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CONTAINERIZED AND PALLETIZED CARGO *

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Abstract

Containerization and Palletization revolutionized the non-bulk and nonliquid carriage of goods trades at sea and changed the simple concept of 'package' as the term was probably understood in 1936. Industry began to ship goods, either banded together on pallets or packed in trailer-like containers to be loaded, stowed and unloaded as a 'unit'. Often the goods being banded or packed were themselves 'packages' in the traditional sense of the word. Modern containers are able to hold hundreds of "packages". The very concept of a cargo-hold was transformed when vessels were retrofitted to hold containers, which functionally became part of the ship itself. This technological advancement, however, has created a challenge to courts and has posed the question of whether containers and palettes can be considered "packages" under article 4, rule 5 of the Hague Rules and limit the carrier's liability accordingly.

I. INTRODUCTION

Of all the legal problems that have arisen out of the container revolution,(1)

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(1) The phrase 'container revolution' refers to a dramatic change in the movement of cargo brought about by the utilization of large, reusable metal containers in the 1960's. With containerisation, cargo, consisting perhaps of hundred of conventional cartons, can be loaded first into a shipping container and then placed onto a container ship where it remains until it is removed at the end of the voyage. The system reduces drastically the amount of handling needed to transport cargo, reduces damage and loss and generally simplified every aspect of cargo movement. See generally Schmeltzer & Peavey, *Prospects and Problems of the Container Revolution*, 1 J. Mar. L. & Com. 203 (1970). See also Dr. Salvatore R. Mercogliano, "*The Container Revolution*", on-line at:

none has been more perplexing for shippers, carriers, underwriters(2) and courts alike than the question of whether the meaning of the word 'package' in article 4(5) of the Hague Rules (3) should include a container.(4) Article 4 (5) is the provision that addresses how to compensate and limit cargo damages, depending on the way in which that cargo was packaged and shipped. This limitation was enacted to restrain the superior bargaining power wielded by carriers over shippers;(5) its purpose was to set reasonable limitations on liability so as to prohibit carriers from contracting out of liability.(6) Since its inception, the provision has frustrated courts because of its failure to define the term "package".(7) As a result, judicial decisions are not completely consistent in their

http://www.sname.org/newsletter.

(2) See generally Diplock, *Conventions and Morals Limitation Clauses in International Maritime Convention*, 1 J. Mar. L. & Com. 525 (1970), for a discussion of the interplay of interest, among insurers, carriers, and shippers in relation to liability limitations.

(3) Article 4 (5) of the Hague Rules provides in part that:
"Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with goods in an amount exceeding 100 pounds sterling per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading…".

(4) As the court declared in *Orion Insurance Co. v. M/V "Humacao,"* 1994 AMC 1922, 1927 (S.D.N.Y. 1994), "the increased use of containers in maritime transportation has generated an excessive amount of litigation." See also, *American Home Assurance Co. v. Crowley Ambassador*, 2003 AMC 510, 514 (S.D.N.Y. 2003); *River Gurara v. Nigerian National Shipping Line, Ltd.* [1998] 1 Lloyd's Rep. 225 (C.A. 1997).

(5) "...the Hague Rules limitation provisions were designed to prevent shipowners imposing on shippers unrealistically low limits of liability." *River Gurara v. Nigerian National Shipping Line, Ltd.* [1998] 1 Lloyd's Rep. 225,233 (C.A. 1997)

(6) See *Vegas v. Compania Anonima Venezolana de Navegacion*, 1984 AMC 1600, 1601 (11th Cir. 1983). See also *Effort Shipping Co. Ltd.* v. *Linden Management S.A. (The Giannis NK)* [1998] A.C. 605, [1998] 1 Lloyd's Rep. 337 (H.L. *per* Lord Steyn): "This much we know about the broad objective of the Hague Rules: it was intended to reign in the unbridled freedom of contract of owners to impose terms which were 'so unreasonable and unjust in their terms as to exempt from almost every conceivable risk and responsibility'; *it aimed to achieve this by a pragmatic compromise between interests of owners and shippers; ... .*" (Emphasis added). See also *The Jordan II* [2005] 1 Lloyd's Rep. 57 at 63 (H.L. *per* Lord Steyn): "It has often been explained that the Hague Rules and Hague-Visby Rules represented a *pragmatic compromise* between the interests of owners, shippers and consignees."

(7) See *Aluminos Pozuelo Ltd. v. S.S. Navigator*, 407 F.2d 152, 154, 1968 AMC 2532, 2533

interpretation of the term "package".(8) Some courts have determined that Hague Rules supplies no specialized or technical meaning, while others believe that "package" is a term of art in the shipping industry and should be interpreted accordingly.(9) One oft-cited definition of "package" is set forth in U.S. case of ***Aluminos Pozuelo Ltd. v. S.S. Navigator***,(10) which defines "package" as "a class of cargo, irrespective of size, shape or weight, to which some packaging preparation for transportation has been made which facilitates handling, but which does not necessarily conceal or completely enclose the goods."(11)

The advent of containerized shipping has created additional uncertainty with respect to the "package" issue.(12) The container revolution has produced shipping devices "capable of carrying hundreds of packages in the normal sense of that term."(13) Although Containerization was born in the United States over fifty years ago, this technological advancement has created a challenge to U.S. courts, and has posed the question of whether massive metal shipping containers can be considered "packages" under Section 1304 (5) of the U.S. Carriage of Goods by Sea Act(14) and limit the carrier's liability accordingly.(15) Because in many cases the carrier receives a large sealed container. This may or may not

(2d Cir. 1968).

(8) See 2A Benedict on Admiralty 167 (Michael F. Sturley ed., 7th ed. rev. 2003).

(9) *Id.*

(10) 407 F.2d 152, 1968 AMC 2532 (2d Cir. 1968).

(11) 407 F.2d 152 at 155, 1968 AMC 2532 (2d Cir. 1968) at 2535-36.

(12) See Frank L. Maraist & Thomas C. Galligan, Jr., Admiralty in a Nutshell 76 (4th ed. 2001).

(13) *Mitsui & Co. v. Am. Exp. Lines, Inc.,* 636 F.2d 807, 816, 1981 AMC 331, 343 (2d Cir. 1981).

(14) Section 1304 (5) of the U.S.Carriage of Goods by Sea Act provides in pertinent part:

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package..., or in case of goods, nor shipped in package, 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...".

(15) At the time of the law's enactment, Congress did not and could not foresee the advent of containerized shipping. See *Allstate Ins. Co. v. Inversiones Navieras Imparca, C.A.*, 646 F.2d 169, 170 (5th Cir. Unit B May 1981). "[f]ew, if any, in 1936 could have foreseen the change in the optimum size of shipping units…" *Standard Electrica, S.A. v. Hamburg Sudamerikanische*, 375 F.2d 943 (2d Cir.).

contain smaller packages. In many cases, the carrier is unlikely to know whether it does or not. So far as he is concerned he is handed one large object and that is the cargo which he carries. Arguably, the carrier should not be liable for that which he cannot observe and a limitation of $500 per container is appropriate. However, a $500 limitation of liability for an entire container, loaded with packages that would have been covered up to $500 each if they had been shipped individually on traditional vessels, may provide an unfair advantage to the carrier. Therefore, the carrier's attempt to limit his liability to $500 per container has met with opposition from the shipper, who argues that the individual packages within the container are the appropriate packages.

On the other hand, the package question has also arisen when pallets[(16)]were used to group several smaller packages together. The shipper may consider each of the constituent packages on the pallet to be a COGSA package and therefore not declare higher value or otherwise insure his interest. If the cargo is lost or damaged, however, the carrier might claim the entire pallet to be one package. If the carrier is successful in this argument, his liability is likely to be less than the value of the palletised cargo.

This article will chronicle the growth of the container-package disputes and will examine the resolutions offered by the courts in the United States, United Kingdom, United Arab Emirates and Kuwait. The article will also examine the container-package issue under the International Conventions.

II. U.S. DECISIONS

1. CONTAINERIZATION

1.1. SECOND CIRCUIT

1.1.1. *The Leather's Best Decision*

In 1971, the Second Circuit became the first federal appellate court to consider the problem of when, if ever, a shipping container should be

(16) A pallet is a "method of stowing general cargo of a fairly homogeneous nature or rectangular wooden cargo trays designed to be transported by means of a forklift truck". International Maritime Dictionary 565 (2d ed 1961). The U.S. Second Circuit distinguished containers from pallets by explaining that, normally the shipper pays freight for the weight of the pallets but does not pay freight for the weight of containers. *Mitsui & Co. v. Am. Exp. Lines, Inc.,* 636 F.2d 807, 816, 1981 AMC 331, 343 (2d Cir. 1981).

considered a package under section 1304(5)[17] and that was in ***Leather's Best Inc. v. S.S. Mormaclynx***.[18]The case in question concerned a shipment of leather from Germany to the U.S. The leather was wrapped into 99 bales averaging four feet in length, two feet in width, and one-and-one-half feet in height. The bales were shipped in a container furnished by the carrier and loaded by the shipper at his plant in the presence of the carrier's agent. A bill of lading made out by the carrier's agent described the goods: "Number and kind of packages, description of goods: 1 container s.t.c. (said to contain) 99 bales of leather." Also on the bill of lading was a provision limiting liability to $500 per container.[19]

(17) Section 1304 (5) of the Carriage of Goods by Sea Act provides in pertinent part:

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package..., or in case of goods, nor shipped in package, 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...".

(18) 451 F.2d 800 (2d Cir. [N.Y.] 1971). Although it was presented with an opportunity to consider the container problem in *Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer*, 422 F.2d 7 (2d Cir. 1969), the Second Circuit was able to bypass the question because it found an unreasonable deviation from the terms of the bill of lading by the carrier which destroyed the $500 package limitation. In the *Hong Kong Producer*, 4080 cartons of books had been loaded in eight containers which were delivered to the carrier for shipment to Japan. Six containers were stowed on deck, and owing to heavy seas books in them were damaged by sea-water. The majority held that in the circumstances of the case the carriage of the containers on deck constituted a deviation and that the carrier could not rely on COGSA's $500 per package limitation. In a dissenting judgement, however, Judge Hays declared:

> "It seems to me that each container as a unit is the package to which the $500 limitation should be applied...On the bill of lading delivered to the agent by the carrier upon receipt of the container, the 'No. of Kgs' and the 'Description of Packages of Goods' were given, as, e.g. '(1) One metal container...said to contain: 536 ctns. bound books'. I would thus hold that the parties intend each individual container to be considered as the functional packaging unit, that considering the containers as the packages promotes uniformity and predictability, and, accordingly, that the $500 per package limitation applies to the containers".

Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer, 422 F.2d 7 (2d Cir. 1969) at 20.

(19) The clause reads: "Shipper hereby agrees the carrier's liability is limited to $500 with respect to the entire contents of each container except when shipper declares a higher valuation and shall have paid additional freight on such declared valuation..." *Leather's Best*, 451 F.2d 800, at 804.

Upon arrival in the U.S., the container was unloaded and placed in the New York terminal from where it was stolen. The cargo owner thereupon filed suit against *inter alia* the carrier for $49,500 (i.e. $500 for each package or bale of leather). The carrier, relying on the Second Circuit's earlier decision in ***Standard Electrica***,(20) argued that the container, not the bales of leather, should be considered a COGSA package.(21) In *Standard Electrica*, the Second Circuit held that when a shipper had placed six cardboard cartons on each of nine pallets in order to facilitate ocean transportation, the pallets rather than the cardboard cartons were "packages."(22) Judd, DJ, after a wide-ranging review of all possible material including Continental decisions, came to the conclusion that in the circumstances of the case the bales were to be treated as packages for the purposes of computing the carrier's liability.(23)

On appeal, the Second Circuit,(24) in an opinion authored by Judge Friendly, considering a great many factors-the ownership of the container, the identity of the party loading the container (the carrier supplied the container and had an employee observe its loading), the method for calculating freight, the size of the container, the description of the goods in the bill of lading, the relative economic power of the parties, held that the container was not a package under COGSA's limitation of liability provision. Rather, the 99 bales which had been placed inside were considered to be the measure of liability. Attempting to distinguish the court's decision in *Standard Electica*,(25) which held that pallets containing cardboard boxes were packages, Judge Friendly stated:

> "Several factors distinguish Standard Electrica from this case. The pallets were nothing like the size of the container here, they had been made up by the shipper; and the dock receipt, the bill of lading, and libellant's claim letter all indicated that the parties regarded each pallet as a 'package'. Indeed, there

(20) *Standard Electrica v. Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft* 375 F.2d 943 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967).
(21) *Leather's Best Inc. v. S.S. Mormaclynx* 451 F.2d 800 (2d Cir. 1971) at 815.
(22) *Standard Electrica*, 375 F.2d 943 (2d Cir.) at 944
(23) 313 F. Supp 1373 at 1380-2.
(24) *Leather's Best Inc. v. S.S. Mormaclynx* 451 F.2d 800.
(25) 375 F.2d 943 (2d Circ. 1976).

> seems to have been nothing in the shipping documents in that case that gave the carrier any notice of the number of cartons."(26)

The court further reasoned that the purpose of limitation of liability provision in COGSA was "to set a reasonable figure below which the carrier should not be permitted to limit his liability..." Judge Friendly felt that equating a container - "a large metal object" - with a package - "the unit in which the shipper packed the goods" - lacks sensibility; a container was "functionally a part of the ship."(27) In a footnote, the court re-emphasised its understanding of the relationship between carrier and container, explaining:

> "The shipper here received a discount of 10% from the otherwise applicable tariff for services in loading the container. However, there is nothing to show that the carrier did not realise corresponding economic advantages for the container method of shipment; to the contrary, the district court was of the view that containers are primarily for the convenience of the carrier, since they cut down handling time and can save as much as 90% of the time required for unloading and loading a

(26) *Leather's Best Inc. v. S.S. Mormaclynx* 451 F.2d 800 at 815. While the *Leather's Best* court did not explicitly state what factors should be considered in reaching the determination as to what constitutes a package under COGSA, the court emphasized the need to determine whether the shipper had given the carrier notice of the number of packages in the shipping documents. Therefore, since the shipper in *Leather's Best* had given the carrier notice of the contents of the container in the bill of lading, the Court held that the container did not constitute a package under COGSA. *The Leather's Best* analysis was applied in *S.S. Ornacvega* 307 F.Supp.793, where the shipper sought to recover damages for loss of container holding 38 pallets of 'Teflon'. The container was delivered to the carrier by a freight forwarder employed by the carrier. The ocean bill of lading described the shipment as '1 container said to contain 38 pallets [Teflon]'. The court cited *Leather's Best* in support of its decision to apply the $500 limit to each pallet, rather than to the container as a whole.

(27) *Leather's Best Inc. v. S.S. Mormaclynx* 451 F.2d 800, at 815. Judge Friendly, while acknowledging Judge Hays' statement in his dissenting opinion in *The Hong Kong Producer*, *supra*, note 19, that viewing the container as the package would result in predictable and uniform standard, nevertheless, concluded that such a standard would contravene the purpose behind s.1304(5) of COGSA 451 F.2d at 815.

vessel."(28)

Judge Friendly left for future consideration the question whether a different result would be reached if the shipper "had packed the bales in a container already on its premises and the bill of lading had given no information with respect to the number of bales."(29)

2.1.1. *The Kulmerland Decision (The Functional Economics Test)*

Two years later, the Second Circuit was once again confronted with a COGSA package limitation case involving containerized cargo in ***Royal Typewriter Co. v. M/V Kulmerland.***(30) In the case in question, however, the Second Circuit espoused a very different approach to the problem. Facing with a question *Leather's Best* case had left open, namely, the proper treatment under section 1304(5) of COGSA of a container that is not furnished by the carrier and which contents are not disclosed to him, the court held that such a container is a COGSA package.

In *Kulmerland*, a German manufacturer packed 350 adding machines in cartons 15 inches long, 10 inches wide and 10 inches high and then delivered them to its freight forwarder. The latter placed the cartons in a small container which was sealed and delivered to the vessel. A bill of lading was issued describing the cargo as "1 container said to contain machinery" without any reference to the number of the individual cartons or to the type of machinery

(28) *Leather's Best Inc. v. S.S. Mormaclynx* 451 F.2d 800, at 815.

(29) *Id.*, at 815. Courts have stated that the clear holding in *Leather's Best* is that "at least when what would ordinarily be considered packages are shipped in a container supplied by the carrier and the number of such units is disclosed in the shipping documents, each of those units and not the container constitutes the 'package' referred to in [section 1304(5)]; See *Mitsui & Co. v. Am. Exp. Lines*, Inc., 636 F.2d 807, 817 (2d Cir. 1981); *see also Monica Textile Corp. v. The Tana*, 952 F.2d 636, 639 (2d Cir. 1991) (concluding that containers are not "packages" within the meaning of COGSA); *Croft & Scully Co. v. The Skulptor Vuchetich*, 664 F.2d 1277, 1281 (5th Cir. 1982) (holding that container supplied by carrier is not a COGSA package); *Yeramax Int'l v. The Tendo*, 1977 A.M.C. 1807, 1829 (E.D. Va. 1979) ("[A] container should rarely, if ever, be labeled as a package for purposes of the COGSA liability provision."). .See Contro Sinon, *Latest Developments in the Law of Shipping Containers*, 4 J.Mar.L. & Comm. 441 (1973) (Container is not a package was clear holding of *Leather's Best*).

(30) 483 F.2d 645, 1973 AMC 1784 (2d Cir. [N.Y.] 1973)

stored inside the container. Upon arrival in New York the container was stored in the carrier's terminal. The contents were subsequently stolen.

The consignee sought recovery in the amount of $29,000, the alleged value of the 350 adding machines. The carrier contended that the container was a package within the meaning of both the contract of carriage and COGSA.

The district court held that the limitation of liability in COGSA was applicable, and thus the carrier was only liable for $500 damages.(31) The trial judge reasoned that the facts of *Royal Typewriter* were beyond the scope of the Second Circuit's decision in *Leather's Best*:

> "In my view, therefore, this case squarely presents what Chief Judge Friendly described as a 'left open' matter in his discussion in Leather's Best, Inc... To track his language, '...it leaves open, for example, what the result would be if [the seller] had packed the bales in a container already on its premises and the bill of lading had given no information with respect to the number of bales.' Here ... the shipper, through its agent packed the adding machines in a container on the agent's premises in West Berlin. Further, the ocean bill recited only '1 container said to contain machinery'".(32)

He therefore concluded that since the shipper chose the container, the shipper "must accept the result, which is a recovery ... of $500."(33)

(31) 346 F.Supp 1019 (S.D.N.Y. 1972) at 1025

(32) *Id.* at 1024.

(33) *Id.* at 1025; see also *Sperry Rand Corporation v. Norddeutscher, Lloyd* 1973 A.M.C. 1392 (S.D.N.Y. 1973) where plaintiff shipped 190 cartons of shavers from West Germany to the U.S. The 190 cartons of shavers were loaded into a container at the shipper's premises and the container was delivered to the carrier. The bill of lading was issued specified the "number and kind of packages" as "container" and described the goods as "9500 apparatus electrical dry shavers". Prior to delivery to the consignee, the container was stolen. The court concluded, after reviewing *Standard Electrica* and *Leather's Best*, that the container was indeed the COGSA package. The court based its decision upon the apparent intent of the parties to treat the container as a COGSA package. The parties' intent to treat the various containers as single COGSA packages was indicated by:

"1. the bill of lading gave no indication of the container's contents.

2. the container was procured, stuffed and delivered to the vessel

Although the Second Circuit [34] praised the trial judge's decision as a "thoroughly reasoned opinion", it proceeded to affirm on what it termed "a slightly different basis." The basis, in fact, turned out to be thoroughly different.[35] The Second Circuit came up with a new and novel test which Judge Oakes called a "functional economics test."[36] "[T]he first question in any container case," said Judge Oakes, "is whether the contents of the container could have feasibly been shipped overseas in the individual packages or cartons in which they were packed by the shipper." If the shipper's individual units are functional or usable for overseas shipment,[37] a presumption is raised that the container is not a package, and the burden is placed on the carrier to show that both parties intended the container to be the package.[38] If the shipper's individual units are not functional or usable for overseas shipment, the container is presumptively a package. The burden is on the shipper to show why the

without carrier's involvement; and

3. the container used to ship the shavers was considerably smaller than the container used in *Leather's Best*."

Sperry Rand Corporation v. Norddeutscher, Lloyd ,1973 A.M.C. 1392 at 1396.

(34) *Royal Typewriter Co. v. M/V Kulmerland* 483 F.2d 645.

(35) De Orchis, *The Container and the Package Limitation. The Search for Predictability*, 5 J.Mar.L. & Com. 251, 255 (1974).

(36) The origins of the 'functional economics' test are probably to be found in Judge Hay's dissent to *The Hong Kong Producer*, *supra*, note 19. Judge Hay had stated: "I would thus hold that the parties intended each individual container to be considered as the functional packing unit..." 422 F.2d 7 (2d Circuit) at 20. Judge Hayes did not explain his concept of a functional packing unit. It is suggested that he did not intend to create a new test, but was simply following the facilitation of transport test laid down in *Standard Electrica*.

(37) *Royal Typewriter Co. v. M/V Kulmerland* 483 F.2d 645, at 648.

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

container should not be treated as the 'package'.(39) The decision continued:

> "Only then does custom and usage in the trade, the parties' own characterisation or treatment of the items being shipped in supporting documentation or otherwise and any other factor bearing on the parties' intent become relevant, as in Standard Electrica or Leather's Best."(40)

Applying the functional economics test to the shipment in question, Judge Oakes concluded that the container constituted a COGSA package since the individual cardboard cartons involved were too flimsy to be transported separately and they never had been shipped separately in the past(41) and the bill of lading described the shipment as container of machinery.

Finally, Judge Oakes expressed his belief that the functional economics test would ensure predictability by permitting the "parties concerned [to] allocate responsibility for loss at the time of contract, purchase additional insurance if necessary, and thus avoid the pains of litigation."(42)Therefore, he labelled it a 'common sense' approach.(43)

Contrary to the expectations of Judge Oakes, courts(44)and

(39) *Royal Typewriter Co. v. M.V. Kulmerland* 483 F.2d at 649.

(40) *Id.* Courts consider the information contained in dock receipts, bill of lading, and other documents indicative of the parties' intent. See, e.g., *Standard Electrica*, 3175 F.2d 943, 946 (2d Cir.). Another factor considered by Courts to be important in determining the parties' intent is whether it was the shipper or carrier who chose to use the container. See, e.g., *Rosenbruch v. American Export Isbrandtsen Lines, Inc.*, 1976 A.M.C. 487, 489 (2d Cir. 1976). Finally, whether an agent or employee of the carrier observed the loading of the container and thereby ascertained the number of cartons placed in it has been considered important by courts in determining the parties' intent. See, e.g., *Cameco, Inc. v. S.S. American Legion*, 514 F.2d 1219, 1299 (2d Cir. 1974).

(41) *Royal Typewriter Co. v. M.V. Kulmerland* 483 F.2d 645 at 646.

(42) *Id.* at 649.

(43) *Id.*

(44) See *Matsushita Electric Corp. v. S.S. Aegis Spirit* 414 F. Supp. 894, 1976 AMC 779, [1977] 1 Lloyd's Rep. 93 (W.D. Wash. 1976); *Yeramex International v. 8.S. Tendo* 1977 AMC 1807 (E.D. Va. 1977), rev'd on other grounds, 595 F.2d 943, 1979 AMC 1282 (4 Cir. 1979)*; Allstate Ins. Co. v. Inversiones NavierasImparca, C.A.* 646 F.2d 169 at 172, 1982 AMC 945 at 948 (5 Cir. ·1981) (test "was subject to severe criticism from all corners"); *Croft & Scully CO. v. M/V Skulptor Vuchetich* 664 F.2d 1277, at 1281, note 10 (5 Cir. 1982) (functional economics test "necessitated

commentators(45)have severely criticised the functional economics test as creating economic waste because a shipper, when using a container, can avoid having his container deemed a package only if he ships goods packed in such a way that they need not be shipped in a container(46)and thereby incurs significant economic waste. Any shipper who switches from break-bulk shipment(47)to modern containerization must continue to use the same obsolescent and costly casing he always used, or forego any recovery over $500 for loss or damage to the containerized shipment.(48) In other words, the test unjustly penalises the shipper for taking advantage of the economic benefits derived from containerization whilst leaving the carrier, who reaps far greater rewards, unscathed.(49) Moreover, critics of the functional economics test have

much judicial guessing work, and we are well rid of it"); *Monica Textile Corp. v. S.S. Tana* 952 F.2d 636 at 639, 1992 AMC 609 at 614 (2 Cir. 1991). *Complaint of Norfolk, B & C Line* 478 F. Supp. 383, 392 (E.D. Vol. 1979).

(45) De Orchis, *supra*, note 25, at p. 257-58; "*The Shipping Container as a COGSA Package: The Functional Economics Test is Abandoned*" (1981) 6 Mar Law. A. Calamari, *The Container Revolution and the $500 Package Limitation-Conflicting Approaches and Unrealistic Solutions: A Proposed Alternative*, 51 ST. JOHN'S L. REV. 687, 713-14 (1977); Seymour Simon, *The Law of Shipping Containers (pt.1)*, 5 J.Mar.L. & Com. 507, (1974).

(46) *Royal Typewriter Co. v. M/V Kulmerland* 483 F.2d 645 at 648. Since a functional carton is one which is suitable for breakbulk shipment without any other protection necessary, there would be no advantage for a shipper to use a container and face restrictive liability limitation. *Id.* at 649. The shipper receives a 10% freight reduction when using containers but this does not offset the risk to a cargo-owner's insurer if the carrier's liability to $500 for a containerful of goods. De Orchis, *supra*, note 25, at p. 253, Diplock, *supra*, note 2 at p. 528.

(47) 'Breakbulk' refers to packaged, non-fungible cargo; see R. De Kerchove, *International Maritime* Dictionary (1948). Breakbulk shipment, constituted the traditional precontainer form of cargo shipment. *Matsushita Electric Corp. v. S.S. Aegis Spirit* 1976 A.M.C. 779, 785 N. (14).

(48) Simon, *supra*, note 35, at pp. 520, 532.

(49) Simon, *supra*, note 35, at p. 531. It is Simon's contention that the carrier realises enormous saving by the use of containerisation, at times amounting to 90% of the cost of loading and unloading ships. In contrast, the shipper's only saving is that produced by the utilization of less expensive and less durable packaging. According to Simon, the functional economics test penalizes the shipper by applying the $500 liability limitation to the container when the shipper employs an economical form of packaging, but permits the carrier to retain the benefits it receives from containerisation. Thus, Simon concluded that the economic impact of the test is inequitable. *Id.*, at pp. 521-22.

urged that it is contrary to the legislative purpose of U.S.COGSA as it places undue emphasis on the parties' intent and purpose rather than an objective balancing of interests.(50) The parties may agree to a package definition that limits the carrier's liability to a nominal amount, thus violating the purpose of the U.S.COGSA. Even the Second Circuit itself had previously observed that bills of lading often are contracts of adhesion drafted and issued by the carrier, and, as such, are hardly indicative of the parties' mutual intent.(51) By placing such importance upon the parties' private definition of the term 'package' as evidenced by the bill of lading, the Second Circuit has thus departed from its prior recognition that a major purpose of U.S.COGSA is to protect shippers from the over-reaching of carriers through contracts of adhesion.(52)

The functional economics test has even been criticised by a counsel representing carrier interests, who might have been expected to welcome it. The counsel criticised the test as an unfair burden on carriers because a carrier that receives a sealed container may have no means of determining whether the goods inside are packaged functionally.(53)Consequently, the carrier is without guidance in allocating the risk of shipment of that container. On the other hand, the shipper will usually know whether its packages are functional and can allocate its risks accordingly.

Despite the criticisms, the Second Circuit, in a further opinion by Judge Oakes, applied the functional economics tests in ***Cameco, Inc. v. S.S. American***

(50) *The Aegis Spirit*, 1976 A.M.C. 779, 792.

(51) See *The Hong Kong Producer*, 422 F.2d 7, (2d Cir. 1969) at 11,13; *Standard Electrica* 375 F.2d 943, 945 (2d Cir. 1967).

(52) *The American Legion*, 514 F.2d 1291, 1300 (2d Cir. 1974); *The Hong Kong Producer*, *id.*, at 11.

(53) De Orchis, *supra*, note 25, at p. 257. The issue of whether a container is a COGSA package only arises when the shipper packs and seals containers supplied by the carrier. Siomon, *Admiralty Jurisdiction and the Liability of Wharfinger* 3 J. Mar. L. & Com. 513, 517 (1972). A carrier cannot pack a container without the knowledge of the shipper and thereby unilaterally limit his liability by maintaining that the container is the package. *Id*. When the shipper packs a container, however, all the carrier has knowledge of is the "Shipper Load and Count" as it appears in the bill of lading. *Id*. The carrier is unable to verify the number of cartons in a package and sealed container delivered to it. *Id*.

Legion.(54) Acknowledging that the *Kulmerland* opinion had been criticised, Judge Oakes countered that such criticism "depends to some extent on whose ox is gored."(55) He pointed out that the test is not dispositive of the COGSA package issue, but only indicates which party bears the burden of proof.(56)

The facts of the *American Legion* were that 500 cartons and four pallets of Danish canned [meat] were shipped in refrigerated container. The container, which was owned by the carrier, was loaded by the shipper at his place of business. An agent of the carrier was present at the tally and count, and may have participated in it. The carrier's bill of lading enumerated the number of cartons within the container but provided space for inserting the value of the goods. Prior to delivery to the consignee, the cargo was stolen.

Mentzner, D J, with regard to the package limitation question, stated:

> "The bill of lading here shows that a container owned and furnished by the [carrier] was used to package the cargo and this cargo consisted of 500 cartons and four pallets of [meat]. Containerization was at the carrier's request. The carrier had notice of the number of packages of merchandise that it was carrying in the container. Absent the container, the cartons would have been shipped individually. Of...Kulmerland... Thus, under the ruling in Leather's Best... the limitation of $500 ... does not apply to this container."(57)

(54) [1975] 1 Lloyd's Rep. 295; see also *The Bookly Maru*, 1974 A.M.C. 2443 (S.D.N.Y. 1974)., where the District Court applied the functional economics test to a containerised shipment of 636 boxes of photographic equipment and chemicals. Having determined the boxes were not suited for breakbulk shipment, and therefore, were not functional packages, the court considered the following factors:

1. who owned and packed the container;
2. whether the goods for more than one shipper or goods to be sent to more than one destination were placed in the container, and
3. the characterisation in the bill of lading.

1974 A.M.C. 2443, at 2446. In holding that the container was the COGSA package, however, the court apparently ignored the fact that the number of boxes had been listed in the bill of lading.

(55) *American Legion* [1975] Lloyd's Rep. 295, at 303.

(56) *Id.*

(57) *American Legion* [1975] Lloyd's Rep. 295, at 297.

On appeal, the Second Circuit reversed the district court and held that the $500 per package limitation applied to each carton of tinned [meat]. The decision stated that the cartons and the pallets of tinned [meat] satisfied *Kulmerland's* functional economics or functional packaging unit test.(58) To support its decision that each carton constituted a package, the court cited the following facts:

> "Here the use of the container was as much for the shipowner's benefit as for the shipper's. Here the ship was a container ship, and these goods could not have been shipped by way of the ship absent a refrigerated container, since there was no refrigeration as such in the ship. Here a 10 per cent discount was supplied the shipper on the basis that the carrier could avoid stuffing and unstuffing or loading and unloading costs thereby. Here the trucker who crated the carrier's container was the carrier's agent. He was present at the shipper's tally and count and could have participated in it. Here the bill of lading specifically set forth the number of cartons of tinned [meat] and the respective number of tins and weight per tin in each carton, unlike the one container said to contain machinery in the Kulmerland case or the one container said to contain household goods in the Rosenbruch case. Here as in Leather's Best...the bill of lading described the goods as one container 's/t/c' a specific number of cartons or bales, etc."(59)

The court rejected the contention that, in all cases, the container must be considered a single COGSA package. It also rejected the argument that a container should never be considered a COGSA package:

> "To hold in all cases that a container is a package is to defeat the purpose of COGSA, which is to protect shippers from the over-reaching of carriers through contracts of adhesion and to provide incentive for careful transport and delivery of cargo... At the same time to suggest...that in no event can a container be

(58) *Id.* at 303.
(59) *American Legion* [1975] Lloyd's Rep. 295, at 303.

> treated as a COGSA package is to ignore the interplay between cargo insurance procurable by a shipper and P&I insurance."(60)

Another case decided by the Second Circuit, ***Rosenbruch v. American Export Isbrandtsen Lines, Inc***.,(61) purported to answer the question left open in *Leather's Best*, viz. whether a container loaded by the shipper on his premises is a package when the bill of lading does not indicate the number of units in it. In *Rosenbruch*, the plaintiff shipper had arranged for carriage of his household goods from New York to Hamburg. A container was delivered to the shipper's agent in New York. The agent stuffed, sealed and transmitted the container to the carrier. The bill of lading stated that one package was being shipped and described the contents as "used household goods." Due to inclement weather, the container was lost at sea.

Given token recognition to the functional economics test, but placing particular emphasis on certain facts concerning the selection and packing of the container, the Second Circuit held that the container was a package under COGSA. The following facts were found to be determinative:

> "[T]he shipper's agent alone loaded the container which he obtained from the carrier, rather than constructing separate wooden crates. The metal container was loaded with the shipper's goods only, not those of any other shipper. The contents of the container were not separately packed or labelled. The shipper's agent selected the voyage and the vessel for the shipment. He stated on the bill of lading that one package or container was involved and described the contents as 'used household goods'. The carrier was not involved at all in packing the container.(62)

(60) *Id.* at 304.

(61) 543 F.2d 967 (2d Cir. 1976), cert. denied, 420 U.S. 939 (1976).

(62) *Rosenbruch* 543 F.2d 967, at 970. Interestingly, in applying the functional economics test the court did not treat the test as creating a presumption that the container was or was not a package which may be rebutted by other evidence of the parties' actual intent. Rather, the court appears to have interpreted the test as giving the shipper a choice in advance of shipment; the shipper may either package the items as to be suitable for shipment without containers and have the $500 limitation applied to each carton, or it

While the facts of these package cases vary widely, the court concluded, this is about as clear a one as we have seen for holding that the container constituted a package for the purpose of Section 4(5) of COGSA. Indeed, it comes very close to the hypothetical case envisioned by Judge Friendly in Leather's Best…where the shipper would load the container on his own premises and the bill of lading would disclose nothing with respect to the number of units within the container."(63)

The *Rosenbruch* panel admitted that the functional economics test does not solve the limitation of liability problems created by the container age:

> "[U]nless and until Congress resolves the limitation of liability problems created by the new container age, we think that the "functional economics test" ... enunciated in Kulmerland ... while not solving the problem entirely, offers as good a judicial interpretation of the word "package" in Section 1304(5) as we have seen."(64)

may use containers, receive 10% rate reduction allowed for containerised goods and submit the $500 per container limitation. *Id*.

(63) *Rosenbruch v. American Export Isbrandtsen Lines, Inc*., 543 F.2d 967, at 970.

(64) *Id.* District Courts in the Second Circuit applied *Kulmerland's* functional economics test. In *Baby Togs v. The American Ming*, (1975 A.M.C. 2012 (S.D.N.Y. 1975)), the U.S. District Court for the Southern District of New York held cartons of infants' clothing shipped inside a container were packages for purposes of section 1304(5) since the cartons involved could be safely shipped by sea as break-bulk cargo. *(Id.* at 2021). After the court found that the cartons were functional as individual units, the burden shifted to the ocean carrier to overcome the presumption that the container was not a package. (*Id.)* According to the district court, the carrier did not meet that burden because the container was the property of the carrier; the freight was not based upon the measurement of the container, but rather upon that of the cartons contained therein; and the bill of lading listed the contents of the container by number of cartons, nature of cargo, measurement and gross weight. (*Id*).

After *Baby Togs*, the Southern District of New York applied the functional economics test in two other cases. The court held in *Insurance Company of North America v. The Brooklyn Maru* (1974 A.M.C. 2443 (S.D.N.Y.1974)), that a container filled with photographic supplies and chemicals constituted a package for the purposes of liability limitation under section 1304(5). (*Id.* at 2447). Utilizing the functional economics test, the district court limited the carrier's liability to $500 because the container was loaded with 636 boxes that were not suitable for overseas shipment without further packaging or

3.1.1. *Mitsui Decision (The Abandonment of the Functional Economics Test)*

Eight years after the Second Circuit's adoption of the functional economics test in *Kulmerland*, the Second Circuit reconsidered the issue of the package limitation as it relates to containers in ***Mitsui & Co., v. American Export Lines, Inc.***(65) Facing a set of facts virtually on all fours with the *Leather's Best*,(66) the Second Circuit returned full circle from the reasoning of *Kulmerland* to hold that a container supplied by the carrier is not a COGSA package if the shipper fully discloses its contents to the carrier.

In *Mitsui*, Mitsui and Armstrong were two consignees sought damages for their cargo which was damaged or washed overboard during a storm.

Mitsui was the consignee of 1834 tin ingots. The cargo was stacked in "bundles" inside five containers, but the bundles inside the five containers were not banded or strapped together as the word "bundle" might suggest.(67) Listed on the bill of lading was a column labeled "No. of Cont. or other Pkgs.," with the entry being "30 bundles of 438 pcs.) Tin Ingot."(68) Printed on the opposite side of the bill of lading was Clause 16, stating that the value of the goods would be deemed to be $500 per package or per shipping unit.

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special shipping arrangements. (*Id.* at 2446). Because the individual boxes were not functional, a presumption was created that the container was the section 1304(5) package.(*Id*) The shipper failed to rebut this presumption because it chose, packed, and sealed the container. (*Id.* at 2447) Also, the carrier did not supervise or participate in the packing. (*Id*) Therefore, the container was deemed a package under section 1304(5).(*Id*)
The district court reached a similar conclusion in *Eastman Kodak Company v. Transmariner*, 1975 A.M.C. 123 (S.D.N.Y. 1974), a decision involving a container carrying photographic equipment and chemicals that were not suitable for overseas transportation without further preparations. Because the cargo could not have been shipped without the use of a container, the shipment failed the functional economics test enunciated in *Kulmerland*. (See *id.* at 128).

(65) 636 F.2d 807 (2d Cir. 1981).

(66) One important difference, however between the two cases is that in *Leather's Best*, the agent was present when the container was packed so that the carrier could verify the information on the bill of lading, while in *Mitsui*, the carrier's agent was not present when the containers were being packed.

(67) 636 F.2d 807 (2d Cir. 1981)at 811.

(68) *Id.*, at 812.

Armstrong was the consignee of cargo, with 1705 rolls of floor covering. The floor covering was packaged in such a manner that each roll could be stowed in a vessel's hold as break-bulk cargo.(69) The bill of lading listed the number of containers as well as the number, weight and measurements of the rolls. The Armstrong bill of lading also contained Clause 16, limiting the value of the goods to $500 per package or shipping unit.

During the voyage, five containers holding Mitsui's tin ingots and 13 containers filled with Armstrong's rolls of floor covering were lost. Mitsui sought damages from the carrier in the amount of $917,000, a figure representing the total number of lost ingots (1834) multiplied by the $500 per-package limitation. The carrier argued its liability was limited to $2500 because the five containers, not the tin ingots inside, were the COGSA packages. Armstrong claimed damages in the amount of $357,946.19 based upon the number of missing rolls. The carrier again sought to limit its liability to $6,500 on the basis that the 13 containers, not the 1705 rolls of floor covering, were COGSA packages.

The district court, applying the functional economics test, found the unbanded and unstrapped stacks of tin ingots were packages within the meaning of section 1304(5).(70) Additionally, the court found the 1705 rolls of

floor covering were packages under section 1304(5).(71) The consignees appealed contending that the ingots were not shipped in packages(72) and that they should be awarded the value of the cargo. The carrier cross-appealed contending that the containers were packages and that his liability should be limited to $9,000 (18 containers multiplied by $500 packages limitation).

The court of appeal's(73) enquiry began with an examination of the language

(69) *Id.*, at 810.
(70) *Id.* at 813.
(71) *Id.* at 812-13.
(72) *Mitsui American Export Lines, Inc.*, 636 F.2d 807 at 813. The consignees argued that the bundles of ingots were not packages and, according to the clause in the bill of lading, the $500 limitation should be applied to each shipping unit, i.e. each ingot. *Id.*, at p. 813.
(73) 636 F.2d at 807 (2d Cir. 1981). Sitting on the panel were Chief Judge Feinberg, Judge Friendly who had authored the landmark opinion of *Leather's Best* and Judge Oakes who had created the functional economics test.

of section 1304, the intent of that provision, and the broader statutory scheme of COGSA.(74) As to the statutory language, the court noted that section 1304(5) "establishes a clear distinction between goods shipped in packages and goods not shipped in packages."(75)Secondly, the court noted that section 1304(5) does not include any definition of the term 'package'.(76) The court cited with approval the interpretation given this provision by the Ninth Circuit which had adopted a "plain, ordinary meaning" standard.(77) The court asserted that the "minimum level of liability" was intended to prevent carriers from using their "superior bargaining power to compel shippers to agree to provisions reducing their liability to insignificant amount.(78)

The broader purpose of U.S.COGSA package limitation entails two dominant objectives: (1) to ensure uniformity in the basic rights and responsibilities arising out of bills of lading, and (2) to fix an irreducible minimum of immunity of the carrier from liability. The court stressed that both aspects must be given effect in any judicial interpretation. Otherwise the carrier would have little incentive to undertake the precautions mandated by other sections of the statute.

In an extremely thorough opinion, the court, speaking through Judge Friendly, reviewed the earlier package decisions(79) that had wrestled with the apparent inconsistency between the functional economics test, and the test promulgated in *Leather's Best*, noting that a few courts outside the Second Circuit had followed the functional economics test.

The court found that the *Kulmerland* decision was inconsistent with the *Leather's Best*.(80)Although the court in *Kulmerland* concluded that, "underlying

(74) *Id.*, at 813-814.
(75) *Id*., at 813.
(76) *Id*., at 813-814.
(77) *Id.*, at 814 (citing *The Pacific Bear* 491 F.2d 960, 963 (9th Cir).
(78) *Id.*
(79) The opinion cited *The Aegis Spirit*, 414 Supp. 894 (W.D. Wash. 1976); *Yermax Int'l v. S.S. Tendo*, 1977 A.M.C. 1807 (E.D Va.), and *Complaint of Norfolk B & C Line* 478 F.Supp. 383 (E.D v. 1979).
(80) *The Mitsui* Court, in its analysis of the functional economics test, stated that despite the significant criticism and its own conviction that the test was contrary to the language and purpose of COGSA, the Second Circuit would be bound to follow it if the court

Leather's Best...is the concept that the 'bales' there could have been shipped individually rather than in the container,"(81)the *Mitsui* court found no basis in the *Leather's Best* opinion to support such a conclusion as the clear holding of *Leather's Best* was that carrier-furnished containers whose contents are fully disclosed are not COGSA packages. Judge Friendly explained:

> "Although the Kulmerland panel asserted that the critical fact in Leather's Best was that the bales of leather could have been shipped breakbulk, nothing in the opinion suggested that the decision had proceeded on that basis, there was no evidence on the point one way or the other, and the shipper had advanced no such argument." (82)

The court noted that under the functional economics test, many such containers might be considered packages "since few shippers would incur the wasteful expense of supplying packaging unnecessary for container shipments simply to avoid having the containers deemed the packages."(83) The court also noted that the *Kulmerland* decision failed to adequately explain why the container would constitute a COGSA package where the shipper had described the number of units stowed within the container in the bill of lading, despite the holding of *Leather's Best* to the contrary.(84) The court further criticised the

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determined that the functional economics test was consistent with the holding in *Leather's Best*. The *Mitsui* Court, however, was unable to make that determination. 636 F.2d 807, at p. 818.

(81) 483 F.2d 807, at 649.

(82) 636 F.2d at 807 (2d Cir. 1981) at 818.

(83) *Id.* The *Mitsui* Court, in criticising the function economics test, stated that:
"Under the Kulmerland rationale the carrier's maximum liability for 350 cartons of adding machines worth approximately $29,000 would be limited to the token amount of $500 even if the bill of lading disclosed the number of cartons and the nature of the machinery. This would be reminiscent of the precise evil which [the Hague Rules] and COGSA was designed to remedy".
Id., at 818 n.11.

(84) The *Kulmerland* Court rejected the importance of the *Leather's Best* requirement of disclosure of the units within the carrier-owned or carrier-supplied containers. The court reasoned that ownership of the containers is not important because:
"a. The container is used for the benefit of both the shipper and the carrier and it is not an integral part of the shipment; and
b. Containers do not become the property of the consignee but are re-used by the

Kulmerland decision because it ignored the possibility that the goods shipped without sufficient packaging might be "goods not shipped in packages", a class of cargo specifically provided for in section 1304 (5).(85)Judge Friendly explained:

> "Even if this might tend to show that each of those units is not a package a conclusion that is by no means ineluctable it does not at all follow that the container is. It could just as reasonably, indeed far more reasonably, be the case that the goods are "not shipped in packages" at all a class of cargo specifically provided for in s 4(5). Kulmerland does not explain why carrier-furnished containers stowed with fully described units unsuitable for breakbulk shipment constitute packages despite our earlier recognition in Leather's Best, ... that a container is "functionally part of the ship"… The Kulmerland test simply does not take into account the important possibility that goods shipped in such containers with packaging insufficient for breakbulk shipment might be "goods not shipped in packages."(86)

Chief Judge Friendly further pointed out that the approach in *Leather's Best* better conforms to international developments respecting the package limitation. More specifically, the approach in *Leather's Best* conforms to the approach implemented by the 1968 Brussels Protocol,(87) an international agreement (commonly known as the Visby Rules) that amended the Hague Rules in a number of important areas. Most importantly, article II(c) of the Visby Rules answers the question of when a container may be considered a package by deleting article 4(5) of the Hague Rules and replacing it with the following language:

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owner for as many different shipments as possible".
The court further reasoned that disclosure is irrelevant because it cannot be verified. 483 F.2d at p. 647.

(85) 636 F.2d at 819.

(86) *Id.* at 818-19.

(87) Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, February 23, 1968 [hereinafter Visby Rules].

> "Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the Bill of Lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this package or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit."(88)

Therefore, under these rules, the number of packages listed on the bill of lading is deemed to be the number of packages for limitation purposes. If the bill of lading does not list the number of separate packages within a container, then each article of transport (container) is deemed to be a package.(89) Chief Judge Friendly thought the goal of international uniformity is better served by the approach in ***Leather's Best*** because it is consistent with the Visby Rules.(90)

After the exhaustive review of these various factors, Judge Friendly concluded:

> "Clearly the goal of international uniformity(91)is better served

(88) *Mitsui & Co., v. American Export Lines, Inc*, 636 F.2d 807, at 821.

(89) *Id.* See *Interflow (Tank Container System) Ltd. v. Burlington Northern Santa Fe Railway Co.*, 2005 AMC 2894, 2906-07 (S.D. Tex. 2005) (tank containers supplied by the shipper and filled with lubricating oil, which was not otherwise packaged, qualify as COGSA packages); *Alternative Glass Supplies v. M/V Nomzi*, 1999 AMC 1080, 1084-85 (S.D.N.Y. 1999) (bill of lading listed the container as a single package, but also described the contents of the container as "2 units" without any indication that the units qualified as packages); *Orion Ins. Co. v. M/V "Humacao,"* 851 F. Supp. 575, 1994 AMC 1922 (S.D.N.Y. 1994) (a 40-foot container packed with 42,298 pounds of bulk resin is a single package because the bill of lading describes the shipment as "1 CNT" in the "No. of Pkgs." column and as "BULK RESIN" in the "Description of Packages and Goods" column); *FMC Corp. Defense Sys. Int'l v. M/V Am. Resolute, 1991 AMC 1626 (S.D.N.Y. 1991) (an "open top 20 foot by 8 foot steel and wooden shipping* box" will be treated as a "package" when the bill of lading indicates a single package and the description of the goods does not contradict that characterization). *Cf. Tamrock USA, Inc. v. M/V "Maren Maersk,"* 1996 AMC 676 (S.D.N.Y. 1995) (treating a forty-foot flat rack container "said to contain" a self-propelled driller as a single package).

(90) *Mitsui & Co., v. American Export Lines, Inc*, 636 F.2d 807, at 820-21.

(91) The *Minsui* Court also expressed its concern for domestic uniformity, noting that the functional economics test was not likely to gain acceptance in other circuits. *Id.*, at pp. 819-20.

> by the approach in Leather's Best that generally a container supplied by the carrier is not a COGSA package if its contents and the number of packages or units are disclosed than by the functional economics of Kulmerland. For all these reasons this panel respectfully declines to follow the functional economics test set forth in Kulmerland."(92)

After rejecting the functional economics test, Chief Judge Friendly applied *Leather's Best* to the consolidated cases in *Mitsui*. *Leather's Best* states that "at least when what would ordinarily be considered packages are shipped in a container supplied by the carrier and the number of such units is disclosed in the shipping documents, each of those units and not the container constitutes the 'package' referred to in section 1304(5)."(93) In *Armstrong's* case, the bill of lading put the carrier on notice that the carrier was shipping rolls of floor covering, not just loaded containers.(94) Therefore, the containers could not be considered COGSA packages.(95) The court's next inquiry, however, was whether the rolls of floor covering inside the containers could fairly be described as packages. Chief Judge Friendly indicated that, in making this determination, the court would use the plain, ordinary meaning of the word "package."(96) In *Armstrong's* case, the shipper had wrapped the rolls, inserted fiber discs at the bottom and top, and covered the bottom of the discs with burlap cloth.(97) Clearly, the rolls could be considered packages.(98)

(92) *Id.* at 821.
(93) *Id.* at 817.
(94) *Id.* at 821.
(95) *Id.* at 822
(96) *Id.* at 814. Judge Friendly approved of the Ninth Circuit's method of determining the plain, ordinary meaning of the word "package." *Id.* In *Hartford Fire Ins. Co. v. Pac. Far E. Lines, Inc.*, 491 F.2d 960, 963 (9th Cir. 1974), the court of appeal stated that dictionary definitions provided a starting point in determining the meaning of "package." The court quoted Webster's Third New International Dictionary 1617 (1966), defining a package as "a small or moderate sized pack: bundle, parcel ... a wrapper or container ... a protective unit for storing or shipping a commodity." *Id.* Additionally, the court quoted Black's Law Dictionary 1262 (4th ed. 1968), defining a package as "a bundle put up for transportation or commercial handling; a thing in form to become, as such, an article of merchandise or delivery from hand to hand .... As ordinarily understood in the commercial world, it means a shipping package." *Id.*
(97) *Mitsui & Co., v. American Export Lines, Inc*, 636 F.2d 807, at 821.
(98) *Id.*

The court had more difficulty with *Mitsui's* case. The bill of lading listed "bundles of tin ingots" under the heading "No. of Cont. or other Pkgs."(99) Because the containers could not be considered packages under section 1304(5),(100) the next issue was whether the tin ingots were packages even though they were in no way secured or bundled but merely placed in separate stacks. After noting that the shipper had done nothing to bind the tin ingots together inside the containers, Chief Judge Friendly held that the "bundles" of tin ingots in this case could not be regarded as packages within the ordinary meaning of that term.(101) However, the court concluded that the consignee was estopped from denying that the cargo was shipped as packages due to the entry on the bill of lading:

> "The typewritten material in the bill of lading, found to have been included by the shipper, represented that the contents of the containers consisted of 'bundles' of ingots. If the ingots had in fact been bundled, each bundle would have been a package… When the S.S. Red Jacket sailed from New York, AEL had no way of knowing that the shipper's representation was false. If the action here were by the shipper, this would seem a classic case for the application of estoppel. Mitsui and its insurer can stand no better; the shipper must be regarded as their agent in preparing the shipping documents."(102)

In a concurring opinion, Judge Oakes, author of the *Kulmerland* decision, acknowledged the rejection of the functional economics test.(103) He indicated that he has since been convinced that the functional economics test, seeking certainty, had failed to be helpful. He had been persuaded by Judge Friendly, Judge Feinberg, and Judge Reeks:

> "But I have at all times...been aware of Judge Feinberg's statement in his dissent in Standard Electrica...that 'certainty at the expense of legislative policy and equity is undesirable and

(99) *Mitsui & Co., v. American Export Lines, Inc*, 636 F.2d 807, at 812.
(100) *Id.* at 822.
(101) *Id.* at 821-22.
(102) *Id.* at 823.
(103) *Id.* at 825.

> often turns out to be ephemeral'. And Judge Reeks in Matsushito Electric Corp. v. S.S. Aegis Spirit referred to and quoted at length by Judge Friendly, have persuaded me that the functional economics' test of Kulmerland does not function well and had better be abandoned. In the realm of container shipping where the bill of lading specifies the contents, the ship's container should not be deemed a package - even presumptively only - irrespective of how the goods within it are packed. I therefore am joining in the abandonment of the Kulmerland Cameco test, noting only that the results of either case would be changed by virtue of today's decision".(104)

In a further decision of ***Smythgreyhound v. M/V Eurygenes***,(105) the Second Circuit effectively overruled *Kulmerland's* functional economics test and reinforced the general rule of *Mitsui*. *Smythgreyhound* concerned cartons of stereo equipment shipped in containers from Japan to New York and European ports.(106) The shipper had its freight forwarder load 1500 cartons of stereo equipment into eight containers. The freight forwarder delivered the sealed containers to the vessel. The bill of lading specified both the number of containers and the number of cartons inside the containers.

The ship caught fire during the voyage, severely damaging the shipper's stereo equipment. Reaffirming its *Mitsui* holding, the Second Circuit held that "in the absence of clear and unambiguous language indicating agreement on the definition of 'package,' ... we will conclusively presume that the container is not the package where the bill of lading discloses the container's contents."(107) The court noted that the *Mitsui* rule "has the advantage of being a bright line,

(104) *Id.*

(105) 666 F.2d 746 (2d Cir. 1981); several decisions, concerning container shipment have followed the approach taken by the *Mitsui* Court *Watermill Export, Inc v. M/V 'Ponce'*, 506 F. Supp 612 (S.D.N.Y. 1981) (trailer containing bulk shipment of potatoes not a COGSA package and damages assessed on the basis of $500 per customary freight unit). In *Clairol, Inc. v. Moore McCormock Lines, Inc*. 425 n.y.s. 2D472, cartons of curlers and not the container constituted the COGSA packages since contents of each container were disclosed in the bills of lading.

(106) *Smythgreyhound v. Eurygenes*, 666 F.2d 746, 747 (2d Cir. 1981).

(107) 666 F.2d 746 (2d Cir. 1981) at 753 n.20.

achieving 'certainty' but not 'at the expense of legislative policy and equity."'[108] Furthermore, the court stated that "*Mitsui* and our decision today will put carrier interests on notice that the container will not be considered the COGSA 'package' where the bill of lading discloses the contents of the container."[109] The court did qualify its holding, stating: "This does not mean that the parties cannot agree between themselves that the container will be the COGSA 'package' ...."[110]

Because the bill of lading in *Smythgreyhound* listed the number of cartons inside the containers, the Second Circuit held that the cartons of stereo equipment rather than the containers constituted packages under section 1304(5).[111] In reaching this holding, the court rejected the carrier's argument that whenever a shipper affirmatively prefers to use containers for its convenience, the containers must be COGSA packages.[112] According to the court, its previous decisions did not support the carrier's contention.[113] The *Mitsui* rule clearly applied, "regardless of the fact that the shipper had a choice of break-bulk or container shipment."[114]

4.1.1. *The Modern Analysis*

After *Mitsui*, it is clear that when a bill of lading reveals the number of individual items within a container, and those items can fairly be described as packages using the ordinary, plain meaning of the term, then those items are considered packages for limitation purposes.[115] The question remaining after *Mitsui*, though, was what happens when the bill of lading does not list the cargo

(108) *Id.* (quoting *Standard Electrica, S.A. v. Hamburg Sudamerikanische* 375 F.2d 943, 948 (2d Cir. 1967).).
(109) *Id.*
(110) *Id.*
(111) *Id.* at 753 ("[T]here is no evidence which leads us to conclude that the [stereo] cartons are not 'packages' for COGSA purposes."). Accordingly, the Second Circuit in *Smythgreyhound* also held that the $500 per package limit on liability applied to the stereo cartons. *Id.*
(112) *Id.* at 750.
(113) *Id.*
(114) *Id.* at 753.
(115) See *Binladen BSB Landscaping v, The Nedlloyd Rotterdam*, 759 F.2d 1006,1013 (2d Cir, 1985.

within a container as being packaged?(116) Can the container then be considered a COGSA package? These questions were answered in ***Binladen BSB Landscaping v. The Nedlloyd Rotterdam***. (117)

Binladen involved the shipment of live plants from Houston and Miami to Saudi Arabia in ten refrigerated containers aboard the Nedlloyd Rotterdam. Upon arrival in Saudi Arabia, the plants inside two of the containers were dead due to a malfunction of the refrigeration units. The bill of lading for the container shipped from Houston read "1 40' reefer container said to contain: 7,990 live plants," with the container from Miami being shipped under a bill of lading reading "5/40' reefer containers said to contain 11735 pcs. live plants misc. and 24 pkgs. shade cloth."(118) The district court found Nedlloyd responsible for the damaged cargo.(119) The court then found that because the bills of lading disclosed the contents of the containers, the two containers were not packages under COGSA's section 1304(5).(120) Nedlloyd appealed, arguing that the containers were COGSA packages and that the trial court incorrectly awarded damages in excess of section 1304(5).

The Second Circuit noted that the bills of lading in this case, while listing the number of live plants inside the containers, gave no indication whether or how the plants were packaged. The court explained:

"But the word 'plant,' standing alone in a bill of lading, does not describe an item that has been packaged for transport. Nor can a carrier that has agreed to transport a container of "live plants" reasonably infer from this description that each plant has been so packaged. Some plants may be simply stowed or stacked without potting, tying, wrapping or other preparation for shipping, in which event they are not individual packages but rather "goods not shipped in packages."(121)

(116) *Id.* at 1008-10.
(117) *Binladen BSB Landscaping v, The Nedlloyd Rotterdam*, 759 F.2d 1006 (2nd Cir.).
(118) *Id.* at 1009.
(119) *Id.* at 1011 (citing the district court's decision in *Binladen BSB Landscaping v, The Nedlloyd Rotterdam*, 593 F. Supp. 546,547-50(S.D.N.Y. 1984).
(120) *Binladen BSB Landscaping v, The Nedlloyd Rotterdam*, 759 F.2d 1006 (2nd Cir.).
(121) *Id.* at 1014. In *Aviles v. S.S. San Juan*, 1991 AMC 2681 (S.D.N.Y. 1991) , the bill of lading indicated that the container held 249 *pieces.* The bill of lading gave no indication

Because the bills of lading in this case failed to indicate the number of packages inside the two containers, the court affirmatively answered the question reserved in *Mitsui*-whether the container should be considered a COGSA package when the bill of lading lists only the number of containers and does not describe the contents as being shipped as packages. The Second Circuit held that when a bill of lading does not clearly indicate an alternative number of packages, the container must be treated as a COGSA package if it is listed as such on the bill of lading and if the parties have not specified that the shipment is one of goods not shipped in packages.(122) The court recognized that the allocation of risk in shipping is a matter governed by contract between the parties, but the parties cannot allocate the risk if the carrier has no information concerning the number and type of packages being shipped inside the containers.(123) According to the court, any other rule would "prevent the carrier from accurately assessing its potential liability at the time it contracts to transport the goods."(124)

of whether or how these pieces were packaged, however, and other evidence showed that the carrier had no knowledge of how the contents of the container were stowed. The court thus ignored the 249 figure (despite the fact that it was in the "no. of pkgs" column), and held that the container was the COGSA package on the basis of a bill of lading definition. In *American Home Assurance Co. v. Crowley Ambassador*, 2003 AMC 510 (S.D.N.Y. 2003) , the bill of lading indicated that the container held "22,355 pieces" of clothing. Although the "garments were prepackaged in sets wrapped in plastic," id. at 511 , there was no indication of how many sets there were. The court thus felt that it had "no other viable option," id. at 516 , than to treat the container as the package.

(122) *Id.* at 1015-16. See *Morris Graphics Inc. v. Trans Freight Lines*, 1990 AMC 2764 (S.D.N.Y. 1990) , where the bill of lading listed the container as a package but it also described the cargo as a "loose used print machine." The court concluded that the term "loose" denoted goods not shipped in packages and, applying *Binladen*, held that the container therefore was not a package. In *Insurance Co. of North America v. M/V Xiang He*, 1993 AMC 342, 344-45 (S.D.N.Y. 1990) , the bill of lading had no entry in the "No of Containers or Pkgs" column, but it referred to the flat rack container as the "Kind of Package." In the absence of any alternative measure of the packages shipped and any indication that the shipment was one of "goods not shipped in packages," the court treated a flat rack container to which a helicopter was secured as a single package.

(123) *Id.* at 1016.

(124) *Id.*

After *Mitsui* and *Binladen*, the Second Circuit follows two general rules to determine when a container may be deemed a COGSA package under section 1304(5). These rules are:

(1) When the bill of lading lists the number of containers and describes the items inside the containers in terms that can reasonably be understood as "packages," the items inside, not the containers, will be treated as COGSA packages.(125)

(2) "[W]hen the bill of lading does not clearly indicate an alternative number of packages, the container must be treated as a COGSA package if it is listed as a package on the bill of lading and if the parties have not specified that the shipment is one of 'goods not shipped in packages."'(126)

(125) See *Mitsui*, 636 F.2d at 821; *Smythgreyhound*, 666 F.2d at 748. But see *Monica Textile Corp. v. S.S. Tana* (952 F.2d 636), where the Second Circuit reworded the *Mitsui's* rule, stating, "when a bill of lading discloses on its face what is inside the container, and those contents may reasonably be considered COGSA packages, then the container is not the COGSA package." (*Id*. at 639). The exception to this rule is that the court "will treat the container as the "package' if the bill of lading discloses that the parties have so agreed in terms that are explicit and unequivocal." (*Id.* at 642). Boilerplate language deeming the container a "package" for COGSA liability purposes is not necessarily binding. (*Id*. at 643). The bill of lading in *Monica Textile* was ambiguous because it contained two different kinds of language: (1) language disclosing seventy-six bales of cloth inside the container; (*Id*. at 637) and (2) two boilerplate provisions limiting the carrier's liability to $500 per container. (*Id.* at 641-42). The court found that the exception to Mitsui's rule was inapplicable because the bill of lading was ambiguous and the boilerplate language was unbargained and held that each bale of cotton constituted a package rather than one container.

(126) *Binladen BSB Landscaping*, 759 F.2d at 1015-16. But see *Orient Overseas Container Line, Ltd. v. Sea-Land Serv., Inc.*, (2001 AMC 1005 (S.D.N.Y. 2000)); and *Alternative Glass Supplies v. M/V Nomzi, No. 97- C4387*, (1999 AMC 1080 (S.D.N.Y. Dec. 30, 1998), where two Southern District of New York courts have taken a step beyond the approach in *Mitsui* and *Binladen*. In *Orient Overseas* the shipper chartered space with carrier to carry 1768 Ford automobile engines (*Orient Overseas*, 2001 AMC 1005 at 006.)."The engines were not covered by any wrapping and were not boxed or crated." (*Id*). The engines were stowed on racks designed to accommodate eight engines each (*Id*). The racks holding the engines were stowed in seventeen containers. (*Id*) The bill of lading listed 1768 pieces under the "Quantity of Packages" column. (*Id*). Under the "Description of Packages and Goods" column, the bill of lading stated: "STC [said to contain] automobile engines gasoline for new vehicles packed into 17 x 40' container" and the "Total Packages" column listed 1768 packages. (*Id*. at 1006). Although the *Orient Overseas* court cited to *Mitsui* and *Binladen*, the court concluded that *Binladen*'s

2.1. FOURTH CIRCUIT

The container-package issue has also been considered by district judges in the Fourth Circuit. The issue was first faced by the court in ***Yeramex v. S.S.***

view holding the contractual agreement to be the touchstone for analysis, was too simplistic. (*Id.* at 1012-14) The court determined that the case did not turn on the reference in the bill of lading to the engines as "packages"; rather, it turned upon "whether the engines qualified as COGSA packages, without regard to their description in the bill of lading." (*Id.* at at 1014-15) Relying on *Allied International American Eagle Trading Corp. v. S.S. Yang Ming*, (1982 AMC 820 (2d Cir. 1982)), the *Orient Overseas* court held that the containers were the packages (*Orient Overseas*, 2001 AMC at 1017 (citing *Yang Ming*, 1982 AMC at 828-29).*Yang Ming* stated that, in cases where the container is not listed as the COGSA package but nothing else described on the bill of lading qualifies as a package, then the container must be regarded as the package by operation of law. (1982 AMC at 828-29). Although there was evidence that the racks constituted packaging preparation, because they were not disclosed on the bill of lading they were not eligible to be considered "packages." (*Id*).

In *Alternative Glass Supplies v. M/V Omzi*, (1999 AMC 1080 (S.D.N.Y. Dec. 30, 1998)), the shipper chartered space with the carrier to carry a glass-toughening furnace. (*Id*. at 1080-81). The furnace was dismantled into two components and packed in a container. (*Id.* at 1081). There was no evidence that the components of the furnace were packaged in anything other than the container. (*Id.* at 1085). The bill of lading listed the number "1" under the "Packages" column. (*Id.* at 1082). Under the "Description of Cargo" column, the bill of lading listed "2 Units Components One Glass Tempering Machine (2 pcs.)."(*Id*). The court seemed to dismiss the general rule set forth in Monica Textile's dicta that "where the bill of lading discloses the contents of the container, then the container is not the COGSA package." (*Id*. at 1084 n.3 (citing *Monica Textile v. S.S. Tana*, 952 F.2d 636, 641). In its analysis of the evidentiary value of the bill of lading, the court used Binladen as a starting point and determined that "unless there is evidence that [the] units were the object of "some packaging preparation,' ... such reference to the number of units contained in the container would by itself be insufficient to establish that they were packages under COGSA."(*Id*. at 1084). *Alternative Glass* goes further than *Binladen* because in addition to looking at the contract, the court looks beyond the bill of lading to the physical characteristics of the "units" for evidence of packaging.(See *id.* at 1083-84). The court did not explicitly recognize that it had forged past *Binladen*; in fact it held that "under the Binladen rule, the container would be the only package for purposes of COGSA's liability limitation." (See *id*. at 1084).

Orient Overseas and *Alternative Glass* focused on whether the contents of the container could reasonably be considered to be COGSA packages. (See *Orient Overseas Container Line, Ltd. v. Sea-Land Serv., Inc.*, 2001 AMC 1005, 1011-12 (S.D.N.Y. 2000); see also *Alternative Glass*, 1999 AMC at 1084.) Although the bills of lading referred to the contents of the containers as "packages" and "units," the courts determined that the items were not sufficiently "wrapped, bundled, or tied" to be COGSA packages. (*Orient Overseas*, 2001 AMC at 1014-15; *Alternative Glass*, 1999 AMC at 1084).

Tendo,(127) which involved a shipment of 216 cardboard cartons of cloth goods from the United States to France. Following the carrier's instruction, the cartons were placed into two containers owned and selected by the carrier. The containers were stuffed by the carrier's agents, who inspected the condition of each of the cartons as they were loaded into the containers.

Rejecting the functional economics test and relying on *Leather's Best* and *Aegis Spirit*the trial court (128) held that the shipper's cartons rather than the containers constituted COGSA packages. The court found significant the fact that the vessel involved was a containership and could not have carried the cargo break-bulk, the containers were owned and selected by the carrier, they were loaded by agents of the carrier, and the carrier had an opportunity to view the goods and their quantity during loading.(129)Judge Kellam left open the question of whether such containers may be found to be COGSA packages where they were owned, selected, loaded, and sealed by persons other than the carrier, prior to their delivery for shipment.(130)

However, the question that was left open in *Yeramex* was answered by the same court, the Eastern District of Virginia, in ***Norfolk, B & C Line***(131) where it was held that the containers were the COGSA packages where the carrier neither owned nor decided to ship the goods in the containers, he was not present when the containers were packed and the bill of lading offered no information as to the number, nature, or value of the contents.

The facts of the case were that a shipper contracted with a carrier to transport ninety-six containers. The containers were loaded aboard a containership that was incapable of carrying bulk cargo. Shortly after arrival at her destination, the ship capsized and sank, dumping some 93 containers into the water. Seeking to limit his liability to $500 per container, the carrier contended that each of the containers was a COGSA package. The damaged containers were all owned by the shipper, and were packed and sealed prior to their delivery to the carrier.

(127) 595 F.2d 943, 1979 A.M.C. 1282
(128) 1977 A.M.C. 1807 (E.D. Va 1977),.
(129) *Id.*, at p. 1835.
(130) *Id.*, at 1833 .
(131) 478 F.Supp 383 (E.F. Vo. 1979)

The court framed its discussion of the container-package issue by asking "whether the policies and principles which Congress intended to implement through [COGSA] are properly applied and advanced by including the containers in this case among 'packages' for the purpose of section 4(5)."(132) After reviewing in some detail the case law which has emerged in the Second Circuit, the court concluded that "the determination whether a particular container is a COGSA package cannot be controlled by a talismanic formula" but necessitates analysis of the facts of each case in light of congressional policy. Concurring with *Aegis Spirit*, the court rejected the functional economics test as too narrow for determining whether containers are packages. In lieu of the functional economics test, the court listed twelve criteria for determining whether the shipper's packages or the containers constitute COGSA packages. The twelve criteria were:

1. Whether the carrier actually possesses superior bargaining strength sufficient to coerce the shipper's agreement to an adhesion contract;
2. Whether the parties treated the container as a single unit in their negotiations, on the documents of contract, and in determining the shipping rate;
3. Whether the shipper, or at least one other than the carrier, chose to ship the goods in container;
4. Whether the shipper or carrier procured the container;
5. Whether the goods were delivered to the carrier previously loaded into the container;
6. Whether the goods were loaded by the shipper or by the carrier;
7. Whether the carrier actually observed the contents of the container before it was sealed for shipment;
8. Whether the container was loaded with the shipper's goods only, and not those of any other shipper;
9. Whether the markings on the container provided a complete and

(132) *Id.*, at 393; see *The Puerto Rico* 455F.Supp 310 (D.Md. 1979), a case not involving a container, but where the court stated:

accurate indication of the contents and their value;

10. Whether the bill of lading contained any declaration of the nature of the container's contents and their value;
11. Whether the bill of lading provided the shipper with an adequate opportunity to declare the value of the container and its contents, and to obtain financial protection for any excess value;
12. Whether the shipper took advantage of this opportunity.(133)

The court stated that these criteria were not intended to be exhaustive, but were designed to ascertain the "intent of the parties and their actual ability to foresee and allocate the risks of carriage, and thereby to protect their respective interests."(134)

Applying the twelve criteria to the facts of the case in question, the court concluded that the shipper's containers were packages within the meaning of COGSA. Several factors compelled this conclusion: (1) there was no indication of inferior bargaining strength; (2) the only listing in the 'Number of Packages' column on the bill of lading was the number of containers; (3) the bill of lading failed to indicate the actual and complete contents of the containers or their value; (4) the carrier charged a flat rate per container, regardless of contents; (5) the carrier did not select or own the containers, nor did he see their contents; (6) the shipper had been given an adequate opportunity to declare a higher value for the containers had he wished to avoid application of the $500 per package limitation.(135)

In 1993, in ***Universal Leaf Tobacco Co. v. Companhia De Navegacao Maritima Netumar***,(136) the Fourth Circuit adopted without reservation the Second Circuit's rule in *Mitsui*; namely, that "when a bill of lading discloses on its face what is inside the container, and those contents may reasonably be considered COGSA packages, then the container is not the COGSA

(133) 478 F.Supp at 392.
(134) *Id.*
(135) *Id.*
(136) 993 F.2d 414 (4th Cir. 1993).

package."(137)

The Fourth Circuit also followed the *Mitsui-Monica Textile* rule that "[w]hen a bill of lading refers to both containers and other units susceptible of being COGSA packages, it is inherently ambiguous."(138) In these situations, specific references to the quantity of cargo inside the containers trumps both the more general "no. of pkgs." designation on the bill of lading form, and boilerplate language referring to the containers as packages.(139)

The cargo that was the subject of the *Universal Leaf* decision was 1200 cases of tobacco stuffed into twelve containers.(140) Concluding that each case was a package, the Fourth Circuit referred to the language on the bills of lading.(141) Under the form heading, "Particulars furnished by shipper/description of packages and goods," the bill of lading listed the number of cases of tobacco sealed within each container.(142) Because the bill of lading disclosed on its face the containers' contents, and the tobacco cases could reasonably be considered COGSA packages, the containers were not deemed COGSA packages.(143) This was so even though the bill of lading had additional language indicating the containers were packages.(144) Under *Mitsui* and *Monica Textile*, the more specific provisions canceled the general language on the bill of lading form.(145)

3.1. FIFTH CIRCUIT

The Court of Appeal for the Fifth Circuit has had the opportunity to address the container-package issue in ***Allstate Insurance Co. v. Inversiones Navieras Imparca***.(146) There, a shipper shipped 341 cartons of stereo receivers and digital clocks in a container aboard the carrier's vessel. The shipper obtained the container from the carrier's agent, loaded it with the goods, and sealed it. The

(137) *Id.* at 417 (quoting *Monica Textile Corp. v. The Tana*, 952 F.2d 636, 639 (2d Cir. 1991)).
(138) *Universal Leaf Tobacco Co. v. Companhia de Navegacao Maritima Netumar*, 993 F.2d 414, 417 (4th Cir. 1993) (quoting *Monica Textile Corp.*, 952 F.2d at 642).
(139) Id.
(140) *Id.* at 414.
(141) *Id.* at 416.
(142) *Id.* at 415.
(143) *Id.* at 416-17.
(144) *Id.* at 415.
(145) *Id.* at 417.
(146) 646 F.2d 169 (5th Cir. 1981).

shipper's agent then delivered the container to the carrier. A bill of lading was issued describing the shipment as "One 20 Ft. container with 341 cartons" and as "One 20 Ft. container said to contain electronic equipment radio apparatus." When the cargo was discharged, it was discovered that 202 cartons were missing. The consignee sought to recover the value of the missing goods. The district court held that the entire container was the appropriate 'package' for the purpose of COGSA limitation of liability and entered a judgement for only $500.(147)

On appeal, the Fifth Circuit reversed and held that where the shipper placed goods in cartons and then loaded those cartons in a container owned by the carrier and the number of cartons within the container was disclosed to the carrier, each unit within the container was the package.

The Fifth Circuit panel began its analysis by acknowledging that the "apparent purpose of the [package limitation] was to set a reasonable figure below which the carrier should not be permitted to limit his liability."(148) The court further noted that containerization has created problems not envisioned by the drafters of COGSA, and that the Fifth Circuit had not addressed these problems.(149) After a brief analysis of the jurisprudence on the container issue the court determined that the facts before it fell squarely within the facts of *Leather's Best*(150) and the *Armstrong Cork* part of *Mitsui v. American Export Line*(151) and, therefore, the Fifth Circuit was not "faced with any expansion of the Second Circuit rule, or any issue as to whether any particular factor is a necessary precondition for application of the rule."(152)

The court further rejected the functional economics test, using the plain ordinary meaning test of *The Pacific Bear* to interpret the term 'package'. Thus, it indicated that in the plain ordinary meaning of the word, a container is not a package, but is a part of the ship.(153)

(147) *Id.*, at . 170.
(148) *Allstate Insurance Co. v. Inversiones Navieras Imparca*, 646 F.2d 169, at 172-3.
(149) *Id.*, at p. 171 (citing *Leather's Best* 451 F.2d 800 at 815).
(150) *Leather's Best Inc. v. S.S. Mormaclynx* 451 F.2d 800 (2d Cir. [N.Y.] 1971).
(151) 636 F.2d 807 (2d Cir. 1981)
(152) *Allstate Insurance Co. v. Inversiones Navieras Imparca*, 646 F.2d 169 at p. 171.
(153) *Id.*, at 172.

The court concluded that in the absence of a legislative definition of the term 'package' the rule developed in *Mitsui* and *Leather's Best* is the best judicial solution.

The Fifth Circuit once again addressed the container in ***Croft & Scully Co. v. M.V. Skulptor Vuchetich***.(154) In this case, a container was dispatched by the carrier to the shipper. The shipper's employees stuffed 1755 cases of soft drinks into the container and sealed it. The carrier did not observe the cargo before the container was sealed. A bill of lading was issued designating the number of cases stowed within the container. The district court(155) adopted the fourteen criteria 'multi-factor analytical construct'(156) to aid in the determination of the container issue and added two additional criteria: Whether the contents of the container could have been shipped in the individual cartons or other original packing as they were prepared by the shipper,...[w]hether the carrier or another interest owned or supplied the container.(157)However, the court acknowledged that the multi-factor analysis provides little comfort to those who seek some form of short cut to predictability of result with regard to [the container/package] issue.(158)

Before the Fifth Circuit,(159) the carrier argued that, if the court did not consider the container to be the package,(160) the customary freight unit limitation should apply to the entire container. Judge Brown, writing for the court, agreed with this theory,(161) and after reversing the lower court's opinion that the container was the package, remanded the customary freight unit limitation question to the district court for factual determinations. He stated that the relevant 'customary freight unit' is a question of fact that will vary from contract to contract.(162) In connection with the contract in the case before him,

(154) 664 F.2d 1277, 1281 (5th Cir. 1982)
(155) 508 F. Supp. 670 (S.D. Tex. 1981)
(156) *Id.*, at 685.
(157) *Id.*.
(158) *Id.*
(159) *Croft & Scully Co. v. M.V. Skulptor Vuchetich* 664 F.2d 1277 (5th Cir. 1982).
(160) The carrier argued that the cases could not be considered "packages" because the cases did not cover the goods and the "exposed product could not be shipped except in a container". *Id.*, at 127.
(161) *Croft & Scully Co. v. M.V. Skulptor Vuchetich* 664 F.2d 1277, at 1281.
(162) *Id.*, at 1282.

Judge Brown stated, "Although [the shipper] admitted that the freight charge was $2200, calculated on a 'flat container rate', we do not know how the parties arrived at that rate. Does it depend upon the contents, weight, value, custom of the trade, applicable tariffs, if any, or other factors?"(163) He concluded that, if the container was actually used as the customary freight unit to compute the freight charge, the carrier's liability would be limited to $500. If, however, some other customary unit was actually used to compute the freight charge and the container was listed as the freight unit as a mere sham, the carrier could not limit his liability to $500.(164)

For this ruling Judge Brown looked to ***Caterpillar Americas Co. v. S.S. Sea Roads***.(165) He quoted the following relevant language from that opinion:

> "With respect to the words 'customary freight unit', the authorities are conclusive that this phrase refers to the unit upon which the charge for freight is computed and not to the physical shipping unit... As thus construed, the statute gives the court the task of determining what unit was actually used by the carrier for computing the freight charge on the shipment in question. Under the statute the freight unit, if one exists, will control the question of limitation of liability, unless the freight unit employed was a mere sham, and, therefore, not a 'customary unit' within the meaning of the statute."(166)

4.1. NINTH CIRCUIT

The container-package issue has also been considered by Ninth Circuit. The issue was first faced by the district judge in ***Matsushita Electric Corp. v. S.S. Aegis Spirit***.(167) In this case, a shipment of electrical equipment was carried from Japan to the United States. In preparation for shipment, the goods were first packed in durable cardboard cartons by the shipper and then loaded into eleven containers, which had been provided by the carrier. The carrier was not

(163) *Id.*
(164) *Id.*
(165) 231 F.Supp 647, 649, aff'd, 364 F.2d 829.
(166) *Croft & Scully Co. v. M.V. Skulptor Vuchetich* 664 F.2d 1277, at 1282
(167) 414 F. Supp. 894 (W.D.Wash.1976)

present during loading, and had no firsthand knowledge of the containers' contents.(168) But the bill of lading did indicate the number of cartons said to be packed within each container.(169)The bill of lading also defined each container or similar article of transport as a package or a unit.

Upon arrival in the United States, it was discovered that all the containers and their contents had sustained damage.

Judge Beeks, relying upon *The Pacific Bear*,(170) in which the Ninth Circuit had examined the COGSA term 'package' and said: "Since no specialized or technical meaning was ascribed to the word 'package' we must assume that Congress had none in mind and intended that this word be given its plain, ordinary meaning",(171) concluded that a container is not a package within the ambit of section 4(5).(172)

Judge Beeks undertook a thorough evaluation of the Second Circuit's conflicting approaches to the package controversy. Observing that the Second Circuit's decision in *Leather's Best*(173) and *Pioneer Moon*,(174) on the one hand, and *Kulmerland* (175)and *American Legion*,(176) on the other, were irreconcilable,(177)decided that any solution the container problem was destined to be found in the *Leather's Best* rather than the *Kulmerland* line of cases, and using the former case as a touch stone, he laid the analytical foundation for the proposition that a container ought never to be considered a COGSA package.

(168) *Id.* at 899.
(169) *Id.* at 898. The various bills of lading showed the number of containers or packages as '2' containers, but under the 'Description of Goods' heading listed the number of individual cartons, the gross weight, and the measurement. The freight rate was calculated per container, and the bills of lading contained an express agreement to treat each container as a package or unit. However, the carrier also issued a 'letter of guaranty' stating that its liability for losses or damage was limited to $500 for each package in the container. *Id*.
(170) *Hartford Fire Ins. Co. v. Pac. Far E. Lines, Inc.*, 491 F.2d 960 (9th Cir. 1974).
(171) *Id.*, at 963.
(172) 414 F. Supp at 907.
(173) 451 F.2d 800, 815, 1971 AMC 2383, 2403 (2d Cir. [N.Y.] 1971)
(174) 507 F.2d 342 (2d Cir.1974).
(175) 483 F.2d 645, 1973 AMC 1784 (2d Cir. [N.Y.] 1973).
(176) [1975] 1 Lloyd's. Rep. 295
(177) *Id.* at 902.

Judge Beeks pointed out that the 'functional economic test' was unsatisfactory since it did not conform either to the practical economics of container shipping or to the sense of section 4(5) of COGSA.(178) He was unable to detect anything in the statute which justified a presumption based upon whether the packaging employed is functional:

> "There can be found no indication in COGSA or its legislative history that goods shipped in cartons, crates or other receptacles were to be disqualified from packaged goods treatment whenever the shipper's packaging fell below some later-to-be-established standard of strength and durability."(179)

Additionally, since the test requires a determination as to whether the packaging used was suitable for a hypothetical overseas shipment, Judge Beeks asserted, it compels courts to make a conjectural determination and consider evidence not even remotely contemplated by the framers of COGSA.(180) Further, the test penalizes shippers who avail themselves of the more economical packaging made possible through containerization.(181) Such shippers face the prospect of increased liability due to the container being deemed the COGSA package. This result violates the principle that courts could foster good commercial practices and refrain from creating disincentives of mercantile economization.(182) Judge Beeks considered the most serious flaw of the test to be its dependence upon the intent of the parties. "If carriers alone, or even carriers and shippers together, are allowed to christen [an item] a 'package' [when such christening] distorts or belies the plain meaning of [package] as used in the statute, then the liability floor becomes illusory..."(183)Judge Beeks stated that "[t]he better and more traditional approach...is to conscientiously construe the legislation in the actual context, seeking to effectuate the legislative, not the parties' intent and purpose.'(184)

(178) *Id.*, at 903-4.
(179) *Id.*, at 906.
(180) *Id.*, at 904.
(181) *Id.* See Simon, above note 35, at 522-24.
(182) 414 F.Supp at 904.
(183) *Id.*, at. 905.
(184) *Id.*, at. 903.

Having rejected the functional economics test, Judge Beeks was faced with the task of formulating a suitable alternative. Accordingly, he looked to *Leather's Best*(185)as a guide. After quoting the statement in *Leather's Best*, that treating a container as a package is inconsistent with the Congressional purpose of establishing a reasonable minimum level of liability, he write:

> "Certainly, if the individual crates or cartons prepared by the shipper and containing his goods can rightly be considered 'packages' standing by themselves, they do not suddenly lose that character upon being stowed in a carrier's container."(186)

He found that containers are more analogous to "detached stowage compartments of the ship" which serve to divide up the available cargo stowage space than they are to COGSA packages.(187) Consequently, the court concluded that the $500 package limitation is not applicable to a container as a single unit. A contrary holding, in Judge Beeks's view, would distort the meaning of the statutory term 'package'.

With respect to the ramifications of his decision, Judge Beeks commented that, first, recognizing that the container is ship's transport equipment rather than a COGSA package negates the possibility of an unacceptable result where a container holds the packaged goods of many shippers.(188) Second, if a carrier desires information as to a container's contents, he can insist, as a pre-condition of carriage, that the shipper include a package count in the bill of lading.(189)Third, the ruling is "satisfactory" in all cases where the carrier furnishes the container, yet is not specifically intended to reach cases in which container owned by shippers or other persons, such as freight forwarders, are involved. "Nevertheless, I would hope the reasoning and principles upon which the instant decision rests may provide some assistance."(190)

(185) *Id.*, at 904.
(186) *Id.*
(187) *Id.*
(188) *Id.*
(189) *Id.*, at 908.
(190) *Id.* Judge Beeks observed that "[c]arriers, are hardly helpless to secure [such] information and will not be heard to argue their self-imposed ignorance as a countervailing consideration". *Id.*

In ***All Pacific Trading, Inc. v. Vessel Hanjin Yosu***,(191) the Ninth Circuit concluded that a container could not be a COGSA package if the shipper listed the number of packages as being the container's contents.(192) The court stated that "by listing the number of packages and containers, the shipper avail[s] itself of the opportunity to clarify the liability limits."(193) To support this statement, the court cited *Universal Leaf Tobacco* and *Monica Textile*,(194) both of which fully incorporated the *Mitsui-Binladen* analysis developed by the Second Circuit.(195) By citing these two decisions, it is clear that the Ninth Circuit adheres to the principles embodied in *Mitsui* and *Binladen*.

5.1. ELEVENTH CIRCUIT

The Court of Appeal for the Eleventh Circuit has had the opportunity to address the container-package issue in ***Hayes-Leger Associates, Inc. v. The Oriental Knight*** (196) In this case, Hayes-Leger was the consignee of five containers of woven baskets and rattan goods shipped from the Philippines aboard the M/V Oriental Knight and the M/V Pacific Dispatcher. The goods were prepared for shipment(197) before being placed into containers and five separate bills of lading, were issued. Four of the bills of lading inaccurately listed the number of packages inside the respective containers. One bill of lading listed the container itself as the package.(198) Upon delivery, Hayes-Leger opened the containers and found their goods had been severely damaged by salt water.(199) After consolidating Hayes-Leger's actions, the district court found

(191) 7 F.3d 1427 (9th Cir. 1993).
(192) *Id.* at 1433.
(193) *Id.*
(194) *Id.* (citing *Monica Textile Corp. v. The Tana*, 952 F.2d 636, 639-43 (2d Cir. 1991) and *Universal Leaf Tobacco Co. v. Companhia De Navegacao Maritima Netumar*, 993 F.2d 414, 416-17 (4th Cir. 1993)).
(195) *Monica Textile Corp.*, 952 F.2d at 639 ("*Mitsui* settled the law in container cases for this circuit and has been steadily followed."); *Universal Leaf Tobacco Co.*, 993 F.2d at 417 n.1 ("In adopting the Second Circuit's rule in its entirety, ...").
(196) 765 F.2d 1076 (11th Cir. 1985)
(197) *Id.* at 1078.
(198) *Hayes-Leger*, 765 F.2d at 1081.
(199) *Id.* at 1078 n.3. The damage to each shipment was as follows: Shipment #1 - 223 chairs damaged but recouped; 26 chairs destroyed; total loss $ 2,094.47. Shipment #2 - 228 baskets damaged but recouped; 247 baskets destroyed; total loss $ 3,165.33. Shipment

that the goods had been shipped in packages and stored inside the containers and awarded Hayes-Leger an amount in accordance with the COGSA per-package limitation of liability provision.(200) The district court rejected the defendant's argument that the goods were not shipped in packages, that the containers were the customary freight unit, and, thus, that they were only liable in the amount of $ 2500 ($ 500 per container).

Although the Eleventh Circuit agreed with the district court's definition of a "package,"(201) it did not uphold its ruling. The court, adopting the rule and analysis announced in *Binladen,*(202) found that where the bill of lading correctly lists the number of packages in a container, the COGSA $ 500 per-package limitation applies, but if the bill of lading incorrectly lists the number of packages, the extent of carrier liability depends upon the inaccuracy. Applying the *Binladen* framework, the court first addressed the second bill of lading. The bill of lading listed “ONE CONTAINER ONLY,” but did not list the number of packages inside the container. Ordinarily, the container would be considered the COGSA package in this situation. However, since the court decided to apply the ***Binladen*** rules prospectively, the court determined that the goods must be considered as “goods not shipped in packages” for purposes of section 1304(5).(203)

#3 - 553 baskets destroyed; total loss $ 8,006.42. Shipment #4 - 55 pieces of furniture damaged but recouped; 638 baskets destroyed; total loss $ 7,332.47. Shipment #5 - 643 wreaths and 200 baskets destroyed; total loss $ 8,523.22. Total equalled $ 29,121.91 plus prejudgment interest, at a rate of 14%, of $ 10,162.53.

(200) *Id.* at 1079.

(201) *Id.* at 1082.

(202) *Binladen BSB Landscaping v. M/V Nedlloyd Rotterdam*, 759 F.2d 1006, 1013, 1985 AMC 2113, 2121-22 (2d Cir. 1985)). *The Hayes-Leger* court distilled the holding of *Binladen* into the following two rules:

(1) when a bill of lading discloses the number of COGSA packages in a container, the liability limitation of section [130]4(5) applies to those packages; but

(2) when a bill of lading lists the number of containers as the number of packages, and fails to disclose the number of COGSA packages within each container, the liability limitation of section [130]4(5) applies to the containers themselves.

Hayes-Leger, 765 F.2d 1076, at 1080(11th Cir. 1985).

(203) *Hayes-Leger v. The Oriental Knight*, 765 F.2d 1076, 1080-81.

Next, the court examined the remaining four bills of lading. These four bills of lading purported to list the number of packages inside the containers, but they did so inaccurately. The four bills of lading listed the following specifics: The first bill of lading listed the number of packages as "TWO THOUSAND SIX HUNDRED FORTY ONE PCS. ONLY." The goods were described as "2,641 PCS. WOVEN BASKETS AND RATTAN FURNITURES." The third bill of lading listed the number of packages as "THREE THOUSAND FORTY FIVE PCS. ONLY" and described the goods as "3,045 PCS. WOVEN BASKETS AND RATTAN FURNITURES." The fourth bill of lading listed the number of packages as "TWO THOUSAND FOUR HUNDRED THIRTY ONE PCS. ONLY" and described the goods as "2,431 PCS. WOVEN BASKETS AND RATTAN FURNITURES." The fifth bill of lading listed the number of packages as "TWO THOUSAND ONE HUNDRED FORTY SIX PCS. ONLY" and described the goods as "2,146 PCS. WOVEN BASKETS AND RATTAN FURNITURES. More specifically, the shipper overstated the number of packages because not every item inside the containers could be considered a package using the plain, ordinary meaning of the term.(204) The court of appeal drew a distinction at this point between decisions in which the shipper overstates the number of packages in the container, and those in which the shipper understates the number of packages.(205) When the shipper understates the number of packages, the court of appeal stated that the preferred approach was to limit the carrier's liability based on the number of packages as stated in the bill of lading.When the shipper overstates the number of packages in a container, the court held that the COGSA liability limitation should be applied to the actual number of packages in the container. Since the district court properly applied the perpackage limitation to the actual number of packages in the container, the court of appeal affirmed the district court's award of damages under those four bills of lading.(206)

The Eleventh Circuit faced the container issue again in ***Fishman & Tobin, Inc. v. Tropical Shipping & Construction Co***.(207) In this case, Fishman and

(204) *Id.*
(205) *Id.* at 1082.
(206) *Id.*
(207) 240 F.3d 956 (11th Cir. 2001).

MacClenny were two manufacturers who shipped clothing from the Caribbean to the United States. Two bills of lading were issued. The bill of lading which sent to Fishman listed its contents as " One forty foot container said to contain 39 “big packs”(208). The bill of lading which sent to MacClenny listed the contents as "One forty foot container said to contain 5,000 units of men's jackets” . During the voyage, the carrier had a number of containers fall overboard due to improper storage on the vessel. The carrier admits its liability and asserts that section 1304(5) of COGSA limits its liability to $ 500.00 per package lost. Fishman argued that the smaller bundles of its pants, referred to as "dozens", should be considered packages rather than the "big packs" used to store those dozens before they go into the containers. It contended that the cargo manifest and customs declaration form (reembarque) were the relevant documents to be examined as they were prepared by it and were simply miscopied from it's form to the bill of lading. Those two documents stated that 2,325 dozens (bundles) of pants were inside the big packs. MacClenny argued that a single jacket packaged on a hanger and enclosed in a poly bag is understood in the industry to be the unit of packaging. Furthermore, the cargo manifest given to the carrier indicated that 5000 units or packages were being shipped for a total value of $ 23,750.

The district court(209) decided in favor of the carrier, concluding that the Fishman package was a big pack and fair recovery was the amount of $19,500 or 39 "big pack" packages at $ 500 per package. MacClenny would receive only $ 500 in compensation for the loss of only one container. Both Fishman and MacClenny appealed.

On appeal, the court affirmed. Referring to the Fishman argument that the smaller bundles of its pants, referred to as "dozens", should be considered packages rather than the "big packs" used to store those dozens before they go into the containers the court said:

(208) A "big pack," which is akin to a pallet, has 4 x 4 ft. dimensions, is slotted at the bottom so that it can be picked up by a forklift, and is partially enclosed in corrugated cardboard with a base and cover made of plastic. Inside these containers are bundles of boys' pants and the like which are wrapped in paper and sorted by style. See *Fishman & Tobin, Inc. v. Tropical Shipping & Construction Co* 240 F.3d 956, at 959.

(209) 1999 AMC 1051 (S.D. Fla. Jan. 27, 1999)

> "Fishman would be hard pressed to support their claim that "dozens" are the relevant unit of measurement. By its own admission, Fishman acknowledges that "dozens" as a unit of measurement and packaging in this case could refer to any number of pants from one to twelve. The designation really referred to the total number of pants in the container rather than some common form of packaging that facilitates transportation. As a result, not only is a Fishman "dozen" an inaccurate unit of measurement, it is one not clearly denoted on the cargo manifest, customs declaration, or bill of lading. As such, the Fishman dozen cannot be used as the measure of packaging referred to by COGSA. Accordingly, we find nothing wrong with the district court's conclusion that the "big packs" as opposed to the "dozens" were the appropriate unit of measurement. Based on this analysis, Fishman received a fair settlement from the district court. The cargo manifest and the bill of lading each indicate 39 big packs and state nothing about the smaller dozens." (210)

The court also dealt with Fishman's contention that the bill of lading miscopied relevant "package" information contained in the cargo manifest and customs declaration form (reembarque). The court conceded that "when a bill of lading and shipping documents do not conform, the bill is construed as having reflected the number of packages designated in the shipping invoices."(211) The court noted, however, that in this case both the bill of lading and the "reembarque" documents agreed as to the type and number of packages shipped, and thus there was no need to look further.(212)

The court, then, turned to MacClenny argument that a single jacket packaged on a hanger and enclosed in a poly bag is understood in the industry to be the unit of packaging. The court found that the bill of lading referred to both containers and other units susceptible of being COGSA packages, which was in the court's view ambiguous.(213) In order to resolve the ambiguity and determine

(210) *Fishman & Tobin, Inc. v. Tropical Shipping & Construction Co* 240 F.3d 956, at 962
(211) *Id.* at 961
(212) *Id.*
(213) *Id.*, at 964.

the appropriate COGSA package in MacClenny case, the court looked beyond the bill of lading to shipping documents prepared by MacClenny and other evidence. Citing ***Hayes-Leger***, the court explained its approach as follows:

> "[O]ur precedent has clearly required that the number of packages that are declared must be indicated in the number/quantity of packages column on the bill of lading .... Absent such an indication (and in light of the circumstances such as the present), the shipper's own documents as the next most reliable source of information should give some clear indication that more than one package is being shipped in order to claim multiple losses".(214)

Finding that neither the bill of lading nor the reembarque or customs form offered a clear indication that each jacket was a package, the court held the single container was a package.(215)

2.PALLETIZATION

The first important decision of the U.S. courts concerning pallets and per package limitation was the decision of the Court of Appeals, Second Circuit, in ***Standard Electrica, S.A. v. Hamburg Sudamerikanische***.(216) In this case, nine pallets were packed by the shipper, each containing six fibreboard cartons. Each carton contained forty television tuners. The bill of lading and other shipping documents referred to the goods as 'nine packages'. Seven pallets were not delivered. The carrier admitted liability but computed the amount of his

(214) *Id.*, at 965.

(215) *Id.* The Court did note, however, that "this is not to say that there may never be a case where the conflict between the information provided in the quantity column and the description column would lead to a different result. There was simply not enough evidence to support that conclusion in this case. It is also our hope that by providing a bright-line rule now, such conflicts may be avoided in the future and shippers and carriers alike will be on notice as to how to proceed." *Id.* at 965 n.13.

(216) 375 F.2d 943 (2d Cir. 1967). The pallets were formed by placing three tiers of two cartons on a platform, covering the cartons with a wooden deck to protect the cartons from other cargo and from the metal straps which were placed around the unit. When bound with the metal straps, the dimensions of the pallets were 39" x 33" x 42". *Id.*, at 944-5.

liability at seven packages times $500, or $3500.(217) The shipper, claiming that the pallets were merely mechanical devices to facilitate loading, contended that each of the cartons on a pallet should be considered a package.(218) The majority of the panel disregarded the shipper's contention holding that the pallets and not the cartons were the packages.(219) To support this conclusion, the court noted that the pallets were referred to as packages in various documents exchanged by the parties including the bill of lading,(220) that the shipper, not the carrier, had made up the pallets apparently for the reasons of greater convenience and safety in handling,(221) and that the shipper had been provided an adequate opportunity to obtain full coverage simply by declaring the nature and value of the goods in the bill of lading and paying any accordingly higher tariff.(222) The court observed that any other decision "would place upon the carrier the burden of looking beyond the information in the bill of lading or beyond the outer packing to investigate the contents of each shipment.(223) The court concluded that "only

(217) *Id.*, at 944.
(218) *Id.*, at 947.
(219) *Id.*, at 944.
(220) *Id*., at 946. The dissent noted, however, that the carrier's agent referred to the loss as one of "42 cartons". *Id.*, at 948 (dissenting opinion).
(221) *Id.*, at 946.
(222) *Id.* But see *Mitsui* case 636 F.2d 807 (2d Cir. 1971) where the Second Circuit Court of Appeals specifically rejected the view that COGSA was intended to protect the carrier by forcing shippers to declare a higher valuation of the goods and pay higher freight rates in order to increase the carrier's liability. In addition, the court dismissed the argument that since a shipper can always protect himself by declaring a higher value and paying a higher and valorem freight rate, there is no need for a strict construction of the word "package". *Id*., at 815 n.9. The *Mitsui* court reasoned that while a number of courts have justified their decisions on the ground that the shipper could have exercised this option, "[t]he option to declare a higher value is practically never exercised". The court noted one obvious reason for this: ad valorem freight rates will only benefit the shipper if the carrier is liable, whereas a shipper's insurance will protect against all risks of shipment and not just those risks for which recovery may be had under COGSA. *Id.*
(223) 375 F.2d at 947. The majority opinion has been harshly criticised. One commentator is of the opinion that the court failed to implement the remedial intent of the legislature, and was "unjustified in relying on the carrier's bill of lading terms in applying the statute". Simon, Containers - Are They a "Package"? 4 J.Mar.L. & Com 441, 444 (1973). Other authors have asserted that the decision does not promote predictability but instead creates additional confusion. Bissell, *The Operational Realities of Containerization and Their Effect on the "Package" Limitation and the "On-deck"*

if 'package' is given a more predictable meaning will the parties concerned know when there is a need to place the risk of additional loss on one or the other accordingly or adequately to insure against it."(224)

Circuit Judge Feinburg delivered a strong dissenting judgement. Finding the result "unfair and contrary to the legislative policy of protecting cargo interests,"(225) he went on to deal with the supporting reasons given by the majority in the following manner:

> "(i) Who made up the pallet is irrelevant as both parties benefit from the use of pallets;
>
> (ii) Stating that the shipper could have declared the value and nature of the goods, paid excess freight and thereby avoided the limitation lends no weight whatsoever to the decision as this is presuming that the pallet is in fact a package which is the very question the court is trying to decide;
>
> (iii) That although the majority found that the word 'package' can include the pallets, it is clear that the word 'package' also applied to the cardboard cartons used for packing the television tuners and therefore this adds no weight to the decision."(226)

Judge Feinburg then goes on to state:

> "Finally, the majority's result is justified as giving 'package' a more predictable meaning. I am not sure what the 'certain' definition of package is that the majority relies upon..."(227)

In accord with the majority decision are ***Omark Industries, Inc. v. Associated Container***;(228) and ***Menley and James v. Hellenic Splendo***r.(229)

In ***Omark*** the shipper prepared pallet bundles, each of which consisted of 20

Prohibition: Review and Suggestions, 45 Tul.L. Rev. 902, 910 (1971).

(224) 375 F.2d at 947.
(225) *Id.*, at 947.
(226) *Id.*, at 947-8.
(227) *Id.*, at 948.
(228) 420 F.Supp 139 (D. Or. 1976).
(229) 1977 A.M.C. 1782 (S.D.N.Y. 1977).

to 26 cardboard cartons arranged in layers and tiers to form a large almost cubical mass, entirely enclosed by heavy double-walled corrugated cardboard. Judge Beeks held that palletized units, rather than the inner cartons, to be COGSA packages.(230)

The court relied on the following factors:

(I) the shipper prepared the palletized units; and

(2) each unit was enclosed by heavy double-walled corrugated cardboard concealing the cartons within.

Judge Beeks applied to the case before him the general principle that a COGSA package is the largest individual unit of packaged cargo made up by the shipper and entrusted to the carrier.(231) He pointed out that pallet cargo can easily be distinguished from container cargo for package limitation purposes. He treated the outer packaging material as an integral part of the shipment; if the shipper opts for such large packages to achieve greater protection, the court reasoned, he must settle for less protection under COGSA.(232)

Similar reasoning and the same result are found in ***Menly***,(233) a case where palletized cartons were referred to as nine pieces containing a total of 163. The pieces, which were pallets, were considered to be the package.

The court relied on the following factors:

(1) the decision to palletize was the shipper's;

(2) the shipping documents referred to 9 pieces although they also disclosed that they contained 163 cartons;

(3) there was no evidence that the cartons themselves were suitable for shipment.(234)

But in ***Allied Int'l, Am Eagle Trading Corp. v. S.S. Export Bay***(235) a

(230) 420 F.Supp at 142.
(231) *Id.*
(232) *Id.*
(233) 1977 A.M.C. 1782.
(234) *Id.*, at 1783-4.
(235) 468 F.Supp 1233 (S.D.N.Y. 1979).

district court within the Second Circuit reached an opposite result. The claim there was based on the loss of 18 kgs of steel fasteners strapped to two pallets of nine kegs each. The bill of lading was stated to describe the cargo as "3 pallets (27 kegs) 4 kegs, 9 drums, for a total of 16 packages."(236) The court relied on the following factors in holding that each keg was the packages:

(1) the shipping documents listed each keg as a package;

(2) the kegs themselves were suitable shipping containers and a portion of the shipment in fact moved unpalletized;

(3) the separate kegs in each pallet were clearly visible.

However, the Second Circuit case of ***Allied Int'l. Am. Eagle Trading Corp. v. S.S. Yang Ming***(237) may have put the *Export Bay* case to rest. ***The Yang Ming*** decision commented that:

> "We disagree with (Export Bay), however, at least insofar as it placed primary importance on mere notice to the carrier in determining the package limitation."(238)

In ***Yang Ming***(239) the bill of lading described the cargo as follows:

> Under the heading "Description of Packages and Goods", there is a parenthetical listing of the number of cartons, cases and drums on each pallet, as well as the points of origin and a general legend reading, "Screws, Bolts, Nuts, Studs". Below all of this information, a printed line requires the parties to fill in the "Total Number of Packages or Units (in words", after which is typed "Thirty (30) Packages Only."(240)

The pallets were missing, one holding nine cartons and the other holding ten drums.

(236) *Id.*, at 1234.
(237) 1982 A.M.C. 820 (2d Cir. 1982).
(238) *Id.*, at 829 n.4.
(239) 1982 A.M.C. 820 (2d Cir. 1982). *Yang Ming* discussed whether pallets were COGSA packages, but also discussed containers extensively in dicta.
(240) *Id.*, at 821.

The carrier contended that the pallets should be considered 'packages' within the meaning of the package limitation of COGSA, thereby limiting its liability for the lost cargo to $1,000 for the two pallets. The shipper argued that the cartons and drums should be the COGSA packages. The United States District Court for the Southern District of New York, relying on the standard set forth in *Mitsui*(241) held that since the contents of the shipment t packed on pallets were fully disclosed in the bill of lading, the $500 COGSA limitation would apply to individual units, rather than to the pallet. The Second Circuit reversed, finding the pallets to be the COGSA packages and limiting the carrier to a maximum liability of $1,000.(242)

In reaching its decision the court adopted a rule based solely upon the parties' intent:

> "The thrust of our cases has been to seek to arrive at the parties' intent and to search for some degree of certainty and predictability."(243)

Applying the above rule to the facts before it, the court held that even though the bill of lading notified the carrier of the contents of the pallet, this was not binding on the carrier "if, elsewhere in the bill of lading the parties expressed agreement upon a number of 'packages' which counts only the pallets."(244)

By way of dicta the court indicated that the above rule would also apply to containers:

> "But when the bill of lading expressly refers to the container as one package, or when the parties fail to specify an alternative measure of the 'packages' shipped, the courts have no choice but to respect their express or implied understanding and to treat the container as a single package."(245)

(241) 636 F.2d 807 (2d Cir. 1981).
(242) *Alliet Int'l Am. Eagle Trading Corp. v. S.S. Yang Ming*, 519 F. Supp 187, 190 (S.D.N.Y. 1981).
(243) *Yang Ming*, 672 F.2d at 1056.
(244) *Id.*, at 1061.
(245) *Id.*

In order to distinguish the holding in *Mitsui* that notice of the contents of the container prevents consideration of the container as a COGSA package, the *Yang Ming* court stated that *Mitsui* "did not replace contract analysis with notice analysis," and that the decision in *Standard Electrica* was "still the law with regard to pallets." (246)

III. ENGLISH DECISIONS

Although the beginning of containerization can be seen in an early English case of ***Whaite v. Lancashire & Yorkshire Ry.,***(247) where the court held that a wagon containing ten oil paintings was a package since the shipper, who chose to use the wagon, described it as a package, and he did not declare the valuation. Nevertheless, English courts have not had the opportunity to address the container-package question until 1998 in the case of ***The River Gurara***.(248) In this case a vessel on a voyage from West Africa had run aground on the coast of Portugal and later sank with loss of life and a total loss of cargo. Much of the cargo was containerized and many of the containers had been stowed with their contents by the shippers before they were delivered to the carrier or its agents. The bills of lading described the cargo in the containers as constituting a specified number of ""bales" or ""parcels" or ""bags" or ""bundles" or ""crates" or ""cartons" or ""pallets". The specific type of bill of lading used was the U.K. West Africa Line. The bill of lading incorporated a clause paramount which had the effect of making the contract of carriage subject to the 1924 Hague Rules providing the rules formed part of the law of the place of shipment.(249) The bills of lading on the facts of The River Gurara were clearly subject to the Hague Rules since the place of shipment of the cargo had incorporated these rules.

(246) *Id.* The court has left undecided what constitutes an express reference to a container as a package in a bill of lading, or what language constitutes a clear and unambiguous expression of the parties intent to treat the container as the package.

(247) L.A. 9 Ex. 67

(248) [1998] 1 Lloyd's Rep 225.

(249) The Hague Rules of 1924 have been adopted by most nations and will apply if the voyage is from a contracting state, this is made clear by what is known as a clause paramount inserted in the bill of lading.

The carriers proceeded to argue that their liability was limited to ""£100 per package or unit" for the purposes of the Hague Rules, Article 4, rule 5 and that package or unit referred to the container as opposed to its contents. In support of their claim the carriers pointed to clause 9(B) of the bills of lading which provided *inter alia*:

> Shipper Packed Containers. If a Container has not been packed or filled by or on behalf of the Carrier ...
>
> (B) notwithstanding any provision of law to the contrary the Container shall be considered a package or unit even though it has been used to consolidate the Goods the number of packages or units constituting which have been enumerated on the face hereof as having been packed therein by or on behalf of the Merchant and the liability of the Carrier (if any) shall be calculated accordingly.

The cargo owners contended that it was the items in the containers that constituted the package or unit. This was said to be clear from the face of the bills of lading which described the cargo as constituting containers ""said to contain" parcels, bales, pallets and so on.

The judge at first instance found in favour of the cargo owners. The carriers appealed on two main grounds. In the first place, the basis of calculating the limitation of liability under the Hague Rules depended on the paramount intentions of the parties which could be discovered from the bills of lading. As such the effect of the "said to contain" proviso in the bills of lading had the effect of merely enumerating the containers since the bills had lost their evidential significance.(250) Secondly, the description of the goods in the bills of lading was definitive for the purpose of calculating limitation of liability. In response to these grounds the cargo owners contended that the true interpretation of Article 4, rule 5 was that it was the items within the containers which constituted the relevant packages for the purpose of limitation of liability.

(250) The argument represented by the carriers was that the ""said to contain" qualification was the same thing as using the qualification ""weight, number, quantity unknown". As such the onus shifted on the cargo owners to prove that cargo had been loaded since the bills of lading, by incorporating such a clause, had no evidential significance.

Furthermore, clause 9(B) of the bills of lading was rendered void by Article 3, rule 8 of the Rules because it had the effect of reducing the liability of the carrier contrary to the Article.

Both of the carriers' arguments were rejected by the Court of Appeal. The Court's decision is fundamentally influenced by the Ninth Circuit's decision in the ***S.S. Aegis Spirit***.(251) In *S.S. Aegis Spirit*, as we have seen, a number of cartons containing electronic equipment had been shipped from Japan to the United States. The bill of lading stated that two containers said to contain 601 cartons had been loaded. The court held that it was the cartons and not the containers which constituted the relevant package for the purpose of limitation. By far the most important aspect of this case is the judgment of Judge Beeks which was crucial to the decision in *The River Gurara*. Judge Beeks in the *S.S. Aegis Spirit* addressed the problem of defining ""package" or ""unit" not by reference to any one of the established tests in the States but rather by examining the legislative intent of Article 4, rule 5. The matter was not what the parties intended, since after all, the purpose of the Hague Rules was to avoid ridiculously low amounts of liability by carriers in their bills of lading. Rather, the question was, what was the intent of the Hague Rules with regard to limitation of liability, and given the growth of containerization, how should the courts give effect to that intention? The following passage which was cited by Phillips L.J. explains how Judge Beeks approached the matter:

> "To be satisfactory, 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 the legislative policy embodied in the pertinent COGSA provisions ... The better and traditional approach, which I adopt, is to conscientiously construe the legislation, in the factual context seeking to effectuate the legislative, not the parties' intent and purpose. The undoubted objective of [the legislation] was to establish a minimum floor below which carriers ... could not reduce their liability for cargo damage ... The package limitation provision serves no purpose whatsoever if the Courts' function in applying it is to merely

(251) *Matsushita Electric Corp. v. S.S. Aegis Spirit* 414 F. Supp. 894 (W.D.Wash.1976).

> identify and uphold the parties' private definition of COGSA package ... ".[252]

There was no question on the facts of *The River Gurara* that it was the individual items such as the specified bales, cartons, pallets and so on which constituted the package for the purpose of limitation. The bills of lading had made it absolutely clear the amounts of items or ""units" loaded albeit without reference to their description. Description of the goods was not to be decisive in calculating the limitation of liability. The question was not the intention of the parties. In respect of the defendants' claim that the ""said to contain" qualification in the bills of lading had the effect of depriving the bills of lading of their evidential significance, this was rejected by the Court. Phillips L.J. was of the opinion that the ""said to contain" provision did nothing more than clearly make plain to the carrier the number of packages albeit not the description. In this respect they did have an evidential purpose.

In light of these observations the Court of Appeal held that clause 9(B) of the shipowners' bills of lading was contrary to Article 3, rule 8 since it did have the effect of lessening the liability of the carrier.

With respect to English Law reference may be made to Canadian decisions and in Canada the courts have analysed the package or unit limit, in the context of containerized and palletized goods, in some detail. One decision of the Trial Division and one decision of the Appeal Division of the Canadian Federal Court are worthy of mention. These are ***The Aleksander Serafimovich***.[253] and ***Consumers Distributing v. Dart Container Line***.[254]

In ***The Aleksander Serafimovich*** the cargo owner shipped 150 cartons of sewing machine heads from Japan to Canada. The cartons were strapped to three pallets, each containing 50 cartons. The bill of lading listed the number of the cartons within the pallets. While being discharged at Vancouver one pallet was dropped over the side of the vessel. The carrier admitted liability, but contended that they could limit their liability to Can.$500 per pallet for each

(252) *Id.* at 903-4
(253) [1975] 2 Lloyd's Rep 346 (Fed. Ct. T.D.).
(254) 1979, 31 N.R. 181 (Fed. Ct. A.D.).

pallet was a statutory package. The cargo owner maintained that each carton was a package for the limitation of liability purposes.

Smith, J., held that each of the 150 cartons was a 'package' for limitation purposes. The trial Judge discussed at length *Leather's Best* case and *The Tindenfjell* case(255) and said:

> "From all the cases referred to...it is clear that the decision whether a large container, a pallet, or a smaller, wrapped parcel in or on a container or pallet, is a 'package' within the meaning of r.5 of art. IV [of the Hague Rules] depends on the facts and circumstances of each case. In particular, it depends upon the intention of the parties as indicated by what is stated in the shipping documents, things said by the parties and the course of

(255) [1973] 2 Lloyd's Rep 253 (Fed. Ct. T.D.).*The Tindenfiell* case involved damage to a shipment of cartons of shoes transported in containers from Barcelona to Montreal. The cargo owner retained Spanish freight forwarders to arrange for the shipment of 316 cartons of shoes. The freight forwarders had leased two twenty-foot containers and packed the cartons into them. The containers were delivered to the carrier. The bill of lading described the shipment as two containers containing 143 cartons and 173 cartons respectively. The freight was calculated on a weight basis. The containers and the contents arrived in a damaged condition and the claim was for Can.$10,000. The carrier argued that it could limit it liability under article 4, rule 5 of the Schedule to the Act of 1970 to:

(i) either Can.$500 per container for each container was a 'package'; or

(ii) to an amount based on the customary freight unit and since the two containers when packed weighed 10.07 metric tons, and the freight was calculated at a rate per metric ton, this constituted the customary freight unit and the limitation should be somewhere between Can.$5,000 and Can.$5,500. Collier, J., held that the cartons and not the containers were the statutory packages. He saw the parties' intention as the crucial factor:

"To a large extent, the facts of each particular case must govern, and equally important, the intention of the parties in respect of the contract of carriage must be ascertained., I think it proper in a case such as this to determine if the cargo-owner and the carrier intended the containers should constitute a package for the purposes of limitation, or whether the number of packages in the containers was to be the criterion."

Id. at 257

dealing between them."(256)

Applying the 'intent' test to the shipment in question, the court held each carton of sewing machine heads within the pallets to be a package for limitation of liability purposes. The court relied primarily upon the description of the goods in the shipping documents as 3 pallets (150 cartons) to reach its conclusion.(257)

The Appeal Division of the Canadian Federal Court addressed the container issue in ***Consumers Distributing v Dart Container Line*.** This case concerning a shipment of bicycles from Austria to Canada. Each bicycle was encased in a heavy export type cardboard package. The cartons were shipped in 16 containers furnished by the carrier and loaded by the shipper's agent. The shipping documents including the bill of lading described the shipment as follows:

Container No.16 Containers said to contain 103.100 kos
As per attached40 As per attached specification
specification.
Marks and Nos.650 crt ...
420 crt ...
700 crt ...
2450 crt ...
700 crt ...
972 crt ...
———
5892 crt

Tare of container
Each: 3,200 kos.

Upon arrival in Canada it was found that 359 bicycles had sustained rust damage. It was approved that the damage occurred while the bicycles were in the custody of the carrier. The carrier sought to limit liability to $500 per container. The court, reviewing and appraising the above three cases concluded that the parties intended the number of packages for the purpose of limitation of

(256) [1975] 2 Lloyd's Rep 346 (Fed. Ct. T.D.) at 354.
(257) *Id.*, at 354.

liability should be the number of cartons stowed in the containers. The court based its decision on the following findings:

1. It noted that the cartons containing the bicycles were self-contained capable of themselves being shipped but only as a matter of convenience were shipped in containers.
2. More important, the court noted that the shipping documents including
   the bill of lading described in detail the contents of the containers and
   that the carrier had accepted the documents without complaint.

IV. EIMARATI AND KUWAITI DECISIONS

A few UAE and Kuwait decisions have addressed the container and pallet-package limitation issue. Eimrati and Kuwaiti courts have generally looked to the intent of the parties to determine whether the limitation amount should apply to the container or to its contents. To determine the intent of the parties, the courts have relied entirely on the examination of the bill of lading or other shipping documents. Where the bill of lading or other documentation has specifically listed the number of packages or units within the container or pallet, the limitation amount has applied, even with the existence of "Said to Contain" clause, to each of the units listed. Where, on the other hand, the bill of lading has not specifically listed the contents, the limitation has applied to the entire container or pallet as a single package. Thus, where a container contained 2001 cartons of electrical tools carried from Italy to Dubai and 20 cartons were lost. The bill of lading described the cargo as, "1 container 'said to contain' 2001 cartons." The Court of Appeal of Dubai held, relying on the above description, that the individual cartons and not the container were packages for limitation purposes.(258)

(258) No. 61 (1983) unreported.

Again, in a case where the shipment had been described in the bill of lading as "40 Ft. Container –S.T.C. - 20 rolls of carpet" and these rolls were damaged by seawater, the court held that each roll was a package for the limitation purposes.(259) It is worth mentioning that in this case the container was supplied, stowed and sealed by the shipper without any interference from the carrier who delivered the container as he had received it from the shipper.

The Kuwaiti Supreme Court has applied the same approach. In the case involved, 9 containers contained 1880 cartons. Relying on the description of the goods in the bill of lading as "Nine containers contain 1880 cartons" the court held that the cartons within the containers were the package.(260)

The same approach has also been applied to palletized cargo. In a case before the Court of Appeal of Abu Dhabi where 38 pallets contained cartons of dried milk were shipped from London to Abu Dhabi. The bill of lading referred to the goods as "38 pallets each contain 896 cartons". On arrival, five pallets and 165 cartons of their contents were found to be damaged. The carrier contended that his liability should be limited to L100 per pallet, but the court refused this contention holding that because the bill of lading had listed the contents of each pallet then the cartons inside the pallets were the basis for the limitation.(261)(48)

A Kuwaiti judgement is to the same effect. 80 pallets containing 2880 cartons of corn oil were loaded. The bill of lading spelled out the number of cartons in the pallets. The Supreme Court of Kuwait ruled that the cartons and not the pallets were the basis for the limitation of carrier's liability.(262)

Where the bill of lading does not list the contents of the container or pallet the courts have considered the container or the pallets the 'package'. In a case involving the loss of one pallet containing 4 cartons of electrical equipment, the

(259) No. 73 (1982) unreported.
(260) No. 39 (1978) unreported.
(261) No. 299 (1982) unreported.
(262) No. 19 (1977) unreported.

Court of Appeal of Dubai relied on the description of the goods in the bill of lading as "One pallet" in holding that the pallet and not its contents was the basis for the limitation of the carrier's liability purposes.(263)

It should be mentioned that Eimrati and Kuwaiti courts, in determining whether a container is or is not a package, never looked at the identity of the person who owned or supplied the container. It is irrelevant whether the container is a shipper - or a carrier - furnished container. It is also irrelevant whether the container was packed by the shipper or the carrier. The courts' main concern is the disclosure of the contents of the container in the bill of lading.

V. INTERNATIONAL CONVENTIONS

1. HAGUE VISBY/RULES

In an effort to overcome the problems created by containerized cargo under the Hague Rules, a new provision had been adopted in the amended Rules, i.e. Hague Visby/Rules(264) relating to containers. Article 4, rule 5 (c) of the Visby Rules reads:

> "Where a container, pallet or similar article of transport(265) is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph so far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit."

The above provision makes it clear that a container or pallet will cease to count as a single package if the packages or units within the container are

(263) No. 152 (1979) unreported.

(264) Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, February 23, 1968 [hereinafter referred to as the Visby Rules].

(265) In the interest of brevity, the container, pallet or similar article of transport will hereinafter be referred to only as the container.

enumerated in the bill of lading. In other words, the number of packages or units within the container must appear on the face of the bill of lading in order to constitute the basis for calculation of the limitation. Accordingly, a carrier receiving a closed container is not forced to pay compensation on the traditional package basis when he does not know the contents of the container. Further, a person who acquires a bill of lading can readily ascertain from looking at it the type of cover under which the goods have been shipped. For example, if the contents of the container are itemised in the bill of lading (e.g. 1 container containing 100 cases of machinery), each will qualify as a package or unit. But, if the bill of lading describes the shipment merely as "1 container containing machinery", then the container is deemed to be the individual package or unit.(266) If, on the other hand, the contents of a container are partially enumerated in the bill of lading, (e.g. 1 container containing 100 cartons of TV sets and general merchandise), then the 100 cartons would form separate packages for the purpose of limitation and the remaining goods would come within the weight limitation.

The legislative background of the said provision, article 4(5)(c), clearly reveals that the intention of the parties has received much attention in the formulation of this provision. The Chairman of the drafting committee responsible for the container clause, who was also the Chairman of the British Delegation, explained its nature and purpose as follows:(267)

> "It is for the shipper and the carrier to decide whether they want the particular container to be treated as the package for the purpose of limitation of weight, or whether they want the smaller packages or units in it to be so treated, and no doubt when the latter alternative is taken...a higher rate of freight will be payable...What is essential is that into whoever's hands the bill of lading may come, the hands of the consignee, of the banker who finances the transaction or of the insurer, it will appear on the face of the bill of lading whether the package for purposes of maximum liability is the container or the individual

(266) But of course this does not preclude the use of the alternative weight criterion for the contents lost or damaged.
(267) Report of 1968 Brussels Conference, p. 118.

> packages inside the container... What we want to do is to leave open to the shipping industry, the shippers and the shipowners, to decide as a matter of business whether they want to get ‘‘per container rates’, in which case the container will be treated as the package, or the ordinary freight rates in which (case) the traditional packages within it will be treated as individual package... Under this paragraph all you will have to do is to look at the bill of lading and see, does it contain any figures of the number of package other than the containers themselves...”.

A similar view has been recorded by Lord Diplock, in his article “*Conventions and Morale - Limitation Clauses in International Maritime Conventions*”:(268)

> “The container clause adopted by the Brussels Conference enables the cargo owner and the carrier to select the maximum which will be applicable to the particular contract of carriage. If they are content with the weight limitation, the bill of lading issued by the carrier will not state the number of packages or units within the container. If they wish to adopt the package or unit limitation in respect of any of the contents of the container, the bill of lading will state the number of packages or units to which this higher limitation is to apply and the weight limitation figure will apply to the container itself and any remaining contents. Like the existing provision for the insertion of a declaration of value of goods in the bill of lading, the enumeration in the bill of lading of the number of packages or units stowed in a container will have the effect of increasing the amount of the risk of loss or damage to the cargo borne by the carrier and is likely to be reflected in his charging a higher freight rate for containers whose contents are enumerated than for those whose contents are not. Indeed, if it were otherwise, it would involve consignors of containers whose contents were enumerated in subsidising the higher

(268) [1970] 1 J.M.L.C. p 525, at pp. 528-532.

> recoveries of consignors with containers with enumerated contents. In the light of past experience of the value declaration, I would venture to prophesy that the enumeration option, too, will be seldom exercised in practice, because, for the reasons already mentioned, the economic cost of covering the excess by P. & I. insurance is likely to be greater than that of covering it by cargo insurance. This has nothing to do with morals. It has everything to do with the practical economics of commerce."

However, the interpretation of the container clauses as allowing a carrier to charge an additional fee for the shipper's right to enumerate package in the bill of lading was rejected by the U.S. delegation because it would nullify the benefits of U.S.COGSA. "The shipper should not be required to pay an extra charge for protection that COGSA said the carrier must provide." The United States delegation argued against placing containerized cargo in a less favourable position as to liability limitation than the same cargo before containerization, stating: "that such an inequitable and anomalous consequence" could not and should not be intended.(269)

(269) Report of the Unites States Delegation, Brussels, February 19-23, 1968, at p. 250. Delegates to the draft convention clashed over how containerized cargo would be treated in the amended Hague Rules (see John L. DeGurse, Jr., *The "Container Clause" in Article 4(5) of the 1968 Protocol to the Hague Rules*, 2 J. Mar. L. & Com. 131, 132 (1970-71)).. The delegates from the United States, Norway, and Sweden feared that the amendments would place containerized cargo in a less favorable position than that enjoyed by such cargo prior to containerization (i*d.* at 139, 144). The participants drafting the Protocol differed on how the new scheme would affect ad valorem rates (see *id*. at 141-46). In practice, under the Hague Rules, when a shipper declared the nature and value of goods, the carrier charged a higher rate; shippers reacted by obtaining more cargo insurance rather than enduring higher freight rates (see *id.* at 135). The Visby Amendments did not change this situation; the ad valorem rate system continues to affect shipping contracts. While most nations ratified the Visby Amendments, tension and inconsistency continues to exist regarding limitation of liability per package (see generally Comite Maritime International, *The Travaux Preparatoires of the Hague Rules and of the Hague-Visby Rules (1997)*) Because the United States explicitly declined to ratify the amendments, it is curious and may be inappropriate that American judges have declined to interpret legislative inaction as outright rejection of the Visby Amendments (see Michael F. Sturley, *Proposed Amendments to the Carriage of Goods by Sea Act,* 18 Hous. J. Int'l L. 609, 610-11 (1996).

It has also been argued that nothing in the language of the container clause indicates that for the privilege of the enumeration in the bill of lading the number of packages or units loaded into the container the shipper must pay an increased freight rate.(270) As the practice of charging higher rates has tended to discourage shippers from declaring the nature and value of their goods in the bill of lading. Instead, they have tended to rely on supplementary cargo insurance as a means of protection against loss, which is, for the most part, less expensive than paying a higher freight rate.

The terms of the Hague Visby/Rules were adopted by U.K.COGSA 1971. The main principles of the Visby Rules including the exception of the per package limitation were also incorporated into the Maritime legislations of United Arab Emirates and (271)Kuwait,(272). Thus, the statutory criterion as to the container or pallet-package question in all the above mentioned countries is the enumeration of the packages or units in the bill of lading. The United States, on the other hand, have not yet adopted the Hague Visby/ Rules, however some U.S. courts, in rendering judgement, have already referred to the Visby/Rules' container provision for the purpose of interpreting the Hague Rules.(273)

(270) J.L. De Gurse, *The 'Container Clause' in Article 4(5) of the 1968 Protocol to the Hague Rules* [1970] 2 J.M.L.C. 131.
It has also been argued that if the British interpretation is to be accepted, with the result that an additional freight rate is quoted by the carrier which proves unacceptable to the shipper, then it is quite probable that the shipper will not so enumerate, thus restricting him to maximum recovery of 30 francs per kilo of gross weight, which, it is submitted, may be unrealistically low in some cases.

(271) Art. 276(2).

(272) Art. 193(3).

(273) See *Binladen* (*Binladen BSB Landscaping v. M/V Nedlloyd Rotterdam*, 759 F.2d 1006, 1013, 1985 AMC 2113, 2121-22 (2d Cir. 1985)) and *Mitsui* (*Mitsui & Co. v. Am. Exp. Lines, Inc.,* 636 F.2d 807, 821, 1981 AMC 331, 350 (2d Cir. 1981). In *Inter-American Foods, Inc.*, 313 F.Supp, the court held that each cardboard carton of frozen shrimps placed in a freezer trailer was a "package" for limitation purposes. the court noted that the plaintiff's argument that each carton was a "package" was "confirmed by...the Brussels Protocol". *Id* at 1337. The court held:
"The Brussels Protocol makes it clear that each unit in 'palletized' or 'containerized' cargo constitutes a 'package'. Under the definition accepted by the leading maritime nations of the world, even where a carrier receives at dockside a sealed container, contents unknown, each package or unit enumerated in the bill of lading is deemed a package".

Although the purpose of article 4, rule 5(c) of the Hague Visby/Rules seems apparent, the authors of Scrutton(274) have drawn attention to the following potential problems:

1.What articles of transport are "similar to" containers and pallets? The learned authors said that 'roll on - roll off' lorries and trailers do not fall within this description.

However, the author of Carver(275) expressed a different view. He found that roll on - roll off, push on - push off, drive on - drive off, fly on - fly off, are not only similar to but are container as they consolidate goods. While Diamond(276) found that a lorry can hardly be described as "similar to" a container, he, nevertheless, submitted that there is no reason why the principles embodied in article 4, rule 5(c) should not be applied by analogy to other situations since, if those principles are valid for containers and pallets, there would seem no reason why they should not be more generally applied.

2.What precisely is meant by "used to consolidate" goods? The authors of Scrutton suggested that the most obvious interpretation is "used to carry" or "used to contain". However, they referred to the fact that the word 'consolidate' is often used in a maritime context as meaning to 'treat as one consignment for the purposes of calculating freight'. Difficulties are most likely to arise when a forwarding agent ships the goods of several different consignors in a single container.

Diamond suggested that the expression "used to consolidate goods" refers to the physical placing of goods together inside a container, not to the consolidation of the goods of different shippers or of the goods shipped under different contracts of carriage.

3.In what circumstances is the number of packages "enumerated in the bill of

Id. at 1338.

(274) Scrutton on Charterparties, 19th ed., p. 455.

(275) Carver, 'Carriage by Sea', 13th ed., p. 397.

(276) A. Diamond, *Hague-Visby Rules* [1978] L.M.C.L.O. 225; see Chorley and Giles 'Shipping Law (8th ed) where it is suggested that the phrase "or similar article of transport" can, in a proper case, cover LASH (Lighter aboard ship) and BACAT (barge aboard catamaran).

lading as packed" in the container? The authors of Scrutton submitted that where the bill is "said to contain" a certain number of packages, then this is sufficient for the purposes of article 4, rule 5(c), even though it would probably not create an estoppel under article 3, rule3.(277) They also submitted that both parties are bound, for limitation purposes, by an incorrect enumeration which is, in their view, an unsatisfactory result.

Diamond(278) is of the same view regarding "said to contain" clause, but to treat the incorrect enumeration as conclusive for limitation purposes while it is not binding for the liability purpose would be, in his view, a silly result. Diamond submits that both the liability and also the limitation should be based on the accurate figure. For instance, if the bill of lading described the shipment as 'one container said to contain 500 cases' but it is found that the container contains only 475 and that 25 case were never shipped, then the limitation should be based on the figure 475.

The reason for considering the "said to contain" clause is of no effect on the operation of article 4, rule 5(c) is explained by the authors of Chorley and Giles' Shipping Law: (279)

> "The Rules give the carrier the opportunity not to enumerate the quantity of goods shipped where he is in no position so to enumerate. Where this is the position, the carrier ought to exercise that option rather than enumerate [the quantity of goods] and then insist that what was really meant was one container. In so far as the 'said to contain' clause is used as a device to reduce the amount of damages recoverable under Art. 4, the clause can be struck down by Art. 3, rule 8, which prohibits clauses lessening liability under the Rules. Moreover it appears that even if the clause alters the evidentiary strength of the representation in the bill of lading, this would not

(277) The proviso to article 3, rule 3 would seem to nullify the effect of the container provision in that the carrier shall not be "bound to state...in the bill of lading...any quantity or weight...which he has no reasonable means of checking".
(278) Diamond, op. cit. at p. 243.
(279) 8th ed. 1987.

> necessarily mean that the lower multiplier is to be preferred to the higher for purposes of limitation: Art.4, rule 5(c) speaks simply of 'packages or units enumerated in the bill of lading as packed' and not of packages warranted to have been shipped."

U.S.,[(280)] English,[(281)] Emirati and Kuwaiti container decisions have not been bothered by the "said to contain" clause and have determined that this shows the intention of the parties to have the individual packages used for limitation purposes. A clause in the bill of lading like 'said to contain' would not act as a reservation or an estoppel under article 3, rules 3 and 4. The courts' decisions suggest that a "said to contain" clause will be a sufficient enumeration on the bill of lading to allow the limitation provision to apply to individual packages.

It is submitted that the Visby/Rules' requirement of a statement in the bill of lading regarding the number of packages in the container is unworkable and ought to be rejected. The effective use of containers requires that ocean carriers receive containers which have been sealed at the point of loading. This loading may take place far inland. Thus, the carrier will have no knowledge of the actual contents of a container when it reaches the harbour, and the contents of the container will not be noted on the bill of lading. Under such circumstances, the operation of the Rules will be thwarted. A more workable solution would be to allow the shipper to prove the contents of the container at trial without regard to the notations on the bill of lading.

Again, where the cargo is delivered for shipment in container, it is not clear under the container clause whether the liability of 30 francs per kilo applies to the contents alone or both. If both, then the carrier's liability could be well increased beyond proportion where low-priced commodities are stowed in heavily refrigerated containers.

Another question which the Hague Visby Rules leave unanswered concerns a container in which only some of the contents are enumerated. Are the items singled out entitled to individual package limits, and the rest subject to the

(280) *Leather's Best Inc. v. S.S. Mormaclynx* 451 F.2d 800; *S.S. Ornacvega* 307 F.Supp.793; *Allstate Insurance Co. v. Inversiones Navieras Imparca*. 646 F.2d 169 (5th Cir. 1981).
(281) *The River Gurara* [1998] 1 Lloyd's Rep 225.

weight limit? Whether the alternative limits will be so combinable is unclear.

2. HAMBURG RULES(282) AND ROTTERDAM RULES(283)

Article 6(2) of the Hamburg Rules provides:

> "For the purpose of calculating which amount is the higher in accordance with paragraph 1(*a*) of this article, the following rules apply:
>
> (*a*) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading, if issued, or otherwise in any other document evidencing the contract of carriage by sea, 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.
>
> (*b*) In cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the carrier, is considered one separate shipping unit."

Article 59 (3) of the Rotterdam Rules provides that:

> "When goods are carried in or on a container, pallet or similar article of transport used to consolidate goods, or in or on a vehicle, the package or shipping units enumerated in the contract particulars as packed in or on such article of transport or vehicle are deemed packages or shipping units. If not so enumerated, the goods in or on such article of transport or vehicle are deemed one shipping unit".

Article 6, rule 2(a) of the Hamburg Rules and Article 59(3) of the Rotterdam Rules are identical with article 4, rule 5(c) of the Hague Visby/ Rules and the

(282) Adopted at Hamburg, March 31, 1979; in force November 1, 1992.
(283) Adopted at Rotterdam, December 11, 2008; not yet in force.

three possibilities for calculating the maximum limit of liability are similar under booth Rules and they have already been dealt with.One important difference, however, between the three Rules is that under article 4, rule 5(c) of the Visby/Rules and article 59, rule 3 of the Rotterdam Rules, where there is no enumeration on the bill of lading of the contents of the container, whether it is a carrier - or a shipper-owned container, the container is deemed to be the package or unit. But, under article 6(2)(a) of the Hamburg Rules, when the container is supplied by the carrier and there is no disclosure of its contents in the bill of lading, the container will not be considered as a package or shipping unit. This is because, as it seems, the container in this case is deemed to be part of the ship's hold.

Article 6, rule 2(b) of the Hamburg Rules contains a unique feature not included in the Visby/Rules or the Rotterdam Rules. It stipulates that if the container is supplied by the shipper and is lost or damaged, the carrier will be liable for the loss according to the limitation set. For example, if a shipper-furnished container containing 50 packages or shipping units is lost or damage, then the units of limitation would be 50 + 1 (the container itself) = 51 packages or shipping units.

It is irrelevant under article 6, rule 2(b) of the Hamburg Rules whether the goods belong to one or several shippers or whether the carrier or the shipper packed the container. In all cases, when the container is supplied by the shipper, It will be considered as one shipping unit.

VI. CONCLUSION

It appears from the review of the U.S. decisions, that there is little uniformity in the approach of the U.S. courts to the solution of the container problem. While the recent decisions of the Second Circuit have principally relied on the intent of the parties as exemplified by the information on the bill of lading,(284) such reliance on the bill of lading has been criticized by the Ninth Circuit(285) which maintained that the courts should look to the intent of the legislators

(284) See *Mitsui*, 636 F.2d 807 (2d Cir. 1981), *Eurygenes*, 666 F.2d 746 (2d Cir. 1981), see also the decision of the Fifth Circuit in *Allstte v. Inversions*, 646 F.2d 169 (5th Cir. 1981).

(285) *The Agis Spirit*, 414 F. Supp. 894 (W.D. Wash. 1976).

rather than relying on a bill of lading intent analysis. Since the carrier is the 'final arbiter' of the contents of the bill of lading, reliance on this factor in determining whether a container is a package would, very often, result in nominal carrier liability.

Another factor relied on by the courts was the ownership of the container. In cases where the container was furnished by the carrier, the courts treated the container as a part of the ship(286) and held it not to be a package. But, the court, in relying on this factor, failed to explain why or how can the container change from a part of the ship into a package when the shipper fails to disclose the contents? The container is either a part of the ship or it is a package for the purposes of section 1304(5) of the U.S. COGSA.

It is argued that the ownership of the container is not readily ascertainable since even the carriers do not own all the containers which they supply. They often rent containers from other parties, and by the same token, when a freight forwarder supplies a container, it cannot always be determined on the face of it from which party he obtained the container. Therefore, to rely on the ownership of the container factor,(287) is merely an invitation to inquire into elusive and irrelevant matters. Should a consignee recover less merely because the shipper's agent supplied the container rather than the carrier?(288)

(286) *Leather's Best*, 451 F.2d 800 (2d Cir. 1971), *The Agis Spirit*, 414 F.Supp 894, 907, *Northeast Marine Terminal Co. v. Capute* 432 U.S. 249, 270 (1976) (container is substitute for hold of ship). See Simon, More on the Law of Shipping Containers, 6 J.Mar.L. & Com. 603, 604 (1075) (the president of a consortium of steamship companies characterised the container as part of the ship when he said that the ship is now able to meet the shippers on shore).

(287) Some courts have refused to rely exclusively upon "ownership of the container" factor. In *re Norfolk B & C Line*, 478 F.Supp 393 (E.D. Va. 1979); *Rosenbruch v. American Export Isbrandtsen*, 357 F.Supp 982 (S.D.N.Y. 1973).

(288) Simon, above note 213 at 447.
Considering the container as a part of the ship gives way to several questions to arise. Although they are not directly related to the container package problem, but are of considerable importance:

1. What are the seller's obligations under f.o.b. terms? Once the obligations of the seller under f.o.b. terms is "to make available at the port of loading and to ship free on board goods answering in all respects the description in the contract of sale". The Institute of Export, 14 'Export' (1951). Under f.o.b. terms the seller is liable for loss of or damage to the goods until the moment the goods have actually passed the ship's rail; see

A further test adopted to aid in the determination of the container issue was the 'multi-factor test.

This test, however, is too unwieldy and may yield conflicting signals in some situations. Suppose, for example, that the shipper chose to ship the goods in the container and that the container provided a complete and accurate indication of the contents. The test's third and ninth factors, respectively, address these issues. The third factor indicates that the container is the proper COGSA package because the shipper freely selected the packaging to be used. On the other hand, the ninth factor(289) indicates that the shipper's original packages are the COGSA packages because the carrier had knowledge of internal packaging. How can such conflict be resolved? As the court which formulated it failed to indicate how much weight to accord each factor in determining the proper COGSA package.

On the other hand, it was argued that a container, if not a package, should be deemed a 'customary freight unit' for the purpose of $500 limitation.(290) There are two significant limitations to the 'freight unit argument. First, the 'customary freight unit' is limited under COGSA to those goods not shipped in packages.(291) If the goods shipped in the container cannot be considered

Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd. [1954] 2 Q.B. 402 at p 414.
Thus, on the basis of the above consideration, the container is a part of the ship, will the seller's obligation to deliver the goods on board be considered as completely fulfilled and that the carrier's obligation has commenced as soon as the goods have passed into a container which is still on shore ?

2. Is the shipper entitled to demand an on-board Bill of Lading once his cargo has passed into the container although the ship has not yet been advised ?
It is known that on board Bill of Lading is only issued when the goods have actually passed the ship's rail. Any other practice is very dangerous if payment under a purchase contract is arranged on the basis of a Letter of Credit. Bankers will only effect payment under a Letter of Credit against presentation of a clean on board Bill of Lading. Uniform Customs and Practice for Documentary Credit arts. 18, 19, 20.

3. In a case of a freight prepaid agreement, is the freight due for payment after the cargo has passed into a container?

(289) I.e. whether the shipper, or at least one other than the carrier, chose to ship the goods in containers.

(290) I.e. whether the markings on the container provided a complete and accurate indication of the contents and their value.

(291) 664 F.2d 1277, 1281 (5th Cir. 1981).

COGSA packages, then the 'freight unit' limitation will apply. In other words, the 'customary freight unit' limitation should only be applied after a court has decided that the cargo at issue is 'goods not shipped in packages'. The second limitation on the 'freight unit' argument is that the container itself must be found to be the 'customary freight unit' if the carrier is seeking the minimum liability of $500. For the container to be considered as a 'customary freight unit', there would have to be, at the very least, a lump sum of flat rate freight charge.(292)

In the absence of a clear judicial solution to the container-package problem, American writers have attempted to formulate such solution. De Orchis suggested the following test which is to be applied in determining whether a container is a package for the purpose of the $500 per package limitation:

> "Where the use of a container is chosen by the shipper...and the bill of lading counts each container as one package, the limitation should apply to the container. Where the goods are packed in the container by the carrier...and the number of cartons or bales is tallied by the carrier and receipt of their number is acknowledged in the bill of lading, the package limitation should be applied to the number of cartons or bales,...placed in the container."(293)

According to De Orchis, this suggestion could be implemented by allowing the shipper to choose whether a container is to be used in the first instance and noting this choice on the face of the bill of lading. By permitting the parties alone to decide what is to be deemed a package under their contract of carriage, De Orchis contended, "the pains of litigation and the search for predictability would both be ended."(294)

As a solution to the problem, it is also suggested that the $500 COGSA package limitation should operate against the party deriving the greatest benefits from containerization. Clearly, where the container is owned and supplied by

(292) 46 U.S.C. section 1304(5). The courts have not found containers to be "customary freight unit", but rather have calculated the "customary freight unit" on an alternative basis; see *Cia Tanamena de Seguros v. Prudential Lines*, 416 F.Supp 641(1) (Z. 1976).
(293) De Orchis, *supra* note 25, at 258.
(294) *Ibid.*, at 279.

the carrier, it is the carrier who benefits most from containerization.(295) Even if the container is loaded at the shipper's premises, the shipper is merely using the tools of the carrier's trade and, in effect, assisting the carrier in reducing overall costs.

But when the container is used by the shipper as a true substitute for packaging or in other instances when containerization is primarily for the benefit of the shipper, then the container might be considered a package.

The decision of the Court of Appeal in *The River Gurara* is to be welcomed as giving effect to the reality of maritime trade. The Hague Rules provisions on limitation of liability were drafted in a period when containerization was not the major means of sea transportation of cargo. Yet, the purpose of the Rules was to prevent ridiculously low limits of liability by shipowners in bills of lading. As economic change takes place there is always the danger that the aims and objectives of rules can be undermined if the rules are applied to transactions of a totally different kind without modification of the original rules themselves. The decision is in accordance with the Hague Visby/Rules, Hamburg Rules and Rotterdam Rules.

(295) See Schneltzer & Peavy, *supra* note 1, at 208; Simon, *supra* note 35, at 521.

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ملخص بحث

الوضع القانوني للبضاعة داخل الحاوية أو على البالـــــــة

أدى النقل البحري للبضائع غير السائلة بواسطة الحاوية أو المنصة الناقلة (البالـــة) إلى تغيير جذري في الطريقة التقليدية القديمة، التي كانت تنقل وتعبـــأ بهـــا البضـــائع، وبالتالي فهي تعتبر تغييراً في المفهوم التقليدي للطرد، والذي كان مستخدماً حتى بدايـــة الستينات، وبسبب استخدام الحاويات بدأت المصانع في شحن البضائع مربوطة معاً على منصة أو مرصوصة داخل حاوية، ومعدة للشحن وللتفريغ "كوحدة". وغالباً مـــا تكـــون البضائع المربوطة أو المرصوصة مع بعضها، وبذلك فهي تعتبر طروداً فـــي المفهـــوم التقليدي للمصطلح. فالمفهوم التقليدي للشحن تغير تغييراً جذرياً مع بناء ســـفن خاصـــة للنقل البحري بالحاويات. إلا أن التطور الذي أحدثه النقل البحـــري بالحاويـــات فـــي المفهوم التقليدي للطرد تسبب في وضع تحدي أمام المحاكم للإجابة على السؤال فيما إذا كانت الحاويات أو المنصات تعتبر طرود في مفهوم المادة (4) مـــن قواعـــد لاهـــاي وبالتالي تحدد مسؤولية الناقل وفقا لذلك.