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Nancy A. Sharp

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# COMMENT

## WHAT IS A COGSA "PACKAGE?"

### INTRODUCTION

In 1936 the United States Congress passed the Carriage of Goods by Sea Act<sup>1</sup> (COGSA). The purpose of COGSA was to establish a standardized set of definitions and rules to govern the terms and conditions used in ocean bills of lading.<sup>2</sup> One of its unique provisions limits a carrier's liability for lost or damaged cargo<sup>3</sup> on a "per package" basis;<sup>4</sup> however, COGSA failed to define the term "package." To resolve their differences of opinion, shippers and carriers heavily litigated the issue of what is a COGSA package for purposes of limiting a carrier's

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1. 46 U.S.C. app. §§ 1300-1315 (1988). COGSA is the United States version of the International Convention for the Unification of Certain Rules Relating to Bills of Lading, [the Hague Rules] Aug. 25, 1924, 120 L.N.T.S. 155. The Hague Rules is an international agreement dealing with terms and conditions of bills of lading used in the international transportation of goods. D.C. Toedt III, Comment, *Defining "Package" in the Carriage of Goods by Sea Act*, 60 TEX. L. REV. 961, 964 (1982) [hereinafter D.C. Toedt III].

2. An ocean bill of lading is

[a] document evidencing receipt of goods for shipment issued by a person engaged in business of transporting or forwarding goods and it includes airbill. U.C.C. § 1-201(6). An instrument in writing, signed by a carrier or his agent, describing the freight so as to identify it, stating the name of the consignor, the terms of the contract for carriage, and agreeing or directing that the freight be delivered to the order or assigns of a specified person at a specified place. It is receipt for goods, contract for their carriage, and is documentary evidence of title to goods. *Schwalb v. Erie R. Co.*, 161 Misc. 743, 293 N.Y.S. 842, 846.

BLACK'S LAW DICTIONARY 168 (6th. ed. 1990).

COGSA, modeled after the Hague Rules, attempted to standardize bill of lading terms and the limitation of liability a carrier could assert for negligent damage to cargo. D.C. Toedt III, *supra* note 1, at 964.

3. "The load (ie. freight) of a vessel, . . ." BLACK'S LAW DICTIONARY 213 (6th ed. 1990).

4. 46 U.S.C. app. § 1304(5).

liability.<sup>5</sup>

Prior to COGSA's enactment, defining a package was unnecessary. General maritime law held a carrier strictly liable for loss or damage to goods carried on board its ships.<sup>6</sup> Exceptions existed for loss or damage that occurred due to acts of God, acts of public enemies of the state, acts of the shipper or owner of the goods, or by the inherent vice or nature of the goods.<sup>7</sup> To reduce this liability, carriers resorted to putting exculpatory clauses<sup>8</sup> in ocean bills of lading.<sup>9</sup>

COGSA eliminated much of the need for exculpatory clauses by determining that liability exists on a per package basis,<sup>10</sup> unless there is a genuine agreement by the shipper and carrier to the contrary.<sup>11</sup> COGSA §1304(5)<sup>12</sup> states in part:

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

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5. See generally 2A E. BENEDICT, *BENEDICT ON ADMIRALTY* §167 (7th ed. 1986).

6. J. Hoke Peacock III, Comment, *Deviation and the Package Limitation in the Hague Rules and the Carriage of Goods by Sea Act: An Alternative Approach to the Interpretation of International Uniform Acts*, 68 *TEX. L. REV.* 977 (1990).

7. NICHOLAS J. HEALY AND DAVID J. SHARPE, *CASES AND MATERIALS ON ADMIRALTY* 329-330 (2nd ed. 1986); see also J. Hoke Peacock III, *supra* note 6.

8. "A contract clause which releases one of the parties from liability for his or her wrongful acts. A provision in a document which protects a party from liability arising, in the main, from negligence; . . ." *BLACK'S LAW DICTIONARY* 566 (6th ed. 1990).

9. See D.C. Toedt III, *supra* note 1, at 962-963. Among other things, exculpatory clauses relieved the carrier of liability for damage to goods where the packaging was improper or when the vessel was neither negligent nor at fault. As these clauses became more prevalent, carriers eventually included clauses that exculpated the vessel even from its own negligence. *Id.* at 963 n.9.

10. *Id.* at 966. COGSA and the Hague Rules were patterned after the Harter Act, Ch. 105, 27 Stat. 445 (1893), 46 U.S.C. app. §§190-196 (Supp. V 1987). All were designed to obligate the steamship lines to use due diligence to ensure their ships were seaworthy, and to force ocean carriers to accept responsibility for proper custody and care, loading, stowage and delivery of cargo. COGSA and the Hague Rules differed from the Harter Act in that they prescribed a standard limitation of liability on a per package basis. See e.g., J. Hoke Peacock III, *supra* note 6.

11. "Because of their superior bargaining position, carriers could force shippers to accept the exculpatory clauses." J. Hoke Peacock III, *supra* note 6, at 981.

12. 46 U.S.C. app. §1304(5).

before shipment and inserted in the bill of lading.<sup>13</sup> (*emphasis added*).

This Comment will discuss how shippers and carriers can determine what is a COGSA package. Part I describes the technological developments in ocean transportation that helped define the term "package." It also discusses the "customary freight unit" and declaring the nature and value of the goods<sup>14</sup> as they relate to this definition. Part II reviews the cases that established the present definition of a COGSA package as it pertains to: (a) machinery and equipment; (b) cases, cartons, bags and similar type shipping units; and (c) bundled items, bulk shipments and other unusual shipping units. Finally, Part III analyzes the key elements that define the existence of a COGSA package and rules that have been developed by the courts to help shippers and carriers determine the extent of their liability.

## I. FACTORS THAT INFLUENCED THE DEVELOPMENT OF THE DEFINITION

### A. *Technology*

Transporting goods by sea originally occurred via breakbulk<sup>15</sup> vessels. Initially, men manually loaded and unloaded the cargo hold<sup>16</sup> of a ship. As the technology developed, pulleys, cranes and slings were used to increase efficiency and reduce loading and unloading time. The introduction of forklift<sup>17</sup> machinery resulted in a greater volume of palletized<sup>18</sup> cargo and further improved the handling of the goods. Finally, in the early

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13. *Id.*

14. *Id.*

15. A term of art describing a method of shipment whereby goods are hand-loaded into the portion of a vessel designated for carrying cargo. For a short history of the shipping industry, see Crutcher, Comment, *The Ocean Bill of Lading — a Study in Fossilization*, 45 TUL. L. REV. 697 (1971).

16. "The interior of a ship below deck; the cargo deck of a ship." WEBSTER'S NEW COLLEGIATE DICTIONARY 545 (8th ed. 1975).

17. "[A] self-propelled machine for hoisting and transporting heavy objects by means of steel fingers inserted under the load." *Id.* at 451.

18. "To place on, transport, or store by means of a pallet." *Id.* at 825. A pallet is "a wooden, flat-bladed instrument. . . a portable platform for handling, storing, or moving materials and packages (as in warehouses, factories and vehicles)" by using a forklift truck. *Id.*

1960's, containerization<sup>19</sup> revolutionized the shipping industry. Breakbulk ships were retrofitted,<sup>20</sup> and new ships were built to accommodate truck-size trailers (called containers<sup>21</sup>) in the hold or on the deck of the ships.

### B. Customary Freight Unit

When cargo is deemed "goods not shipped in packages,"<sup>22</sup> COGSA specifies the "customary freight unit"<sup>23</sup> as the alternative measurement that limits a carrier's liability. The customary freight unit is also used to determine the freight charges payable to the carrier for shipping the goods.<sup>24</sup> If the freight charge was applied as a lump sum figure for the item to be shipped, the customary freight unit would be one, and the same limitation of

19. "A shipping method in which a large amount of material (as merchandise) is packaged together in one large container." WEBSTER'S NEW COLLEGIATE DICTIONARY 245 (8th ed. 1975).

20. "[T]o furnish . . . with new parts or equipment not available at the time of manufacture." *Id.* at 989.

21. The Coast Guard defines a "container" as:

[A]n article of transport equipment:

(i) Of a permanent character and suitable for a repeated use;

(ii) Specially designed to facilitate the transport of goods, by one of more modes of transport, without intermediate reloading;

(iii) Designed to be secured and readily handled, having corner fittings for these purposes;

(iv) Of a size that the area enclosed by the four outer bottom corners is either:

(A) At least 14 sq.m. (150 sq.ft.), or

(b) At least 7 sq.m. (75 sq.ft.) if it has top corner fittings. The term 'container'

includes neither vehicles nor packaging; however, containers when carried on chassis are included.

49 C.F.R. 450.3(a)(2) (1991).

22. 46 U.S.C. app. §1304(5).

23. The unit of weight or measure used as a basis for determining the cost of shipping the goods on the carrier's vessel. *Waterman S.S. Corp. v. U.S. Smelting, Refining & Min. Co.*, 155 F.2d 687, cert. denied, 329 U.S. 761 (1946); see also *Caterpillar Americas Co. v. S.S. Sea Roads*, 231 F. Supp 647 (S.D. Fla. 1964) *aff'd*, 364 F.2d 829 (5th Cir. 1966)(not to the physical unit, but to the unit upon which the charge for freight is computed).

The customary freight unit is derived by determining the greater of the weight tons (the gross weight of the shipment divided by the standard weight unit published in the carrier's tariff, ie. a long ton of 2240 pounds) or the measure tons (the total cubic feet of the shipment divided by the standard measurement unit published in the carrier's tariff, ie. a measure ton of 40 cubic feet); if the freight charge is lump sum (a single price per item shipped), the customary freight unit is the single item being shipped.

24. "The compensation paid for the transportation of goods." WEBSTER'S NEW COLLEGIATE DICTIONARY 459 (8th ed. 1975).

liability may result whether the item shipped is determined to be a "package" or "goods not shipped in packages."<sup>25</sup>

### C. *Declaration of Value*

An alternative method for determining the carrier's liability rests in the hands of the shipper. By declaring the value of the goods in advance of shipment and inserting this value on the ocean bill of lading, the shipper can recover from the carrier the amount of loss or damage up to and including the full cost of the shipper's goods.<sup>26</sup> The drawback to this opportunity for the shipper is that a higher freight charge will apply.<sup>27</sup>

## II. THE CASE HISTORY THAT DEVELOPED THE DEFINITION

### A. *Machinery and Equipment*

In the early cases, the courts were asked to determine whether items such as amusement cranes,<sup>28</sup> tractors,<sup>29</sup> locomotives,<sup>30</sup> yachts,<sup>31</sup> automobiles,<sup>32</sup> and other pieces of machinery or equipment<sup>33</sup> were to be considered COGSA packages. The general consensus of the courts was that large pieces of equipment

25. See 46 U.S.C. app. §1304(5).

26. See *Petition of Isbrandtsen Company*, 201 F.2d 281 (2nd Cir. 1953).

27. See *Pan-Am Trade & Credit Corp. v. The Campfire*, 156 F.2d 603 (2nd Cir. 1946), *cert. denied*, 329 U.S. 774 (1946).

28. *Stirnemann v. The San Diego*, 148 F.2d 141 (2nd Cir. 1945).

29. See *Middle East Agency, Inc. v. The John B. Waterman*, 86 F. Supp. 487 (S.D.N.Y., 1949); see also *Caterpillar Overseas, S.A. v. Marine Transport Inc.*, 960 F.2d 714 (4th Cir. 1990); *Ulrich Ammann Bldg. Equipment Ltd. v. M/V Monsun*, 609 F. Supp. 87 (S.D.N.Y. 1985); *Caterpillar Americas Co. v. S.S. Sea Roads*, 231 F. Supp. 647 (S.D. Fla. 1964) *aff'd*, 364 F.2d 829 (5th Cir. 1966); *Gulf Italia Co. v. The Exiria*, 160 F. Supp. 956 (S.D.N.Y. 1958), *aff'd*, 263 F.2d 135 (2nd Cir. 1959), *cert. denied*, 360 U.S. 902 (1959).

30. See *e.g.*, *Petition of Isbrandtsen Company*, 201 F.2d 281; *India Supply Mission v. S.S. Overseas Joyce*, 246 F. Supp. 536 (S.D.N.Y. 1965).

31. *Pannell v. The S.S. American Flyer*, 157 F. Supp. 422 (S.D.N.Y. 1957), *modified*, 263 F.2d 497 (2nd Cir. 1959), *cert. denied*, 359 U.S. 1013 (1959).

32. See *Freedman & Slater, Inc. v. M. V. Tofevo*, 222 F. Supp. 964 (S.D.N.Y. 1963)[*Automobiles (Goggomobiles) are not a package*].

33. See *Hanover Ins. Co. v. Drake Marine*, 440 F. Supp. 686 (D.P.R. 1977), *aff'd*, 581 F.2d 268 (1st Cir. 1978) (a C-45 Bliss Press shipped unboxed, not wrapped or crated and without a skid is not a package); see also *FMC Corp. v. S.S. Marjorie Lykes*, 851 F.2d 78 (2nd Cir. 1988) (fire engines are not packages); *Aetna Ins. Co. v. M/V Lash Italia*, 858 F.2d 190 (4th Cir. 1988) (military vehicles are not packages); *Barth v. Atlantic Container Line*, 597 F. Supp. 1254 (D. Md. 1984) (an automobile is not a COGSA package).

and machinery were not COGSA packages. To illustrate, in *Stirnimann v. The San Diego*<sup>34</sup> an amusement crane was dismantled into 126 component parts and was shipped in good condition from LeHavre, France to San Francisco, California. Each part was weighed and measured and described on a schedule attached to the ocean bill of lading.<sup>35</sup> The bill of lading listed the number of pieces as "126 colis".<sup>36</sup> Upon arrival, the pieces of the crane were "bent, kinked, and dented."<sup>37</sup> The court determined that the individual component parts, and not the crane itself, were packages and subject individually to the \$500 COGSA limitation.<sup>38</sup> The court reasoned that the purpose of §1304(5) was "to prevent 'excessive claims in respect to small packages of great value,' but not to permit carriers to escape liability for just claims."<sup>39</sup> Similarly, in *Petition of Isbrandtsen Company*,<sup>40</sup> the court held that ten locomotives, damaged by fire aboard the transport ship, were not packages for purposes of COGSA's limitation of liability. However, each individual locomotive was the customary freight unit because the freight was charged on a lump sum per locomotive basis. The carrier's liability was limited to \$5000 (10 X \$500).<sup>41</sup>

The first variable the courts encountered came in the form of a partially packaged tractor. In *Gulf Italia Co. v. The Exiria*,<sup>42</sup> the court was asked to determine whether putting waterproof paper and wooden planking around the body of a tractor while leaving the tread portion uncovered would make the tractor a COGSA package. The ocean bill of lading described the

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34. 148 F.2d 141 (2nd Cir. 1945).

35. *Id.* at 143.

36. A "coli" is a component part. *Id.* at 142.

37. *Id.*

38. 148 F.2d at 143.

39. *Id.*, referencing, TEMPERLEY & VAUGHAN, CARRIAGE OF GOODS BY SEA ACT, 1924, 82 (4th. ed. 1932).

40. 201 F.2d 281 (2nd Cir. 1953).

41. *Id.* at 286. See also *India Supply Mission v. S.S. Overseas Joyce*, 246 F. Supp. 536 (S.D.N.Y. 1965) (locomotive is not a package; freight charges were lump sum therefore liability is limited to \$500); *Freedman & Slater, Inc. v. M. V. Tofevo*, 222 F. Supp. 964 (S.D.N.Y. 1963) [Automobiles (Goggomobiles) are not a package, however, freight was charged per auto therefore liability is \$500 per auto].

42. 160 F. Supp. 956 (S.D.N.Y. 1958), *aff'd*, 263 F.2d 135 (2nd Cir. 1959), *cert. denied*, 360 U.S. 902 (1959).

tractor as "semi-boxed."<sup>43</sup> The court held that the tractor was not a package for purposes of limiting the carriers liability, and stated that "a shipper who attempts to minimize possible harm to his property by putting protective covering on sensitive [machinery] parts [should not] be in a worse position than a shipper who cavalierly makes no effort to reduce the possibility of loss not only to himself but to the carrier."<sup>44</sup> In a later decision, this same court refined its definition by holding that machinery or equipment is a COGSA package when the purpose of partial packaging is to both protect the cargo and to facilitate its transportation and handling.<sup>45</sup>

Not satisfied with the results being obtained from the courts, carriers began to develop new strategies to limit their liability under COGSA. In *Pannell v. The S.S. American Flyer*,<sup>46</sup> the carrier defined the term "package" in a clause on the back of the ocean bill of lading. The clause read: "It is understood that the meaning of the word 'package' includes pieces and all articles of any description except goods shipped in bulk."<sup>47</sup> The court decided that there was "no reason why this specific definition should not prevail over the general term 'package' contained in the Act"<sup>48</sup> and held that a yacht was a COGSA package; the carrier's liability was limited to \$500 for the yacht.<sup>49</sup> The court reminded the shipper that the problem could have been avoided by declaring the full value of the yacht on the bill of lading and paying the additional freight charges.<sup>50</sup>

As cranes and forklift trucks came into common usage, shippers began to use pallets, skids<sup>51</sup> and similar items to facilitate

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43. 263 F.2d at 135.

44. 160 F. Supp. at 956, 960. *See also* *Tamini v. M/V Jewon*, 699 F. Supp. 105 (S.D. Tex. 1988), *aff'd*, 866 F.2d 741 (5th Cir. 1989) (a portable rotary drilling rig partially packaged is not a COGSA package); *but see* *Companhia Hidro Eletrica do Sao Francisco v. S.S. "Loide Honduras"*, 368 F. Supp. 289 (S.D.N.Y. 1974) (circuit breakers partially packaged are a COGSA package; the court said that packaging for protection, whether complete or partial, should be considered as constituting a package within §1304(5) of COGSA).

45. *Solar Turbines Inc. v. MV Alva Maersk*, 584 F. Supp. 32 (S.D.N.Y. 1983).

46. 263 F.2d 497 (2nd Cir. 1959), *cert. denied*, 359 U.S. 1013 (1959).

47. *Id.* at 498.

48. *Id.*

49. *Id.*

50. *Id.*

51. "One of a group of objects (as planks, or logs) used to support or elevate a struc-



cargo handling. This presented new opportunities for carriers to attempt to limit their liability, and for the courts to define a COGSA package. For example, in *Aluminios Pozuelo Ltd. v. S.S. Navigator*,<sup>52</sup> the shipper mounted a toggle press<sup>53</sup> on to a skid for handling purposes. In making its determination, the court looked at the common definition of a package, such 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. A parcel is a small package; "parcel" being diminutive of "package." Each of the words denotes a thing in form suitable for transportation or handling, or sale from hand to hand. As ordinarily understood in the commercial world, it means a shipping package.<sup>54</sup>

The court decided that the toggle press on a skid was a COGSA package because the skid facilitated the transportation and handling of the machine.<sup>55</sup> In dicta, however, the court stated that, had the skid been used to protect the machine during shipment, a COGSA package may have not existed.<sup>56</sup> Following this lead, the plaintiff in *Hartford Fire Ins. Co. v. Pacific Far East Line, Inc.*<sup>57</sup> successfully argued that a transformer with lifting lugs,

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ture or object. . . a low platform mounted (as on wheels) on which material is set for handling or moving." WEBSTER'S NEW COLLEGIATE DICTIONARY 1087 (8th ed. 1975).

52. 277 F. Supp. 1008 (S.D.N.Y. 1967), *aff'd*, 407 F.2d 152 (2nd Cir. 1968).

53. A toggle press is "a toggle-joint press." A toggle joint is "a device consisting of two bars jointed together end to end but not in line, so that when a force is applied to the knee tending to straighten the arrangement, the parts abutting or jointed to the ends of the bars will experience an endwise pressure which increases indefinitely as the bars approach a straight-line position." WEBSTER'S NEW INT'L DICTIONARY 2660 (2nd ed. 1957).

54. BLACK'S LAW DICTIONARY 1108 (6th ed. 1990).

55. *Aluminios Pozuelo Ltd. v. S.S. Navigator*, 277 F. Supp. 1008, 1010 (S.D.N.Y. 1967), *aff'd*, 407 F.2d 152 (2nd Cir. 1968); *see also* *Caterpillar, Inc. v. S.S. Enterprise*, 725 F. Supp. 1255 (S.D. Ga. 1989) (a tractor and track loader on metal platforms (bolsters) are packages); *Forwarding v. C.A. Naviera de Transporte Y Turismo*, 486 F. Supp. 636 (S.D. Fla. 1980) (air conditioning equipment bolted to wooden skid is a package); *Mediterranean Marine Lines, Inc. v. John T. Clark & Son of Maryland, Inc.*, 485 F. Supp. 1330 (D. Md. 1980) (a metal working shear on a wooden skid, covered with polyethylene and tarpaulin is a package); *Hartford Fire Ins. Co. v. Pacific Far East Line, Inc.*, 320 F. Supp. 324 (N.D. Cal. 1970), *rev'd*, 491 F.2d 960 (9th Cir. 1974), *cert. denied*, 419 U.S. 873 (1974) (electrical transformer mounted on skid is a COGSA package).

56. *Caterpillar Inc. v. S.S. Enterprise*, 725 F. Supp. 1255, 1258 (S.D. Ga. 1989).

57. 491 F.2d 960.

bolted to a wooden skid for protection purposes, was not a COGSA package.<sup>58</sup>

When a piece of machinery or equipment was completely enclosed in its own casing for protection purposes, the courts reached a similar decision. For example, in *General Motors Corp. v. Mormacoak*,<sup>59</sup> an electric generator was "mounted on a fabricated rolled steel base with provisions for lifting and jacking and [was] enclosed in a sound-insulated, weather-proof steel enclosure."<sup>60</sup> The generator did not have a skid or any packaging preparation designed to facilitate its transportation or handling.<sup>61</sup> The court held that the generator was not a package<sup>62</sup> and that the customary freight unit would be applied to determine the carrier's liability.<sup>63</sup> However, when machinery or equipment enclosed in its own casing underwent preparations to facilitate transportation and handling, the court deemed the cargo to be a package for COGSA purposes.<sup>64</sup>

Machinery or equipment loaded into an ocean container presented a new challenge for the court. In *Norwich Union Fire Ins. Soc., Ltd. v. Lykes Bros. S.S. Co., Inc.*,<sup>65</sup> the district court applied a complex rule to determine whether containerized shipments are packages based on the contents of the bill of lading. The rule states: 1) if the bill of lading does not indicate whether the machinery or equipment loaded into the container is packaged, the number of pieces stated on the bill of lading as being loaded into the container will determine the carrier's liability; 2) if the bill of lading does not list the number of pieces in the container, and instead lists only the container, the container will

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58. *Id.* at 965.

59. 327 F. Supp. 666 (S.D.N.Y. 1971), *aff'd*, 451 F.2d 24 (2nd Cir. 1971).

60. *Id.* at 667.

61. *Id.* at 668.

62. *Id.* See also *Solar Turbines Inc. v. S.S. Al Shidadiyah*, 575 F. Supp. 939, 942 (S.D.N.Y. 1983) (a generator permanently enclosed in trailer for mobility, protection and fireproofing is not a package).

63. 327 F. Supp. at 670.

64. See *General Electric Co. v. M.V. Nedlloyd Rouen*, 618 F. Supp. 62, 66 (S.D.N.Y. 1985), *aff'd*, 817 F.2d 1022 (2nd Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988) (a control cab enclosed in steel on weatherproof steel base and blocked and braced in preparation for transport was deemed to be a COGSA package); cf. *Vistar, S.A. v. M/V Sealand Exp.*, 680 F. Supp. 855, 857 (S.D. Tex. 1987) (a varnishing machine packed in a wooden crate for transportation purposes was a COGSA package).

65. 741 F. Supp. 1051 (S.D.N.Y. 1990).

be deemed the package; 3) if the bill of lading says that the cargo loaded in the container is "goods not shipped in packages," the customary freight unit will be applied.<sup>66</sup> In support of this rule, the court in *Morris Graphics Inc. v. Trans Freight Lines Inc.*<sup>67</sup> concluded that "the bill of lading description of the cargo as a 'loose used printing machine' constitutes the parties' specification that the shipment is one of 'goods not shipped in packages'" and the customary freight unit was applied to determining the carrier's liability.<sup>68</sup>

### B. *Cargo in Cases, Cartons, Bags and Similar Shipping Units*

There is general agreement by shippers and carriers that individual cases, cartons, and bags of material are packages for COGSA purposes.<sup>69</sup> However, when shippers began to palletize these articles to facilitate handling and transportation and to protect the goods against damage, the question arose whether the individual cases or the palletized unit was the COGSA package. In deciding, the courts frequently referred to plain meaning of the term "package" which is "[a] bundle put up for transportation or commercial handling. . . ."<sup>70</sup> For example, in *Standard Electrica, S.A. v. Columbus Lines, Inc.*<sup>71</sup> where television tuners packed in cases were fastened to pallets by metal straps, the court held that the pallets constituted packages because they were "bundles put up for transportation."<sup>72</sup>

The courts have found that the initial step in interpreting

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66. *Id.* at 1057.

67. No. 88 Civ. 3583 (CSH), 1990 WL 96765, (S.D.N.Y. Jul. 3, 1990).

68. *Id.*

69. *Cf. Standard Electrica, S.A. v. Columbus Lines, Inc.*, 262 F. Supp. 343 (S.D.N.Y. 1966), *aff'd*, 375 F.2d 943 (2nd Cir. 1967), *cert. denied*, 389 U.S. 831 (1967).

70. BLACK'S LAW DICTIONARY 1108 (6th ed. 1990).

71. 262 F. Supp. 343 (S.D.N.Y. 1966), *aff'd*, 375 F.2d 943 (2nd Cir. 1967), *cert. denied*, 389 U.S. 831 (1967).

72. *Id.* at 345. *See also* *Allied Int'l American Eagle Trading Corp. v. S.S. "Yang Ming"*, 672 F.2d 1055 (2nd Cir. 1982) (screws, bolts, nuts, and studs in cartons, cases and drums on pallets, the pallets are packages); *American Far Eastern Trading Co. v. Sea-Land Service, Inc.*, 493 F. Supp. 125 (N.D. Cal. 1980), *aff'd*, 678 F.2d 830 (9th Cir. 1982) (cases shrink wrapped on pallets, the pallets are the packages); *Menley & James Laboratories Ltd. v. M/V Hellenic Splendor*, 433 F. Supp. 252 (S.D.N.Y. 1977) (163 cartons of cosmetics loaded on 9 pallets, the pallets are packages); *Omark Industries, Inc. v. Associated Container Transp. (Australia), Ltd.*, 420 F. Supp. 139 (D. Or. 1976) (machine tools in cases loaded on pallets, the palletized units are packages).

what constitutes a package is to examine the contractual intent as indicated in the ocean bill of lading.<sup>73</sup> Thus, in *Insurance Co. of North America v. M/V Frio Brazil*<sup>74</sup> the 12,000 cartons of orange juice, and not the pallets upon which they were loaded, were deemed to be the COGSA package.<sup>75</sup> The court stated that, in listing both the number of pallets and the number of cases on the ocean bill of lading, the shipment description in the bill of lading of the contracting parties was ambiguous, therefore, the court was required to resolve the issue in favor of the shipper.<sup>76</sup> Similarly, in *Allied Chemical Int'l Corp. v. Compania de Navegacao Lloyd Brasileiro*,<sup>77</sup> where 6,000 bags of chemicals were shipped on pallets, both the number of pallets and the number of bags were listed on the ocean bill of lading. The court held that the individual bags and not the pallets were the COGSA package because there was an additional showing of intent of the parties. The ocean bill of lading listed the freight rate which was based on the value of the material. The court deemed that this information showed that the carrier intended to be responsible for the entire value of the goods.<sup>78</sup>

When containerization was introduced into international trade, carriers were held liable for the contents of carrier-loaded containers.<sup>79</sup> *Leather's Best, Inc. v. S. S. Mormaclynx*<sup>80</sup> pro-

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73. *Allied Chemical Int'l Corp. v. Compania de Navegacao Lloyd Brasileiro*, 775 F.2d 476 (2nd Cir. 1985), cert. denied, 475 U.S. 1099 (1986). Cf., *Vegas v. Compania Animada Venezolana de Navegacion*, 720 F.2d 629 (11th Cir. 1983).

74. 729 F. Supp. 826 (M.D. Fla. 1990).

75. *Id.*

76. 729 F.2d at 836. See also *Allied Int'l American Eagle Trading Corp. v. S.S. "Export Bay"*, 468 F. Supp. 1233 (S.D.N.Y. 1979) (Kegs of steel fasteners were shipped on pallets and both the number of pallets and the number of kegs were listed on the ocean bill of lading. The court held that the individual kegs and not the pallets were deemed the COGSA package).

77. 775 F.2d 476.

78. *Id.* at 485-86.

79. A carrier who receives cargo directly from a shipper and who arranges to have that cargo loaded into a container is liable for \$500 per package loaded into the container. See *Inter-American Foods, Inc. v. Coordinated Caribbean Transport, Inc.*, 313 F. Supp. 1331 (S.D. Fla. 1970). (This case concerned nineteen shipments of frozen shrimp (decomposed) and 339 missing cartons. The carrier dispatched containers to the shipper's facility and receipted 620 cartons per container. The carrier made out each bill of lading indicating: "1 trailer load said to contain shrimp product of Nicaragua, shrimpers' load and count." The court held that since the carrier receipt showed the individual cartons, and since the carrier knew the contents of each container, each carton of shrimp

vided the first guideline for determining a carrier's liability for a shipper-loaded container.<sup>81</sup> In *Leather's Best*, the court stated:

[W]e cannot escape the belief that the purpose of §4(5) of COGSA was to set a reasonable figure below which the carrier should not be permitted to limit his liability and that a 'package' is thus more sensibly related to the unit in which the shipper packed the goods and described them than to a large metal object, functionally a part of the ship, in which the carrier caused them to be 'contained.'<sup>82</sup>

Here the court held that because the bill of lading listed the contents of the container, each of the 99 bales of leather stowed therein was a COGSA package.<sup>83</sup>

*Royal Typewriter Co., Div. of Litton Business Systems, Inc. v. M/V Kulmerland*<sup>84</sup> established the "functional package unit" test<sup>85</sup> as a measure for determining whether the contents or the container was the COGSA package in a shipper-loaded container. The court stated that "the first question in any container case is whether the contents of the container could have feasibly been shipped overseas in the individual packages or cartons in which they were packed by the shipper."<sup>86</sup> In applying this test, the court determined that the cartons in which the adding machines had been packed were not adequate to transport the machines overseas, therefore, the container and not the cartons inside was the COGSA package.<sup>87</sup> The court distinguished *Leather's Best* by noting that, once the shipper

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was a COGSA package).

80. 313 F. Supp. 1373 (E.D.N.Y. 1970), *aff'd in part, reversed in part*, 451 F.2d 800 (2nd Cir. 1971), *on remand*, 346 F.Supp 962 (E.D.N.Y. 1972).

81. The shipper arranged to have the carrier's container brought to its facility where it was loaded, sealed, and delivered back to the carrier. *Id.*

82. 451 F.2d at 815.

83. *Id.* at 806-7.

84. 346 F. Supp. 1019 (S.D.N.Y. 1972), *aff'd*, 483 F.2d 645 (2nd Cir. 1973).

85. *Id.* at 649. The court here called it the "functional package unit test", however it is also referred to as the "functional economics test." See *e.g.*, *Cameco, Inc. v. S.S. Am. Legion*, 514 F.2d 1291 (2nd Cir. 1974).

86. 483 F.2d at 648. The court relied on the dissenting opinion of Judge Hays in *Encyclopedia Britannica, Inc. v. S.S. Hong Kong Producer*, 422 F.2d 7, 20 (2nd Cir. 1969). *Id.* n.9.

87. *Id.* at 649.

shows that his packages are functional, it is presumed that the container is not the package and the carrier has the burden of supplying evidence that the parties intended the container to be the package.<sup>88</sup>

The cases that followed used the combined reasoning of *Royal Typewriter* and *Leather's Best*<sup>89</sup> until the court in *Mitsui & Co., Ltd. v. American Export Lines*<sup>90</sup> abandoned the "functional package unit" test.<sup>91</sup> In doing so the court stated that: "[c]learly the goal of international uniformity is better served 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 . . ."<sup>92</sup> Since *Mitsui*, the courts have continued to follow the rule in *Leather's Best* in determining whether the container or the contents is the COGSA package.<sup>93</sup>

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88. *Id.*

89. *See Cameco, Inc. v. S.S. Am. Legion*, 514 F.2d 1291 (2nd Cir. 1974); *see also*, *Matsushita Elec. Corp. of Am. v. S.S. Aegis Spirit*, 414 F. Supp. 891 (W.D. Wash. 1976) (cartons of electronic equipment in containers; cartons were packages).

90. 636 F.2d 807 (2nd Cir. 1981).

91. *Id.* at 821.

92. *Id.*

93. *See Smythgreyhound v. M/V "Eurygenes"*, 666 F.2d 746 (2nd Cir. 1981) (cartons of stereo equipment in containers — cartons are packages where shipper disclosed contents of container; applies even though shipper had choice of container or break-bulk); *see also* *Croft & Scully Co. v. M/V Skulptor Vuchetich*, 664 F.2d 1277 (5th Cir. 1982) (cases of soda are packages, not container, where bill of lading gives no special definition of package and shipper included description contents of container on B/L); *Sentinel Enterprises, Inc. v. M/V "Simo Matavulj"*, No. 89 Civ. 3301 (RWS) 1990 WL 89362 (S.D.N.Y. 1990) (where contents disclosed on the bill of lading container is not package); *St. Paul Fire & Marine Ins. Co. v. Sea-Land Service, Inc.*, 735 F. Supp. 129 (S.D.N.Y. 1990) (container described as loaded with 150 packages of Freight All Kinds equals 150 COGSA packages); *International Adjusters, Inc. v. Korean Wonis-son*, 682 F. Supp. 383 (N.D. Ill. 1988) (contents of container listed as nine cases and 42 cartons of electronic equipment equal 51 COGSA packages); *Sony Magnetic Products, Inc. of America v. Merivienti D/Y*, 668 F. Supp. 1505 (S.D. Ala. 1987), *aff'd*, 863 F.2d 1537 (11th Cir. 1989) (where container loaded with video cassettes in cases on pallets, each carton is a package when described on bill of lading); *Insurance Co. of North America v. S/S Itatica*, 567 F. Supp. 59 (S.D.N.Y. 1983) (where shipper declares contents, here cases of wine, container is not package).

C. *Bulk Shipments, Bundles, and Other Unusual Shipping Units*

Not all items shipped in international transportation are able to be shipped as produced. When a manufacturer produces a chemical "in bulk"<sup>94</sup> for shipment overseas, a suitable container is needed. In *Shinko Boeki Co., Ltd. v. S.S. Pioneer Moon*<sup>95</sup> the carrier furnished 2000 gallon tanks for a bulk shipment of liquid latex. The carrier supervised the loading, and the ocean bill of lading indicated that 24 tanks were shipped containing a total of 359,170 pounds of liquid latex.<sup>96</sup> The carrier argued that the individual tanks were the container for purposes of limiting its liability.<sup>97</sup> The court did not agree. It held that 1) the tanks were the carrier's property and were filled under the carrier's supervision, and 2) the bill of lading contained a definition of the term "package" which excepted "goods shipped in bulk."<sup>98</sup> The tanks were not the COGSA package and the carriers liability was determined by the number of customary freight units.

When foodstuffs are shipped in bulk, the same result occurs. For example, in *Watermill Export, Inc. v. MV Ponce*<sup>99</sup> potatoes were loaded into an ocean container. The bill of lading did not indicate whether the potatoes were in packages. The court considered the shipment "goods not shipped in packages" and applied the customary freight unit to limit the carrier's liability.<sup>100</sup>

The courts have dealt with large items, like steel coils, in a manner similar to that of machinery and equipment. For example, when a shipper crated a steel coil, the crate was considered the COGSA package.<sup>101</sup> Similarly, when a shipper banded a steel

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94. "[N]ot divided into parts; not packaged in separate units." WEBSTER'S NEW COLLEGIATE DICTIONARY 145 (8th ed. 1975).

95. 507 F.2d 342 (2nd Cir. 1974).

96. *Id.* at 344.

97. *Id.*

98. 507 F.2d at 345.

99. 506 F. Supp. 612 (S.D.N.Y. 1981).

100. *Id.* at 617. See also *B. Terloth and Cia (Canada) Inc. v. M/V Tropic Lure*, 682 F. Supp. 514 (S.D. Fla. 1987) (Frozen poultry parts were loaded in a refrigerated container; the container is not a package and goods are not deemed to be shipped in packages).

101. See *Mitsubishi Int'l Corp. v. S. S. Palmetto State*, 311 F.2d 382 (2nd Cir. 1962), cert. denied, 373 U.S. 922 (1963).

coil but made no further preparation for shipment, the court considered this preparation for transport and called each steel coil a COGSA package.<sup>102</sup>

Bundling is another technique that the courts consider preparation for transport. When a shipper bundles ingots<sup>103</sup> or lengths of pipe,<sup>104</sup> each bundle is deemed to be the COGSA package.<sup>105</sup>

For shipments of household goods, the issue of what is to be considered the COGSA package will depend on the contents of the ocean bill of lading.<sup>106</sup> In *Nemeth v. General S.S. Corp., Ltd.*<sup>107</sup> the ocean bill of lading described the shipment as "3 (three) cases household goods"<sup>108</sup> and listed a value of \$400 when the actual value was "in excess of \$20,000."<sup>109</sup> When the goods arrived, two of the crates had been broken open and the parcels inside were either damaged or missing.<sup>110</sup> The shipper claimed full value of the goods, but the court held that the carrier's liability was limited to \$500 per crate or \$1000.<sup>111</sup> In making this determination, the court held that the ocean bill of lading gave no indication as to the number of items or packages contained in the crates, therefore, each crate would be a COGSA package.<sup>112</sup> When household goods are shipped in containers, a similar result occurs. In both *Lucchese v. Malabe Shipping Co., Inc.*<sup>113</sup> and *Rosenbruch v. American Export Isbrandtsen Lines,*

102. *Nichimen Co. v. M/V Farland*, 333 F. Supp. 691 (S.D.N.Y. 1971), *modified*, 462 F.2d 319, (2nd Cir. 1972). See BLACK'S LAW DICTIONARY 1108 (6th ed. 1990) definition of package which states: "A bundle put up for transportation or commercial handling. . . ." *Id.*

103. *Seguros "Illimani" S.A. v. M/V Popi P*, 735 F. Supp. 108 (S.D.N.Y. 1990), *aff'd*, 929 F.2d 89 (2nd Cir. 1991).

104. *Crispin Co. v. M/V Morning Park*, 578 F.Supp. 359 (S.D.Tex. 1984).

105. See *supra* notes 102 and 103.

106. See 2A BENEDICT, *supra* note 5, §167 at 16-20. (The courts have attached great significance to the description of the cargo on the ocean bill of lading).

107. 691 F.2d 800 (9th Cir. 1982).

108. *Id.* at 610.

109. *Id.* at 611. *Nemeth* claimed that he provided the moving company an inventory of the goods and their true value which was in excess of \$20,000. He further claimed that the declared \$400 value on the bill of lading was put there without his knowledge or consent. *Id.*

110. *Id.*

111. *Id.*

112. 691 F.2d at 613-14.

113. 351 F. Supp. 588 (D.P.R. 1972). Household goods of several persons were



*Inc.*<sup>114</sup> the courts agreed that unless the contents of the container are described on the ocean bill of lading and an appropriate value is declared, the carrier's liability will be limited to \$500 for the entire container.<sup>115</sup>

In *Marcraft Clothes, Inc. v. M/V Kurobe Maru*,<sup>116</sup> a clothing merchant obtained the benefit of a properly prepared ocean bill of lading. The manufacturer shipped a container load of mens' suits that arrived in New York damaged. In resolving the claim, the court held that the merchant was entitled to the full value of the damaged goods. The manufacturer had described the contents of a container as "4,400 Sets of Men's Suits with Vests."<sup>117</sup> The court stated that the carrier had been put on notice as to the contents of the container and, therefore, its liability was limited to \$500 for each individual suit because each suit was deemed a COGSA package.<sup>118</sup>

Shipments of live plants presented another opportunity for the courts to convey the message that the description on ocean bill of lading was a key element to determining what the COGSA package would be. In *Binladen BSB Landscaping v. M.V. Nedlloyd Rotterdam*<sup>119</sup> where the bill of lading listed the number of containers and the number of live plants in each, the court held that failure to describe goods as not separately packaged will mean the "goods are not shipped in packages" and the \$500 liability limit will apply per "customary freight unit."<sup>120</sup>

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loaded in the same container but the ocean bill of lading did not describe the nature and value of the goods; the container was loaded by the shipper and the freight was charged on lump sum basis for the container. *Id.* at 590.

114. 357 F. Supp. 982 (S.D.N.Y. 1973), *aff'd*, 543 F.2d 967 (2nd Cir. 1976), *cert. denied*, 429 U.S. 939 (1976). A container was loaded with the household goods of one individual; the contents were loaded by the moving company and not described on the ocean bill of lading. *Id.* at 983.

115. *Id.* at 985. *Lucchese v. Malabe Shipping Co., Inc.*, 351 F. Supp. 588, 590 (D.P.R. 1972). *See also D.W.E. Corp. v. T.F.L. Freedom*, 704 F. Supp. 380 (S.D.N.Y. 1989) (a container loaded with household goods is a package when the goods loaded inside are not described).

116. 575 F. Supp. 239 (S.D.N.Y. 1983).

117. *Id.* at 242.

118. *Id.* at 243. The court noted that since each suit was individually hung and wrapped in a plastic wrap, it constituted a package. The court stated that it was irrelevant whether the package was sufficient for breakbulk shipping. *Id.*

119. 759 F.2d 1006 (2nd Cir. 1985), *cert. denied*, 474 U.S. 902 (1985).

120. *Id.* at 1013, *quoted in Watermill Export, Inc. v. "Ponce"*, 506 F. Supp. 612, 617 (S.D.N.Y. 1981).

Additionally, in *Van Der Salm Bulb Farms, Inc. v. Hapag Lloyd, AG*<sup>121</sup> where the bill of lading specified that the container was loaded with 872 trays of flower bulbs, the court held that each tray was a COGSA package.<sup>122</sup>

### III. ANALYZING THE RULES: THE DEFINITION OF A COGSA PACKAGE

In deciding a COGSA package case, the factor most relied upon by the courts is the intent of the parties as exhibited by the ocean bill of lading. The description of the cargo plays a significant role in determining intent.<sup>123</sup> In describing the goods, a key element is how the goods are physically packaged. To determine intent, the courts have also examined the construction of the freight rate<sup>124</sup> and any clauses that appeared in the bill of lading.<sup>125</sup> The courts have developed a complex set of rules which allow the shipper and carrier to each determine the level of risk they bear for the goods shipped in international trade.

#### A. Machinery and Equipment

Whether a piece of machinery or equipment is a COGSA package, and what the carrier's limitation of liability is, can be determined by applying the following rules:

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121. 818 F.2d 699 (9th Cir. 1987).

122. *Id.* at 701.

123. *See Norwich Union Fire Ins. Soc., Ltd. v. Lykes Bros. S.S. Co., Inc.*, 741 F. Supp. 1051 (S.D.N.Y. 1990) (the container is the package where the contents were not listed on the bill of lading); *see also Insurance Co. of North America v. M/V Frio Brazil*, 729 F. Supp. 826 (M.D.Fla. 1990) (where description is ambiguous, the court will resolve the issue in favor of the shipper).

124. *See Allied Chemical Intern. Corp. v. Compania de Navegacao Lloyd Brasileiro*, 775 F.2d 476 (2nd Cir. 1985), *cert. denied*, 475 U.S. 1099 (1986) (when the freight charge is based on value of goods, the carrier is liable for the full value of the goods); *see also* *Petition of Isbrandtsen Company*, 201 F.2d 281 (2nd Cir. 1953) (freight was charged on a lump sum basis per locomotive); *Caterpillar Americas Co. v. S.S. Sea Roads*, 231 F. Supp. 647 (S.D. Fla. 1964), *aff'd*, 364 F.2d 829 (5th Cir. 1966) (the freight rate was lump sum).

125. *See Pannell v. The S.S. American Flyer*, 157 F. Supp. 422 (S.D.N.Y.), *modified*, 263 F.2d 497 (2nd Cir. 1959), *cert. denied*, 359 U.S. 1013 (1959) (where the bill of lading gives a more specific definition of the term package, the bill of lading definition will prevail over general description in act); *see also Shinko Boeki Co., Ltd. v. S.S. Pioneer Moon*, 507 F.2d 342 (2nd Cir. 1974) (the bill of lading contained a clause that stated goods shipped in bulk were not goods in packages).

1. When a piece of machinery or equipment is shipped as produced, it is not a COGSA package. The customary freight unit will be applied to determine the carrier's liability.<sup>126</sup>
2. When machinery or equipment is shipped on a skid or pallet, or is otherwise prepared in a manner that facilitates its handling or transportation, the equipment or machinery will be considered a COGSA package.<sup>127</sup> Conversely, if the machinery or equipment is packaged for protection purposes only it will not be deemed a COGSA package and the customary freight unit will apply to limit the carrier's liability.<sup>128</sup> If the machinery or equipment is packaged for the dual purposes of protection and facilitation of transportation and handling, the item will be deemed a COGSA package.<sup>129</sup>
3. When machinery or equipment is shipped in a container:
  - a. If there is no indication on the bill of lading whether the machinery or equipment inside is packaged, the number of pieces stated as the contents on the bill of lading will determine the carrier's liability;
  - b. If the bill of lading lists the container but does not identify the contents, the container will be deemed the package; and,
  - c. If the cargo in the container is indicated to be goods not shipped in packages, the customary freight unit will be applied to limit the carrier's liability.<sup>130</sup>
4. If the carrier specifically describes the term "package" in a clause on the back of the ocean bill of lading, this specific description will apply over the general term contained in COGSA.<sup>131</sup>
5. The shipper can avoid the carrier's limitation of liability by declaring the value of the goods on the ocean bill of lading and paying the additional freight charge.<sup>132</sup>

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126. See *supra* pp. 8-9.

127. See *supra* notes 42-44, 51-54 and 63 and accompanying text.

128. See *supra* notes 55-61 and accompanying text.

129. See *supra* note 45 and accompanying text.

130. See *supra* notes 64-66 and accompanying text.

131. See *supra* notes 46-49 and accompanying text.

132. See *supra* note 50 and accompanying text.

### B. *Cargo in Cases, Cartons, Bags and Similar Shipping Units*

When shipping cases, cartons, bags or similar types of shipping units, the rules vary slightly from those used for machinery and equipment.

1. Individual cases, cartons and bags of material are COGSA packages when shipped individually.<sup>133</sup>
2. If the cases, cartons, bags, etc. are palletized for the dual purpose of protecting the goods from damage and to facilitate their transportation and handling, the pallet is the package.<sup>134</sup>
3. Where the intent of the parties as indicated by the bill of lading is ambiguous, the ambiguity will be resolved in favor of the shipper.<sup>135</sup>
  - a. where pallets and their contents are listed on the bill of lading, the contents of the pallet will be the package.<sup>136</sup>
  - b. where containers and their contents are listed on the bill of lading, the contents of the container will be the package.<sup>137</sup>
4. Where the bill of lading further evidences the intent of the parties, the package will be determined based upon that intent.<sup>138</sup>

### C. *Bulk Shipments, Bundles and Other Unusual Shipping Units*

Many items do not explicitly fall within the previous categories and, therefore, have their own rules.

1. If similar items are bundled together, the bundle will be the COGSA package.<sup>139</sup>
2. Bulk shipments of material will be deemed goods not shipped in packages and the carrier's liability will be based on the customary freight unit.<sup>140</sup>
3. Large items, other than machinery or equipment, that are prepared for transportation will be considered COGSA

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133. See *supra* note 68 and accompanying text.

134. See *supra* notes 69-71 and accompanying text.

135. See *supra* notes 72-73 and accompanying text.

136. See *supra* note 75 and accompanying text.

137. See *supra* notes 81-92 and accompanying text.

138. See *supra* notes 76-78 and accompanying text.

139. See *supra* notes 102-104 and accompanying text.

140. See *supra* notes 93-99 and accompanying text.

packages.<sup>141</sup>

4. If the items being shipped are crated or containerized and the contents of the crates or containers are listed on the bill of lading, the individual parcels that make up the contents will be the COGSA packages.<sup>142</sup>

#### CONCLUSION

The goals of the shipper and carrier involved in moving shipments in international trade can be stated as follows: "[t]he shipper will wish to minimize his freight costs while maximizing his chance of full recovery in the event of an accident. A carrier, on the other hand, will desire to maximize the shipper's freight cost and thus his own revenues while at the same time minimizing his exposure to liability."<sup>143</sup> A key element in limiting liability is the definition of a package. Under COGSA, the carrier's liability is limited to \$500 per package or per customary freight unit,<sup>144</sup> however, no definition of the term package was provided in the Act. After much litigation, the courts constructed a complex set of rules that help shippers and carriers to determine what is a COGSA package for purposes of limiting liability. The key to these rules lies in the intent of the parties to the bill of lading. If the bill of lading provides a proper description for the goods, absent any evidence of a contrary intent of the parties, this description will determine the limitation of liability. However, if the bill of lading shows that the carrier and shipper intended something other than the description of the goods to control the limitation of liability, the intent of the parties will control.

It has been fifty-six years since COGSA was passed, and the conflict over what is a COGSA package may not be ended. Technology continues to advance. Along with it comes the opportunity for shippers and carriers to disagree on whether a new development impacts the definition of a package. Although the

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141. See *supra* notes 100-101 and accompanying text.

142. See *supra* notes 105-121 and accompanying text.

143. D.C. Toedt III, *supra* note 1, at 981.

144. 46 U.S.C. app. § 1304(5).

present environment is relatively static, there is no telling what the future holds.

Nancy A. Sharp