakes."

16 75 U.S. (8 Wall.) 15 (1868). By holding that admiralty jurisdiction extended to lakes and navigable waters, this decision substantially superseded the Act of 1845. The full impact of the decision was the acknowledgment that the cases provided for by the act were already within the admiralty jurisdiction as a result of the Judiciary Act of 1789.

17 61 U.S. (20 How.) 296 (1857). See generally the opinion of Mr. Justice Grier and Mr. Justice McLean, holding that the District Courts exercise jurisdiction over fresh-water rivers "navigable from the sea," by virtue of the Judiciary Act of 1789, and not as conferred by the Act of 1845, which extends their jurisdiction to the Great Lakes and waters "not navigable from the sea." It should be noted that, had the decision in *The Eagle* never been rendered, nor the Act of 1845 passed, if Justices Grier and McLean were correct, then the opening of the St. Lawrence Seaway would probably have brought the Great Lakes within the admiralty jurisdiction of the federal courts, since they would have become "navigable from the sea."

18 Despite the subsequent revisions of the Judicial Code, the provision for jury trial has been retained. The most current form appears in the Act of June 25, 1948, and reads:

> In any case of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons or upward, enrolled or licensed for the coasting trade, and employed in the business of commerce and navigation between places in different states upon the lakes and navigable waters connecting said lakes, the trial of all issues of fact shall be by jury if either party demands it — 28 U.S.C. § 1873 (1952).

19 The Frank J. Fobert, 32 F. Supp. 214 (W.D.N.Y. 1940); see generally, GILMORE & BLACK, THE LAW OF ADMIRALTY 28-29 (1957).

20 Jannson v. Swedish American Line, 185 F.2d 212, 216 (1st Cir. 1950). Later cases have expressed the rule somewhat differently, holding that ". . . state law is admissible to modify or supplement admiralty and maritime law only when the state action is not hostile to characteristic features of the maritime law." Wilburn Boat Co. v. Fireman's Fund Ins. Co., 201 F.2d 833, 837 (5th Cir. 1953), *rev'd on other grounds*, 348 U.S. 310 (1954). As will subsequently be shown, the federal courts generally have been extremely reluctant to surrender their jurisdiction.

21 In Guerrido v. Alcoa Steamship Co., 234 F.2d 349, 352 (1st Cir. 1956), the court held that,

> One of the purposes of the establishment by the Constitution of the rules of

Before discussing the conflicts of law created by the innovation of the admiralty and maritime laws of the United States, one extensive limitation placed on foreign shipping must be mentioned. This concerns the "coastal" shipping between the states. Since it is now accepted that "the maritime usages of foreign countries are not obligatory upon us, and will not be respected as authority, except so far as they are consonant with the well-settled principles of English and American jurisprudence," [22] the United States has undertaken to severely limit the right of foreign ships to partake in our coastwise trade.[23] Although this perhaps could be construed as another act tending to thwart efforts towards international unification, such a contention is doubtful since many countries have adopted similar provisions in order to safeguard certain national interests.[24] As a result, few recommendations for international unity have been advocated in this area of the law.

The problem of conflicts of law has existed for the United States from the

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the general maritime law as part of the laws of the United States was to preserve harmony and uniformity in maritime matters in both international and interstate relations of the country. This purpose was best to be promoted if the rules of maritime law thus established were to be regarded as applicable and enforceable *throughout the whole extent of the navigable waters over which the United States has authority to exercise jurisdiction.* . . . (emphasis added); *accord,* Cline v. Price, 39 Wash. 2d 816, 239 P.2d 322 (1952).

22 The Elfrida, 172 U.S. 186, 203 (1898); *accord,* The Kongsli, 252 Fed. 267, 271 (D. Me. 1918).

23 Merchant Marine Act § 39, 41 Stat. 999 (1920), 46 U.S.C. § 883 (1952).

> No merchandise shall be transported by water, or by land and water . . . between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by section 13 [*] or 808 [*] of this title: *Provided,* That no vessel having at any time acquired the lawful right to engage in the coastwise trade, either by virtue of having been built in, or documented under the laws of the United States, and later sold foreign in whole or in part, or placed under foreign registry, shall hereafter acquire the right to engage in the coastwise trade. . . .

* Section 13 provides that:

> All foreign-built vessels admitted to American registry, owned on February 1, 1920, by persons citizens of the United States, and all foreign-built vessels owned by the United States on June 5, 1920, when sold and owned by persons citizens of the United States, may engage in the coastwise trade so long as they continue in such ownership, subject to the rules and regulations of such trade.

* Section 808 provides that:

> Any vessel purchased, chartered, or leased from the Secretary of Commerce, by persons who are citizens of the United States, may be registered or enrolled and licensed, or both registered and enrolled and licensed, as a vessel of the United States and entitled to the benefits and privileges appertaining thereto: *Provided,* That foreign-built vessels admitted to American registry or enrollment and license under this chapter, and vessels owned by any corporation in which the United States is a stockholder, and vessels sold, leased, or chartered by the Secretary to any person a citizen of the United States, as provided in this chapter, may engage in the coastwise trade of the United States while owned, leased, or chartered by such a person. . . .

24 See statutes cited notes 99, 102, 103, *infra.* It is universally accepted that a country has a right to protect its national interests by limiting its coastwise trade solely to its own vessels. The only problem of unity arising in this area, therefore, is where such states as the British Commonwealth States have imposed a limitation on their "coastal" trade. Because of their relation with Great Britain, and the necessity of providing certainty to British shippers and carriers in their bills of lading, it seems advisable to remove such a limitation from a British ship when it is plying the shores of one of the Commonwealth States. Those Commonwealth States that have adopted this limitation have based their act on the earlier Harter Act of the United States. But the system of federalism in the United States, under which the Harter Act necessarily arose, is a different concept of "statehood" than that existing in the States of the Commonwealth. Hence, to provide uniformity among the Commonwealth States, it would be best to expand their present acts to include all the Commonwealth States.

first moment that the Supreme Court announced our right to impose national restrictions on admiralty jurisdiction.[25] While this problem apparently will never be eliminated, it certainly can be reduced substantially in maritime transactions through effective legislation or judicial interpretation aimed at international unity. This is particularly true in the field of Carriage of Goods by Sea Acts.[26]

In the past the United States has sought to eliminate many policy questions arising in international trade, suits for maintenance and cure, maritime torts and contracts, and the carriage of goods by sea, by making treaties with certain foreign powers.[27] Such a procedure has been anything but uniform, however, since the courts have declared that "public policy"[28] or a legislative enactment[29] conflicting with such treaty may nullify the effect of the latter. The judicial and legislative jurisdictional discretion approved in the above cases has been affirmed since the date they were decided,[30] and appears to be founded on sound and compelling precedent.[31] But, such discretion is not necessarily inconsistent with attempts to attain international unity in transactions affecting the carriage of goods by sea. Indeed, it may actually be one of the fundamental frameworks of such a policy.[32]

II. Bills of Lading

In any explanation of Carriage of Goods by Sea Acts, it is necessary to understand bills of lading, since the foregoing acts are passed to achieve some uniformity in such bills. That they are not always successful will become obvious as the various acts are discussed. "A bill of lading is, in the first instance and most simply, an acknowledgment by a carrier that it has received goods for shipment. Secondly, the bill is a contract of carriage."[33] At least it can be said that the definition is uniform! But because a bill of lading is a contract, and contracts depend on the particular individuals or agencies involved, prior to the adoption of the Hague Rules[34] all semblance of uniformity in such bills ended with the definition. To some extent this disunity is exemplified even by the two principal acts governing bills

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25 The Exchange, 11 U.S. (7 Cranch) 116, 136 (1812).

26 The United States Carriage of Goods by Sea Act is known as, and hereafter referred to as "COGSA." Foreign acts, though often bearing a similar name, will be referred to by their full title.

27 See Wildenhus' Case, 120 U.S. 1, 11 (1886). In this case, which involved the slaying of a foreign sailor by another foreign sailor on a foreign ship in the port of Jersey City, N.J., the court held:

> It is a part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, *unless by treaty or otherwise* the two countries have come to some different understanding or agreement . . . . (emphasis added.)

28 Cunard S.S. Co. v. Mellon, 262 U.S. 100, 124 (1922). These were appeals from decrees of district courts dismissing suits brought by appellant steamship companies for purpose of enjoining United States officials from seizing liquors carried by appellants' passenger ships as sea stores and from taking other proceedings against the vessels under the National Prohibition Act. The Court held that, ". . . the local sovereign may out of considerations of *public policy* choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting *solely in its discretion.*" (emphasis added.)

29 The Ester, 190 Fed. 216, 221 (E.D.S.C. 1911). In this case a libel in rem against a foreign ship, brought by a Swedish citizen to recover unpaid wages, and damages for personal injuries, was dismissed because the United States had a treaty with Sweden governing such matters. Nevertheless, the court pointedly remarked that, "Where Congress has passed an act which may conflict with prior treaty stipulations, it is the duty of the court to uphold the later statute if clear and explicit, even in contravention of express stipulations in an earlier treaty."

30 See Farrell v. United States, 336 U.S. 511, 517 (1948); The Taigen Maru, 73 F.2d 922 (9th Cir. 1934), *rev'd on other grounds,* 297 U.S. 114 (1935).

31 The Exchange, 11 U.S. (7 Cranch 116, 136 (1812).

32 O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 40-41 (1943); The Nanking, 292 Fed. 642, 649 (N.D. Cal. 1923).

33 Gilmore & Black, *op. cit. supra* note 19, at 87.

34 See generally, 1 Benedict, *op. cit. supra* note 6, § 95.

of lading in the United States. The first of these is The Uniform Bills of Lading Act (1909).[35] The second is the Federal Bills of Lading Act (1916),[36] popularly referred to as the Pomerene Act. Since state laws regulating admiralty and maritime matters will not be enforced if the field has been pre-empted by federal law,[37] state statutes regulating bills of lading have no application to interstate and foreign commerce by water.[38] There is no real problem of disharmony in this field, therefore, between state and federal laws. Nor does the application of COGSA affect the Pomerene Act, which continues to apply to the negotiability of ocean bills of lading, since COGSA neither repealed nor amended this act.[39] A problem arises, however, when we consider the effect the Pomerene Act has upon foreign bills of lading.[40]

III. The Harter Act

Although the Harter Act[41] is not the focal point of this Note, its importance cannot be underestimated, since it was the act which the Brussels Convention (1924) used as a model in attempting to establish the framework for a unified approach to bills of lading and Carriage of Goods by Sea Acts.[42] Indeed, from 1893 to 1936, the Harter Act was the only legislation the United States had adopted to regulate a carrier's liability for carriage of goods. It therefore applied to "both foreign and domestic water carriage under bills of lading."[43] The act itself is detailed, particularly in those sections dealing with the right of a carrier to limit its liability under bills of lading. For the purpose of this Note it is sufficient, therefore, to point out that the Harter Act did achieve uniformity for American voyages. Such uniformity is necessarily only *national* in scope, however, and falls far short of the unity required to attain certainty in decisions and flexibility in jurisdiction in the field of international maritime transactions. Yet, because of the jurisdictional discretion allowed the federal courts,[44] it was also possible for foreign vessels to take advantage of the Harter Act by incorporating it into their bills of lading, provided a suit involving such a bill of lading was brought in the United States. This is true even today, although to a much more limited extent.[45] More must be

35 The text of this Act is set out in 4 Uniform Laws Annotated (1922). For the purpose of this Note, it is sufficient to remark that this act dealt primarily with the *negotiability* of bills of lading, and gave full negotiability to such bills issued in *intra-state commerce*. Hence, the problem of uniformity was not so great as with the later Pomerene Act. See generally Gilmore & Black, *op. cit. supra* note 19, at 88-89.

36 39 Stat. 538-45 (1916), 49 U.S.C. §§ 81-124 (1952). This act also dealt primarily with the *negotiability* of bills of lading, although here full negotiability was given to those bills *issued in the United States* in interstate and foreign commerce. See generally, Gilmore & Black, *op. cit. supra* note 19, at 88-89.

37 Jannson v. Swedish American Line, 185 F.2d 212 (1st Cir. 1950).

38 Goldstein v. Robert Dollar Co., 127 Ore. 29, 270 Pac. 903 (1928); see generally, 1 Benedict, *op. cit. supra* note 6, § 95.

39 Section 3(4) of COGSA (49 Stat. 1208 (1936), 46 U.S.C. § 1303(4) (1952)) provides that "nothing in this Act shall be construed as repealing or limiting the application of any part of [the Pomerene Act]."

40 "Since the Pomerene Act does not apply to bills of lading issued in foreign countries for shipment to the United States, the negotiability of such bills would depend on the law of the country of issue. The law of negotiability is, however, a sort of *ius gentium* — in broad outline although not in detail everywhere the same." Gilmore & Black, *op. cit. supra* note 19, at 88-89.

41 27 Stat. 445 (1893), 46 U.S.C. §§ 190-195 (1934).

42 See Scarburgh v. Compania Sud-Americana de Vapores, 174 F.2d 423 (2d Cir. 1949).

43 Gilmore & Black, *op. cit. supra* note 19, at 126.

44 Cunard S.S. Co. v. Mellon, 262 U.S. 100 (1922); The Ester, 190 Fed. 216 (E.D.S.C. 1911).

45 "The Harter Act applies to foreign vessels in suits brought in the United States, in respect to relations prior to loading and after discharge of cargoes in foreign trade; and also in respect of cargoes carried in domestic trade insofar as foreign vessels are permitted to participate in such trade." 1 Benedict, *op. cit. supra* note 8, § 95; see statutes cited note 23 *supra*. No reported cases could be found involving the approach taken by foreign forums in suits not involving the United States, but where the Harter Act had been specifically incor-

said about the Harter Act, but to understand its full significance, it is first necessary to introduce the United States' answer to the proposals made at the Brussels Convention — the United States Carriage of Goods by Sea Act.

IV. The United States Carriage of Goods by Sea Act

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods *by sea* to or from ports of the United States, *in foreign trade,* shall have effect subject to the provisions of this Act.[46] (Emphasis added.)

Because of the increased importance of the Great Lakes and its extensions as a result of the opening of the enlarged St. Lawrence Seaway, the two terms in the above act which are of particular significance are (1) "by sea," and (2) "in foreign trade." The explanation of "in foreign trade" is supplied by the act itself,[47] and is satisfactory for the present discussion. To properly understand the possibly unique position of the Great Lakes within the term, "by sea," however, it is necessary to explore the early development of the meaning of the term, "high seas."

> The term ["high seas"] was formerly used, particularly by writers on public law, and generally in official communications between different governments, to designate the open, unenclosed waters of the ocean, or of the British seas, outside of their ports and havens. . . .
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> If there were no seas other than the ocean, the term "high seas" would be limited to the open, unenclosed waters of the ocean. But . . . there are other seas besides the ocean. . . .
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> . . . the term would seem to be as applicable to the open waters of the great Northern Lakes as it is to the open waters of those bodies usually designated as seas. The Great Lakes possess every essential characteristic of seas. They are of large extent in length and breadth; they are navigable the whole distance in either direction by the largest vessels known to commerce; objects are not distinguishable from the opposite shores; they separate, in many instances, States, and in some instances constitute the boundary between independent nations; and their waters, after passing long distances, debouch into the ocean.[48]

Again we are confronted with a historical problem. At the time the term "high seas" received its initial Anglo-American interpretation there quite obviously was no thought that the Great Lakes would someday become great highways of commerce. Hence, the term was limited to a designation of the large, unenclosed bodies of water that the ordinary layman thinks of when he hears someone speak of "the sea." Yet it is equally obvious that the Great Lakes are not only analogous to the earlier meaning given to the term,[49] but actually fulfill every requirement

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porated into a foreign bill of lading. Based on the later results of cases arising under the Carriage of Goods by Sea Act, however, it seems highly unlikely that the law of the foreign forum was subordinated to the principal of a unified approach embodied in the Harter Act. Indeed, the necessity of subsequently convoking the Brussel Convention in 1924 would belie such a contention.

46 49 Stat. 1207 (1936), 46 U.S.C. §§ 1300-1315 (1952).

47 The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this chapter shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: *Provided, however,* That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an *express statement* that it shall be subject to the provisions of this chapter, shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter. . . . 49 Stat. 1212 (1936), 46 U.S.C. § 1312 (1952). (emphasis added.)

48 United States v. Rodgers, 150 U.S. 249, 253-54, 256 (1893); see also 1 Benedict, *op. cit. supra* note 6, § 36, where he proposes that very possibly the terms "the sea," "the high sea," and "the high seas" are interchangeable.

49 Canada Malting Co. v. Paterson Steamships, 51 F.2d 1007 (2d Cir. 1931), *aff'd,* 285 U.S. 413 (1931); see generally, 1 Benedict, *op. cit. supra* note 6, § 38:

> The visible flux and reflux of the tide is by no means necessary to con-

demanded by this early definition.[50] It would seem, therefore, that the Great Lakes are "seas" as that term is presently interpreted, and hence should fall within the scope of COGSA. This result is absolutely necessary if a unified approach to international maritime transactions is to be achieved.

To speak of the purpose of COGSA is necessarily to speak of the Brussels Convention of 1924, since the latter provided the impetus for the adoption by both the United States and foreign countries of statutes relating to bills of lading and the carriage of goods by sea.[51] Suffice it to say that one of the main purposes of the Convention was the development of a principle of international unity in the area of bills of lading covering the carriage of goods by sea.[52] A fortiori, the rules emerging from the Convention (generally referred to as "the Hague Rules") express an attempt to implement this principle.[53] Unfortunately, the Hague Rules have not been applied uniformly. And while it can be said for the United States that "[COGSA] was adopted to carry out the Bussels Convention of 1924. . . . ,"[54] the act has proved uniform in theory only. The responsibility for such a result rests with at least three different factors — a jealous safeguard of jurisdiction on the part of a majority of the federal courts,[55] the existence of conflicting foreign statutes,[56] and inherent failings in the language of the act itself.[57] It is, perhaps, unfair to condemn either

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stitute the sea. . . . The Baltic, the White, the Black, and the Caspian seas have no tide, *but like our inland seas, the Great Lakes,* they have at intervals . . . a rise and fall of the water. . . . (emphasis added.)

50 United States v. Rodgers, 150 U.S. 249 (1893); *but see* Bigelow v. Nickerson, 79 Fed. 113, 117-18 (7th Cir. 1895):

> . . . Lake Michigan is not a "high sea," in the sense that it is "open and unenclosed, and not under the exclusive control of any one nation or people, but is the free highway of adjoining nations or people." . . . This lake lies wholly within the territory of, and as respects foreign nations is under the exclusive dominion of the government of the United States. . . . It is not by nature free to the commerce of the world. It is so free solely by the grace of this government.
>
> Lake Michigan is a high sea, within the provisions of the act under consideration in U.S. v. Rodgers, but it is not an open sea, nor a boundary line between nations.

51 An important advance [in the unification of maritime law] was made when, in 1921, a comprehensive set of Rules was agreed internationally at the Hague *for general adoption throughout the world* defining the responsibilities and liabilities, rights and immunities of a carrier of goods by sea. Cleminson, *International Unification of Maritime Law,* 23 JOURNAL OF COMPARATIVE LEGISLATION 163, 165-66 (1941). (emphasis added.)

The author's subsequent statement that "the great bulk of world trade is now carried under the Rules giving corresponding certainty to buyers and sellers, shipowners, bankers and underwriters," is appropriate only if we speak of "national" unity and certainty, since the Hague Rules have not been uniformly adopted in all those States presently engaging in maritime trade.

52 "For the purpose of bringing about international uniformity in ocean bills of lading, delegates of all the leading maritime nations of the world assembled at the Hague in 1921 at a meeting of the Maritime Law Committee of the International Law Association." Note, 23 VA. L. REV. 590 (1937). (This assembly laid the foundations for the later Brussels Convention).

53 1 BENEDICT, *op. cit. supra* note 6, § 95. For a history of the Hague Rules, see the Report of Congressman Bland, Chairman of the Committee on Merchant Marine and Fisheries, H.R. REP. No. 2218, 74th Cong., 2d Sess. 4-7 (1936); Maritime Law Association, Doc. No. 223, 2313-2318 (1936); U.S. CHAMBER OF COMMERCE, UNIFORM OCEAN BILLS OF LADING 5-7 (1931).

54 Spanish-American Skin Co. v. The M. S. Ferngulf, 143 F. Supp. 345, 348 (S.D.N.Y. 1956), *aff'd,* 242 F.2d 551 (2d Cir. 1957); *accord,* The S.S. Asturias, 40 F. Supp. 168 (S.D. N.Y. 1941), *aff'd,* 126 F.2d 999 (2d Cir. 1942); Pan-Am Trade & Credit Corp. v. The Campfire, 156 F.2d 603 (2d Cir. 1946). See generally, S. REP. No. 742, 74th Cong., 1st Sess. 4 (1935).

55 Chemical Carriers, Inc. v. L. Smit & Co.'s Internationale Sleepdienst, 154 F. Supp. 886 (S.D.N.Y. 1957); St. Paul Fire & Marine Ins. Co. v. The Republica De Venezuela, 105 F. Supp. 272 (S.D.N.Y. 1952).

56 See notes 99, 102, 103 *infra.*

57 See notes 64, 67, 68 *infra,* statute cited note 47 *supra.*

the United States or foreign countries for their failure to achieve international uniformity in the interim immediately following the Brussels Convention. It is far worse, however, to condone the same results at the present time. International uniformity in Carriage of Goods by Sea Acts is as possible as was national uniformity under the Harter Act.[58] It can be achieved only by returning to the principles originally embodied in the Hague Rules.[59]

Since the Harter Act provided the material from which the Brussels Convention hoped to mould internationally unified rules for bills of lading,[60] the subsequent foreign Carriage of Goods by Sea Acts often bore a close resemblance to that act.[61] The same is not true of COGSA, however. With but a few important exceptions it has completely pre-empted the field of bills of lading formerly subject to the Harter Act.[62]

The first of these exceptions applies to what is popularly called the "coastwise option." By express provision of the act,[63] COGSA applies only to bills of lading covering the carriage of goods by sea "in foreign trade."[64] Yet it is also possible for a party to expressly stipulate for coverage by COGSA rather than by Harter in shipping carried on between ports of the United States[65] (*i.e.*, in "domestic voyages"), in which case "the terms of [COGSA] override any inconsistent provision of the bill."[66] It is important to note that the requirement of an "express" agreement to incorporate COGSA has been strictly construed.[67] In its absence, therefore, it seems likely that the provisions of the Harter Act will be controlling.

The second area is one in which the Harter Act continues to maintain complete supremacy. This apparent anomaly results from the fact that COGSA applies only to transportation in foreign commerce "from tackles to tackles" — *i.e.*, from the time the goods are lifted from the loading dock until the time they are unloaded to the dock at the point of destination.[68]

The third principal difference between the two acts affects the liability of the carrier. In this area COGSA provides greater protection to the carrier than was available under the Harter Act. This increased protection arises primarily in the negligence or exception clause of the later act. Under Harter, the exception clause

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58 See Scarburgh v. Compania Sud-Americana De Vapores, 174 F.2d 423, 424 (2d Cir. 1949):

> The Carriage of Goods by Sea Act of 1936 . . . expresses our adherence to the Brussels Convention of 1924, embodying substantially the provisions of the earlier Harter Act of 1893 . . . . The purpose of the Act was to carry over into the international sphere the *uniformity achieved for American voyages in the Harter Act* by mitigating the common-law "insurer's" liability of carriers, in exchange for a prohibition of clauses in the contract of carriage lessening the carrier's liability. (emphasis added).

59 See 1 BENEDICT, *op. cit. supra* note 6, § 95.

60 ". . . the 'Hague Rules' as they are commonly called, contained terms greatly strengthening and augmenting the provisions of the Harter Act. . . ." Note, 23, VA. L. REV., 590 (1937).

61 See notes 99, 102, 103 *infra.*

62 In A. M. Collins & Co. v. Panama R. Co., 197 F.2d 893, 895 (5th Cir. 1952), the court held that, "The Harter Act . . . was held to be superseded for the most part by the Carriage of Goods by Sea Act of April 16, 1936. . . ."

63 See statute cited note 47 *supra.*

64 "As to foreign commerce [COGSA] has exclusive application, but it has no application to domestic commerce." Note, 27 VA. L. REV. 1078, 1079 (1941).

65 See statute cited note 47 *supra.*

66 Pannell v. The S.S. American Flyer, 157 F. Supp. 422, 429 (S.D.N.Y. 1957).

67 In The Vale Royal, 51 F. Supp. 412, 424 (D. Md. 1943), the court held that,

> . . . the 1936 Carriage of Goods by Sea Act . . . expressly relates to foreign trade; that is, to the transportation of goods between ports of the United States and foreign ports. It is true provision is made for adoption of the Act in cases of domestic trade *but this must be by express agreement* . . . in which event it supersedes the earlier . . . Harter Act. (Emphasis added.)

68 The Monte Iciar, 167 F.2d 334 (3rd Cir. 1947); see generally, 1 BENEDICT, *op. cit. supra* note 6, § 94.

wasn't "self-executing," but "conditional."[69] In other words, under the Harter Act the exemption allowed a carrier for "negligent navigation" was available only if the carrier had used "due diligence" in making the vessel "seaworthy" in all respects. It made no difference that there was no causal connection between the unseaworthiness and the loss of, or damage to, the cargo.[70] Under the exception clause in COGSA, however, the carrier is always exonerated from liability unless his failure to use due diligence in some respect proximately causes or contributes to the loss.[71] So long as the goods are being carried under a bill of lading subject to COGSA, the above exemption applies to the carrier "notwithstanding the absence of such a provision in the contract."[72] As regards the right of a carrier to limitation of liability, COGSA also "goes beyond the actual terms of the Harter Act in granting immunity by an omnibus exemption of 'any other cause arising . . . without the actual fault or neglect of the agent or servants of the carrier.' "[73] This latter provision is not so significant, however, as the important and far-reaching change made in the exception clause.

In general, then, it is fair to say that the Harter Act has been superseded by COGSA. Indeed, it is unfortunate that any remnants of the 1893 Act are still with us. Admittedly, as COGSA now reads,[74] it would not extend sufficient coverage to eliminate the exceptions which now fall within the language of the Harter Act. But this has partially been remedied by the "coastwise option."[75] Thus, at least the groundwork has been laid for a single uniform law applying to the carriage of goods by sea under bills of lading. Further legislation is necessary, however, if the exceptions are to be completely eliminated. It would seem to be no great legislative innovation to make the "coastwise option" no longer optional, but obligatory. In other words, it would be possible for COGSA to *completely* supersede the earlier Harter Act. In this way the United States would take a large stride forward in its efforts to assure uniformity and certainty in maritime transactions. Through such a measure we not only would be paralleling the Hague Rules more closely,[76] and thereby following the recommendations of the leading scholars on the subject,[77] but would be creating a Carriage of Goods by Sea Act in all essentials the same as those of the other leading maritime countries.[78] The thrust of the opportunities presented by these results should demand no further recommendation.

Before the possibility of uniformity in such acts can become a reality, however, the question of jurisdiction must become more stable. In this area Congress appears to have taken a very wise and liberal approach in drafting the 1936 Act. As was pointed out in a well-written decision in the Second Circuit,[79]

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69 See 1 BENEDICT, *op. cit. supra* note 6, § 95.

70 May v. Hamburg-Amerikanische Packetfahrt Aktiengesellschaft, 290 U.S. 333 (1933).

71 See COGSA § 4 (1), 49 Stat. 1210 (1936), 46 U.S.C. § 1304 (1) (1952); see generally 1 U. ILL. L.F. 88 (1959); 1 BENEDICT, *op. cit. supra* note 6, § 95.

72 Note, 23 VA. L. REV., *supra* note 52, at 593.

73 Note, 27 VA. L. REV., *supra* note 64, at 1088-9.

74 See Statute cited note 47 *supra.*

75 Pannell v. The S.S. American Flyer, 157 F. Supp. 422 (S.D.N.Y. 1957); The Vale Royal, 51 F. Supp. 412 (D. Md. 1943); see statute cited note 47 *supra.*

76 See Note, 23 VA. L. REV., *supra* note 52.

77 See note 104 *infra* and accompanying text.

78 See statutes cited notes 99, 103 *infra.*

79 Wm. H. Muller & Co. v. Swedish American Line Ltd., 224 F.2d 806, 807-8 (2d Cir. 1955). In this case, a provision allowing Sweden to have jurisdiction over the suit was upheld as reasonable and therefore the court, in its discretion, declined to hear the case. It is unfortunate that the Second Circuit has been practically alone in liberally interpreting the test of "reasonableness" in cases involving an agreement as to the choice of a forum; because, although it is hoped that a unified system of international Carriage of Goods by Sea Acts will eventually evolve, until that goal is reached it is absolutely vital that there be a consistent application of existing law. To achieve such consistency the federal courts should either adhere to the principal of comity and give full recognition to the law of a foreign state, when that law has been incorporated into a foreign maritime agreement, or else decline jurisdiction

> The Carriage of Goods by Sea Act contains no express grant of jurisdiction to any particular courts nor any broad provisions of venue . . . . . in each case the enforceability of such an agreement depends upon its reasonableness . . . . [I]f in the exercise of its jurisdiction, by a preliminary ruling the court finds that the agreement is not unreasonable in the setting of the particular case, it may properly decline jurisdiction and relegate a litigant to the forum to which he assented.

The absence in COGSA of an express grant of jurisdiction to any particular court is a great step towards an internationally uniform approach to bills of lading. Indeed, were such a provision given a broad interpretation, the achievement of such unity would become highly probable. At the present time, for example, many shippers, hoping to attain some certainty in their bills of lading, have seized upon the opportunity offered by COGSA to incorporate its provisions into their foreign bills of lading.[80] And the decisions, while conflicting on the question of whether or not foreign forums can apply COGSA to disputes arising under bills of lading issued in the United States, or by American ships,[81] have seemingly approved the general policy of incorporating COGSA in foreign bills of lading.[82] Indeed, the courts have been willing to hold that even where a foreign bill of lading was issued in which COGSA was not specifically incorporated, that act will determine the liability of the carrier so long as the shipment is to or from a port of the United States.[83]

From the results reached in the above cases it is evident (1) that the absence of an express grant of jurisdiction or broad provisions of venue in COGSA gives the federal courts great discretion in determining whether or not to exercise jurisdiction; (2) that a few of the courts, apparently realizing the necessity of flexibility[84] in transactions involving bills of lading, have been willing to transfer jurisdiction to the forum of a foreign country when such transfer was deemed "reasonable"; and (3) that many of the courts have been reluctant to go this far, expressing a jealous regard for those aspects of admiralty and maritime jurisdiction which traditionally

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in suits in which the litigants have provided for a hearing in a foreign forum; provided, of course, that such a provision is neither "unreasonable" nor against "public policy."

80 Petition of Isbrandtsen Co., 201 F.2d 281, 285 (2d Cir. 1953). This was a proceeding to determine a carrier's liability for loss of cargo being shipped from Germany to Korea under a shipping contract incorporating that provision of COGSA limiting the carrier's liability. The court said that,

> The Carriage of Goods by Sea Act is applicable to shipments in foreign trade to and from ports of the United States, but not to shipments . . . between foreign ports or to coastal shipping between two United States ports. . . . Permission has been granted to subject contracts for shipments between United States ports to the Carriage of Goods by Sea Act . . . . But Congressional silence as to incorporation of the Act in bills of lading covering trade between two foreign ports is not such a declaration of policy as to overcome the long standing rule that such agreed value provisions . . . are valid. Moreover, any policy against the use of such clauses is difficult to find, since they are expressly allowed as to stipulations covered by the Act. . . .

81 "With respect to the Carriage of Goods by Sea Act . . . as governing law, there is nothing to indicate that its widespread application to foreign courts in marine controversies cannot be matched by the tribunals of a maritime country such as Sweden." Munillo Ltda. v. The Bio Bio, the Paraguay, The Argentina, 127 F. Supp. 13, 16 (S.D.N.Y. 1955), *aff'd*, 227 F.2d 519 (2d Cir. 1955); *accord*, Galban Lobo Trading Co. S/A v. The Diponegoro, 108 F. Supp. 741 (S.D.N.Y. 1952); *contra*, Sociedade Brasileira De Intercambio Commercial E Industrial, LTDA v. S.S. Punta Del Este, 135 F. Supp. 394 (D.N.J. 1955).

82 Petition of Isbrandtsen Co., 201 F.2d 281 (2d Cir. 1953).

83 The Ciano, 69 F. Supp. 35 (E.D. Pa. 1946). This was an action for damage to a cargo of paprika shipped from Spain to Philadelphia, Pa. In deciding for the libellant the court held that COGSA applied, even though not specifically incorporated, and despite the fact that the bill of lading was issued in Spain. *Accord*, Schroeder Bros. v. The Saturnia, 123 F. Supp. 282 (S.D.N.Y. 1954).

84 Although no case could be found in which the court specifically used the word "flexibility," the tests of "reasonableness" and "forum non conveniens," when invoked, have been so closely analogous to "flexibility" as to be practically synonymous terms.

have adhered to the federal judiciary system.[85] The reasoning expressed in the decisions of both the "liberal" and "conservative" federal courts apparently has been founded primarily on four factors: (a) the test of "reasonability," (b) the test of "public policy," (c) the test of "forum non conveniens," and (d) the test of the extent to which United States citizens or shipping is involved.[86] All four tests are legitimate and have been used often in the past. And although several of the cases can be distinguished on their facts, the factor causing the failure of a uniform approach still seems to be lodged in the refusal of the federal courts to fully utilize the discretion given them by implication in COGSA.

Disputes over arbitration clauses often arise when suits involving bills of lading incorporating COGSA are brought into the federal courts.[87] Although the difficulties encountered seemingly center around the question of whether COGSA or the arbitration clause is to prevail if the two are in conflict, the real problem is again the refusal of the federal judges to permit what they consider an attempt by the litigants to oust the court of its jurisdiction.[88] The problem was particularly vexing in the field of arbitration clauses, since

> [p]rior to 1925 there was no federal legislation on the subject of arbitration and it is an historical fact that our courts . . . had not looked with favor upon arbitration agreements. They had never denied that an agreement to arbitrate created a right but public policy was thought to forbid specific performance.[89]

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85 *But see,* Aetna Insurance Co. v. The Satrustegui, 171 F. Supp. 33, 35 (D. Puerto Rico 1959) which is the latest case on point. In that case the district court of Puerto Rico adopted the liberal approach recommended by the earlier decisions of the Second Circuit. In holding that the enforcement of a provision in a bill of lading requiring suit in Barcelona, Spain, was not "unreasonable" nor "against public policy," the court said:

> The vessel is a Spanish vessel, its owner is a Spanish concern, it was loaded in a Spanish port, . . . all persons who participated in the receiving and handling of the merchandise . . . are residents of Spain; all the evidence necessary to prove the condition of the merchandise when it was received and shipped at the port of Valencia, Spain is only available in that place. . . .
>
> Absent any question of unreasonableness or in contravention of public policy, a sound use of their discretion by the courts warrants the enforcement of jurisdictional agreements such as the one involved in this action.

86 Nieto v. The S.S. Tinnum, 170 F. Supp. 295, 296 (S.D.N.Y. 1958) involved an action for damages to cargo en route from Mexico to Cuba on a German vessel. The bill of lading provided that all disputes were to be decided by German Law and exclusively by Hamburg Courts. In holding the provision valid, the court said:

> While jurisdictional agreements of this kind have . . . been denied enforcement, [*] the rule in this Circuit is to hold them "invalid only when unreasonable." [*]
>
> . . . for this Court to enforce the terms of the bill of lading *or of the Hague Convention* would not necessarily violate the public policy of the United States. Comparable terms have been enforced in the past, and their enforcement would not now contravene public policy merely because the Carriage of Goods by Sea Act contains different provisions. (Emphasis added.)

* See Chemical Carriers, Inc. v. L. Smit & Co.'s Internationale Sleepdienst, 154 F. Supp. 886 (S.D.N.Y. 1957); St. Paul Fire & Marine Ins. Co. v. The Republica De Venezuela, 105 F. Supp. 272 (S.D.N.Y. 1952).

* See Kreger v. Pennsylvania R.R., 174 F.2d 556, 561 (2d Cir. 1949). See cases cited notes 80, 84 *supra.*

87 See cases cited notes 88, 89, 91 *infra.*

88 . . . if Congress in 1947, thought that the Carriage of Goods by Sea Act . . . affected or forbade any provisions in the Arbitration Act of 1947, it would and could have plainly avoided any such confusion. I am unable to find in the Carriage of Goods by Sea Act any reason or statement forbidding such parties to voluntarily agree to take advantage by arbitration and to arbitrate their controversy rather than be compelled to have the delay and expense of a trial . . . .

> The real trouble appears to be in the reluctance of the Federal Courts to yield any of its [sic] jurisdiction, directly or indirectly. Uniao De Transportadores v. Companhia De Navegacao, 84 F. Supp. 582 (E.D.N.Y. 1949).

89 Petition of Pahlberg, 43 F. Supp. 761, 762 (S.D.N.Y. 1942).

As a result of federal legislation,[90] however, and the judicial interpretation put upon it when it appears to conflict with COGSA[91] the present position of such arbitration clauses seems clear. They definitely take precedence over COGSA.[92] This, too, then, is a stride forward in what appears to be an ever-increasing concern over the attainment of certainty and unformity in the area of maritime transactions. Indeed, in this specific area of the law, the right to arbitrate has been further extended to give cognizance to a provision for arbitration in a foreign country, despite the fact that COGSA was applicable.[93]

V. Foreign Statutes

To fully comprehend the feasibility of creating an internationally unified control of bills of lading and of carriage of goods by sea, it is necessary to closely scrutinize the many foreign statutes which have been passed to regulate this aspect of maritime procedure. Just as COGSA was passed in an attempt to effectuate the principles propounded by the Brussels Convention,[94] so, too, were the numerous foreign acts. The British Carriage of Goods by Sea Act[95] is of particular importance since it provided the momentum for many of the later regulations passed by other States.[96] Since Great Britain had no equivalent of the earlier Harter Act, the British Carriage of Goods by Sea Act does not suffer from the limitation on coastal

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90 Arbitration Act, § 1, 61 Stat. 669 (1947), 9 U.S.C. § 2 (1952) provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3 of the same Act further provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. See also the *Report of the House Committee on Judiciary,* Com. Rep. No. 96, accompanying H. R. Rep. No. 646 68th Cong., 1st Sess. (1923):
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> Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the form in which the contract is made . . . . The bill declares that such agreements will be recognized and enforced by the Courts of the United States. . . . An arbitration agreement is placed upon the same footing as other contracts where it belongs. . . .

91 In San Shipping Co. v. De Fosse & Tanghe, 199 F.2d 687, 689 (2d Cir. 1952), which involved a proceeding to enjoin arbitration of a dispute concerning alleged short delivery, the court granted the remedy even though the demand was not made within the one year limitation upon suits required by COGSA, holding:

> Nor does the reservation to the carrier in the charter party of all rights it would have under the Carriage of Goods by Sea Act . . . make the demand for arbitration untimely. It is true that the demand wasn't made within the one year limitation upon suits, contained in § 1303(6) of the above Act, but there is, nevertheless, no time bar because arbitration is not within the term "suit" as used in that statute. Instead, it is the performance of a contract for the resolution of a controversy without suit.

92 Uniao De Transportadores Para Importacao E Comercio, Ltda. v. Companhia De Navegacao Carregadores Acoreanos, 84 F. Supp. 582 (E.D.N.Y. 1949).

93 *Id.*

94 Cases cited note 54 *supra.*

95 Carriage of Goods by Sea Act, 1924, 14 & 15, Geo. 5.

96 See statutes cited notes 99, 101 *infra.*

shipping contained in COGSA.[97] The act has one severe restriction in that it is possible that an English bill of lading, although incorporating the Hague Rules, will not remain subject to those Rules. This is not the direct fault of the British Act, however, but rather of the forum which applies the governing law.[98]

The British Carriage of Goods by Sea Act is important, not only because it seems to have adhered most closely to the Hague Rules, but also because, as was mentioned above, it has exerted profound influence in encouraging other countries to follow suit. Indeed, most of the other States of the Commonwealth have passed domestic legislation adopting the Hague Rules.[99] Although the acts are called by

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97 The 1924 Carriage of Goods by Sea Act (14 & 15 Geo. 5, c. 22, § 1), "applies generally to all bills of lading under which goods are carried by ship 'from any port in Great Britain or Northern Ireland to any other port *whether in or outside* Great Britain or Northern Ireland.'" CARVER, CARRIAGE OF GOODS BY SEA 160 (10th ed. 1957). (Emphasis added.) Because of the wording of the British act, it would not apply where goods are carried in foreign or coastal trade otherwise than under a bill of lading. This apparent lack of uniformity is easily corrected, however, because of the almost universal use of such bills. (It is to be noted, however, that COGSA does not contain a similar limitation, but has expanded the scope of the act to include "[e]very bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States in foreign trade. . . .") 49 Stat. 1207 (1936), 46 U.S.C. § 1300 (1952).

98 A bill of lading issued in the United Kingdom will, by section one of the British Act, incorporate the Rules set out in the Schedule whether or not it contains an express statement that it is subject to those Rules, provided it is governed by English law. If, on the other hand, it is governed by foreign law, the question whether or not the Hague Rules apply to it will (in the absence of an express statement in it), . . . depend on the legislation of the foreign country in question. Since the scheme of the convention was that each State should legislate only in respect of bills of lading issued in its own territory, this would normally mean that such a bill of lading would not be subject to the Hague Rules. It would be subject to them if, for instance, the governing law was that of the United States, and the shipment was to that country, since the United States Carriage of Goods by Sea Act, 1936, applies both to outward and inward bills of lading. CARVER, *op. cit. supra* note 97, at 214.

99 CARVER, *op. cit. supra* note 97, at 1043: "The following, in addition to the United Kingdom, which were or are member States of the Commonwealth have adopted the Hague Rules by domestic legislation. . . :

State	*Short Title of Act*	*Date Passed*	*Effective Date*
Commonwealth of Australia [*]	Sea-Carriage of Goods Act, 1924 (No. 22 of 1924.)	Sept. 17, 1924	Jan. 1, 1925
India	Indian Carriage of Goods by Sea Act, 1925 (No. 26 of 1925.)	Sept. 21, 1925	Jan. 1, 1926
Newfoundland	Carriage of Goods by Sea Act, 1932 (22 Geo. 5, c. 18.)	April 30, 1932	June 30, 1932
Dominion of Canada	Water Carriage of Goods Act, 1936 (1 Edw. 8, c. 49.)	June 23, 1936	Aug. 1, 1936
New Zealand [*]	Sea-Carriage of Goods Act, 1940 (No. 31 of 1940.)	Jan. 25, 1943	Mar. 1, 1943
Republic of Ireland	Merchant Shipping Act, 1947, s. 13 (No. 46 of 1947.)	Dec. 23, 1947	April 1, 1948
Union of South Africa	Merchant Shipping Act, 1951, ss. 2, 307-310 (No. 57 of 1951.)	June 27, 1951	Not yet in force

* As to coastwise trade, the Australian Sea-Carriage of Goods Act, 1924, § 4 (2) holds: "The Rules *shall not* by virtue of this Act apply to the carriage of goods by sea from a port in any State *to any port in the same State.* CARVER, *op. cit. supra* note 97, at 1051. (Emphasis added.)

* As to *coastwise trade,* New Zealand has Part I: This Part contains provisions relating *only* to carriage "from any port in New Zealand to any other port in New Zealand." CARVER, *op. cit. supra* note 97, at 1052-53. (This provision was modelled on the Harter Act). Very possibly New Zealand and Newfoundland have found one way to achieve uniformity in the issuance of bills of lading. Both countries have acts containing a provision *"imposing a penalty for issuing a bill of lading which does not contain a statement that it is subject to the Rules [i.e.,* the Hague Rules], *thus making the inclusion of such a statement 'obligatory.'"* CARVER, *op. cit. supra* note 97, at 211. (Emphasis added.)

a variety of names, and vary in date of passage from 1924 to 1951, each essentially repeats the provisions of the British act. Hence, with few exceptions,[100] the acts of the States of the Commonwealth apply to the carriage of goods by sea in "interstate commerce," unlike the provision in the United States Carriage of Goods by Sea Act.[101] A vigorous adoption of the Hague Rules commenced among the British colonial possessions in 1926, and has continued until the present day.[102]

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100 *Ibid.*

101 The ability of foreign states to include both foreign and interstate commerce in their acts stems largely from the fact that they were not hampered with an earlier law similar to the Harter Act. Further, in interpreting the meaning of carriage of goods "by sea," the Commonwealth States have not been faced with a problem similar to that of the United States of properly referring to the Great Lakes as "seas." Because of the "coastwise option" in COGSA (see Statute cited note 47 *supra*), however, and based on the reasonable certainty that the Great Lakes are, at the least, analogous to "the sea" (see notes 49, 50 *supra*), Congress should feel itself compelled to continue the trend toward unity in maritime transactions by altering those sections of COGSA which have permitted the Harter Act to retain some importance.

102 CARVER, *op. cit. supra* note 97, at 1057-59:

COLONIAL ENACTMENTS ADOPTING THE HAGUE RULES

Colonial Enactments Adopting the Hague Rules

Territory Acceding to Convention	*Short Title of [Act]*	*Date Passed*	*Effective Date*
Aden	Carriage of Goods by Sea Ordinance. (Cap. 14, Revised Ordinances, 1945.)	Oct. 15, 1941	Oct. 15, 1941
Bahamas	Carriage of Goods by Sea Act. (Cap. 161, Revised Edition, 1929.)	Mar. 22, 1926	Feb. 1, 1929
Barbados	Carriage of Goods by Sea. 1926. (No. 10 of 1926.)	Mar. 15, 1926	Mar. 15, 1926
Bermuda	Act 1 of 1926.	Jan. 13, 1926	Jan. 13, 1926
British Guiana	Carriage of Goods by Sea Ordinance. (Cap. 123, Revised Edition, 1930.)	May 21, 1927	July 31, 1926
British Honduras	Carriage of Goods by Sea Ordinance 1926. (No. 19 of 1926.)	Sept. 22, 1926	Jan. 1, 1927
Ceylon	Carriage of Goods by Sea Ordinance 1926. (No. 18 of 1926.)	Dec. 3, 1926	June 1, 1927
Cyprus	Carriage of Goods by Sea Law, 1927. (No. 8 of 1927.)	Feb. 2, 1927	Jan. 1, 1927
Falkland Islands and Dependencies	Carriage of Goods by Sea Ordiance, 1927. (No. 7 of 1927.)	Nov. 16, 1927	April 1, 1928
Fiji	Sea-Carriage of Goods Ordinance, 1926. (No. 1 of 1926.)	June 2, 1926	June 10, 1926
Gambia	Carriage of Goods by Sea Ordinance, 1926. (No. 5 of 1926.)	May 31, 1926	Sept. 1, 1926
Gibraltar	Carriage of Goods by Sea Ordinance, 1926. (No. 1 of 1926.)	Mar. 26, 1926	July 1, 1926
Gold Coast	Carriage of Goods by Sea Ordinance, 1926. (Cap. 19, Revised Edition, 1928.)	Mar. 12, 1926	May 1, 1926
Hong Kong	Carriage of Goods by Sea Ordinance, 1928. (No. 17 of 1928.)	Dec. 28, 1928	Jan. 1, 1929
Jamaica	Carriage of Goods by Sea Law, 1927. (Law 10 of 1927.)	Mar. 31, 1927	Mar. 31, 1927
Kenya	Carriage of Goods by Sea Ordinance, 1926. (No. 16 of 1926.)	Sept. 28, 1926	Jan. 1, 1927
Leeward Islands—Antigua	Carriage of Goods by Sea Ordinance. (No. 2 of 1926.)	Feb. 24, 1926	Mar. 11, 1926

Again there has been remarkable uniformity with the British Act.

Other countries have ratified the Hague Rules to some degree, but the uniformity present among the States of the Commonwealth and the British colonies is lacking in these foreign enactments.[103] Nevertheless, several of these States have

Dominica	Carriage of Goods by Sea Ordinance. (No. 7 of 1926.)	Sept. 2, 1926	Oct. 18, 1926
Montserrat	Carriage of Goods by Sea Ordinance. (No. 6 of 1926.)	Feb. 20, 1926	April 17, 1926
St. Christopher and Nevis	Carriage of Goods by Sea Ordinance, 1926. (No. 1 of 1926.)	Feb. 2, 1926	Mar. 3, 1926
Virgin Islands	Carriage of Goods by Sea Ordinance, 1925. (No. 7 of 1925.)	—— — ——	Jan. 1, 1926
Malaya, Federation of	Carriage of Goods by Sea Ordinance, 1950. (No. 13 of 1950.)	May 23, 1950	May 23, 1950
Malta	Carriage of Goods by Sea Act, 1954.	—— — ——	Jan. 1, 1955
Mauritius	Carriage of Goods by Sea Ordinance, 1927. (No. 28 of 1927.)	Nov. 5, 1927	Feb. 15, 1929
Nigeria	Carriage of Goods by Sea Ordinance, 1926. (No. 1 of 1926.)	Mar. 18, 1926	Jan. 1, 1926
North Borneo	Carriage of Goods by Sea Ordinance, 1927. (No. 5 of 1927.)	Sept. 1, 1927	Jan. 1, 1928
Palestine	Carriage of Goods by Sea Ordinance, 1926. (No. 43 of 1926.)	Dec. 1, 1926	Dec. 1, 1926
Sarawak	Order No. c-4 (Carriage of Goods by Sea Act), 1931. (Order No. c-4 of 1931.)	Aug. 1, 1931	Aug. 1, 1931
Seychelles	Carriage of Goods by Sea Ordinance, 1926. (No. 7 of 1926.)	Sept. 25, 1926	Jan. 1, 1927
Sierra Leone	Carriage of Goods by Sea Ordinance, 1926. (No. 13 of 1926.)	April 10, 1926	April 10, 1926
Singapore	*See* Straits Settlements.		
Somaliland Protectorate	Carriage of Goods by Sea Ordinance, (Cap. 49, Revised Edition, 1930.)	Nov. 17, 1926	Nov. 17, 1926
Straits Settlements	Carriage of Goods by Sea Ordinance, 1927. (No. 4 of 1927.)	April 20, 1927	Oct. 1, 1927
Tanganyika Territory	Carriage of Goods by Sea Ordinance, (Cap. 117, Revised Edition, 1928.)	April 1, 1927	Jan. 1, 1927
Trinidad and Tobago	Carriage of Goods by Sea Ordinance, 1926. (No. 6 of 1926.)	April 22, 1926	Jan. 1, 1927
Western Pacific Islands— British Solomon Islands	Carriage of Goods by Sea Regulation, 1926. (No. 1 of 1926.)	Mar. 31, 1926	Mar. 31, 1926
Gilbert and Ellice Islands Colony	Carriage of Goods by Sea Ordinance, 1926. (No. 1 of 1926.)	Mar. 31, 1926	Mar. 31, 1926
Tonga	Carriage of Goods by Sea Act, 1927. (Cap. 67, Revised Edition, 1928.)	Aug. 12, 1927	Sept. 1, 1927
Windward Islands— Grenada	Carriage of Goods by Sea Ordinance, 1926. (No. 4 of 1926.)	Mar. 27, 1926	April 1, 1926
St. Lucia	Carriage of Goods by Sea Ordinance, 1926. (No. 12 of 1926.)	June 29, 1926	Jan. 1, 1927
St. Vincent	Carriage of Goods by Sea Ordinance, 1926. (No. 13 of 1926.)	May 26, 1926	June 1, 1926
Zanzibar Protectorate	Carriage of Goods by Sea Decree, 1926. (No. 3 of 1926; Cap. 84, Revised Ed., 1934.)	Jan. 15, 1926	Mar. 31, 1926

adopted or ratified essentially the same Rules and thereby render the problem of international uniformity anything but hopeless. Again the largest trouble area seems to center around the coastal trade. This is difficult to understand when one views the success of the British Carriage of Goods by Sea Act. Most probably the solution rests in an incisive legislative drafting of certain amendments to the present Acts. In particular, all earlier references to the Harter Act as a model should be forgotten.

Conclusion

Can international unity be achieved for bills of lading and the carriage of goods by sea? Viewing the content, purpose and scope of all existing Carriage of Goods by Sea Acts, together with their similarities and disimilarities, international unification seems possible, if not highly probable. The awakening interest in this area of the law most likely will receive increased momentum as a result of the opening of the enlarged St. Lawrence Seaway.[104] The Great Lakes now provide a vast new area of commercial maritime exploitation.[105] Such an increase in trading facilities and possibilities necessarily requires a more thorough uniformity in admiralty and maritime law. Substantive certainty for both carrier and shipper can result only from jurisdictional flexibility aimed at diminishing the conflicts of law. A fortiori, until legislative uniformity is achieved on an international scale, the courts must

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103 CARVER, *op. cit. supra* note 97, at 1072. The following countries outside the Commonwealth have ratified or acceded to the Convention.

Country	*Date of Ratification or Accession*	*Effective Date*
Belgium [*]	June 2, 1930	June 2, 1931
Hungary	June 2, 1930	June 2, 1931
Spain [*]	June 2, 1930	June 2, 1931
Monaco	May 15, 1931	Nov. 15, 1931
Portugal [*]	Dec. 24, 1931	June 25, 1932
Poland	Oct. 26, 1936	April 26, 1937
France [*] and Algeria	Jan. 4, 1937	July 4, 1937
United States [*]	June 29, 1937	Dec. 29, 1937
Rumania	Aug. 4, 1937	Feb. 4, 1938
Sweden [*]	July 1, 1938	Jan. 1, 1939
Denmark [*]	July 1, 1938	Jan. 1, 1939
Norway [*]	July 1, 1938	Jan. 1, 1939
Italy [*]	Oct. 7, 1938	April 7, 1939
Germany [*]	July 1, 1939	Jan. 1, 1940
Finland [*]	July 1, 1939	Jan. 1, 1940
Egypt [*]	Nov. 29, 1943	May 29, 1944
Netherlands [*]	Aug. 15, 1955	Sept. 14, 1955

(*—those countries which have passed domestic legislation adopting the Rules).

> [Denmark, Norway, Sweden and Finland] . . . made identical reservations of their coasting trade, their Baltic trades, and their railway services which are subject to the Rome Railway Conventions of 1933.
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> [In Italy] . . . the Hague Rules were made to apply to bills of lading issued in Italy for the carriage of goods *to a destination outside Italy.*
>
> [In Spain] . . . the Hague Rules . . . shall not apply to the carriage of goods by Spanish coastal services and shall have effect solely and exclusively in relation to the carriage of goods between States which have ratified or acceded to the Convention *and* have incorporated it in their national law. CARVER, *op. cit. supra* note 97, at 1075, 1075-76.

104 To understand the scope of the increasing interest in the legal problems created by international streams, see generally Engleton, *The Use of Waters of International Rivers,* 33 CAN. B. REV. 1018 (1955); BLOOMFIELD & FITZGERALD, BOUNDARY WATER PROBLEMS OF CANADA AND THE UNITED STATES (1958); U.S. DEPT. OF THE INTERIOR, DOCUMENTS ON THE USE AND CONTROL OF THE WATERS OF INTERSTATE AND INTERNATIONAL STREAMS (1956).

105 "The St. Lawrence, in a sense, is the front door to North America or at least to the northern half of the continent. It connects the Atlantic Ocean with the Great Lakes, thus leading from the open sea to the continental heartland, providing a natural waterway extending some 2,000 miles . . . ." 1 U. ILL. L. F., *supra* note 71, at 34.

vigorously advocate adherance to the principal of comity. As was pointed out by Lord Macmillan, in *Stag Line v. Fascolo Mango*,[106]

> It is important to remember that the Act of 1924 was the outcome of an international conference and that the rules in the Schedule have an international currency. As those rules must come under the consideration of foreign courts it is desirable *in the interests of uniformity* that their interpretation should not be rigidly controlled *by domestic precedents of antecedent date*, but rather that *the language of the rules should be construed on broad principles of general acceptation.*

Where adopted, the Hague Rules have laid a framework of certainty in international maritime transactions.[107] Great Britain has done yeoman's service and achieved great success in gaining adherance to this principal among the other Commonwealth Nations and the British colonies. It remains for the United States, as a major maritime power, to set the pace during the final stages of such unification. Apart from the legislative modifications necessary to remould COGSA into an internationally more workable act, the major area of change centers in the federal courts. Not only must they abandon their over-zealous protection of their jurisdiction, but they must continue to give judicial recognition to the right of Congress to alter, qualify or supplement the admiralty and maritime law as "experience or changing conditions may require,"[108] in order "to keep pace with advancing commerce and civilization."[109]

If *absolutely identical* Carriage of Goods by Sea Acts are not everywhere feasible, they must, at the very least, become essentially uniform. Until this is accomplished, it is vital that there be a more uniform interpretation and application of the statutes now in force. The opening of the enlarged St. Lawrence Seaway has re-emphasized the necessity of achieving international unity in admiralty and maritime law. Such a goal has long been recognized, for even "in the minds of the great men who framed the Constitution . . . admiralty and maritime jurisdiction meant 'not the law of any particular country, but *the general law of nations.*' "[110] To continue, therefore, to adhere to a multitude of diverse laws which cannot hope to advance the principal of international unity in maritime transactions, is to revitalize the "principal of confusion," for a multitude which cannot reduce itself to unity *is* confusion.

John C. Hirschfeld

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106 [1932] A.C. 328, 350. (Emphasis added.) In this concise statement, Lord MacMillan unites the entire subject matter of this Note and ably points out the goal of future legislation and judicial interpretation in the area of bills of lading and carriage of goods by sea.

107 ". . . the usual method of incorporating the rules [*i.e.*, the Hague Rules] into a contract of carriage is to incorporate, *in toto*, the enactment by which they were adopted by one or the other country." CARVER, *op. cit. supra* note 97, at 160.

108 O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 40-41 (1943).

109 The Nanking, 292 Fed. 642, 649 (N.D. Cal. 1923).

110 *Id.* (Emphasis added.)