Interpreting COGSA: The Meaning of "Package"

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COMMENT

INTERPRETING COGSA: THE MEANING OF "PACKAGE"

HENRY J. VAN WAGENINGEN*

I. HISTORICAL DEVELOPMENT: BLUEPRINT FOR CONFUSION ............................................. 169
II. THE COURTS' INTERPRETATIONS OF THE PURPOSE OF COGSA ...................................... 173
III. DEFINITIONAL APPROACHES: THE MEANING OF "PACKAGE" ........................................... 175
   A. Defining Package According to the Layman's Concept .................................................. 177
   B. Appearance, Size and Weight ......................................................................................... 179
   C. The Facilitation for Transport Test ................................................................................ 180
   D. The Applicability of the Bill of Lading Description As a Test ...................................... 185
       1. Whenever COGSA Applies Ex Proprio Vigore ......................................................... 185
       2. Whenever COGSA Does Not Apply Ex Proprio Vigore ............................................. 188
   E. The Container's Effect on the Viability of "Package" As the Relevant Unit ................... 190
IV. CONCLUSION AND PROPOSALS FOR RESOLUTION OF THE PROBLEM ............................. 195
   A. A Judicial Solution ........................................................................................................ 197
   B. Legislative Solutions .................................................................................................... 198

I. HISTORICAL DEVELOPMENT: BLUEPRINT FOR CONFUSION

The International Convention for the Unification of Certain Rules Relating to Bills of Lading,1 otherwise known as the Hague Rules, were formulated in 1925 to bring uniformity and predictability to the international shipping trade, which previously had been burdened by the myriad laws and regulations of all the maritime nations. Especially confusing before development of the Hague Rules, were the exculpatory clauses in the bills of lading which, given quite diverse treatment by the courts, left shippers without effective protection from liability.

In 1936 the United States enacted the Carriage of Goods by Sea Act2 (COGSA) which incorporated the language of the Hague Rules almost without change. There is, however, one variation in the wording of COGSA which has served to create havoc and uncertainty in the very area to which COGSA and the Hague Rules were designed to bring a measure of uniformity and predictability: the limitation of carriers' liability for damaged cargo. The Hague Rules limit a carrier's liability to a specific monetary amount "per pack-

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age or unit.” Section 1304(5) of COGSA, on the other hand, provides that a carrier’s liability shall be limited to “$500 per package . . . or in case of goods not shipped in packages, per customary freight unit . . . unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.”

Unlike the United States, Canada and many European countries adopted in their Carriage of Goods by Sea Legislation, the “per package or unit” terminology of the Hague Rules, although they failed to define either term. The courts of many of these countries, however, have interpreted the word “unit” to be the same as a “shipping unit,” and almost the same as a package, thereby producing a result radically different from that achieved in the United States under COGSA. In a recent decision, the Supreme Court of Canada made the following statement:

[T]he natural interpretation of the word “unit” in the phrase “package or unit” appears to be that it has been added in order to cover parts of a cargo similar in a general way to a package, but not strictly included in that term, which properly implies something packed up or made up for portability and would therefore not include such a thing as a log of wood or a bar of metal. The word “unit” has, it is suggested, been added in order to embrace such things and not to extend the scope of the Rule to bulk cargoes or parts thereof.

The court held that an unpackaged tractor and generator were each one “shipping unit” and therefore limited recovery to a total of $1,000. The plaintiff’s argument that the limit of liability should be computed on the basis of $500 per unit of freight rate, as is done under COGSA in the United States, was rejected. The court reasoned that the unpackaged units of less careful shippers should not merit greater legal protection than that which prudently prepared

3. Id. § 1304(5) (emphasis added). The Hague Rules also provide for full liability if the nature and value of such goods is declared by the shipper and included in the bill of lading.

4. See Code Com. Mar. art. 91. § IV(5) (Belgium); Carriage of Goods by Sea Act, art. IV(5) (Eng.); Act of (2 April) 2. 4. 1936 § 5 (Fr.); HGB § 660 (Ger.); NMC § 469 no. 5, as amended by an Act of 26/8. 1956 (Neth.); Carriage of Goods by Water Act, CAN. REV. STAT. c. 15 (1970) (Canada); Canada Shipping Act, CAN. REV. STAT. c. 5-9 (1970) r. 5 of art. IV.

The words “freight unit” are found in section 105 of the Swiss Maritime Code, and “parcel or . . . customary unit of the commodity” in section 118 of the Maritime Code of the U.S.S.R. See E. SELVIG, UNIT LIMITATION OF CARRIER’S LIABILITY § 2 (1961) [hereinafter cited as SELVIG].

packages received, and it further determined that the wording in the Canadian Carriage of Goods by Water Act (COGWA) precluded an analogy to COGSA because the words, "customary freight unit," in COGSA were meant to change, not clarify, the meaning of the word "unit" as it appears in the Hague Rules and COGWA.⁶

Although there are few English, German or Scandinavian decisions construing the word "unit," those which do so are in accord with the decisions of the French courts which have tackled the problem extensively reaching much the same conclusion as the Canadians. In *The Strasbourgeois,*⁸ for example, 500 casks of wine were transported from Algeria to France, but two were found to be missing upon delivery. While the consignee argued that the carrier's limitation of liability should be based on the hectoliter—each cask containing six hectoliters—the court held instead that the relevant unit was the cask.

In their effect, then, there is little difference between the concepts of "package" and "unit" under the prevailing interpretation of these words in the Hague Rules and national legislation based directly upon them. If an item of cargo does not qualify as a "package," it may nonetheless be categorized as a "unit." The limitation of the carrier's liability is $500 in either case. Under COGSA, however, a court's determination of whether an article of cargo is or is not a "package" will crucially affect the amount which will be recovered in damages. Where even a few "customary freight units" are involved, the limitation of liability may run into the thousands of dollars; if only one "customary freight unit" is found, the carrier's liability is but $500. Thus, the carrier's limitation of liability is clearly more uniform and predictable under the wording of the Hague Rules. Nevertheless, two interpretive problems do arise under those rules: (1) whether bulk cargo constitutes a "unit" and (2) whether the recently developed large shipping containers are "packages" or "units."

The Hague Rules do not specifically include or exclude bulk cargo from the liability limitation. The prevailing view in France, Germany and the Scandinavian countries is that bulk cargo is subject to the limitation under article IV(5), whereas Canada and Eng-

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⁶. *Id., citing* The Bill, 55 F. Supp. 780 (D. Md.), aff'd, 145 F.2d 470 (4th Cir. 1944), which defined "per customary freight unit" as the "unit of quantity, weight, or measurement of the cargo customarily used as the basis for the calculation of the freight rate to be charged." *Id.* at 783.

⁷. SELVIG, supra note 4, at 46-54.

land hold to the contrary. The French courts have calculated the carrier's limitation of liability on the basis of weight, volume, or other unit of measure in cases where the bulk cargo cannot be separated into distinguishable "units." It is important to note, however, that the "unit" on which the freight is adjusted—the relevant unit in American cases—is not necessarily the unit on which calculations will be made in the French courts.

There has been no confusion over the treatment of bulk cargo in the United States under COGSA because the terminology "per customary freight unit" is easily applicable to bulk cargo.

Common, however, to the wording of both the Hague Rules and COGSA is the second interpretational problem: whether containers are to be considered as "packages" or "units." The problem is so similar under both types of statutes that American decisions were cited in support for the holding in a Canadian case which recognized that the container revolution has outdated the concepts of "package" or "unit."

It is readily apparent from this brief introduction that Congress, by changing the wording of the Hague Rules when adopting COGSA, sacrificed uniformity of result with the laws of the countries which adopted the terminology of the Hague Rules. What may not be quite so obvious is that Congress also failed to foresee the definitional problems created in United States courts by the change. "Packages" or "units" are simple and interchangeable concepts.

9. SELVIG, supra note 4, at 39-40. See also note 5 supra and accompanying text.
10. Compare Encyclopaedia Britannica, Inc. v. M/V New Yorker, 422 F.2d 7 (2d Cir. 1969), with Transports Maritimes de L'Etat v. Lesueur, 1949 DMF 11 Cour de Cassation 28. 4. (April 28, 1947), where, instead of the unit on which the freight rate was charged, the kilogram was held to be the applicable "unit" in applying the limitation of liability to a cargo of cordage because the cargo had been described in the bill of lading by weight only, i.e., as 40,000 kg.

11. See The Bill, 55 F. Supp. 780 (D. Md.), aff'd, 145 F.2d 470 (4th Cir. 1944), holding that a ship's tank of oil shipped in bulk was not a "package." The court applied the "customary freight unit" limitation of liability: $500 per 1000 kg. To overcome the argument that "per customary freight unit" in COGSA meant "shipping unit," evidence was introduced to show the synonymous trade usage of "freight unit" and "freight rate." See Middle East Agency, Inc. v. The John B. Waterman, 86 F. Supp. 487, 496 (S.D.N.Y. 1949).

The case which best illustrates the difference between COGSA and the Hague Rules in this area is Waterman S.S. Corp. v. United States Smelting, Ref. & Mining Co., 155 F.2d 687 (5th Cir.), cert. denied, 329 U.S. 761 (1946) which held that liability on 698 pieces of structural steel shipped in bulk, each weighing more than one ton, would be limited to $500 per 100 lbs. (the "customary freight weight"), not to $500 per piece. The courts in Europe would likely have held that each piece was a "shipping unit," thereby limiting liability to $500 per piece.

12. The Tindefjell, [1973] 2 Lloyd's List L. R.
under the Hague Rules since they are both shipping units. But when Congress rejected the term “unit” and replaced it with the “per customary freight unit” standard of COGSA, the meaning of the word “package” assumed a far more crucial role in determining the carrier’s liability. Congress exacerbated the situation by failing to define the term “package”; as of yet, the courts have been unable to prescribe a universally acceptable definition. The result is thus a lack of uniformity not only on the international plane, but also at the domestic level.

II. THE COURTS’ INTERPRETATIONS OF THE PURPOSE OF COGSA

In an attempt to conform their interpretations of the term “package” with the underlying purpose of COGSA, many federal courts in the United States have examined the legislative intent behind its passage. Unfortunately, however, these courts have read into the passage of COGSA different motivating factors, largely because very little legislative history is available. Confusion and uncertainty have been the result. A determination that COGSA was intended to benefit cargo interests has persuaded some courts to apply a restrictive construction of the word “package” since the “customary freight unit” method of computing liability usually favors cargo interests. Conversely, a view of COGSA as intending to benefit carriers, or at least as a compromise between the interests of shippers and carriers, has encouraged a more expansive interpretation of the word “package” since the “customary freight unit” method of computing liability usually works to the benefit of cargo interests.

In Hartford Fire Ins. Co. v. Pacific Far East Lines, Inc. the United States Court of Appeals for the Ninth Circuit held the central purpose of the Hague Rules, as incorporated by COGSA, was to establish international uniformity in certain matters relating to ocean bills of lading on a basis fair to ocean carriers, cargo owners, insurers and bankers. Yet the court did not view COGSA as an unbiased statute. It added that COGSA modified the law existing then to give greater protection to cargo interests in three significant respects: (1) by placing the burden of proof on the carrier to show

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13. See Aluminios Pozuelo, Ltd. v. S.S. Navigator, 407 F.2d 152, 154 (2d Cir. 1968).
14. 491 F.2d 960 (9th Cir. 1974) (holding that a 36,700 lb. transformer on a skid did not constitute a “package”).
15. Id. at 962, citing Hearings on S. 1152 Before the Senate Comm. on Commerce, 74th Cong., 1st Sess., at 15 (1935) [hereinafter cited as 1935 Hearings].
how the damage occurred and that the carrier was not responsible therefor; (2) by giving owners of goods more time to file claims; and (3) by placing a minimum liability on carriers which they could not contract away and for which they could not charge increased freight rates. If sympathy toward cargo owners can be read into this court's view, it is consistent with the outcome of the case. Hartford Fire represents a dramatic rejection of previous case law, especially that embodied in Aluminios Pozuelo, Ltd. v. S.S. Navigator, a case strikingly similar to Hartford Fire.

Shortly after Hartford Fire, the Ninth Circuit stated in Tessler Brothers (B.C.) Ltd. v. Italpacific Line, that Congress had passed COGSA in order to preclude carriers from drafting ocean bills of lading with "all embracing exceptions" to liability and to obviate the necessity for shippers to meticulously inspect the fine print on the bill of lading on each occasion before shipping. In accord with this view, some courts have emphasized that COGSA was intended to protect the shipper from adhesion contracts resulting from the carrier's stronger bargaining position.

Another viewpoint is that COGSA was designed to protect carriers by forcing shippers to declare a higher valuation and to pay higher rates if they desired complete coverage for cargo worth more than $500 per package or customary freight unit. Similarly, courts have held that the purpose of COGSA was "to prevent 'excessive claims in respect of small packages of great value,' but not to permit carriers to escape liability for just claims."

The most accurate picture of the purpose behind the passage

16. Id., citing 1935 Hearings at 18, 47. See notes 18 and 19 infra and accompanying text.
17. 407 F.2d 152 (2d Cir. 1968) (holding that a 6,200 lb. press bolted to a skid was a "package"). See Comment, Skidded Machinery, 2 Rutgers Camden L. J. 361 (1970).
19. E.g., Standard Electrira, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft, 375 F.2d 943 (2d Cir. 1967), holding, however, in favor of the carrier that television tuners shipped in nine pallets, each holding six cartons bound by metal straps, constituted nine and not 54 "packages."
20. Caterpillar Americas Co. v. S.S. Sea Roads, 231 F. Supp. 647 (S.D. Fla.), aff'd, 364 F.2d 829 (5th Cir. 1964), holding that a tractor which was shipped unboxed and uncrated and which was dropped while being unloaded under its own power was not a package but that it did, nevertheless, constitute "one customary freight unit" and that, therefore, the carrier's liability was limited to $500.
21. Nichimen Co. v. M/V Farland, 462 F.2d 319, 335 (2d Cir. 1972), quoting Stirnimann v. The San Diego, 148 F.2d 141, 143 (2d Cir. 1945). The same court, however, specifically rejected the argument that COGSA was only intended to protect carriers from liability for small packages of great value. Mitsubishi Int'l Corp. v. S.S. Palmetto State, 311 F.2d 382 (2d Cir. 1962).
COGSA is probably a combination of the aforementioned arguments. COGSA was a compromise between the interests of carriers and cargo owners. It set a bottom limit to the liability which the carrier could contract away at a level which would not encourage negligence or indifference on the carrier's part, and yet it provided reasonable protection to the shipping industry. The "balance" was struck in 1936 at $500 per "package" or per "customary freight unit." This "balance," however, no longer exists. Inflation has so worked to the benefit of the carrier through the years, that today the protection which shippers receive is but a fraction of what it once was. Advances in technology have also tended to benefit carriers because palletized and containerized cargo may under certain circumstances be a package or one customary freight unit.

It is this contemporary imbalance which probably accounts for the uncertain definition of the word "package." Under the guise of "legislative purpose" in interpreting statutory terms ("package" or "customary freight unit") which cannot be equated as easily as the terms of the Hague Rules ("package" or "unit"), courts are currently struggling with the same basic conflict between shipper and carrier that the legislature faced back in 1936.

III. DEFINITIONAL APPROACHES: THE MEANING OF "PACKAGE"

A clear, precise and predictable definition of the term "package" is necessary to insurers, bankers, cargo owners and carriers alike. If an item of cargo is on the borderline between being a package and not being a package, insurers will have to charge more for the increased risk embodied in that uncertainty. Also, the bill of lading relating to such goods will be worth somewhat less to any purchaser of commercial paper due to the uncertainty surrounding the carrier's liability for the item of cargo represented by the bill of lading. Carriers and cargo owners alike will tend to over-insure, or if they try to outguess the courts and fail, they will have tended to under-insure.


A. **Defining "Package" According to the Layman's Concept**

Only recently have some courts agreed that the layman’s concept of an ordinary package is no longer the standard by which to define a “package” under COGSA.24 But as late as 1958, in the case of *Gulf Italia Co. v. American Export Lines, Inc.*,25 the layman’s concept lurked about as a test by which to legally define a “package.” In *Gulf Italia* the United States Court of Appeals for the Second Circuit held that a 20 ton Caterpillar tractor, which had been prepared for shipment with waterproof paper coverings over some of its parts and with a partial encasement of the superstructure with wooden planking, was not a package. The tread portions of the tractor were uncovered and the tractor was not attached to skids. The lower court’s decision had concluded that

the item damaged would not be considered a “package” under any ordinary construction of the term. A large tractor, weighing 43,319 pounds, is not within the purview of the layman’s view of a “package.”26

The court of appeals affirmed, but the oft-quoted dissenting opinion of Judge Moore proved to be the harbinger of future decisions. He emphatically argued that “[a] large tractor . . . is not within the purview of the layman’s view of a ‘package.’ However, a layman’s definition of a package would not be determinative here.”27

Subsequent Second Circuit decisions have undercut *Gulf Italia* and its limited concept of a “package.” In *Aluminios Pozuelo Ltd. v. S.S. Navigator,*28 a 6,200 pound press bolted to a skid without any other preparation for transport was held to be a package. This time the Second Circuit explained that a “package” in maritime law is a word of art and that the parties are presumed to have understood its consequences when they so described the press. In *Companhia

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24. *E.g.*, Mitsubishi Int’l Corp. v. S.S. Palmetto State, 311 F.2d 382 (2d Cir. 1962), holding that three rolls of steel, measuring 16’ x 6’ x 5’ and weighing 32 1/4 tons each, completely enclosed in separate wooden cases, constituted only three packages, notwithstanding their size and weight.


28. 407 F.2d 152 (2d Cir. 1968). The court emphasized, however, that the press had been placed on a skid and, therefore, “put up for transportation.” *Accord*, *Nichimen Co. v. M/V Farland*, 462 F.2d 319 (2d Cir. 1972) (holding that coils of steel weighing three to nine tons each, strapped by metal bands, were packages). *See* note 48 *infra* and accompanying text.
Hidro Electrica v. S.S. Loide Honduras, a district court within the Second Circuit also questioned the validity of Gulf Italia and held that five unwrapped gas circuit breakers which were fully visible except for wooden crating covering the instrument panel, and taking up 239 cubic feet of space each, were packages. Each was on a "form of steel base" which was a permanent part of the circuit breaker.

While it appears that in the Second Circuit the layman's definition of a package has been buried for good, this view is not shared across our continent. The Ninth Circuit, in Hartford Fire, seems to have completely rejected Aluminios by holding that a 36,700 pound electrical transformer measuring approximately 13' x 11' x 71/2', attached by bolts to a wooden skid and not otherwise boxed or crated, was not a package. The court reasoned that Congress had not defined the term "package" even though it was aware that technological advances such as pallets, which permitted the consolidation of cargo, were in common use by 1936. The court further reasoned that Congress had provided an alternative limitation of liability for "goods not shipped in packages" and that, therefore, industry-wide advancements such as the skid did not justify an overextension of the statutory term "package." Thus, the court held that "[s]ince 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."

In the Ninth Circuit, then, the "customary freight unit" is a far more prevalent method of computing the carrier's limitation of liability than is the "package" basis, making this court one of the most hospitable to cargo interests. So restrictive is the Ninth Circuit in its use of the "package" concept that it may be expected to require that a "package" not easily lend itself to inspection of its contents, notwithstanding its size. The court in Hartford Fire, cited Whaite v. Lancashire & Yorkshire Ry., an English case which "involved a group of oil paintings placed into a four-wheeled wagon which had sides but no top, such that the identity of the paintings themselves was hidden, though it was clear that paintings were being transported." Since the contents could not easily be inspected, the whole wagon was held to be one package despite its size.

30. 491 F.2d 960 (9th Cir. 1974). See text accompanying notes 14-17 supra.
31. 491 F.2d at 963.
32. [1874] L.R. 9 Ex. 67.
33. 491 F.2d at 963.
Of course, it may be that the court in *Hartford Fire*, instead of basing its decision on a layman's definition of package, was simply loath to apply a $500 limitation of liability to an article as valuable as an electrical transformer, despite the shipper's failure to exercise his option to declare its value and secure full liability coverage in return for a higher freight rate. It is interesting to note that in *Hartford Fire* the Ninth Circuit did not hold the electrical transformer to be one "customary freight unit" as the Second Circuit might well have held.\(^4\) Instead, it showed its inclination to favor cargo interests by noting that in the case of goods not shipped in packages, "based upon the number of customary freight units applicable to the nonpackaged goods, liability could well exceed the statutory limit of $500 per package."\(^3\)

The desirability of applying the layman's definition of a "package" is dubious. In the shipping trade there are many types of cargo which for purposes of COGSA should be labeled "package" or "non-package." A rough categorization of possible types includes the following:

1. cargo shipped in cases, crates, barrels, casks and any other form of completely enclosed container;
2. cargo shipped in wrappings, bags, sacks and other forms of coverings which partly or wholly conceal the identity of the goods;
3. cargo shipped on skids, frames, pallets, or tied together, whether fully or partly visible;
4. cargo shipped in units without any special preparation for transport such as yachts, trucks, cars, bales, machinery, etc.;
5. cargo shipped neither as a unit nor as bulk freight, such as wood, cordage, steel bars, etc.;
6. cargo shipped in bulk such as grain, ore and oil.\(^8\)

Under the Hague Rules, types a through e (with a split as to f) would be included as a "package or unit."\(^37\) The layman's meaning of "package," as used in *Hartford Fire*, would at best be limited to types a and b.\(^38\) The *Aluminios* case would include category c as a "package." *Companhia* seems to include, at least partly, goods in

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\(^{34}\) See note 39 infra.

\(^{35}\) 491 F.2d at 962.

\(^{36}\) SELVIG, supra note 4, at 44.

\(^{37}\) See note 4 supra and accompanying text.

\(^{38}\) The court turned to Websters' Third International Dictionary 1617 (1966), for a definition which "though alone insufficient, provide[s] at least a starting point . . . : 'a small or moderate sized pack: bundle, parcel . . . a commodity in its container . . . a covering wrapper or container . . . a protective unit for storing or shipping a commodity.'” 491 F.2d at 963.
classification d. Thus, the Ninth Circuit in *Hartford Fire* defers a great deal of cargo in favor of the "customary freight unit" alternative to the $500 per "package" limitation. This view of "package" is not only in conflict with the Second Circuit’s decisions, but more importantly, is inconsistent with the concept of a "package" as formulated by the Hague Rules and its adherents. The Second Circuit not only applies a far broader definition of package than does the Ninth Circuit, but when goods are found to be "not a package," it often holds that the cargo is but one "customary freight unit." The approach of the Second Circuit more closely approximates the construction of "shipping unit" under the Hague Rules and therefore lends a bit more uniformity to the international shipping trade, one of the purported aims of COGSA.

B. Appearance, Size and Weight

American cases generally agree that appearance, size or weight have little, if any, bearing on the determination of whether an article of cargo is a "package" under COGSA. In *Primary Industries Corp. v. Barber Lines*, the court held that a bundle of 22 tin ingots tied with metal straps was one package. The court emphasized the preparation to facilitate handling and not the package’s size, shape or weight, nor whether the goods were enclosed. In accord was *Mitsubishi International Corp. v. S.S. Palmetto State*, where fully boxed steel rolls weighing 32 ½ tons each were declared packages notwithstanding their size and weight. In *Gulf Italia* the court held that any test dependent upon the extent of external covering would lead to uncertainty and increased litigation. Moreover, in *Nichimen*
Co. v. M/V Farland, the appellate court reversed the trial court and held that whether they were wrapped in burlap or not, rolled steel sheets in coils strapped with steel bands were packages.

It is submitted that considerations of appearance, size and weight are inherent in the layman's view of a "package" as defined by the Ninth Circuit in Hartford Fire. That court did not, however, establish what criteria the layman should apply to define a package; nevertheless, one can surmise that the layman would most likely apply such standards as appearance, size and weight.

One disturbing foreign decision to note is that of F.I.A.T. v. American Export Lines. This Italian decision interpreting COGSA held that a case containing 25 tons of machinery was not a package and limited liability to $500 per 40 cubic feet of cargo. The court reasoned that cargo was shipped in packages to facilitate the handling, loading, stowing and discharging of goods, but that no such consideration was applicable when the case weighed 25 tons. Although not binding on any courts here, the case is a poignant reminder that uniformity and predictability within the domestic legal system are necessary if foreign courts are to interpret American law in cases where the rights of American citizens are at stake.

C. The Facilitation for Transport Test

The facilitation for transport test is one of the most frequently used in determining whether certain cargo will be held to be a package. As the following discussion indicates, the test is a vague one which allows courts to arrive at divergent results upon the slightest factual nuances.

Black's Law Dictionary, often quoted in these decisions, provided the inspiration for this test. It defines a package as a "bundle put up for transportation or commercial handling; a thing in form to become, as such, an article of merchandise for delivery from hand to hand. . . . As ordinarily understood in the commercial world, it means a shipping package." Generally, the preparation of cargo for transport would bring goods under the definition of a package if the preparation facilitated transport by allowing for easier lifting, loading, storing, etc. Any evidence of preparation which tended to protect the cargo was irrelevant to the determination of whether the article was a package.

43. 462 F.2d 319 (2d Cir. 1972).
45. BLACK's LAW DICTIONARY 1262 (rev. 4th ed. 1968) (emphasis added).
In *Standard Electric, S.A. v. Hamburg Suedamerikanische Dampfschiffahrts-Gesellschaft*, it was held that palletized cargo which constituted an integrated unit for handling in transportation was a package despite the fact that this technological innovation went beyond the expectancies of legislators when they enacted COGSA in 1936. The court recognized that packages were increasing in size due to technological advancements and that this, in effect, reduced the liability of carriers.

In *Nichimen*, hot rolled steel sheets strapped with steel bands were held to be packages. The court viewed this as “some packaging for transportation which facilitates handling” and glossed over the plaintiff’s argument that such strapping was done primarily for purposes of warehouse storage. The court reasoned that the storage function of such strapping did not preclude it from also facilitating the transport of the steel rolls.

In *Aluminios*, a pound press was prepared for shipment bolted to a skid. The court held that although the skid did to some extent protect the machine, it served primarily to facilitate delivery and to present the press as a package in a form suitable for transportation. This case is difficult to reconcile with *Hartford Fire* which held that a 36,700 pound transformer bolted to a skid was not a package. The *Hartford Fire* court, in specifically rejecting the facilitation for transport test, said:

Any distinction based upon the subjective purpose for which the skid was attached should not be the test for resolving the issue. The skid certainly protected the transformer to some extent . . . [a]nd, the skid could have been utilized to facilitate the transportation of the transformer. Nevertheless, we are unpersuaded that by simply attaching the transformer to a wooden skid, the shipper created a “package.”

The transformer already had four lifting lugs attached to its four upper corners to facilitate its movement and transportation. It was designed to stand freely on the ground but the shipper had placed a heavy wooden skid on the bottom to protect the transformer. Under the reasoning of *Aluminios*, it is difficult to speculate what result would have been reached in *Hartford Fire*. Since the purpose

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46. 375 F.2d 943 (2d Cir. 1967). See note 19 supra. Compare this case with the reasoning in *Hartford Fire*, supra note 30 and accompanying text.
47. 462 F.2d 319 (2d Cir. 1972).
49. 491 F.2d 960 (9th Cir. 1974).
50. 491 F.2d at 965.
of the skid was primarily for protection, and the transformer needed no preparation in order to be transported, the Aluminios court might have held that it was not a package. Yet the very fact that the skid could be utilized to facilitate the transportation of the transformer, might have provided a sufficient basis on which to hold that the transformer was a package.

In Gulf Italia, a Caterpillar tractor was held not to be a package despite extensive coverings made in preparation for shipment. The tread portions of the tractor, however, were uncovered and it was not attached to a skid. Judge Moore's dissent noted that the tractor was "as carefully packaged as a tractor with protruding treads could be." It seems ludicrous that the addition of a few unnecessary pieces of lumber would have made it a package even though the treads needed no protection and a skid would not have added to the stability of the cargo. Ten years separate this decision from Aluminios in which there was no other packaging preparation but a skid.

Only six years after Aluminios, the Federal District Court for the Southern District of New York decided Companhia. In this case five huge gas circuit breakers, unwrapped except for some wooden crating covering the instrument panel, were held to be packages. Since they were mounted on a "form of steel base," the defendant carrier argued that the base was the equivalent of a skid which facilitated handling and delivery. The plaintiff argued that the base was a permanent part of the circuit breaker. The court cited Aluminios for the proposition that since the parties had described the article in the bill of lading as a package and, in addition, had prepared the article to facilitate its handling and transport, the article would be deemed a package. This court, arguing that Gulf Italia had already been discredited by both Nichimen and Aluminios, viewed the crating on the instrument panel as sufficient to satisfy the facilitation for transport test. Companhia, however, goes far beyond Aluminios. Crating over an instrument panel hardly facilitates the handling of a huge circuit breaker. The court in

53. In Gulf Italia the tractor had also been described as "one package" in the bill of lading, and the preparation for transport was far more extensive than that which Companhia concluded was enough to pass the "package" test. Compare Gulf Italia with Petition of Isbrandtsen Co., 201 F.2d 281 (2d Cir. 1953), holding that a locomotive stowed on rail and timber beds, and secured by wire lashings, clips, and turnbuckles, was not a package.
Companhia defended its reasoning by arguing that packaging, to the extent that it protects cargo, also facilitates handling. Therefore, it concluded, the distinction is without merit.

Companhia represents one of the furthest extensions of the concept of "package." Its result is consistent with the terminology of the Hague Rules, under which these circuit breakers would have been "shipping units." The court in Hartford Fire, by adhering to the most limited interpretation of "package" in American jurisprudence, would not have defined each of these circuit breakers as a "package" or one "customary freight unit."

Even the cases in which COGSA does not apply ex proprio vigore are inconsistent in their application of a definition of "package." An additional complication in these cases is that COGSA is made to apply only because the terms of COGSA have been incorporated into the bill of lading. The cases generally involve loss or damage to cargo while at dockside or "on deck" where the jurisdiction of COGSA does not extend by its own force. It remains unclear whether the courts' definitions of "package" apply when parties incorporate COGSA into their contract of shipment or whether the parties are free to define a package themselves notwithstanding hostile case law.

In General Motors Corp. v. S.S. Mormacoak, a generator was enclosed in a weather proof metal housing and mounted on a rolled steel base. The bill of lading had incorporated COGSA because it was on-deck cargo. The court found that the generator, although described in the bill of lading as a package, was not a package because it did not have a skid or any packaging preparations. No consideration was given to the fact that the generator, was by itself, fit for transport. But the resulting amount of damages was the same since the court found it to be "one" freight unit rather than a package and limited recovery to $500.

In the case of Island Yachts, Inc. v. Federal Pacific Lakes Lines, a 42-foot yacht transported on deck was held to be a package. COGSA had been incorporated into the bill of lading and the parties had described the yacht as a package. The court applied the facilitation of handling test and found that the shipping cradle, which allowed the cargo to stand upright in a stable position, qualified as packaging preparation.

The *Island Yachts* court could very easily have circumvented the definitional problem by holding, as did the court in *Pannell v. United States Lines Co.*,\(^56\) that since COGSA did not apply to deck cargo, the parties were free to define a "package" between themselves. Thus, the yacht was a package in this limited situation. In dicta, however, the court commented that had COGSA applied *ex proprio vigore*, the yacht would not have constituted a "package."

It is obvious, upon inspection of the aforementioned cases, that even the facilitation of transport or handling test is not being uniformly applied by the circuit courts, adding to the unpredictability of the meaning of "package." In *Aluminios* a skid was enough to satisfy the test; in *Island Yachts* a cradle was enough; in *Petition of Isbrandtsen*,\(^57\) however, a rail and timber beds with wire lashings and clips were insufficient qualities to have the locomotive declared a package. In the *Mormacoak* case, the generator was not a package although it did not need any preparation since the unit was built for transport. But, in *Companhia*, the court decreed that a covering of the instrument panel satisfied the test, although it went on to declare that preparation for protection and for transport were one and the same concept.

The court in *Gulf Italia* was of the opinion that preparation of goods for ocean transport did not automatically classify them as packages. The court feared that such a rule would penalize those who protect their shipments against damage. Since less extensive packaging might provide a greater recovery under the non-package "customary freight unit" computation of a carrier's liability, shippers might be discouraged from taking precautions against damage. The extension of the facilitation for transport or handling test to the extremes which *Companhia* approaches, goes far to prevent such a development. If the slightest covering satisfies the test, then a shipper would have to ship goods without the benefit of any preparation whatsoever in order to avoid having his cargo designated as a package. As *Companhia* states, preparation for handling and transport cannot be legitimately separated from preparation for protection: they are attributes of a broader purpose. No shipper would be foolhardy enough to invite damage just to assure himself a greater recovery.

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\(^{57}\) 201 F.2d 281 (2d Cir. 1953).
Nevertheless, the majority of cases have not taken as far-reaching a view as Companhia. In most, the dividing line between packaging which passes the test and packaging which does not is indefinable. It is in these instances that a shipper would be penalized for his precautions in preparing cargo for shipment. In Gulf Italia the court held that despite extensive packaging, the tractor was not a package. Later cases have been less favorable to cargo interests. With the liberalization of the facilitation for transport test, more cargo with less packaging has been included within the scope of a package. The fears expressed in Gulf Italia merely reflect the true inadequacy of the test—its vagueness. Since Companhia is not the decision of an appellate court, it does not have the full weight of law. Thus, the dividing line between what is a package and what is not remains undefined, and shippers who find themselves in the “twilight zone” of the test continue to be penalized for that extra margin of preparation which tipped their cargoes into the package status. Companhia in effect would eliminate the test; since almost all units of cargo are prepared for shipment in one way or another, they would all be packages.

D. The Applicability of the Bill of Lading Description As a Test.

1. Whenever COGSA Applies Ex Proprio Vigore.

With the increase in litigation concerning the definition of a “package,” the courts began to look beyond such tests as “facilitation of handling or transport,” perhaps because they recognized its inadequacy. Thus, courts turned to the bill of lading in order to determine whether or not the parties intended or understood the cargo to be a package. This determination has been of secondary importance in some cases but quite significant to the outcome of others. Again, this uncertainty has proved to be unfair to both carriers and cargo interests since they cannot be sure how much importance to ascribe to the bill of lading’s description of the goods being shipped.

In 1949 the landmark case of Middle East Agency, Inc. v. The John B. Waterman58 held that 11 tractors, uncrated and uncovered, were not packages although the number “11” had been typed under the bill of lading heading of “quantity or number of pieces or packages.” The court decided that the use of the word “package” printed on the bill of lading was not a stipulation by the parties that the

tractors were packages under COGSA. In so holding, the court recognized and avoided a possible conflict with a provision in section 1304(5) of COGSA which provides that the carrier and shipper may contract for a higher, but not a lower limit of liability in the bill of lading. By defining an article of cargo to be a package because the bill of lading described it as such, a court might in effect reduce a carrier's liability below what was statutorily permissible on the basis of the carrier's own contract where, by use of a more proper test, the unit of cargo would not really be a "package." Thus, by using the bill of lading as a test, the court would in such cases be preventing a shipper from recovering his rightful share under the "customary freight unit" measure of liability, which often greatly exceeds $500. Indirectly, the court would be allowing carriers to limit their liability contract in violation of Congressional intent. Thus, the court warned: "Any attempt by the carrier to modify the limitation provisions of the Carriage of Goods by Sea Act through a printed provision of a bill of lading should be carefully scrutinized by the courts." It should be emphasized that in this case the tractors had no additional qualities that would categorize them as packages since they were uncrated, uncovered, and not on skids. This court's warnings, however, were not heeded by subsequent courts.

In Gulf Italia the court held that an unskidded tractor was not a package although it had waterproof paper over some parts as well as a superstructure partially encased with wooden planking. Faced with far more "packaging" on this tractor than on the ones in Middle East Agency, the court resorted to the bill of lading's description of the tractor as "semiboxed" to support its finding that the tractor was not a package.

In Aluminios, however, the court drew attention to the bill of lading in support of its conclusion that a 6,200 pound press bolted onto a skid with no other preparation relating to facilitation of handling was a package. In this instance the number "One (1)" was written into the column headed "No. of Pkgs." Thus, the court reasoned that the parties had specified the press as "one package," which in maritime law is a word of art. The parties were presumed to have understood the limitation of liability consequences of such a specification.

59. Id. at 491.
60. See note 51 supra and accompanying text.
61. See note 58 supra and accompanying text.
Moreover, in *Nichimen* the court held that rolled steel coils strapped and tied with steel bands were packages partly because the parties considered each coil to be a "package" in light of the sales contract, the bill of lading, and the common understanding between the parties. In this case it seems that the facilitation of handling test was only of equal importance to the specifications in the bill of lading.

Similarly, a New York State court declared that 25 bundles of 22 tin ingots, each with metal straps resting in place on "grooves" molded into the bottom ingots, were packages. This time the court was forced to view the bill of lading with some selectivity because under the bill of lading heading of "No. of pkgs." the number "550" was typed in. Yet under the heading of "Description of Package and Goods" was written: "Ingots Tin Ingots (in 25 Bundles, each 22 ingots) (Net weight 25,402 Kgs.) (Total Ingots 550 In 25 Bundles Only)." The court focused solely on the "In 25 Bundles Only" provision to support its holding.

The furthest extension of the bill of lading description as being dispositive of whether an article of cargo is a package is *Companhia*. In this case the packaging preparation (wooden crating covering the instrument panel on a large circuit breaker) could hardly pass the prevailing interpretation of the facilitation of handling test. Finding itself on uncertain ground, the court urged that the parties abide by the bill of lading description which was merely the number "6" typed into the column headed "Number of Packages." Citing *Nichimen*, the court explained that although the bill of lading description was not controlling, it was important evidence of the parties' understanding.

Again, the case which stands out among the rest for its non-conforming approach is *Hartford Fire*. In advocating the layman's definition of "package," the court impliedly rejected the "intention of the parties" as a test since the bill of lading description was not discussed in the decision.

To reiterate, the main fault in giving weight to the bill of lading description is that the parties themselves will, in borderline situations, indirectly determine whether the cargo is a package; the re-

63. 462 F.2d 319 (2d Cir. 1972). See text accompanying note 47 supra.
66. 462 F.2d 319 (2d Cir. 1972).
67. 491 F.2d 960 (9th Cir. 1974).
68. See text accompanying notes 30-31 supra.
sult may be that the carriers will generally prevail in the "close cases." In several cases the bill of lading has been characterized as an adhesion contract. The carrier who has the form printed according to his specifications chooses the headings, and the shipper has no recourse but to fill out the form according to such headings. The carrier is in a better position to know the consequences of the use of a word of art such as "package" in a printed heading. Not only does it usually work to the carrier's advantage to label cargo as "one package," but a shipper who is not in the business of shipping is far less likely to protect himself with knowledge of the law.

2. WHENEVER COGSA DOES NOT APPLY EX PROPRIO VIGORE.

Unlike the Harter Act, which applies to cargo in the custody of the carrier, COGSA holds the carrier liable for damages only between and including the loading and unloading of cargo. Nor does COGSA apply to on-deck cargo. The shipper and carrier, however, may extend the applicability of COGSA by contract to on-deck and dockside cargo in the custody of the carrier.

As has previously been discussed, it is not clear whether parties are free to define the term "package" even though they extend the applicability of COGSA to on-deck and dockside cargo in the bill of lading. An older Second Circuit decision states that the

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72. Id. § 1301(c). Where the bill of lading gives the carrier the option to carry the goods on or below deck, but nothing in the bill of lading indicates which option the carrier has exercised, the goods are not exempted from the operation of COGSA. Encyclopaedia Britannica v. S.S. Hong Kong Producer, 422 F.2d 7 (2d Cir. 1969). Similarly, where the carrier gives a shipper a clean bill of lading for a container of goods and the ship is especially designed for container cargo in which containers are loaded above and below deck, stowage on deck is neither an unreasonable deviation from the contract of carriage nor outside the reasonable meaning of section 1304(4) of COGSA. DuPont de Nemours Int'l S.A. v. S.S. Mormacuega, 493 F.2d 97 (2d Cir. 1974).
73. The carrier and the shipper are also free to limit the liability of the carrier's agents, such as stevedores, by incorporating such limits into the bill of lading. Sechrest Mach. Corp. v. S.S. Tiber, 450 F.2d 285 (5th Cir. 1971).
74. See notes 54-56 supra and accompanying text.
75. Pannell v. United States Lines Co., 263 F.2d 497 (2d Cir. 1959). There was dicta to the effect that had COGSA applied ex proprio vigore, the yacht would not have been a package. Accord, The Margaret Lykes, 57 F. Supp. 466 (E.D. La. 1944), holding that an unboxed truck carried on deck was a package where the bill of lading described it as such and COGSA had been incorporated into the bill of lading.
parties may stipulate in the bill of lading that a yacht to be carried on deck is a package. More recently, however, a lower court in the same jurisdiction has held that a generator without a skid or packaging preparation was not a package even though the parties incorporated COGSA into an on-deck bill of lading and had described the cargo as a generator. Thus, under this theory, COGSA may not be modified once it is incorporated into the bill of lading where otherwise COGSA would be inapplicable. Subsequently, the same court held that where the bill of lading described the cargo as an "unpacked" sailing yacht, the carrier had precluded himself from the benefit of the $500 liability limit and would therefore be liable for $7,000. Although no mention was made of COGSA's incorporation into the bill of lading, it must be assumed since the yacht was on-deck cargo. Thus, the $7,000 recovery must have represented 14 customary freight units.

In a particularly confusing case from another circuit, the court cited Aluminios and held that where the parties described the on-deck yacht as a package, they were to be held to it since it was a word of art. Yet the court also stated that the shipping cradle satisfied the facilitation for transport test. Although the result is similar to the case which states that the parties are free to define a package where COGSA does not apply ex proprio vigore, the very fact that the facilitation of transport test was used implies that the parties are not completely free to define a "package."

In Leather's Best, Inc. v. S.S. Mormaclynx, another case within the Second Circuit involving the disappearance at dockside of a container with bales of leather, the court invalidated a provision stamped onto the bill of lading which read: "Shipper hereby agrees that carrier's liability is limited to $500 with respect to the entire contents of each container . . . ." The case stands for one or both of two possible rules: (1) that a carrier may not limit his total liability to $500 once the court decides that the items inside the container are packages, despite the fact that COGSA does not apply ex proprio vigore; or (2) that parties may not define a package.

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79. 407 F.2d 152 (2d Cir. 1968).
81. The bill of lading had extended COGSA coverage to dockside cargo. COGSA prohib-
(the container) for themselves in the bill of lading although COGSA does not apply ex proprio vigore.

In the Second Circuit, then, there is only confusion, both within and between the aforementioned cases in which COGSA was applicable by its own force; the holdings in Leather's Best and Mormacoak are in opposition to those in Pannell and Van Breems. Therefore, the coexistence of two incongruous and undesirable situations is apparent: In a "borderline" case, the bill of lading's definition may be the key factor in holding that an article of cargo is a package when COGSA applies ex proprio vigore, and yet in another case, where COGSA applies only by reason of the bill of lading's incorporation, the parties' description of the cargo as a package may be of no legal significance at all. "Only if 'package' is given a more predictable meaning, will parties concerned know when there is a need to place the risk of additional loss on one or the other accordingly or to adequately insure against it." 82

E. The Container's Effect on the Viability of "Package" As the Relevant Unit

Containers, as articles of transport equipment, are revolutionizing the shipping industry by allowing ships to load and unload cargo efficiently at great speed, thus significantly reducing time spent in port. Containers also reduce risk of damage to individual cargo especially during loading and unloading and give added protection to the cargo on board ship during the voyage. Efficient container ships are being designed in increasing numbers to take advantage of these economies. Containers provide savings to the shipper as well by lessening the need for packaging inside the container and helping to reduce thefts. 83 Containers are commonly made of metal and are therefore durable and reusable.

The International Customs Convention on Containers 84 defines a container as follows:

its carriers from contracting for a lower liability per package than the $500 limit imposed. 46 U.S.C. § 1303(8) (1971). Cf. Royal Typewriter Co. v. M/V Kulmerland, 483 F.2d 646 (2d Cir. 1973), holding that a container stolen at dockside was a package notwithstanding the fact that the bill of lading described the cargo as "1 container said to contain machinery."


84. 49 C.F.R. § 420.3.
(c) "Container" means an article of transport equipment (lift-van, portable tank, or other similar structure . . .), other than a vehicle or conventional packaging-

(1) Of a permanent character and accordingly strong enough to be suitable for repeated use;
(2) Specifically designed to facilitate the carriage of goods by one or more modes of transport, without intermediate reloading; . . .
(5) Having an internal volume of 1 cubic meter (35.3 cubic feet) or more.\(^{85}\)

The courts have yet to agree that a container is not a "package." In *United Purveyors v. M/V New Yorker*,\(^{86}\) a freezer-van container broke down in mid-voyage resulting in the spoilage of 839 boxes of frozen fish. The court did not indicate whether the van was a "package" or one "customary freight unit," but it limited the carrier's liability to $500. There are no clues to the basis for the decision other than that the transport was charged at a flat rate of $1,000, according to gross weight, the cheapest rate available.

*United Purveyors* influenced the court's decision in *Luccheses v. Malebe Shipping Co.*,\(^{87}\) in which a trailer filled with household goods was delivered to the carrier to be shipped at a flat rate which, although the most economical rate to the shipper, had no relation to the number of pounds or the value of the cargo. Flat rates are offered in order to encourage shippers to containerize. The rate was computed with reference to the trailer as a single unit, and no value was declared by the shipper. The carrier was not aware of the nature or condition of the goods inside. Thus the trailer was declared a package. The decision is as unclear as *United Purveyors* as to why shipping according to a flat rate, irrespective of the contents of the container, can influence the determination that the cargo is a package. Carriers might construe the court's reasoning as advising them that if they do not know the contents of a container and charge a flat (lower) rate on it, the entire container will be declared a package. Thus, under this case, carriers may subtly, but effectively, contract for a lower liability by charging less for transport in avoidance of the provisions of section 1303(8), COGSA, which declares null and void any clauses which decrease the carrier's statutory liability. If lack of knowledge of the contents was a key factor to the

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85. Id. (emphasis added).
decision in this case, it is without merit because all the carrier has
to do is ask.

The Lucchese court was obviously influenced by the container
provision of the protocol\textsuperscript{88} passed at the second meeting of the
Twelfth Session of the Diplomatic Conference on Maritime Law,
Brussels, February 19-23, 1968. It reads:

\begin{quote}
(c) Where a container, pallet or similar article of transport is
used to consolidate goods, the number of packages or units enu-
merated on 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 as far as these packages or units are concerned.
Exception as aforesaid, such article of transport shall be considered
a package or unit.\textsuperscript{90}
\end{quote}

The above put the onus on the shipper to protect himself by describ-
ing the goods inside. Yet this protocol has never been the law;\textsuperscript{90} therefore the shipper cannot be expected to know about it. Thus, the
court should not have considered it to justify its decision against the
shipper.

In \textit{Inter-American Foods, Inc. v. Coordinated Caribbean Trans-
port, Inc.},\textsuperscript{91} the court reached a far more desirable result. In this
case, involving the spoilage of a freezer-trailer of frozen shrimp, each
master carton within, consisting of ten five-pound boxes was held
to be a package. Unlike Lucchese, however, this carrier picked up
the cartons, loaded them into the trailer and gave a receipt for the
number of cartons inside. The decision was far easier to reach with
these additional factors.

\textit{Leather's Best}\textsuperscript{92} has been hailed as one of the better decisions
relating to containers. A 40' x 8' x 8' container disappeared from a
New York pier after a voyage from Europe. The bill of lading, under
the column headed "number and kind of package," stated "1 con-
tainer said to contain 99 bales of leather." The carrier owned and
provided the container.\textsuperscript{93} The court, in holding that each of the 99
bales was a package, opined that containers are provided primarily

\textsuperscript{88}. In international law the first draft or rough minutes of an instrument or transaction
is called a protocol. Also so termed is any document serving as the preliminary to, or opening


\textsuperscript{90}. \textit{Id.} This protocol has not been submitted for ratification.


\textsuperscript{92}. \textit{See} note 80 \textit{supra} and accompanying text.

\textsuperscript{93}. \textit{See} DeOrchis, \textit{The Container and the Package Limitation—The Search for
for the benefit of the carrier to reduce the loading and unloading
time by 90%, although the shipper also benefits through the reduc-
tion of expensive export packaging. Moreover, the bales had steel
straps around them to protect the goods and to qualify them as bales
under applicable tariffs.

It is unclear whether the court consciously considered that since
less packaging of containerized articles is needed, a broader defini-
tion of "package" might be appropriate such as one which approxi-
mates the concept of "shipping unit" as used in the Hague Rules.
The reality of such a necessity is evident, however. Had the bill of
lading in Lucchese described the household goods in detail and had
they been "unpacked," would each of the goods have been
packages?

The court which decided Royal Typewriter Co. v. M/V Kulmerland94 might have had this packaging problem in mind when
it formulated a new "test" to be employed in container cases. Unfor-
unately, this test is impractical because it presents very difficult
problems of proof.95 In this case a container with 350 cartons of
adding machines was stolen while in storage. The container be-
longed to the carrier and the bill of lading description stated "1
container said to contain Machinery" without mention of how many
cartons were inside. In rejecting the two key bases for the decision
in Leather's Best, the court held that the consideration of which
party obtained the container and the description on the bill of lad-
ing were immaterial because the freight rate was the same whether
the bill of lading referred to just the container or the individual
cartons therein.

Instead, the court inaugurated a new two-tiered test: First,
when 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, the presumption is that the container is not
a package. Furthermore, to overcome this presumption, evidence
must be presented that the parties intended the container to be a
package. The 350 cartons in Kulmerland were single-wall corrug-
ted cartons measuring 15" x 10" x 10" and thus could not have
been shipped individually. Therefore, to have had the presumption
in his favor the shipper would have had to incur needless and expen-
sive extra packaging. Since container packaging need not be as

94. 483 F.2d 645 (2d Cir. 1973).
for an excellent critique of the case. See also DeOrchis, supra note 93.
strong or protective and is therefore cheaper, this first test will seldom benefit the shipper. Second, if the units of cargo do not pass the first test, the burden shifts to the shipper to show that the "units" inside the containers are packages. At this point the parties' intent, custom, trade usage, and characterization of the units become relevant. This test leaves numerous questions unanswered. Must a shipper prove that his units would have been packages had he "packaged" them better? Does one use as a standard the usual non-container package definitions as developed by totally inconsistent decisions? If the container includes various types of articles packaged in different ways, are some to be proved packages and others not? The test is counterproductive to the development of an efficient shipping industry and discourages innovation in packaging.

The court did not expressly overrule Leather's Best, but instead chose to interpret the result as consistent with the new test—that each bale could have been shipped individually and still have been a "package." What remains of Leather's Best, a decision consistent with those of Canada and other countries which abide by the Hague Rules terminology of "package or unit," is difficult to discern. Rather than distinguishing Leather's Best from Kulmerland, the court incorporated the former decision.

In Rosenbruch v. American Export Isbrandtsen Lines, the district court chose to place Leather's Best and the facts of Kulmerland on opposite sides of a spectrum in which Rosenbruch was somewhere in between. The court stated that in Leather's Best the carrier was heavily involved in the preliminaries of providing the container, supervising the loading operation, and giving a receipt for the bales which indicated the exact nature of the contents of the container. The court stated that "it is only where the shipper packs the container or requests the carrier to do so that it becomes necessary to

96. The court implies that the bales would have been analogous to the steel coils in Nichimen, supra note 21.
97. The Tindefjell, [1973] 2 Lloyd's List L.R., holding that the intention of the parties is the key consideration, each case to be decided on its facts. Elements used to construe intent are whether the carrier was on notice of the goods in the container and whether the bill of lading specifies the contents. The court cited Leather's Best and distinguished Kulmerland and Rosenbruch noting that in both of those cases the bill of lading included only a vague description of the contents. The court said that containers are "merely a modern method of carrying packages." French cases hold that a container is "transportation" equipment, an "instrumentality of the shipping process." See Leather's Best v. S.S. Mormaclynx, 313 F. Supp. 1373 (S.D.N.Y. 1970), aff'd, 451 F.2d 800 (2nd Cir. 1971).
consider whether or not there was a ‘single package’ under § 1304(5).”

In Kulmerland, however, the container belonged to the shipper’s agent who loaded it and sealed it before delivering it to the carrier and the bill of lading did not enumerate the contents of the container. The Rosenbruch court interpreted these facts as signifying that the container was intended by the shipper to be the basic cargo unit, and that the carrier was not on notice as to the nature of the contents.

In Rosenbruch the container was held to be a package. The shipper alone had loaded the container. In the bill of lading the shipper had written the number “1” under the entry “Number of Cont. and other Pkgs.,” and the cargo description was “said to contain household goods.” The container was owned by the carrier and furnished at the shipper’s request.

Since the liability of the shipper and the carrier will shift with the slightest factual nuance in determining the scope of the term “package,” one shipment will often be insured by both carrier and shipper. Double insurance is inefficient and costly, especially to the consumer. The larger the units of transportation become, however, the more the carrier will benefit from the mistake or ignorance of the shipper. A $500 limitation for a 40’ x 8’ x 8’ container is unrealistic no matter what is described in the bill of lading, or by whom the contents are described.

IV. CONCLUSION AND PROPOSALS FOR RESOLUTION OF THE PROBLEM

COGSA was originally intended to strike a balance between the interests of the shipper and those of the carrier. That balance is now gone; it has been implicitly and explicitly tilted in favor of the carrier. Inflation has magnified the imbalance. Larger shipping units which run the risk of being labeled “packages” and the practice of containerization are steadily whittling away at the protection afforded to shippers under COGSA as it was enacted in 1936.100 Packages then were smaller and often shipped individually. Cargo was less sophisticated and therefore often less valuable. Since that time, however, the General Agreement on Tariffs Trade101 (GATT) has increased dramatically the volume of international trade; more-

99. Id. at 985.


over, palletization, containerization, and mechanization have made the shipping industry more profitable and efficient by decreasing the time spent at dockside loading and unloading individual items.

Cargo interests recover only $500 in inflated currency if damaged cargo is deemed a package. Knowing that the facilitation of transport test is the one most frequently used by the courts, a shipper may sacrifice protective packaging in order to benefit from the "customary freight unit" method of computing the carrier's liability. Yet with courts increasingly looking to the bill of lading to determine the parties' intent, the shipper may be limited to a $500 recovery notwithstanding the customary freight unit method of computation since the court may decide that the cargo is merely one "customary freight unit." In view of the fact that such intent is often determined by the bill of lading's description under the heading of "number of packages," the carrier often benefits from the shipper's lack of knowledge when the shipper fills out the bill of lading. Moreover, since the bill of lading forms are generally printed by the carrier, he is in a position subtly to influence the way in which the cargo is described in that document merely through the wording of the column headings. When the courts give weight to a typed-in figure under the column headed "No. of Pkgs." as ostensibly evidencing the intent of both parties, they may in fact be enforcing only the intent of the carrier.102

Clearly, "package" is not a "word of art" in the trade or there would not be such confusion as to its definition. Those in the trade cannot rely even on one jurisdiction's definition because the peculiarities of admiralty law allow in rem actions wherever the ship may be found.103 For example, if insurance is procured relying on the vague definitions of "package" provided by the Second Circuit,104 but an in rem action is filed in the Ninth Circuit,105 that miscalculation could cost a great deal of money. Thus, confusion in the law and differences between jurisdictions within the federal court system itself, engender the wasteful practice of double insurance for the same goods. The carrier and shipper may both overinsure fearing that they will not be adequately covered for an unforeseen turn of events.

102. Other courts, however, may select what they wish out of the bill of lading description. See note 64 supra and accompanying text.
104. For the Second Circuit's viewpoint in Aluminiós, see text accompanying notes 48 and 62 supra; for its view in Companhia, see text accompanying note 65 supra.
105. For the Ninth Circuit's viewpoint in Hartford Fire, see text accompanying notes 49, 67, and 68 supra.
Another possibility for confusion is exemplified by the case of a shipper who does not declare the value of his cargo because he mistakenly believes that the “customary freight unit” method of computing the carrier’s liability covers his goods completely. When the question arises in litigation, however, his cargo is deemed one “package” or one “customary freight unit” and he recovers $500, a fraction of what he honestly expected. In *Stirniman v. The San Diego*,106 the court spoke of this very problem. In that case a large locomotive was held to be one “customary freight unit” due to its size and its description in the bill of lading. Had the locomotive been smaller, the rate charged would have resulted in far more than one “customary freight unit.” The carrier in these situations has too much control over his own liability because he determines the rate to be charged which the courts look to in order to compute liability under the “customary freight unit” alternative. The bottom limit of $500 was intended to bring some benefit to the shippers, not to render invulnerable the carriers who, prior to the enactment of COGSA, totally disclaimed their liability by contract. It should be remembered that the purpose of the Hague Rules and its American counterpart, COGSA, was to bring uniformity to the international shipping industry.

A. A Judicial Solution

As the concept of a “package” has expanded, it has progressively incorporated more types of cargo, which under the Hague Rules would have been “shipping units.” Since such is the case, a simple but very effective solution to the package problem is available to the judiciary. If the courts would hold that henceforth “packages” are to include “shipping units,” and leave the “customary freight unit” measurement to apply exclusively to bulk and similar cargoes, not only would predictability return to the law in this field but American decisions would then be more harmonious with those of Canada and many European countries.

There is no reason why this interpretation cannot be incorporated into COGSA. Congress did not define either term in COGSA, and the legislative history is scant. The courts, especially the Supreme Court, could easily graft the proposed definition onto the word “package.” The Supreme Court should grant certiorari on this question at its next opportunity simply because of the totally differ-

106. 148 F.2d 141 (2d Cir. 1945).
ent definitions given by the Second and Ninth Circuits. The proposed extension of the meaning of the word “package” would not be so drastic in view of the many types of cargo which are already held to be packages in violation of the ordinary sense of the word. Moreover, many items which are found not to be packages are often held to be one customary freight unit. Thus, while the results would not differ greatly, they would at least be predictable and parties could protect themselves with insurance accordingly.

As to containers, many of the present problems would become moot. There would no longer be the need for strained tests such as the one instituted by Kulmerland.

B. Legislative Solutions

Congress has a wide range of alternatives available to improve upon the wording of section 1304(5) in COGSA. The litigation highlighted in this comment could be avoided merely by returning to the “package or unit” terminology of the Hague Rules. All the parties concerned would be able to protect themselves accurately against loss by insurance if the carrier’s liability was evenly applied to all types of cargo.

Congress (and all maritime nations) should also consider changing the $500 limitation to one not based on an absolute dollar figure. Since inflation tilts any fixed limitation of liability in favor of carriers, a new limitation should be inflation-proof. It should be set high enough to insure that carriers will not be indifferent to the damage they cause intentionally or negligently, but low enough to protect and encourage the growth of the shipping trade. One very effective inflation-proof method would be for Congress to tie the limit of liability to a stated percentage of the value of the cargo. Basing the carrier’s liability on the value of cargo is a far more sensible method than the present one. Since losses in these cases are always of an economic nature, the carrier’s liability is a form of insurance to the shipper since the carrier is taking some of the risk. Limiting that risk, though, is a form of insurance to the carrier. Since insurance is a method of protection based on the value of

107. See notes 104 and 105 supra and accompanying text.
108. 483 F.2d 645 (2d Cir. 1973). See text accompanying note 94 supra.
109. The Maritime Law Association of the United States has recommended a $662 per “package” or 90 cents per pound limitation where the number of packages or units is specified in the bill of lading. MARITIME LAW ASSOCIATION OF THE UNITED STATES, REPORT OF THE BILL OF LADING COMMITTEE, Doc. No. 529 at 5632 (June 1968).
goods lost or damaged, and not the freight rate or the description of the goods, it seems that it is far more logical to base the limitation of liability on the value of goods.

Presumably, under this proposed system, the following variables would be considered in determining the freight rate: the weight of the cargo, the volume which it displaces on board, the length of time in transport, the cost of loading and unloading and its value upon declaration. The variables of weight, volume and time in transport are directly related to the carrier's profit margin per voyage. The value of the goods would affect the freight rate only because it would affect liability, as limited by the above proposed statutory percentage of value. The carrier's premiums for the insurance that insulates it from such liability would eventually be passed on to the consumer (the shipper) in the form of higher rates. Conversely, the carrier who minimized his losses would also pass premium savings on to the consumer by lowering his freight rates. The added charge would thus depend upon the carrier's computation of the risk he would take in transporting the unit of cargo, given the accounting profit he would derive from shipping that particular item. Therefore, the added charge for a small, light "package" of great value would be higher relative to the carrier's cost of transporting it than his added charge for a large, heavy package of equal value, despite the fact that, in absolute dollar figures, the rate charged for both packages might be the same.

Under the present system, cargoes of low value are totally or substantially covered by the $500 limit of liability, especially if liability is computed under the "customary freight unit" method for "non-packages." It follows that cargoes of great value are hardly protected by the $500 limitation, especially if the items are deemed "packages" or one "customary freight unit." Thus, the units of cargo of low value are automatically "insured" by the carrier's liability, as limited, or at least substantially more so than items of great value. Shippers of high value cargoes must either insure their cargo themselves, or pay the carrier a higher freight rate upon their declaration of the value of the cargo. Under the present system in either event the shipper actually bears the whole cost of insurance. He either pays the equivalent of a premium when he is charged a freight rate which inherently includes the carrier's expected liability costs, or he insures independently, either by declaring value and paying a higher rate, or by paying through his own underwriter.

Confusion in the present state of the law, however, engenders unnecessarily high freight rates because carriers must protect themselves from the possibility of liability. The carrier's underwriter must take into account the possibility of a finding of liability in another court even where there would be none in the "home jurisdiction." Predictability of the parties' legal positions would help to bring down insurance costs.

Diseconomies are also fostered on the shipper's side. He too, must insure himself against the same uncertainty should a court decision be adverse to his interests and expectations. There is the possibility, therefore, of duplicating coverage for the same uncertainty. If the shipper does not protect himself with his own insurance, due to the mistaken belief that his shipment is already "insured," (i.e., that his cargo falls under the non-package customary freight unit liability valuation method) he becomes a victim of his own imprudence in light of the contradictory case law.

Under the proposed solution these problems would be solved. Although the risk of loss would continue to fall ultimately on the shipper, his insurance premiums would more accurately reflect that risk; such premiums, however, would no longer include a premium for the risk incurred by the confusing state of the law. Since the freight rate would include the carrier's insurance costs, the shipper would indirectly pay for the entire insurance on the cargo shipped. The carrier's liability would merely provide the incentive to gain a competitive advantage over other carriers by reducing costs associated with payments for loss or damage. Beyond the carrier's limitation of liability, the shipper would self-insure directly, either through his underwriter, or by paying a higher freight rate in return for coverage through the carrier.

The "value" of all cargo will have been declared by the shipper upon the carrier's request because carriers would demand such a declaration of value in determining the proper freight rate. The shipper would be legally and equitably bound by the lower of the value he declared, or the fair market value of the goods in question on the date of damage at the place where the dispute is litigated. The fair market value ceiling would effectively preclude a fraudulent shipper from sealing already damaged goods and declaring an artificially high value, so that the carrier's liability on the percentage

111. This requirement would avoid costly evidentiary problems arising out of disputes concerning what value should be used: value at place of shipment, at place of destination, etc.
of the value declared would equal the true value of the goods. The shipper, therefore, would not be able inexpensively and fraudulently to transfer his losses to the carrier by "insuring" them after the goods are in fact damaged. Proscribing such potential fraud would help keep insurance rates on packages of great value at their true market level.

The most attractive aspect of this proposed change, however, is that it eliminates the costly and unnecessary litigation which arises when the limitation of liability depends on the definition of cargo, rather than its value. With liability based on value, goods would not need to be classified or defined: "borderline" cases would exist but the courts would not have to devise complex and unrealistic tests to define and classify goods in transport. No longer would courts have to strain legal definitions in order to apply them to new and unexpected developments in the shipment of cargo.\(^\text{112}\) The limitation of liability would no longer be subject to inflation. Instead, there would exist a constant and predictable formula for risk allocation without the inherent inefficiencies of the present system.