



## McGeorge Law Review

Volume 15 | Issue 3

Article 3

1-1-1984

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### Recommended Citation

Marilyn C. Hover, *A Container is Not a COGSA Package When the Bill of Lading Discloses the Contents*, 15 PAC. L. J. 737 (1983).

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## A Container is Not a COGSA Package When the Bill of Lading Discloses the Contents

MARILYN C. HOVER\*

The ocean bill of lading, although criticized as an anachronism that has changed little in form since the nineteenth century,<sup>1</sup> has become a document that is significant for the purpose of determining the limitation of carriers' liability to shippers<sup>2</sup> for damages to cargo carried by ocean transport. The liability of carriers is regulated by statute and has been limited by the terms of the Carriage of Goods by Sea Act (hereinafter referred to as COGSA).<sup>3</sup> COGSA provides for a \$500 limitation on liability for each

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1. Crutcher, *The Ocean Bill of Lading—A Study in Fossilization*, 45 TUL. L. REV. 697, 731 (1971); see also Bissell, *The Operational Realities of Containerization and Their Effect on the "Package" Limitation and the "On-Deck" Prohibition: Review and Suggestions*, 45 TUL. L. REV. 902 (1971). Bissell suggests that the increase in the speed of transporting goods, due to new methods of packaging, will diminish the need for bills of lading. Computerized communication, whereby goods are cleared simultaneously through export and import customs and through which banks' and merchants' accounts may be debited and credited as part of the same procedure, may also contribute toward the eventual disappearance of the bill of lading. *Id.* at 923-24.

2. The terms "shipper" and "carrier" are used in a general sense: "shipper" includes those who are identified in interest with the shipper, such as the shipper's insurer; "carrier" includes those who are identified in interest with the carrier and the carrier's insurer.

3. Carriage of Goods By Sea Act, 46 U.S.C. §§1300-1315 (1976) [hereinafter re-

“package,” or if packages are not used, for each “customary freight unit”<sup>4</sup> unless the shipper has stated on the bill of lading the nature and value of the goods.<sup>5</sup> Because Congress did not define the COGSA term “package,” the judicial determination of whether specific cargo is a package has been complicated by changes in the methods of transport such as palletization and containerization.<sup>6</sup> Courts have attempted to lend a measure of predictability to this determination by fashioning tests to discover whether Congress or the parties “intended” certain cargo to be a package for limitation of liability purposes.<sup>7</sup> These attempts have produced various and unsatisfactory results, however, and have led to demands for uniformity through legislative action.<sup>8</sup>

International conventions have recently decided that the number of packages enumerated in the bill of lading determines the liability limitation of cargo shipped in containers under international law when damages are assessed for lost or damaged cargo.<sup>9</sup> Judicial analysis under COGSA has developed a simplified rule that also initially considers the expression in the bill of lading. The Second Circuit Court of Appeals has established a conclusive presumption in favor of the shipper that a container is not a COGSA package if the contents of the container are disclosed in the bill of lading, unless clear language evidences the parties’ agreement on the defi-

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ferred to as COGSA]. COGSA generally provides that the carrier owes the shipper the duty to use due diligence in providing a seaworthy ship and in caring for the cargo. *Id.* at §1303. The carrier may avail itself of 17 defenses against liability under COGSA. *Id.* at §1304(2)(a)-(2)(g).

4. Although the “customary freight unit” is undefined by COGSA, courts have settled on its meaning as the “unit of quantity, weight or measure of the cargo customarily used as the basis for the calculation of the freight rate to be charged.” *Brazil Oiticica, Ltd. v. The Bill*, 55 F. Supp. 780, 783 (D.Md.), *aff’d* 145 F.2d 470 (4th Cir. 1944); *see Bissell, supra* note 1; note 23 *infra*. Discussion of “unit” is beyond the scope of this article.

5. Section 1304(5) of COGSA provides in relevant part:

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding \$500 per package lawful money of the United States or in case of goods not shipped in packages, per customary freight unit . . . unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

46 U.S.C. §1304(5).

6. *See, e.g., Simon, The Law of Shipping Containers*, 5 J. MAR. L. & COM. 507 (1974); *see infra* notes 57-59 and accompanying text.

7. Legislative intent, although sometimes difficult to pinpoint, provides guidance for every determination of cargo liability under COGSA, whereas the parties’ intent, necessarily complex in its reliance on subjectivity and particular facts, may not always be a fruitful inquiry for this purpose. The parties’ intent, as evidenced by the bill of lading, should have no effect on the COGSA determination. *Matsushita Elec. Corp. of Am. v. S.S. Aegis Spirit*, 414 F. Supp. 894, 905 (W.D. Wash. 1976). *See infra* notes 127-32 and accompanying text.

8. *See, e.g., Bissell, supra* note 1; Edelman, *Cargo Claims and Limitation of Liability*, 17 FORUM 719 (1982); Sorkin, *Changing Concepts of Liability*, 17 FORUM 710 (1982); Comment, *Interpreting COGSA: The Meaning of “Package”*, 30 U. MIAMI L. REV. 169 (1975); Comment, *A Container Should Never Be a Package: Going Beyond Mitsui v. American Export Lines, Inc.*, 2 PACE L. REV. 309 (1982).

9. *See infra* notes 26-34 and accompanying text.

inition of the COGSA package.<sup>10</sup>

This article will review legislation and international agreements that provide the framework for the limitation of carriers' liability for ocean-transported cargo.<sup>11</sup> In addition, the author will summarize the development of the judicial determination of "intent" as to whether cargo should be within the statutory term "package," particularly as that term relates to containerized cargo.<sup>12</sup> The article will evaluate the recent Second Circuit decision, *Smythgreyhound v. M/V "Eurygenes,"*<sup>13</sup> which refined the judicial analysis that looks first to the bill of lading to determine whether a container is a COGSA package.<sup>14</sup> Finally, this article will suggest that the *Smythgreyhound* decision elucidated a clear test to determine the COGSA package.

### STATUTORY FRAMEWORK

The liability of carriers for damaged or lost cargo carried on ocean voyages was first limited by the International Convention for the Unification of Certain Rules Relating to Bills of Lading, known as the Hague Rules, adopted in 1924.<sup>15</sup> The Hague Rules were designed to bring uniformity and predictability to maritime commerce<sup>16</sup> and to protect the shipper from the effects of exculpatory clauses inserted in the bill of lading by the carrier who controlled the contract of carriage.<sup>17</sup>

To incorporate the Hague Rules, the United States enacted the Carriage of Goods by Sea Act in 1936.<sup>18</sup> COGSA generally covers only foreign commerce and applies only to the time between the loading and unloading of cargo,<sup>19</sup> but parties may stipulate that the provisions of the

10. *Smythgreyhound v. M/V "Eurygenes"*, 666 F.2d 746 (2d Cir. 1981).

11. *See infra* notes 15-55 and accompanying text.

12. *See infra* notes 56-98 and accompanying text.

13. 666 F.2d 746 (2d Cir. 1981).

14. *See infra* notes 99-138 and accompanying text.

15. International Convention for the Unification of Certain Rules Relating to Bills of Lading (Hague Rules), Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155 (1931-32) [hereinafter referred to as Hague Rules]. The Hague Rules were formulated at the Hague Convention in September, 1921, and adopted by the Diplomatic Conference on Maritime Law in Brussels, August 25, 1924. The earlier Harter Act of 1893, which regulated responsibility under ocean carriers' bills of lading, was silent as to package limitation clauses. The Harter Act applies primarily to domestic carriage under bills of lading, up to delivery at a fit and customary wharf and according to custom and usage of the port. 46 U.S.C. §§181-195 (1976).

16. *See, e.g.,* *Robert C. Herd & Co., Inc. v. Krawill Machinery Corp., et al*, 359 U.S. 297, 301 (1959).

17. *See* Calamari, *The Container Revolution and the \$500 Package Limitation - Conflicting Approaches and Unreal Solutions: A Proposed Alternative*, 51 ST. JOHN'S L. REV. 687 (1977); Sorkin, *Changing Concepts of Liability*, 17 FORUM 710 (1982). The exculpatory clauses were often regarded from the shipper's point of view as a contract of adhesion. *See, e.g.,* *Caterpillar Overseas, S.A. v. S.S. Expedito*, 318 F.2d 720 (2d Cir. 1963); Simon, *Latest Developments in the Law of Shipping Containers*, 4 J. MAR. L. & COM. 441 (1973).

18. Carriage of Goods By Sea Act, 46 U.S.C. §§1300-1315 (1976).

19. 46 U.S.C. §1311.

Act apply domestically and to a period of time subsequent to unloading.<sup>20</sup> The limitation of carriers' liability for damaged or lost cargo in section 1304(5) of COGSA provides that liability shall be limited to "\$500 per package . . . or in case of goods not shipped in packages, per customary freight unit . . . unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading."<sup>21</sup> Therefore, if a declaration of value in the bill of lading by the shipper is absent, the limitation on liability will depend upon the definition of package. If the goods are not packaged, the limitation on liability will be determined by the customary freight unit, which has come to mean the unit of cargo used as the basis for the freight rate charged.<sup>22</sup>

The purpose of the COGSA package limitation was to promote uniformity and establish a minimum carriers' liability to protect shippers from the disclaimers that were inserted in the bills of lading by carriers who had control over the contract of carriage.<sup>23</sup> Under COGSA, if the shipper declares the nature and value of the goods before shipment by inserting a provision in the bill of lading, the limitation on liability is rendered inoperative. The parties may agree to an amount higher than the \$500 limitation, but the carrier is not liable for more than the damages actually sustained.<sup>24</sup>

20. 46 U.S.C. §1312. See generally, Recupero, *The Shipper's Right to Recover Under COGSA For Damage to Containerized Cargo*, 15 B.C. INDUS. & COM. L. REV. 51 (1973-74).

21. 46 U.S.C. §1304(5) quoted in note 5 *supra*.

22. In *Brazil Oiticia, Ltd. v. The Bill*, 55 F. Supp. 780 (D. Md.) *aff'd*, 145 F.2d 470 (4th Cir. 1944), the customary freight unit was deemed to be the unit used as the basis for the freight rate to be charged. In this case, where bulk oil leaked and had to be pumped overboard to save cargo in the hold, the issue was whether the "freight" in the phrase "customary freight unit" referred to money or consideration to be paid to the carrier for the transportation of the commodity or to the commodity itself. If deemed to be the "shipping unit," as in England, the recovery would be minimal. If deemed to be the base on which remuneration for the carriage of the commodity was computed, the award would more closely approximate actual damages. See Bissell, *supra* note 1; *Interpreting COGSA*, *supra* note 8. Under this construction, the bill of lading provides guidance. Notably, the Hague Rules, unlike COGSA, limit liability per "package or unit." The decisions regard package and unit as similar categories, and not, as in the United States under COGSA, as exclusive and alternative categories. Bissell, *supra* note 1.

23. See *Hartford Fire Ins. Co. v. Pacific Far East Line, Inc.*, 491 F.2d 960, 962 (9th Cir. 1974) (citing *Carriage of Goods by Sea, 1935: Hearings on S.1152 Before the Comm. on Commerce, 74th Cong., 1st Sess. 15, 47 (1935)*); *Encyclopedia Britannica, Inc. v. S.S. Hong Kong Producer*, 422 F.2d 7, 14-15 (2d Cir. 1969) (citing H.R. Rep. No. 2218, 74th Cong., 2d Sess. 7 (1936)); *Jones v. The Flying Clipper*, 116 F. Supp. 386, 388-89 (S.D.N.Y. 1953); *Latest Developments*, *supra* note 17. An additional purpose of the COGSA minimum liability occasionally mentioned by the courts has been the protection of the carrier from exorbitant claims on items whose value is not ascertainable because their precise nature is hidden by the package. See *Aluminios Pozuelo, Ltd. v. S.S. Navigator*, 407 F.2d 152 (2d Cir. 1968); *Inter-American Foods, Inc. v. Coordinated Caribbean Transport, Inc.*, 313 F. Supp. 1334, 1336 (S.D. Fla. 1970). *But see*, *Matsushita Elec. Corp. of Am. v. S.S. Aegis Spirit*, 414 F. Supp. 894, 908 (carrier's argument that it had no knowledge of contents is meritless; it could easily rectify the situation which is "arguably of [its] own making"); see *infra* notes 46-50 and accompanying text. Cf. *DeOrchis, The Container and the Package Limitation-The Search For Predictability*, 5 J. MAR. L. & COM. 251 (1974) (shipper should bear burden to declare container as package or pay higher freight).

24. 46 U.S.C. §1304(5).

The Hague Rules were amended in 1968, but these amendments have not been ratified by the United States.<sup>25</sup> The amendments increased the liability limitation from \$500 to \$622 per package, or to \$.90 per pound, whichever is higher. If containers were characterized as packages, the weight limitation would almost always control because the container probably would weigh more than the number of pounds necessary to exceed the \$622 per package limitation.<sup>26</sup> The amendments address the issue of defining a container as a package by providing that where a container, pallet, or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in the article of transport shall be deemed to be the number of packages or units for the purpose of the liability limitation.<sup>27</sup> The shipper thus may cause the container not to be considered the package by noting on the bill of lading the number of packages stowed in the container.

In 1978, the Hamburg Rules were promulgated by the United Nations Conference on Carriage of Goods by Sea.<sup>28</sup> If ratified by the United States, the Hamburg Rules would alter the operation of COGSA. The container itself, for example, would be subject to the risk of liability because the Hamburg Rules define goods as containers.<sup>29</sup> The liability limit is about \$1,000 per package or \$3.00 per kilogram.<sup>30</sup> The Hamburg Rules, in a manner similar to that adopted by the amendments to the Hague

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25. Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, August 25, 1968, also known as the Visby Amendments, reprinted in the Hamburg Rules on The Carriage of Goods By Sea 302 (S. Mankabady ed. 1978). See DeGurse, *The "Container Clause" in Article 4(5) of the 1968 Protocol to the Hague Rules*, 2 J. MAR. L. & COM. 131 (1970). The United States delegation which participated substantially in the drafting of the amendment could not support limits of liability that might place palletized and containerized cargo in a less favorable position than that attributed to cargo prior to containerization. The recommendation of the delegation that a container never be considered a package for the purpose of limiting liability was not accepted. *Id.*

26. Low weight, high value cargo would most likely be transported by air. DeGurse, *supra* note 25, at 138 n.28.

27. Article 2(c) of the amendments provides that:

Where a container, pallet, or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the Bill of Lading as packed in such article shall be deemed the number of packages or units concerned. Except as aforesaid, such article of transport shall be considered the package or unit.

See DeGurse, *supra* note 5, at 138 n.28 (commentary on the potential application of the "container clause," and the argument that the carrier is without authority to increase unilaterally the freight rate solely because the shipper enumerated the number of packages or units in the bill of lading, even though an increased liability may be assumed thereby); see also Schmeltzer and Peavy, *Prospects and Problems of the Container Revolution*, 1 J. MAR. L. & COM. 203 (1970).

28. United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules), Mar. 30, 1978, A/CONF.89/13, —U.N.T.S.—, U.N. Doc. 1978 [hereinafter referred to as Hamburg Rules].

29. *Id.*, article 1(5). Compare various descriptions of the container as a part of the ship, in *Japan Line v. County of Los Angeles*, 441 U.S. 434 (1979), quoting, Simon, *The Law of Shipping Containers*, *supra* note 6, at 513; *Northeast Marine Terminal Co., Inc., et al v. Caputo*, 432 U.S. 249, 271 (1977) (container is modern substitute for hold of a vessel).

30. Hamburg Rules, article 6(1)(a).

Rules, allow the parties to determine when a container is a package by providing that unless the bill of lading indicates that the individual packages are considered to be separate packages for limitation purposes, the container will constitute the package.<sup>31</sup>

The Hamburg Rules served as a model for the provisions contained in the recently adopted Convention of International Multimodal Transport of Goods.<sup>32</sup> Article 18(2) of the Multimodal Convention increased the liability limits of the Hamburg Rules by 10% to account for inflation, and adopted the attempted resolution of the container-as-package issue in the Hamburg Rules by looking to the bill of lading. Enumeration in the bill of lading of the number of shippers' packages consolidated in one container will preclude treatment of the container as a package.<sup>33</sup>

### SIGNIFICANCE OF THE BILL OF LADING UNDER COGSA

The bill of lading<sup>34</sup> has become the document that a court will examine to determine the application of the COGSA package limitation to a carrier's liability for damages to cargo consolidated in a container, pallet, or similar article of transport. One issue that has arisen with respect to the bill of lading is whether the parties' expression in the bill of lading controls even when COGSA does not apply directly, *ex proprio vigore*.<sup>35</sup> COGSA applies *ex proprio vigore* only to foreign trade to or from United States ports,<sup>36</sup> and to damages sustained between and including the loading and

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31. *Id.*, article 6(2)(a).

32. United Nations Convention on International Multimodal Transport of Goods, U.N. Doc. TD/MT/CONF/16 (1980) [hereinafter referred to as Multimodal Convention], adopted by the United Nations in May, 1980, reprinted and discussed in Driscoll and Larsen, *The International Convention on International Multimodal Transport of Goods*, 57 TUL. L. REV. 193 (1982).

33. Driscoll and Larsen, *supra* note 32, at 263. Article 18(2)(a) of the Multimodal Convention provides as follows:

Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the multimodal transport document as packed in such article of transport are deemed packages or shipping units. Except as aforesaid the goods in such article of transport are deemed one shipping unit.

Assurance of liability limits is established by allowing national law to be effective only if limits are higher. Thus, if loss or damage "can be localized as having occurred during a modal state of the multinational transportation, then any higher modal convention or national law limits will apply." Driscoll and Larsen, *supra* note 32, at 238. Thus, there is a floor to the application of the modal limits. *Id.*

34. A bill of lading is the contract between the shipper and the carrier which defines the rights, duties, exemptions, and limitations of the parties, whether imposed by statute or the result of voluntary agreement. *Jones v. The Flying Clipper*, 116 F. Supp. 386, 388 (S.D.N.Y. 1953) (footnote omitted).

35. *Ex proprio vigore* is defined as "by its own force." BLACK'S LAW DICTIONARY 522 (5th ed. 1979).

36. 46 U.S.C. §1300 provides 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 chapter."

unloading of cargo, excluding on-deck cargo.<sup>37</sup> The shipper and the carrier are free, however, to extend the applicability of COGSA to situations not otherwise covered, by incorporating COGSA by reference in the bill of lading.<sup>38</sup> When COGSA is not applicable *ex proprio vigore*, and the parties choose to incorporate COGSA by reference, they may define the term "package" to affect the carrier's liability even if the result of that definition is contrary to the minimum liability provision of COGSA.<sup>39</sup> An explicit definition, however, should be examined for clarity of expression, especially if that definition as incorporated in the bill of lading confers virtual immunity upon the carrier by altering the statutory rule.<sup>40</sup> When the parties' definition is unclear, a court may examine the facts and rely upon prior case law construing the appropriate limitation of liability in similar cases. Additionally, the COGSA purpose of protecting the shipper

37. *Id.*; see 46 U.S.C. §1301(c) (definition of "goods"). Cases in which COGSA has applied *ex proprio vigore* have relied on the bill of lading as an expression of intent, thereby limiting liability according to the conclusion that an article was "intended" to be a package. The court in *Gulf Italia Co. v. S.S. Exira*, 160 F. Supp. 956 (S.D.N.Y. 1958), *aff'd sub nom.*, *Gulf Italia Co. v. American Export Lines, Inc.*, 263 F.2d 135 (2d Cir. 1959), relied on the description in the bill of lading of the tractor cargo as "semi boxed" in finding that it was not a package. 263 F.2d at 136-37. In *Aluminios Pozuelo Ltd. v. S.S. Navigator*, 407 F.2d 152 (2d Cir. 1968), the court used the bill of lading to support its holding that a press bolted onto a skid was a package, although admittedly a "Brobdingnagian one." *Id.* at 156. The bill of lading recited "One" under the column designated "No. of Pkgs." The specification of "one package" was deemed a word of art, the liability consequences of which the parties were presumed to have understood. *Id.* at 156. In *Nichimen Co. v. M/V McFarland*, 462 F.2d 319 (2d Cir. 1972), the court held that rolled steel coils strapped and tied with steel bands were packages, a conclusion supported in part by the parties' understanding as revealed in the sales contract and the bill of lading. *Id.* at 334-35. A New York state court decision, *Primary Industries Corp. v. Barber Lines*, 357 N.Y.S. 2d 375 (Civ. Ct. N.Y. 1974), based its finding that bundles of ingots were packages on a selective reading of the bill of lading which recited the number of ingots as well as the number of bundles.

38. 46 U.S.C. §1312.

39. In cases where COGSA applied indirectly because of its incorporation by the parties, the definition of package has been upheld unless found to be unclear and ambiguous. See cases and discussion at Edelman, *supra* note 8, at 722-24. According to *Pannell v. United States Lines Co.*, 263 F.2d 497 (2d Cir.), *cert. denied*, 359 U.S. 1013 (1959), the parties were free to stipulate in the bill of lading whether the cargo was a package, if COGSA applied indirectly and was incorporated by reference, but the court noted that this stipulation would not be allowed if COGSA applied *ex proprio vigore*. 263 F.2d at 498. As stated in *Commonwealth Petrochemicals, Inc. v. S.S. Puerto Rico*, 607 F.2d 322, 325 (4th Cir. 1979), *Pannell* held that "when COGSA does not apply *ex proprio vigore*, effect should be given to the parties' definition of package even if that definition is contrary to that which would control if COGSA were directly applicable." See also *Croft & Scully Co. v. M/V Skulptor Vuchetich*, 508 F. Supp. 670 (S.D. Tex. 1981) (consideration of intent was appropriate where COGSA incorporated by reference); *Van Breem v. International Terminal Operating Co.*, (1974) 1 Lloyd's List L.R. 599. *Cf.* cases cited *infra* note 40.

40. See *Robert C. Herd & Co. v. Krawill Mach. Co.*, 359 U.S. 297, 305 (1959) (contracts granting carriers immunity from liability should be strictly construed and not applied to alter familiar rules of liability for negligence, unless the language used in the contract clearly expresses a grant of immunity understood by the contracting parties), cited in *Hanover Insurance Co. v. Shulman Transport Enterprises, Inc.*, 581 F.2d 268, 273-74 (1st Cir. 1978) (COGSA incorporated by reference did not mean liability per statute could be reduced); *David Crystal, Inc. v. Cunard Steamship Co.*, 339 F.2d 295, 298-99 (2d Cir. 1964), *cert. denied*, 380 U.S. 976 (1965) (where COGSA voids a limitation of liability provision, it remains void even where time period is not strictly covered by COGSA); *Watermill Export, Inc. v. M/V "Ponce"*, 506 F. Supp. 612, 614 (S.D.N.Y. 1981) (contract term is void if void under COGSA even when incorporated by reference; *Pannell* distinguished as involving an incorporation of only a part of COGSA).



through provision of a minimum liability<sup>41</sup> should also be considered.

Allowing the definition in the bill of lading to be the test of whether certain cargo should be deemed to be a package permits the possibility of a lower liability than statutorily mandated. When the parties have unwittingly made certain notations on the bill of lading and have relied on the disclosures in the bill, courts have focused on the notations in determining whether the cargo is a package when the definition is unclear.<sup>42</sup> The carrier has an advantage over the shipper in preparing the bill of lading because the carrier chooses the headings and is responsible for printing the form that the shipper must fill out.<sup>43</sup> The carrier will be able to know the contents of the cargo, however, because the bill can be drafted to require that information.<sup>44</sup>

Even if the bill of lading discloses the nature of the cargo, the carrier is not bound by quality or value representations on the bill of lading when the statements cannot be verified. Under section 1303(3)(b) of COGSA, a carrier must furnish the shipper with a bill of lading identifying, *inter alia*, the number of packages or pieces or their quantity or weight when the shipper has demanded the bill. The carrier, however, need not present these items on the bill if the carrier reasonably suspects their inaccuracy or has no reasonable means of checking.<sup>45</sup> Section 101 of the Pomerene Bills of Lading Act<sup>46</sup> relieves a carrier from responsibility for the accuracy of the bill of lading details supplied by the shipper concerning package or bulk freight loaded by the shipper. This Act applies to both interstate and state-to-foreign-country commerce. Under section 100 of the Act, the carrier is obligated to ascertain the details of the cargo that is loaded, and clauses disclaiming this obligation are invalidated.

In practice, carriers either refrain from issuing detailed bills of lading or qualify the bills by the notation "said to contain" (s.t.c.) or "shipper's load

41. The court in *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800 (2d Cir. 1971) invalidated a bill of lading provision that limited carriers' liability to \$500 with respect to the contents of each container, although it relied upon the indication of the bill of lading that the container held 99 bales of leather to support its holding that each bale was a package. *Id.* at 804. The outcome of *Leather's Best* and *Pannell* appear inconsistent. See *Interpreting COGSA*, *supra* note 8. The distinction is made clear by the reasoning in *Smythgreyhound v. M/V "Eurygenes"*, 666 F.2d 746 (2d Cir. 1981), in which the court refused to let the parties' attempted definition control when COGSA was incorporated by reference if it was not clear and unambiguous. Therein, the parties' definition was not clear, since the bill of lading referred to both cartons and containers. *Id.* at 751. Similarly, the bill of lading in *Leather's Best* referenced both bales and containers.

42. See *supra* note 37.

43. See *Interpreting COGSA*, *supra* note 8, at 187-88.

44. See Simon, *The Law of Shipping Containers*, *supra* note 6.

45. Since the carrier will not give a bill of lading with numbers it cannot verify, shippers may refrain from indicating on the bill of lading the number of units of cargo in the container. See Comment, *A Container Should Never Be a Package: Going Beyond Mitsui v. American Export Lines, Inc.*, 2 PACE L. REV. 309, 322 n.95 (1982).

46. 49 U.S.C. §81 *et seq.*

and count."<sup>47</sup> When the shipper stows and seals the container before delivery to the carrier, the shipper loses the benefit of any bill of lading presumptions about the condition of the goods. The shipper then is left with little protection against the carrier's liability for damage to the goods. In addition, the shipper has the burden of proving that the number of items delivered is the same as the number originally claimed.<sup>48</sup> If the carrier refuses to verify the bill of lading as completed by the shipper, either as a matter of cautionary practice or because the carrier cannot verify the contents as loaded and sealed by the shipper, the reliance on the bill of lading disclosure may produce nominal carrier liability.

Decisions that rely on the enumeration of goods in the bill of lading as an indication of whether the cargo should be deemed a package under COGSA have considered the disclosure to be an expression of intent of the parties.<sup>49</sup> If the carrier has been unable to verify the contents of the cargo, however, the numbered items disclosed on the bill of lading are not an accurate expression of the carrier's intent. Some decisions have recognized the problem of relying on the bill of lading if the carrier did not have the opportunity to verify the enumerations and disclosures.<sup>50</sup> These courts have based their decisions on the carrier's actual knowledge of the cargo contents. The courts in these cases did not mention the problem of proving knowledge of the effect on actual value limitations that were caused by the statutory provisions referring to nonverifiable bills of lading under which the carrier is not bound.<sup>51</sup>

An enumeration of the contents of a cargo in the bill of lading should not permit the carrier to charge increased freight rates.<sup>52</sup> The carrier will

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47. Simon, *More on the Law of Shipping Containers*, 6 J. MAR. L. & COM. 603, 609-10 (1975); see *supra* note 45; *infra* note 51.

48. See *supra* note 47.

49. See *supra* notes 40-42.

50. See *duPont de Nemours International S.A. v. S.S. Mormacvega*, 367 F. Supp. 793 (S.D.N.Y.), *aff'd*, 493 F.2d 97 (2d Cir. 1972) (no real dispute as to honesty of shipper's declaration of number of packages in container, although a problem might occur when the shipper filled in the bill of lading on land where the carrier could not verify it, and recovery was on the basis of an "s.t.c." notation); *Inter-American Foods, Inc. v. Coordinated Caribbean Transport Inc.*, 313 F. Supp. 1334, 1336-37 (S.D. Fla. 1970) (court recognized the purpose of minimum liability was also to protect carrier from claims by shipper for damages to contents of package prepared by shipper when nature and value of contents were not declared in bill of lading but here the carrier knew the contents); Schacher, *The Container Bill of Lading as a Receipt*, 10 J. MAR. L. & COM. 39 (1978) (discussion of why the issue has not been raised—perhaps due to insurance litigating tactics). In the Multimodal Convention, *supra* note 32, the multimodal transport document is required to contain certain particulars, including the number of packages or pieces, as furnished by the consignor. *Id.* article 8.1(2). If the multimodal transport operator knows or suspects that the representation is inaccurate, he must insert on the document his reservation specifying the inaccuracies, grounds of suspicion or the absence of reasonable means of checking, and if he fails to note the apparent condition of the goods on the document, the goods are deemed to have been in good condition. *Id.* article 9.

51. See *supra* note 50.

52. See *supra* note 27; see also Note, *Carrier-Owned Shipping Container Found Not to be COGSA "Package"*, 56 TUL. L. REV. 1409 (1982). Carrier insurance is based on ton-

want to know the nature of the goods because the freight rate may be based on the value or the tonnage of the goods, or both. The shipper's simple disclosure of the cargo contents on the bill of lading, however, is not necessarily a declaration of value sufficient to justify a freight increase. Furthermore, the disclosure is insufficient to qualify as a statement of value under section 1304(5) of COGSA, which would exclude the cargo from the limitation as to package or customary freight unit. The risk of cargo damage ultimately is borne by the insurers, and whether the carrier or the shipper should bear the cost of that risk is a continuing controversy.<sup>53</sup> Any resolution must consider that the nature of the liability imposed upon the carrier should induce him to undertake precautions, the cost of which would be economically justified by the reduction of the risk of loss or damage to the goods.<sup>54</sup> This resolution assumes that the twin goals of the cargo loss and damage rules are to minimize higher shipping or product costs and to encourage safe transport.<sup>55</sup>

#### LEGISLATIVE AND CONTRACTUAL INTENT

Courts and commentators have analyzed "intent" in two contexts relating to whether a container is a package under section 1304(5) of COGSA: (1) whether the word package in the statute was intended by Congress to be construed as a "word of art" or pursuant to its "plain meaning," and (2) whether the shipper and the carrier intended the item of cargo to be a COGSA package in each specific case. In the following section, this article will summarize case law construing the legislative intent behind the term "package" in COGSA. The factors that courts have used to determine the parties' intent in defining "package" include the expression in the contract of carriage and the bill of lading.

The absence of a specific definition of "package" in COGSA has led to differing interpretations about the appropriate meaning of the word.<sup>56</sup>

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nage not value so no increase in freight rate is justified by enumerating the contents of the container on the bill of lading. *Id.* at 1420.

53. See, e.g., DeOrchis, *supra* note 23, asserting that the shipper should bear burden of higher freight rate or declaring container as package since cargo insurance purchased by shipper is cheaper than the Privilege and Indemnity (P & I) insurance purchased by the carrier. Cf. Simon, *The Law of Shipping Containers*, *supra* note 6; Simon, *More on the Law of Shipping Containers*, 6 J. MAR. L. & COM. 603 (1975).

54. Diplock, *Conventions and Morals - Limitation Clauses in International Maritime Conventions*, 1 J. MAR. L. & COM. 525, 527 (1970); see also *Mitsui v. American Export Line, Inc.*, 636 F.2d 807 (2d Cir. 1981).

55. Accord Sorkin, *Changing Concepts of Liability*, 17 FORUM 710, 717-18 (1982) (suggests an international convention on insurance); *infra* note 65.

56. An early case under the English Carrier's Act which limited liability for articles contained in any "parcel or package" considered a wagon with sides and no top, transporting a group of oil paintings, to be a package. *Whaite v. Lancashire & Yorkshire Ry. Co.*, L.R. 9 Ex. 467 (1875) (effectuating a purpose to protect carriers from exorbitant claims on items which are hidden by the package).

The judicial search for an interpretation of the term “package” within the policies underlying the enactment of COGSA has been affected by the changes in shipping transport methods, from break-bulk<sup>57</sup> to palletization<sup>58</sup> and containerization.<sup>59</sup> In earlier cases, a “common-sense standard”<sup>60</sup> was applied, but that standard recently has been deemed “outmoded and utterly meaningless.”<sup>61</sup> Acknowledging that the transportation system had changed greatly since the enactment of COGSA, a Fifth Circuit decision stated that because technology has created a maritime transportation system that was not in existence in 1936 when Congress enacted COGSA, the task of the court was to interpret a subject that neither Congress nor the courts had ever considered.<sup>62</sup>

A “plain meaning” definition of the term was given by the Ninth Circuit Court of Appeals in *Hartford Fire Insurance Co. v. Pacific Far East Line, Inc.*<sup>63</sup> The court held that an electrical transformer, movable by

57. “Break-bulk” refers to the handling of loose packages separately or in very small numbers by means of handcars held upright and pushed by stevedores. Simon, *The Law of Shipping Containers*, *supra* note 6, at 510-11. The term is used to refer to traditional non-containerized cargo. *Matsushita Elec. Corp. of Am. v. S.S. Aegis Spirit*, 414 F. Supp. 894, 900 n.14 (W.D. Wash. 1976).

58. “Palletization” is “a method of stowing general cargo of a very homogenous nature on rectangular wooden cargo trays designed to be transported by means of a fork lift truck. The consolidation of cargo on pallets serves to reduce labor costs, to protect the cargo and to facilitate loading and discharging from the vessel.” Bissell, *supra* note 1, at 907.

59. “Containerization” refers to the method of storing cargo in large articles of transport easily loaded and emptied. Various definitions cover a myriad of shapes and sizes. See Angus, *Legal Implications of “The Container Revolution” in International Carriage of Goods*, 14 MCGILL L.J. 395, 398-99 (1968). Summarizing the definition of a container from that adopted by the International Safe Container Convention and the Customs Convention on Containers in 1972, one authority on the subject has stated that:

A container is a permanent reusable article of transport equipment—not packaging of goods—durably made of metal, and equipped with doors for easy access to the goods and for repeated use. It is designed to facilitate the handling, loading, stowage aboard ship, carriage, discharge from ship, movement, and transfer of large numbers of packages simultaneously by mechanical means to minimize the costs and risks of manually processing each package individually.

Simon, *The Law of Shipping Containers*, *supra* note 6, at 513. The advantages of containerization over break-bulk transport include the reduction in (1) time and effort needed to handle cargo; (2) possible theft and damage; (3) time and effort required to move from point of origin to final destination; and (4) the ship’s turnaround time in port. The use of containers has permitted economies of scale to be introduced to in-port operations, allowing more round trips per year, and ultimately reducing the fixed cost allocated per voyage. Tombari, *Trends in Oceanborne Containerization and its Implications for the U.S. Liner Industry*, 10 J. MAR. L. & COM. 311, 311-12 (1979); Schmeltzer and Peavy, *Prospects and Problems of the Container Revolution*, 1 J. MAR. L. & COM. 203 (1970). See *supra* note 29.

60. *Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft*, 375 F.2d 943, 945 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967).

61. *Aluminos Pozuelo Ltd. v. S.S. Navigator*, 407 F.2d 152, 154 (2d Cir. 1968) (palletized 3-ton toggle press held to be a package). The meaning of “package” which has evolved from the cases can . . . be said to define a class of cargo irrespective of size, shape or weight, to which some packaging for transport has been made which facilitates handling but which does not necessarily conceal or completely enclose the goods. *Id.* at 155. The term “package” is a shipping term; the layman’s conception of the work is insignificant. *Mitsubishi Int’l Corp. v. S.S. Palmetto State*, 311 F.2d 382, 383 (2d Cir. 1962), *cert. denied*, 373 U.S. 922 (1963) (fully boxed roll of steel was a package regardless of size and weight of 32 tons).

62. *Wirth Ltd. v. S.S. Acadia Forest*, 537 F.2d 1272, 1276 (5th Cir.) (footnote omitted), *reh’g denied*, 541 F.2d 281 (5th Cir. 1976).

63. 491 F.2d 960 (9th Cir.), *cert. denied*, 419 U.S. 873 (1974); see *Armstrong, Pack-*

built-in lifting lugs and attached by bolts to a wooden skid but not otherwise boxed or crated, was not shipped in a package within the meaning of COGSA. In making this determination, the court stated that because no specialized or technical meaning was ascribed to the word "package," presumably Congress had no specific definition in mind and intended that the word be given its plain, ordinary meaning. Further support for the plain meaning definition of the term was gleaned from the "undoubted objective" of the limitation on liability provision that sought to establish a minimum amount of liability below which carriers could not reduce liability for cargo damage.<sup>64</sup>

The courts had difficulty classifying pallets or containers as packages even when using the plain meaning of the word. A pallet or container, although conceivably serving a function of enclosure similar to that of a package from a layman's point of view, could not be considered a readily movable object nor deemed a COGSA package because the resulting liability would undercut the statutory minimum.<sup>65</sup>

An early test used to define a COGSA package looked to whether the packaging facilitated handling of the item during transport. In *Middle East Agency v. The John B. Waterman*,<sup>66</sup> parts of a rock crusher were bolted to wooden skids but were not otherwise packaged for shipment. The United States District Court for the Southern District of New York ruled that a large piece of machinery shipped on a skid was a package for limitation of liability purposes, rejecting plaintiff's argument that the customary freight unit should apply to uncrated pieces of machinery. A later case, *Gulf Italia Co. v. The Exiria*,<sup>67</sup> modified the analysis used in *Middle East Agency*, viewing the facilitating transport test as only one factor to be used in determining a COGSA package. In *Gulf Italia*, a tractor partially covered by waterproof papering and a wooden sheathing, but not at-

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*aging Trends and Implications in the Container Revolution*, 12 J. MAR. L. & COM. 427, 430-31 (1981).

64. See 46 U.S.C. §1304(5). The United States District Court in *Matsushita Elec. Corp. of Am. v. S.S. Aegis Spirit*, stated that "if carriers alone, or even carriers and shippers together, are allowed to christen something 'package' which distorts or belies the plain meaning of this word as used in the statute, then the liability floor becomes illusory and negotiable." 414 F. Supp. at 905. The United States District Court in *Omark Industries, Inc. v. Associated Container Trans., Ltd.* 420 F. Supp. 139 (D. Oregon 1976) held that palletized units, rather than the inner cartons that formed the constituents of each palletized unit, constituted the "package." *Id.* at 142. One court described the \$500 limitation as a "mere pittance." *Gulf Italia Co. v. S.S. Exira*, 160 F. Supp. 959. See *supra* notes 37 and 42 and accompanying text. Such a characterization, however, should not detract from the practicality of the issue, which is concerned with allocating the cost of the risk, i.e., insurance. Diplock, *supra* note 54. See generally Bannister, *Containerization and Marine Insurance*, 5 J. MAR. L. & COM. 463 (1974); McDowell, *Containerization: Comments on Insurance and Liability*, 3 J. MAR. L. & COM. 503 (1972).

65. See *supra* note 41.

66. 86 F. Supp. 487 (S.D.N.Y. 1949); see *supra* note 37.

67. 160 F. Supp. 956 (S.D.N.Y. 1958), *aff'd sub nom.*, *Gulf Italia Co. v. American Export Lines, Inc.*, 263 F.2d 135 (2d Cir. 1959); see *supra* note 37.

tached to a skid, was held not to be a package. Liability was therefore computed according to customary freight unit. The District Court for the Southern District of New York noted that the wooden shell in this case was present for protective purposes whereas the skid in *Middle East Agency* was attached to facilitate transport.<sup>68</sup> The court stated, however, that this distinguishing factor was insufficient to support the holding of the case at bar. The court considered two additional factors: the protection of carriers from exorbitant claims on items that are hidden by packaging, and the ownership and preparation of the container. The court concluded by holding that the preparation of an item for shipment, standing alone, should not make the item a package within the meaning of COGSA. To adopt such a construction would place a shipper who attempts to minimize possible harm to his property in a worse position than a shipper who makes no effort to reduce the possibility of loss.

The analyses applied by the courts to determine whether a container or pallet is a package have not been consistent. In *United Purveyors, Inc. v. Motor Vessel New Yorker*,<sup>69</sup> the District Court for the Southern District of Florida, without discussion, limited recovery to \$500 for damaged cases of frozen fish shipped in a van, impliedly holding that the van was either the package or the customary freight unit for limitation purposes.<sup>70</sup> In a later case, *Inter-American Foods, Inc. v. Coordinated Caribbean Transport, Inc.*,<sup>71</sup> the same court held that the limitation on liability applied to the cartons stowed within the container rather than to the container itself, even though the bill of lading referred to one trailer.<sup>72</sup> The distinguishing factor in this case was the receipt of the cartons by the carrier's agent. In *United Purveyors*, the shipper had not loaded and sealed the carrier-supplied containers.<sup>73</sup> In dictum, the court in *Inter-American Foods* stated that the cartons, rather than the container, would be considered to be the package even if the shipper had delivered a sealed container to the carrier.<sup>74</sup> Interestingly, no mention of the cartons was made in the shipping documents.

The various tests that were being used by federal courts to classify con-

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68. 160 F. Supp. at 959. The facilitation of transport test looked to the functional transportation ability of the item, and in so doing, relied on the traditional notion of a package as an enclosing type of structure. See *supra* note 61; *Interpreting COGSA, supra* note 8.

69. 250 F. Supp. 102 (S.D. Fla. 1965).

70. *Id.* at 106.

71. 313 F. Supp. 1334 (S.D. Fla. 1970).

72. *Id.* at 1339.

73. *Id.*

74. *Id.* A recent Fifth Circuit decision pronounced that the container is not the package where the bill of lading disclosed the contents of the carrier-supplied container. See *Allstate Ins. Co. v. Inversiones Navieras Imparco*, 646 F.2d 160 (5th Cir. 1981) (followed *Leather's Best* and *Mitsui v. American Export Lines, Inc.*, 636 F.2d 807 (2d Cir. 1981); Note, *Carrier-Owned Shipping Container Found Not to be COGSA "Package"*, 56 TUL. L. REV. 1409 (1982).

tainers rendered the outcome of the package issue unpredictable. In an attempt to provide some certainty to the question of when a container would be deemed to be a package, the Second Circuit, with a split decision in *Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft*,<sup>75</sup> held that a palletized group of cartons was a package for limitation purposes. This decision favored the carrier by strictly construing COGSA.<sup>76</sup> Over a vigorous dissent, the majority opinion noted the following factors in support of its view: (1) the parties considered each pallet to be a package according to the dock receipt, bill of lading, and claim letter; (2) the shipper rather than the carrier chose to place the cartons in a pallet and should bear the consequences; (3) the shipper had a statutory option to declare a higher value if he wished; (4) prior judicial construction warranted the conclusion that the pallet and its contents were a package; and (5) reliance on prior law by shippers and carriers in preparing their insurance needs should not be disturbed.<sup>77</sup> The dissent disagreed with each factor, stating that ambiguities in a bill of lading should be construed against the carrier since the bill of lading is a contract of adhesion. Furthermore, the dissent found that the parties' correspondence described the cargo as cartons and packages, so the bill of lading notation of pallets as packages should be disregarded. Both parties benefitted from the use of pallets, making the shipper's preparation of them insignificant. In addition, the dissenting opinion concluded that the option to declare a higher value was irrelevant if the court held the carton rather than the pallet to be the package. Finally, since COGSA was designed to benefit the shipper, the dissent stated that "certainty at the expense of legislative policy and equity is undesirable and often turns out to be ephemeral."<sup>78</sup>

In contrast, the Second Circuit in *Leather's Best, Inc. v. S.S. Mormaclynx*,<sup>79</sup> held that the container was not a package under section 1304(5) of COGSA because of the indication on the bill of lading that the carrier owned the container. The term "package" was "more sensibly related to the unit in which the shipper packed the goods" than to a large metal object that was functionally part of the ship.<sup>80</sup> In *Leather's Best*, leather was loaded into steel-wrapped cartons that were stowed in a carrier-supplied container. The bill of lading recited "1 container said to contain 99 bales of leather,"<sup>81</sup> and was verified by the carrier. The court recognized the

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75. 375 F.2d 943 (2d. Cir.), cert. denied, 389 U.S. 831 (1967).

76. *Id.* at 947.

77. *Id.* at 946.

78. *Id.* at 947-48.

79. 451 F.2d 800 (2d Cir. 1971).

80. *Id.* at 815.

81. *Id.* at 804. Cf. *Rosenbruch v. American Export Isbrandtsen Lines, Inc.*, 357 F.

conflicting arguments,<sup>82</sup> and noted that the distinctions between this case and *Standard Electrica* were not altogether satisfactory.<sup>83</sup> The court nonetheless adhered to the primary purpose of COGSA which was to set "a reasonable figure below which the carrier should not be permitted to limit his liability."<sup>84</sup> Left open, however, was the question of whether a container would be a COGSA package when the bill of lading failed to state the number of containers or when the container was owned or furnished by the shipper.<sup>85</sup>

Subsequent to the decision in *Leather's Best*, the Second Circuit formulated the "functional economics" test in *Royal Typewriter Co. v. M/V Kulmerland*.<sup>86</sup> According to this test, the shipper's cargo unit stowed in a container would be considered functional, and therefore a package, if the cargo unit could have been shipped overseas in the manner in which it was packaged by the shipper. The cartons of adding machines were not functional because they were packed in the container in a manner unlike that employed in break-bulk shipping customarily used prior to the use of containers. Consequently, the carrier's liability was limited to \$500.<sup>87</sup>

The functional economics test was not consistently followed by the courts and was criticized by the commentators.<sup>88</sup> For example, in *Matsushita Electric Corp. of America v. S.S. Aegis Spirit*,<sup>89</sup> a district court in Washington favored the approach of *Leather's Best* over *Royal Typewriter*, and held that a carrier-furnished container was not a COGSA package when the contents were disclosed in the bill of lading. Although the court proposed that a container never be a COGSA package, the court

Supp. 982, 985 (S.D.N.Y. 1973), *aff'd*, 543 F.2d 967 (2d. Cir.), *cert. denied*, 429 U.S. 939 (1976) (container holding goods of a single shipper held to be a package because the shipper packed the container, and uniformity of result and simplicity of approach would be achieved).

82. 451 F.2d at 815 (holding that if the container were deemed a package, uniformity and predictability would be furthered and if the shipper packed the container it would not be in the weaker position).

83. *Id.* at 815.

84. *Id.*

85. *Id.*; see Simon, *Latest Developments*, *supra* note 17 (clear holding of *Leather's Best* was that container was not a package).

86. 483 F.2d 645 (2d Cir. 1973).

87. *Id.* at 648-49. The court found that the units of adding machines, individually packaged in small cardboard cartons, were not functional and therefore limited the carrier's liability to \$500 under COGSA.

88. See, e.g., *Shinko Boeki Co., L.T.D. v. S.S. "Pioneer Moon"*, 507 F.2d 342, 345 (2d Cir. 1974) (containerized bulk liquids not a package since more analogous to part of the ship that previously used 55 gallon drums to transport liquids). The case is discussed in Simon, *More on the Law of Shipping Containers*, 6 J. MAR. L. & COM. 603 (1975). *In re Tug Dorothy H.*, 487 F. Supp. 383, 392 (W.D. Va. 1979); *Matsushita Elec. Corp. of Am. v. S.S. Aegis Spirit*, 414 F. Supp. at 904. The functional economics test creates unworkable problems of proof, encourages economic waste by causing the shipper to overprepare its cargo to avoid the container being classified as a package, and favors the carrier who experiences major savings, and emphasizes the slight benefits to the shipper of simple packaging. Simon, *The Law of Shipping Containers*, *supra* note 6, at 530-32. Cf. DeOrchis, *supra* note 23.

89. 414 F. Supp. 894 (W.D. Wash. 1976).



did not have to go beyond the facts of the case.<sup>90</sup> The court stated that “[a] test for determining whether a container is a package must reflect the realities of the maritime industry of today while remaining faithful to the express language and legislative policy embedded in the COGSA provisions.”<sup>91</sup> The court, assuming that Congress intended the word package to have its plain, ordinary meaning,<sup>92</sup> pointed out that the parties’ intent as evidenced by the bill of lading should have no effect on the COGSA determination. If the parties were allowed to allocate liability by defining a container as a package, the liability limitation of the statute would have no effect.<sup>93</sup>

In a recent case, *Mitsui v. American Export Lines, Inc.*,<sup>94</sup> the Second Circuit bypassed the functional economics test and returned to the analysis of *Leather’s Best*,<sup>95</sup> which focused on the disclosure in the bill of lading.<sup>96</sup> The *Mitsui* court declined to follow *Royal Typewriter* because of its inconsistency with *Leather’s Best*. According to *Royal Typewriter*, even if a shipper complied with the disclosure relied upon in *Leather’s Best*, the carrier’s liability would be limited to \$500 per container if the units within the container were not functional. Furthermore, the *Royal Typewriter* decision was at odds with the language and purpose of COGSA and overlooked the possibility that goods not shipped in packages could be deemed customary freight units within section 1304(5) of COGSA.<sup>97</sup> The decision in *Mitsui*, like the *Leather’s Best* holding, declined to decide the situation in which the bill of lading failed to state the number of packages or units.<sup>98</sup> Further refinements in the reasoning of *Mitsui* and *Leather’s Best* were undertaken by the Second Circuit in *Smythgreyhound v. M/V “Eurygenes.”*

#### *Smythgreyhound v. M/V “Eurygenes”*

In *Smythgreyhound v. M/V “Eurygenes,”*<sup>99</sup> the Second Circuit Court of Appeals applied *Mitsui* and effectively overruled *Royal Typewriter*. The court commented that *Mitsui* and *Leather’s Best* had appropriately re-

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90. See Simon, *The Law of Shipping Containers*, *supra* note 6; Comment, *A Container Should Never Be a Package: Going Beyond Mitsui v. American Export Lines, Inc.*, 2 PACE L. REV. 309 (1982). For the proposition that a container should never be a COGSA package, see *supra* note 74.

91. 414 F. Supp. at 903-04.

92. *Id.* at 907.

93. *Id.* at 905.

94. 636 F.2d 807 (2d Cir. 1981).

95. 451 F.2d 800 (2d Cir. 1971).

96. *Id.* at 818.

97. *Id.* at 818-19.

98. *Id.* at 821 n.18; see *supra* note 74.

99. 666 F.2d 746 (2d Cir. 1981). The appellate court reversed the district court decision which had been handed down prior to the *Mitsui* opinion.

jected a complex intent analysis in favor of a "clear rule that where the contents of a container are disclosed in the bill of lading then the container is not the COGSA package."<sup>100</sup>

The vessel M/V "Eurygenes" had loaded cargo in Japan consisting of stereo equipment for carriage to London and Rotterdam. A fire occurred in the North Atlantic and destroyed or damaged a substantial quantity of the cargo.<sup>101</sup> A consent decree embodied a settlement formula as to various suits that arose out of the fire and which had been consolidated in the Southern District of New York. Agreement could not be reached, however, as to the appropriate definition of a package for purposes of applying the limitation on liability specified in the bills of lading.<sup>102</sup>

The bills of lading incorporated the terms of COGSA by reference and specified that the bills would be construed according to the laws of the United States.<sup>103</sup> A clause in the bills of lading provided, in language similar to section 1304(5) of COGSA, that the liability of the carrier be limited to "\$500 per package or per unit . . . unless the nature of the goods and a valuation higher than \$500 shall have been declared in writing by the shipper upon delivery to the carrier and extra freight paid if required."<sup>104</sup> The bills of lading recited "SHIPPER'S PACKING SEAL, SAID TO CONTAIN." In the column headed "[n]umber of packages," the notation "8 containers" appeared. Immediately below this, the number of cartons, 1500, was set forth in parentheses. A reference to the number of containers, specifying "8 containers only," appeared where the bill of lading called for a description of the goods.<sup>105</sup>

The plaintiff shipper had sent three shipments of stereo equipment in cartons that were packed in containers. Although the shipper previously had shipped its goods without containers, the shipper chose containers on this occasion because of problems with pilferage. The ship could carry both containerized and break-bulk cargo. The containers were carrier-supplied, but loaded and sealed by the shipper's freight forwarder who delivered them to the ship.<sup>106</sup>

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100. *Id.* at 753.

101. *Id.* at 747.

102. *Id.*

103. *Id.*

104. *Id.* The bill of lading provided in relevant part:

This bill of lading shall have effect subject to the provisions of the Carriage of Goods By Sea Act of the United States of America, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein shall be deemed a surrender by the Carrier of any of its rights, immunities or limitations or an increase of any of its responsibilities or liabilities under said Act. . . . The bill of lading shall be construed and the rights of the parties thereunder determined according to the law of the United States.

*Id.* at 747 nn.1-2.

105. *Id.* at 747; see *Smythgreyhound v. M/V "Eurygenes"*, No. 75 Civ. 2914 (GLG) (S.D.N.Y. Aug. 26, 1980).

106. *Smythgreyhound*, No. 75 Civ. 2914.

Upon referral to a magistrate, the bill of lading provision limiting carrier liability to \$500 per package was applied to the containers. The magistrate concluded that the parties' intended the container, and not the carton, to be considered the package. Using the functional economics test of *Royal Typewriter*, the magistrate initially found that since the cartons were functional and capable of being shipped without being containerized, a rebuttable presumption arose that the cartons should constitute the package.<sup>107</sup> The magistrate looked to the parties' characterization of the cargo, supporting documentation, and trade custom and usage<sup>108</sup> to rebut this presumption by finding evidence of the parties' intent that the container was the package. To support this intent, the magistrate relied upon the carrier's inability to verify the contents of the sealed containers, the several references to containers and only one reference to cartons in the bills of lading, and the plaintiff's preference in using containers to reduce theft.<sup>109</sup>

On appeal, the District Court for the Southern District of New York rejected the magistrate's determination of "intent," but applied the \$500 limitation to the containers because the shipper "chose for its own reasons to obtain containers, stuff and seal them itself, and ship them pursuant to a bill of lading that gave the carrier no ability to determine the value of the cargo therein."<sup>110</sup> After the decision of the district court, the Second Circuit Court of Appeals decided *Mitsui*. The *Mitsui* opinion held that a container supplied by a carrier is not a COGSA package if its contents and the number of packages or units are disclosed in the bill of lading.<sup>111</sup> Thereafter, the Second Circuit heard the appeal for *Smythgreyhound* and held that the decision of the district court limiting recovery to \$500 per container should not be upheld in light of *Mitsui*.<sup>112</sup> The court reversed and remanded for the calculation of damages.<sup>113</sup> In its decision, the court of appeals rejected the carrier's argument that the existence of the shipper's choice to containerize distinguished the case from *Mitsui*. The court also declined to consider the choice to containerize a critical factor in prior cases assertedly based on unequal bargaining power between the shipper and the carrier.<sup>114</sup> According to the court, the issue of bargaining strength had not been a ground for prior judicial determinations of the meaning of the term "package" under the COGSA limitation of liability.

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107. 666 F.2d at 747.

108. *Id.* at 747-48.

109. *Id.* at 747-48 n.3.

110. *Smythgreyhound*, No. 75 Civ. at 2914; see 666 F.2d at 748; *supra* note 107.

111. 636 F.2d at 821.

112. 666 F.2d at 748.

113. *Id.*

114. *Id.* at 748-50.

Rather, the concern of prior cases was with the “congressional purpose of establishing a reasonable minimum level of liability” under COGSA.<sup>115</sup>

The court discounted the carrier’s contention that the inapplicability of COGSA *ex proprio vigore* to the case rendered statutory policy concerns inapplicable, although the court stated that the parties’ definition of a package would have been controlling if clearly and unambiguously set forth in the bill of lading.<sup>116</sup> Absent a clear definition of a package, and given the incorporation of COGSA into the bill of lading making the bill subject to United States law, the court decided to examine prior case law and COGSA policy concerns, rather than to rely on a complicated analysis of the parties’ intent.<sup>117</sup>

The court rejected the assertion that nonverification of the contents of the containers was significant because the bill of lading allowed the carrier the opportunity to examine, measure, and value the goods upon opening the containers. The court also suggested that having the carrier check the loading of the goods, as in *Leather’s Best*, would be neither difficult nor expensive.<sup>118</sup> For the reasons expressed in *Mitsui*, the court declined to accept the argument that because the shipper could have protected itself by declaring a higher value of the goods and paying a higher tariff, the package provision should not be strictly construed against the carrier.<sup>119</sup> In *Mitsui*, the court observed that the option to declare a higher value is practically never exercised. The carrier increases freight rates when a higher value of goods is declared to compensate for the corresponding increase in the carrier’s liability. This increase in freight rates generally is greater than the reduction in cargo insurance premiums paid by the shipper that occurs when a higher value of the goods has been declared and the carrier is held liable.<sup>120</sup>

The *Smythgreyhound* decision rejected a complex intent analysis in determining whether a container is a COGSA package when the intent of the parties is not clear from the bill of lading and when COGSA is incorporated by reference.<sup>121</sup> Although the container was carrier-supplied, the court noted that the same result should ensue when the container is not carrier-supplied.<sup>122</sup> According to the court, when the contents of the container are disclosed in the bill of lading and no clear definition of “package” is expressed therein, the container is conclusively presumed

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115. *Id.* at 750.

116. *Id.* at 751.

117. *Id.* at 750-51.

118. *Id.* at 751-52 n.15.

119. *Id.* at 752.

120. *Id.* at 752, quoting *Mitsui* at 815-16 n.9.

121. 666 F.2d at 753.

122. *Id.* at 749 n.9; see Simon, *Latest Developments*, *supra* note 17, at 447.

not to be a COGSA package. The court held: “[I]n the absence of clear and unambiguous language indicating agreement on the definition of ‘package,’ then we will conclusively presume that the container is *not* the package where the bill of lading discloses the container’s contents.”<sup>123</sup>

#### EVALUATION AND IMPACT OF THE *Smythgreyhound* DECISION

The decision in *Smythgreyhound* refined the *Mitsui* rule and removed the question of the parties’ intent when (1) COGSA is incorporated by reference, (2) the bill of lading discloses the number of cargo units, and (3) any attempt by the parties to define a package has been deemed unclear. Given these conditions, the Second Circuit will conclusively presume that the container is not the COGSA package,<sup>124</sup> which result is in conformance with congressional purpose.<sup>125</sup>

The determination of legislative intent as to a COGSA package is a helpful analysis of the policy applicable to all cases subject to COGSA. The inquiry into the parties’ intent, however, has become overly complex by necessarily relying upon subjective factors weighted inconsistently by different courts.<sup>126</sup> This type of analysis has led to uncertainty due to the unpredictability of each outcome,<sup>127</sup> and has produced results that are inconsistent with the COGSA purpose of providing a minimum amount of liability protection to shippers.<sup>128</sup> Furthermore, the search for the intent of the parties is misdirected because the parties rarely “intend” any position other than the one most favorable to their own interests and those of their insurers. Additionally, the parties should be incapable of “intending” a result contrary to the minimum liability established by section 1304(5), at least to the extent COGSA applies *ex proprio vigore*.<sup>129</sup>

The *Smythgreyhound* court rejected intent as the appropriate measure of liability. When the definition of the package is unclear, the court of appeals in the *Smythgreyhound* decision recognized, as did the district court, that neither party fully intends a definition of package that will result in an unfavorable outcome.<sup>130</sup> The court, as in *Mitsui*, declined to adopt an extensive list of intent criteria because the use of those criteria would not avoid “the pains of litigation.”<sup>131</sup> Rather than employ specific criteria

123. 666 F.2d at 753 n.20 (emphasis in original).

124. Thus the COGSA limitation applies to either the package or the customary freight unit.

125. See *supra* note 23.

126. Compare *Leather’s Best*, 451 F.2d 800 with *Standard Electrica*, 375 F.2d 943.

127. See *supra* notes 64-97 and accompanying text.

128. See *supra* note 23.

129. See *supra* notes 37-41 and accompanying text.

130. 666 F.2d at 748 n.4.

131. *Id.* at 753. For a case utilizing a twelve criteria analysis see *Complaint of Norfolk, Baltimore & Carolina Line, Inc.*, 478 F. Supp. 383, 392 (E.D. Va. 1979). The multi-fac-

when intent is not clear, the *Smythgreyhound* court decided in favor of a clear rule creating a conclusive presumption that the container is not a package as long as the number of cargo items is expressed in the bill of lading.<sup>132</sup> When the number of items is not disclosed, however, an intent analysis may be appropriate, at least when COGSA does not apply *ex proprio vigore*.<sup>133</sup> Relevant factors will be the opportunity given to the shipper to disclose the description of the goods, how they are packed, and by whom.

Although *Smythgreyhound* concerned a bill of lading that incorporated COGSA by reference, the judicially created presumption also may be applicable to situations in which COGSA applies *ex proprio vigore*, whether or not the contents of the container are disclosed. The result in *Smythgreyhound* was based on statutory case law and policy because the parties' definition of the term "package" was not clear and unambiguous. The same law and policy presumably will govern when COGSA applies directly, so that a container will not be the package. Although the decision did not hold that the parties *never* could define a container to be a COGSA package when the statute applied *ex proprio vigore*, the judicial reasoning implied as much.<sup>134</sup>

The disclosure of the contents of the container served as a factor in analyzing the parties' intent in prior cases in which COGSA was incorporated by reference.<sup>135</sup> The primary function of disclosure in *Smythgreyhound*, however, was not to apprise the carrier of the nature of the cargo for purposes of assessing freight rates or circumventing fraud. Certainly, for these purposes, the carrier may insert in the bill of lading a demand for information about the cargo and thus protect itself by issuing a qualified bill

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tor analysis provides "little comfort to those who seek some form of short cut to predictability of result with regard to this [package] issue." *Croft & Scully Co. v. M/V Skulptor Vuchetich*, 508 F. Supp. 670, 684, noted in *Smythgreyhound v. M/V "Eurygenes"*, 666 F.2d at 753 n.18.

132. 666 F.2d at 753.

133. *Id.* at 753 n.19.

134. The court noted that the parties may agree between themselves that the container will be the COGSA package, "especially in cases where COGSA does not apply *ex proprio vigore*." *Id.* at 753 n.20.

135. The "intent" of the parties was a significant factor in *Leather's Best* and *Mitsui*. According to the former, intent was evidenced by the information in the bill of lading and the ownership of the container. 451 F.2d 814-16. The carrier owned the container and the bill of lading's contents as noted were checked by the carrier's agent upon loading. *Id.* at 804. *Mitsui* adopted similar criteria, but the information on the bill of lading which indicated the number of containers and units said to be contained therein was not verified since the carrier-owned containers were given to the shipper for packing and sealing at the shipper's premises and were delivered sealed to the carrier. 636 F.2d at 811-12. Where nonverified, the indicated contents on the bill of lading are not "intended" by the carrier to be dispositive of the items in the containers, much less to be definitive of the term "package" with reference to COGSA limitation of liability. The disclosure on the bill of lading, therefore, should be viewed not as a factor of intent but an element which the court may consider determinative in and of itself of whether the container is a COGSA package. *See supra* notes 49-51 and accompanying text.

of lading.<sup>136</sup> Intent is an inappropriate inquiry outside the policy concerns of COGSA, so that even if the contents of the container are not disclosed on the bill of lading to which COGSA applies *ex proprio vigore*, the container should not be the package. The disclosure element has little relevance to the container-as-package issue in this type of situation. The *Smythgreyhound* decision has removed a judicial analysis of intent from cases in which COGSA law applies because of an unclear definition made by the parties and the incorporation of the statute by reference in the bill of lading. In addition, the logic of the decision would support the same result even if the COGSA statute applied directly.

### CONCLUSION

This article has demonstrated that the *Smythgreyhound* decision affords protection to the shipper and provides a more predictable outcome to litigation over the definition of a "package." The decision is helpful for the purpose of allocating the risk at the time of contracting, and gives both parties a measure of control over the ultimate determination of when the container will not be considered the COGSA package. Under *Smythgreyhound*, if the shipper inserts in the bill of lading, under the definition of "package," a reference to the number of cartons or units as well as to the number of containers, this indication will trigger the conclusive presumption that the container is not the "package" for purposes of invoking liability. The presumption requires an unclear definition of package as well as a disclosure of the cargo contents by enumerating their number, as stowed in the containers. The carrier, however, in preparing the bill of lading, can protect itself by asking for specific information, issuing a qualified bill, or inspecting the items as disclosed on the bill of lading.

The *Smythgreyhound* formulation of a simplified test that focuses on the bill of lading is similar to the recent international conventions addressing the issue of when a container is a package for the purpose of limiting liability. The test leads to the conclusion that a container never can be a COGSA package if COGSA law is applicable. The analysis of intent will be required only in those situations in which COGSA is applicable *ex proprio vigore* and the number of cargo items is not disclosed on the bill of lading, a result in keeping with the policies of both the statute and the parties' freedom to contract.

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136. See *supra* notes 42-48 and accompanying text. A shipper, however, who makes such disclosure on the bill of lading should not be penalized by the refusal of a carrier to accept such information, as long as the carrier has an opportunity to check the contents.