

January 1991

Admiralty Law - Institute of London Underwriters v. Sea-Land Services, Inc.: Good Things Do Not Always Come In Small Packages

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Recommended Citation

Sharon Stover, *Admiralty Law - Institute of London Underwriters v. Sea-Land Services, Inc.: Good Things Do Not Always Come In Small Packages*, 21 Golden Gate U. L. Rev. (1991).
<http://digitalcommons.law.ggu.edu/ggulrev/vol21/iss1/6>

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ADMIRALTY LAW

INSTITUTE OF LONDON UNDERWRITERS v. SEA-LAND SERVICES, INC.: GOOD THINGS DO NOT ALWAYS COME IN SMALL PACKAGES

I. INTRODUCTION

In *Institute of London Underwriters v. Sea-Land Services, Inc.*,¹ the Ninth Circuit determined the effect of the Carriage of Goods by Sea Act (COGSA)² when it is incorporated by contract for goods not ordinarily within COGSA's scope rather than if it applied *ex proprio vigore*.³ The court held that in such a contract, COGSA is effective as a contractual term only; inconsistent terms are, therefore, also valid.⁴

The Ninth Circuit then set forth a method by which to calculate a customary freight unit (CFU) for on-deck cargo⁵ because COGSA limits damage liability to \$500 per "package" or CFU.⁶

1. *Institute of London Underwriters v. Sea-Land Serv.*, 881 F.2d 761 (9th Cir. 1989) (per Goodwin, C.J.; the other panel members were Wright, J. and Norris, J.).

2. 46 U.S.C. §§ 1300-15 (1982). COGSA applies of its own force only to shipments "to or from ports of the United States, in foreign trade . . ." 46 U.S.C. § 1300.

3. *Sea-Land*, 881 F.2d at 763, 768. *Ex proprio vigore* is defined as "by their own force." BLACK'S LAW DICTIONARY 522 (5th ed. 1979). 46 U.S.C. § 1301(c) specifically *excludes* cargo carried on deck. However, in *Sea-Land*, paragraph 1 of the bill of lading (the clause paramount) stated "This bill of lading shall have effect subject to all of the provisions of the Carriage of Goods by Sea Act . . . The defenses and limitations of said Act shall apply to goods whether carried on or under deck." *Sea-Land*, 881 F.2d at 764.

4. *Id.*

5. *Sea-Land*, 881 F.2d at 768.

6. *Id.* The court based its finding on the language contained in the bill of lading, which stated, "The word 'package' shall include . . . cargo shipped . . . on a . . . cradle . . ." *Id.* at 768. 46 U.S.C. § 1304(5) limits a carrier's liability to \$500 *per package*, or in the case of goods not shipped in packages, *per customary freight unit* (CFU).

The district court had determined that a yacht shipped on the deck of a vessel was forty-five CFUs, therefore liability had been assessed at \$22,500.⁷ The Ninth Circuit reversed, finding that the yacht was one "package" and liability should have been limited to \$500.⁸

II. FACTS

Plaintiff, Institute of London Underwriters, was the subrogated⁹ cargo insurer of the shipper of a yacht being transported by ocean vessel from Taiwan to Tacoma, Washington.¹⁰ Sea-Land Services, Inc., the owners of the SS SEA-LAND MARINER,¹¹ the vessel that transported the yacht on its deck, and Container Stevedoring, an independent stevedoring contractor, which unloaded the yacht in Tacoma, were the defendants.¹²

The yacht was shipped in a cradle on the deck of the SEA-LAND-MARINER.¹³ Ordinarily, Sea-Land Services (the carrier) would discharge yachts from its vessel to the dock, unless the shipper instructed that the yacht be discharged into the water,¹⁴ as in this case.¹⁵ Container Stevedoring removed the yacht from its cradle, placed it in slings, and lifted it from the vessel and over the water.¹⁶ The yacht slipped from the slings, fell into the

7. *Sea-Land*, 881 F.2d at 764.

8. *Id.* The district court ruled that the yacht was not a package, and assessed the carriers liability at \$500 per linear foot, since this was the unit upon which freight was charged. *Id.* The Ninth Circuit reversed, finding that the yacht was a single COGSA package. *Sea-Land*, 881 F.2d at 768.

9. Subrogated is defined as "the substitution of one person in place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights or remedies." BLACK'S LAW DICTIONARY 1279 (5th ed. 1979). See *infra* note 18 and accompanying text.

10. *Sea-Land*, 881 F.2d at 763.

11. Brief for Institute of London Underwriters, *Institute of London Underwriters v. Sea-Land Serv., Inc.* 881 F.2d 761 (9th Cir. 1989) (No. 88-3701). The vessel was named as a defendant in rem, pursuant to Fed. R. Civ. P. 9(h).

12. *Sea-Land*, 881 F.2d at 763.

13. *Sea-Land*, 881 F.2d at 768 n.5. Both the cradle and the tarpaulin surrounding it were provided by the shipper, Angel Marine Industries, at its factory in Taiwan. Brief for Sea-Land Services, Inc. at 7, *Institute of London Underwriters v. Sea-Land Serv., Inc.* 881 F.2d 761 (9th Cir. 1989) (No. 88-3701).

14. Pre-Trial Order at 5, *Sea-Land* (No. C 87-210TB).

15. *Sea-Land* 881 F.2d 768 n.5.

16. Pre-Trial Order at 6, *Sea-Land* (No. C 87-210TB).

water, and sustained approximately \$90,000 in damage.¹⁷

London Underwriters paid the shipper's claim, and subrogated to the shipper's rights,¹⁸ then sued Sea-Land Services and Container Stevedoring for reimbursement.¹⁹

At trial, London Underwriters argued that because the yacht was carried on deck, COGSA's limitation of liability provision²⁰ did not apply,²¹ thus they were entitled to full recovery.²²

The district court, however, found that COGSA applied because Sea-Land had included a "clause paramount"²³ in the bill of lading, which incorporated COGSA by reference.²⁴ London Underwriters also argued that Container Stevedoring, which was not a signatory to the bill of lading, could not claim the benefit of COGSA's limitation of liability provision.²⁵ However, relying on paragraph 2 (The Himalaya clause) of the bill of lading, the district court ruled that the Himalaya clause²⁶ served to extend

17. *Id.*

18. *Id.* Pretrial Order at 1, 6, *Sea-Land* (No. C 87-210TB). The Institute of London Underwriters was the insurer of Angel Marine, the manufacturer of the yacht. Having previously paid Angel Marine's claim for the \$90,000 damage to the yacht, London Underwriters sought reimbursement for this amount from defendant(s) Sea-Land Services, Inc. and Container Stevedoring. *Id.*

19. *Id.*

20. 46 U.S.C. § 1304(5) limits a carrier's liability to \$500 per package or CFU. See *infra* note 73 and accompanying text.

21. 46 U.S.C. § 1301(c) specifically excludes cargo carried on deck. See *infra* note 63 and accompanying text.

22. See Pretrial Order at 8, *Sea-Land* (No. C 87-210TB).

23. *Sea-Land*, 881 F.2d at 764. A clause paramount is a provision incorporating COGSA or a similar statute by reference, when it ordinarily would not apply. E. DEUTSCH, MODEL OCEAN BILL OF LADING (1940). In *Sea-Land*, the clause paramount (paragraph 1 of the bill of lading) stated "This bill of lading shall have effect subject to all of the provisions of the Carriage of Goods by Sea Act of the United States of America . . . The defenses and limitations of said Act shall apply to goods whether carried on or under deck." *Sea-Land*, 881 F.2d at 764.

24. *Sea-Land*, 881 F.2d at 763, 764.

25. *Id.* at 767.

26. *Sea-Land*, 881 F.2d at 767. In admiralty law, a Himalaya clause is the language used in the contract of carriage to extend the carrier's defenses and limitation of liability under COGSA to agents and independent contractors of the carrier. *Sea-Land*, 881 F.2d at 767 n.3. Sea-Land's Himalaya clause (paragraph 2 of the bill of lading) read as follows:

If it shall be adjudged that any person other than the owner or demise charterer (including the master, time charterer, agents, stevedores . . . and other independent contractors) is the carrier or the bailee of the goods, or is otherwise liable in contract or in tort, all rights, exemptions and limitations of

COGSA's protections to the stevedore as well.²⁷ Finally, the district court determined that although the carrier and stevedore were both protected by COGSA, which allows recovery of only \$500 per package or CFU, the appropriate basis for the CFU calculation was not a package unit, but rather by linear foot.²⁸ The yacht was forty-five feet long, and freight was charged per foot, therefore the district court assessed defendants' liability at \$22,500.²⁹ Defendants appealed, contending that the damages had been improperly calculated because the bill of lading listed *one yacht*, which, it was argued, was one CFU.³⁰

III. BACKGROUND

A. THE COMMON LAW

At common law, a public carrier of goods by sea was absolutely liable for the safe transport and discharge of those goods, with very few exceptions.³¹ Further, even if the cause of damage to cargo fell within an exception, the carrier was still liable if negligent.³² In order for a shipper to collect damages from a carrier for lost or injured cargo, two things were required: proof of delivery to the carrier of undamaged goods, and non-delivery or delivery of damaged goods.³³ Thus, the common law, in both England and the United States, treated the carrier as both the transporter and insurer of goods carried by sea.³⁴ If a shipper

liability . . . shall be available to such other persons.

Sea-Land, 881 F.2d at 767 (emphasis added).

27. *Sea-Land*, 881 F.2d at 764.

28. *See Id.* at 764. The district court held that, "as a matter of law, the customary freight unit is the unit upon which the charge for freight is computed." *See Id.* (As the district court opinion was unpublished, all references herein refer to the Ninth Circuit's recitations of the district court opinion.)

29. *See Id.* (\$500 x 45 feet).

30. Brief for Sea-Land Services, Inc. at 19-20, *Institute of London Underwriters v. Sea-Land Serv., Inc.* 881 F.2d 761 (9th Cir. 1989) (No. 88-3701).

31. *See generally* G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 139 (2d ed. 1975) [hereinafter *GILMORE*]. The common law exceptions included acts of God or the public enemy, negligence of the shipper, or inherent vice (defective condition prior to shipment) of the cargo. *Id.*

32. *Id.* at 140.

33. *Propeller Niagara v. Cordes*, 62 U.S. (21 How.) 7, 22-23 (1858) (common carrier absolutely liable for goods in his custody, absent act of God or other exempted cause).

34. *Id.* at 23. The Court stated, "Common carriers by water, like common carriers by land, in the absence of any legislative provisions prescribing a different rule, are also, in general insurers, and liable in all events and for every loss or damage, however occasioned, unless it happen by the act of God, or the public enemy . . ." *Propeller Niagara*,

successfully proved his *prima facie* case, the carrier was liable for all damages to the cargo, regardless of fault or the amount of damage.³⁵ The common law recognized no limitation of liability, unless damage to cargo occurred due to an Act of God or public enemy.³⁶

To purportedly remain free from liability in the event cargo was damaged, shipowners began to carve out various "exceptions" in their bills of lading.³⁷ By the end of the 19th century, the list of "exceptions" had grown so extensive that nearly all risks of loss were placed upon the shipper.³⁸ In the event of loss or damage to cargo, the shipper could turn only to his marine insurer for relief, since the carrier had exempted itself from liability for virtually all causes of loss or damage.³⁹ Thus, in less

62 U.S. at 23.

35. *Id.*

36. *Id.* at 26.

37. *Caterpillar Overseas S.A. v. S.S. Expediter*, 318 F.2d 720, 722 (2d Cir. 1963) (bills of lading became contracts of adhesion controlled by carriers.) *See infra* note 38 and accompanying text.

38. *Tessler Bros. (B.C.) v. Italcific Lines*, 494 F.2d 438, 444 (9th Cir. 1974).

39. *See Tessler Bros. (B.C.) v. Italcific Lines*, 494 F.2d 438, 444 (9th Cir. 1974) (quoting the late James A. Quinby, Esq.'s "Them Damaged Cargo Blues").

It is much to be regretted
 That your goods are slightly wetted
 But our lack of liability is plain,
 For our latest Bill of Lading
 Which is proof against evading
 Bears exceptions for sea water, rust and rain
 Also sweat, contamination
 Fire and all depreciation
 That we've ever seen or heard of on a ship
 And our due examination
 Which we made at destination
 Shows your cargo much improved by the trip
 It really is a crime
 That you're wasting all your time
 For our Bill of Lading clauses made it plain
 That from ullage, rust or seepage
 Water, sweat or just plain leakage
 Acts of God, restraining of princes, theft or war
 Loss, damage or detention
 Lockout, strike or circumvention
 Blockade, interdict or loss twixt ship and shore,
 Quarantine or heavy weather
 Fog and rain or both together
 We're protected from all of these and many more
 And it's very plain to see
 That our liability

than a hundred years, the risk of loss for cargo damage had shifted almost entirely from the carrier to the shipper.⁴⁰

B. THE HARTER ACT

The Harter Act⁴¹ passed by Congress in 1893, represents a compromise between the carriers, who wanted the shipper to bear the risk of cargo loss or damage, and the shippers, who wanted the carriers to assume liability.⁴² The Act allocates risks of shipping and lessens the carrier's superior bargaining power by making unlawful many of the exculpatory clauses that previously were inserted into bills of lading.⁴³ However, the Act explicitly preserves the common law liability exceptions of acts of God, perils of the sea, or shipper's negligence.⁴⁴

The Act applies to all shipments via water carrier within the United States, as well as to foreign shipments docked domestically, both prior to loading, and after unloading of cargo.⁴⁵ It also requires the carrier to issue a bill of lading specifying the quantity of goods received.⁴⁶ It provides for no statute of limita-

As regards your claim is absolutely nil
So try your underwriter
He's a friendly sort of blighter
And is pretty sure to grin and foot the bill.

Id.

40. *Caterpillar Overseas, S.A. v. S.S. Expediter*, 318 F.2d 720, 722 (2d Cir. 1963) (historical shifting of risk of loss allocation explained).

41. The Harter Act, ch. 105, 27 Stat. 445 (1893) (codified as amended at 46 U.S.C. §§ 190-96 (1982 & Supp. V. 1987)). See *Caterpillar Overseas*, 318 F.2d at 722.

42. *Encyclopedia Britannica, Inc. v. S.S. Hong Kong Producer*, 422 F.2d 7, 11 (2d Cir. 1969) (purpose of the Harter Act is to achieve a fair balance between carriers' and shippers' interests).

43. See *Tessler Bros. (B.C.) v. Itaipacific Lines*, 494 F.2d 438, 444 (9th Cir. 1974) (Harter Act serves to invalidate most liability exceptions). For example, Harter Act § 1 (46 U.S.C. § 190) renders any attempt by the carrier to exonerate himself from liability for negligence null and void. Harter Act § 2 (46 U.S.C. § 191) prohibits the carrier from including a clause in a bill of lading that purports to relieve the carrier from his duty of due diligence in maintaining his vessel.

44. 46 U.S.C. § 192 provides, in part: "If the owner of any vessel transporting merchandise or property to or from any port in the United States shall exercise due diligence to make . . . the vessel . . . seaworthy . . . neither the vessel, her owner or owners, shall become or be held responsible for damage or loss resulting from . . . damages of the sea, acts of God . . ."

45. 46 U.S.C. § 191. See A. KNAUTH, ON OCEAN BILLS OF LADING 121-22 (1941).

46. 46 U.S.C. § 193 provides in part: "It shall be the duty of the owner . . . of any vessel . . . to issue to shippers of any lawful merchandise a bill of lading . . ."

tions,⁴⁷ but the equitable doctrine of laches may be applied.⁴⁸ Carriers may impose a time limit for negligence suits against them, and this will be enforced if the limitation is reasonable.⁴⁹

Finally, the Act denies exoneration for the carrier's navigational errors if he has failed to exercise due diligence to provide a seaworthy vessel, even if an unseaworthy vessel is not the cause of loss or damage.⁵⁰ This provision denying exoneration is known as the "unseaworthiness doctrine," and was first applied by the Supreme Court in *The Isis*,⁵¹ a case that involved a vessel stranding caused by the vessel's unseaworthiness.⁵²

C. THE CARRIAGE OF GOODS BY SEA ACT

1. Overview

The Harter Act was greeted with approval by foreign nations,⁵³ and it served as the impetus for international legislation regulating shipments between foreign ports.⁵⁴ At an international diplomatic conference in Brussels in 1924, legislation known as the Hague Rules was formally adopted.⁵⁵ Subsequently, most remaining nations engaged in maritime commerce

47. See *P.P.G. Indus. v. Ashland Oil Co.*, 527 F.2d 502, 505 (3rd Cir. 1975). See 46 U.S.C. § 1303(6). In contrast, COGSA contains a one-year statute of limitations for the shipper to bring suit against the carrier for loss or damage to cargo.

48. *P.P.G. Indus. v. Ashland Oil Co.*, 527 F.2d 502, 505 (3rd Cir. 1975). (Harter Act has no statute of limitations and laches may apply).

49. *The Queen of the Pacific*, 180 U.S. 49, 53-58 (1901) (reasonableness of time limit depends on object of notice and length of voyage and thirty day time limit held reasonable).

50. 46 U.S.C. § 191 provides, in part: "It shall not be lawful for any . . . owner to insert in any bill of lading . . . any covenant or agreement whereby the obligations of the owner . . . to make said vessel seaworthy . . . be lessened, weakened, or avoided."

51. *May v. Hamburg - Amerikanische Packerfahrt Aktiengesellschaft (The Isis)*, 290 U.S. 333 (1933) (exemption from liability resulting from faults or errors in navigation or management of the vessel is conditioned upon the carrier's exercise of due diligence to provide a seaworthy ship both at the commencement of the voyage and at any intermediate stage at which he took control).

52. *The Isis*, 290 U.S. at 352. The section of the Harter Act at issue in *The Isis* was 46 U.S.C. § 192 which provides, in part: "neither the vessel, her owner . . . shall become or be held responsible for damage, or loss resulting from faults or errors in navigation. . . ."

53. A. KNAUTH, *ON OCEAN BILLS OF LADING*, 99-110 (1941).

54. *Id.*

55. Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading. Aug. 25, 1924, 51 STAT. 233, T.S. No. 931, 120 L.N.T.S. 155.

adopted the Hague Rules.⁵⁶ In the United States, the Hague Rules were incorporated into domestic law with the enactment of the Carriage of Goods by Sea Act (COGSA) in 1936.⁵⁷

COGSA, like the Harter Act, serves to allocate the risk of loss for cargo damage.⁵⁸ Unlike the Harter Act, COGSA is applicable only to shipments to or from the United States in foreign, rather than domestic trade.⁵⁹ The Harter Act and COGSA function concurrently.⁶⁰ In contracts for domestic carriage of goods (between United States ports) COGSA expressly provides that the parties to the bill of lading may incorporate COGSA by reference, even when the Harter Act would ordinarily apply.⁶¹ When a bill issued for carriage between ports of the United

56. The following nations have adopted the Hague Rules: Angola, Algeria, Argentina, Australia, The Bahamas, Barbados, Belgium, Cape Verde, Cyprus, Denmark, Egypt, Fiji, Finland, France, the Gambia, German Dem. Rep., Fed. Rep. Germany, Ghana, Grenada, Guyana, Hungary, Iran, Ireland, Italy, Ivory Coast, Jamaica, Japan, Kenya, Kuwait, Lebanon, Malaysia, Mauritius, Monaco, Mozambique, Nauru, Netherlands, Nigeria, Norway, Papua New Guinea, Paraguay, Peru, Poland and Free City of Danzig, Portugal, Romania, Sao Tome and Principe, Seychelles, Sierra Leone, Singapore, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Rep., Tanzania, Tanganyika, Zanzibar, Tonga, Trinidad and Tobago, Turkey, United Kingdom, United States, Yugoslavia. 2A BENEDICT ON ADMIRALTY 1:14 (M. Cohen 7th ed. 1989).

57. Carriage of Goods by Sea Act, ch. 229, 49 Stat. 1207 (1936) (codified as amended at 46 U.S.C. §§ 1300-15 (1982)). *Encyclopedia Britannica v. S.S. Hong Kong Producer*, 422 F.2d 7, 11 (2nd Cir. 1969). (Congress' initial goal in its adoption of COGSA was to promote uniformity in maritime commerce). See A. KNAUTH, ON OCEAN BILLS OF LADING 99-110 (1941).

58. *Institute of London Underwriters v. Sea-Land Serv., Inc.* 881 F.2d 761, 763 (9th Cir. 1989).

59. 46 U.S.C. §§ 1300 and 1312. Section 1312 provides, in part:

This chapter shall apply to all contracts for carriage of goods by sea to or from the United States in foreign trade. As used in this chapter the term 'United States' includes its districts, territories, and possessions . . . The term "Foreign Trade" means the transport of goods between the ports of the United States and ports of foreign countries.

60. 46 U.S.C. § 1312 further provides:

Nothing in this Act shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions or its possessions and any other port of the United States or its possessions. *Provided, however, that any bill of lading or similar document of title which is evidence of a contract for the carriage of goods between such ports, containing an express statement that it shall be subject to the provisions of this Act, shall be subjected hereto as fully as if subject hereto by the express provisions of this Act . . .* (emphasis added).

61. *Id.*

States incorporates COGSA by reference, it is known as the "coastwise option."⁶² Further, even in situations where COGSA expressly does not apply,⁶³ the parties may make its provisions contractual by incorporating COGSA by reference,⁶⁴ through the use of a "clause paramount."⁶⁵

COGSA is applicable only to contracts of carriage between shippers and carriers,⁶⁶ but its protections may be extended to third parties, such as stevedores or other agents of the carrier, through a valid "Himalaya clause."⁶⁷ Unlike the Harter Act, COGSA applies only after loading, and prior to discharge of the cargo.⁶⁸ Thus COGSA, while partially superseding the Harter Act, expressly preserves its application.⁶⁹

COGSA contains sixteen separate and distinct exoneration

62. See e.g. *Pan American World Airways, Inc. v. California Stevedore and Ballast Co.*, 559 F.2d 1173, 1175 n.3 (9th Cir. 1977) (coastwise incorporation of COGSA into bill of lading renders it *ex proprio vigore*; inconsistent terms invalid). Vessels "plying coastwise" are those engaged in domestic trade, or plying between port and port in the United States. BLACK'S LAW DICTIONARY 233 (5th ed. 1979).

63. See 46 U.S.C. § 1301(c) which specifically excludes "live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried."

64. 46 U.S.C. § 1312 permits this option. See *supra* notes 59-60 and accompanying text.

65. See *Sea-Land*, 881 F.2d at 764. A clause paramount is a provision incorporating COGSA or a similar statute by reference, when it ordinarily would not apply. E. DEUTSCH, MODEL OCEAN BILL OF LADING 1 (1940).

66. 46 U.S.C. § 1301(b) provides in part: "The term 'contract of carriage' applies only to contractors of carriage covered by a bill of lading . . . regulates the relations between a carrier and holder of the same."

67. See *Carriage of Goods by Sea: Application of the Himalaya Clause to Subdeleagees of the Carrier*, 2 MARITIME LAWYER 91 (1977), which explains the origin of the Himalaya clause: (term derives from an earlier British case involving the vessel HIMALAYA, *Adler v. Dickson*, 1 Q.B. 158 (1954)). See *Sea-Land*, 881 F.2d at 767. (In admiralty law, a Himalaya clause is the language used to extend the carrier's defenses and limitations of liability under COGSA to his agents and independent contractors).

68. 46 U.S.C. § 1301(e) provides: "[t]he term 'carriage of goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship." But, its protections may be extended both prior to loading and after discharge through a valid Himalaya clause. See *Sea-Land*, 881 F.2d at 767. Absent a Himalaya clause, however, the Harter Act governs the rights and duties of the parties prior to loading, and after discharge. 46 U.S.C. § 1311.

69. 46 U.S.C. § 1311 provides:

Nothing in this Act shall be construed as superseding any part of [46 U.S.C. §§ 190-96 (The Harter Act)] . . . insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

clauses⁷⁰ which, if any cause contained within a clause is proven to be the source of cargo loss or damage, relieves the carrier from liability, if he is not negligent.⁷¹ A further provision known as the "Q" clause exonerates the carrier from liability for any other cause arising without his fault or neglect.⁷²

2. Limitation of Liability

Unlike the Harter Act, COGSA contains an express limitation of liability provision that benefits the carrier.⁷³ This provi-

70. 46 U.S.C. § 1304(2)(a)-(p) provides as follows:

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from -

(a) Act, neglect, or default of the master. . . or servants of the carrier in the navigation or management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, accidents of the sea or other navigable water;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods . . .

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause . . .

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight . . . arising from inherent defect . . . or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence.

71. 46 U.S.C. § 1304(3) provides, "The shipper shall not be responsible for any loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants."

72. 46 U.S.C. § 1304(2)(q) provides:

Any other cause arising without the actual fault and privity of the carrier . . . or agents and servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

73. 46 U.S.C. § 1304(5) provides 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 . . . or . . . customary freight unit . . ."

sion has been the subject of much litigation.⁷⁴ It provides that a carrier who has given the shipper a “fair opportunity to declare a higher value”⁷⁵ for the cargo is entitled to limit his liability to \$500 per package or “customary freight unit” (CFU)⁷⁶ for cargo loss or damage.

3. What is a “package” or CFU?

The courts have defined “package” and CFU in a variety of ways.⁷⁷ Generally, the parties will define “package” in the bill of lading. A typical description of the shipment on a bill of lading may read: “one container, said to contain 99 bales.”⁷⁸ In *Pannell v. United States Lines*,⁷⁹ the Second Circuit held that when the bill of lading so stated, a yacht carried on deck was one package, thus limiting the carrier’s liability accordingly.⁸⁰

74. See *Croft & Scully Co. v. M/V Skulptor Vucketich*, 664 F.2d 1277 (5th Cir. 1982) (district court held a container was a “package”; Fifth Circuit reversed, but remanded for question as to whether container was a CFU). *Commonwealth Petrochemicals, Inc. v. SS Puerto Rico*, 607 F.2d 322 (4th Cir. 1979) (an electrical transformer weighing 47,700 pounds was a “package,” thus carrier’s liability limited to \$500 for damage). *Isbrandtsen Co. Inc. v. United States*, 201 F.2d 281 (2nd Cir. 1953) (an entire locomotive was one CFU, thus limiting carrier’s liability for its destruction to \$500). *Stirnemann v. The San Diego*, 148 F.2d 141 (2nd Cir. 1945) (a machine shipped in 126 pieces was held to represent 126 “packages”).

75. See *infra* notes 81-84 and accompanying text. This language, not part of COGSA’s text, was articulated by the Ninth Circuit in *Tessler Bros. (B.C.) v. Itaipacific Line*, 494 F.2d 438, 443 (9th Cir. 1974).

76. 46 U.S.C. § 1304(5). See *supra* note 73 for the relevant text.

77. See *e.g.* *Vegas v. Compania Anonima Venezolana*, 720 F.2d 629 (11th Cir. 1983) (each of 109 boxes of automobile parts were a single package for COGSA purposes despite the fact that they were shipped in two master cartons built on pallets); *Croft & Scully Co. v. M/V Skulptor Vucketich*, 664 F.2d 1277 (5th Cir. 1982) (container supplied by carrier was not a COGSA “package”); *Commonwealth Petrochemicals, Inc. v. S.S. Puerto Rico*, 607 F.2d 322 (4th Cir. 1979) (47,700 pound transformer was one COGSA package); *Cameco, Inc. v. S.S. American Legion*, 514 F.2d 1291 (2nd Cir. 1974) (pallet containing 100 cartons of canned hams was one CFU); *Pannell v. United States Lines Co.*, 263 F.2d 497 (2nd Cir. 1959) (yacht shipped on deck of a vessel while lashed in a cradle, was a COGSA “package”).

78. *Leather’s Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 804 (2nd Cir. 1971) (held a container is not a package where the separate packages in the container are so described).

79. 263 F.2d 497 (2nd Cir. 1959).

80. *Pannell*, 263 F.2d at 498.

4. "The Fair Opportunity to Declare" Doctrine

The \$500 package limitation applies only if the shipper is given a fair opportunity to declare a higher value for the cargo.⁸¹ Precisely what constitutes "fair opportunity" is still an area of dispute among the circuits.⁸² While the Supreme Court has not addressed the issue in the context of COGSA, limitation of liability clauses for railroad shipments have been upheld.⁸³

In *New York, New Haven & Hartford Railroad v. Nothnagle*,⁸⁴ a case involving lost passenger luggage, the Supreme Court adopted the fair opportunity requirement.⁸⁵ The passenger sued the railroad in state court and was awarded \$615, the full value of the lost luggage.⁸⁶ The railroad company appealed, contending that its liability was limited to \$25, due to the applicable tariff filed with the Interstate Commerce Commission.⁸⁷ The Supreme Court conceded that the tariff applied, but held that the passenger was entitled to full recovery, since she lacked actual knowledge of the limitation.⁸⁸ The Court found that passengers should have a "fair opportunity" to choose be-

81. 46 U.S.C. § 1304(5). See *Tessler Bros. (B.C.) v. Italtacific Lines*, 494 F.2d 438, 443 (9th Cir. 1974) (fair opportunity criteria discussed).

82. See e.g. *Tessler Bros. (B.C.) v. Italtacific Lines*, 494 F.2d 438, 443 (9th Cir. 1974) (COGSA requires a shipper be provided with a fair opportunity to choose between a higher or lower liability by paying a correspondingly greater or lesser charge). In *Tessler*, the Ninth Circuit found that shipper will not be deemed to have been given a "fair opportunity" where such opportunity was not presented on the face of the bill of lading. *Tessler*, 494 F.2d at 443 (quoting *New York, New Haven & Hartford R.R. v. Nothnagle*, 346 U.S. 128, 135 (1953)). In contrast, see *Brown & Root, Inc. v. M/V. Peisander*, 648 F.2d 415 (5th Cir. 1981) ("fair opportunity" given when COGSA incorporated by reference) and *Cincinnati Milicron Ltd. v. M/V American Legend*, 804 F.2d 837 (4th Cir. 1986) (short form bill of lading incorporating COGSA by reference provides shipper with fair opportunity to declare a higher value).

83. See e.g. *Pierce Co. v. Wells Fargo & Co.*, 236 U.S. 278 (1915) (carrier's liability limited to \$50, as specified in the bill of lading, since shipper given fair opportunity to declare full \$15,000 value of damaged automobiles.); *Atchison, T. & S. F. Ry. v. Robinson*, 233 U.S. 173 (1914) (carrier's liability for damaged horse limited to \$100, since shipper was aware of written limitation of liability provision of contract of carriage); *Boston & Me. R.R. v. Hooker*, 233 U.S. 97 (1914) (where tariff rates published, notice of fair opportunity to declare a higher value for passenger luggage deemed sufficient).

84. 346 U.S. 128 (1953) (carrier must give passenger fair opportunity to declare higher value in order to limit carrier's liability to less than actual value of loss sustained).

85. *Nothnagle*, 346 U.S. at 135.

86. *Id.*

87. *Id.*

88. *Id.* at 135.

tween higher or lower liability⁸⁹ before a carrier can limit recovery to an amount that is less than the actual loss.⁹⁰ Thus, the Court articulated the fair opportunity requirement but no test was provided for its determination.⁹¹

5. The Ninth Circuit's Development of "Fair Opportunity"

*Tessler Bros. (B.C.) v. Itaipacific Lines*⁹² was the first Ninth Circuit decision to apply the fair opportunity requirement articulated by the Supreme Court in *Nothnagle*. In *Tessler*, the holder of the bill of lading sued the carrier for damage to its industrial dry cleaning machine.⁹³ The Ninth Circuit stated that the carrier had to give the shipper a fair opportunity to choose between a higher and lower liability by paying a correspondingly higher or lower freight charge.⁹⁴

In *Grace Lines, Inc. v. Todd Shipyards Corp.*,⁹⁵ the Ninth Circuit extended the fair opportunity requirement to the carrier's agents.⁹⁶ The Ninth Circuit held that, if a shipper had been given a fair opportunity to declare a higher value, the carrier could extend COGSA's protections to third parties through a valid Himalaya clause.⁹⁷

In *Carman Tool & Abrasives v. Evergreen Lines*,⁹⁸ the Ninth Circuit refined its decision in *Tessler*, and required notice to the shipper of the "fair opportunity" in language equivalent

89. *Nothnagle*, 346 U.S. at 135. The Court stated: "[O]nly by granting its customers a fair opportunity to choose between the higher or lower liability by paying a correspondingly greater or lesser charge can a carrier lawfully limit recovery to an amount less than the actual loss sustained." *Id.*

90. *Id.* at 136.

91. *See id.* at 136.

92. 494 F.2d 438 (9th Cir. 1974).

93. *Tessler*, 494 F.2d at 440.

94. *Tessler*, 494 F.2d at 443. The Ninth Circuit stated "the carrier must give the shipper a fair opportunity to choose between a higher or lower liability by paying a corresponding greater or lesser charge." *Tessler*, 494 F.2d at 443 (quoting *Nothnagle*, 346 U.S. 128, 135 (1953)).

95. 500 F.2d 361 (9th Cir. 1974) (agent of carrier can claim COGSA protection if shipper given fair opportunity).

96. *Grace Lines, Inc. v. Todd Shipyards*, 500 F.2d 361, 369.

97. *Id.* *See supra* note 67 and accompanying text.

98. 871 F.2d 897 (9th Cir. 1989) (fair opportunity requires operative language of to COGSA appear on face of bill of lading).

to COGSA's applicable provision.⁹⁹ Further, the court declared that, if a bill of lading contains the operative language of COGSA,¹⁰⁰ it would be *prima facie* evidence that the shipper was given the requisite fair opportunity to declare a higher value.¹⁰¹

6. COGSA as a Contractual Term

Even when COGSA does not apply *ex proprio vigore*, the parties to a bill of lading are still free to incorporate it by reference.¹⁰² When COGSA is incorporated by reference, it has the same effect as if it applied *ex proprio vigore*.¹⁰³

The Ninth Circuit has held that, when COGSA is incorporated in contracts for domestic carriage, where otherwise the Harter Act would apply,¹⁰⁴ all terms inconsistent with COGSA are invalid.¹⁰⁵ The Third,¹⁰⁶ Fourth,¹⁰⁷ and Fifth¹⁰⁸ Circuits, however, have held to the contrary, and have permitted both COGSA and inconsistent terms to be construed as ordinary terms of contract.¹⁰⁹

99. *Carman Tool*, 871 F.2d at 899. The Ninth Circuit refused to extend the notice requirement to those not having direct dealings with the carrier. *Id.* at 901.

100. *Carman Tool*, 871 F.2d at 901. The court stated that the terms of 46 U.S.C. § 1304(5) should be legibly recited on the bill of lading. *Id.* See *supra* note 73 for partial text.

101. *Carman Tool*, 871 F.2d at 899 (citing *Nemeth v. General S.S. Corp.*, 694 F.2d at 609, 611-12 (9th Cir. 1982)). *Nemeth v. General S.S. Corp. Ltd.*, 694 F.2d 609 (9th Cir. 1982) (microscopic and illegible terms in a bill of lading did not provide shipper with fair opportunity); *Pan Am World Airways v. California Stevedore and Ballast Co.*, 559 F.2d 1173 (9th Cir. 1977) (bill of lading actually *denied* the opportunity to declare a higher value and was declared void).

102. See 46 U.S.C. § 1312. See *supra* note 60 and accompanying text.

103. 46 U.S.C. § 1312.

104. See 46 U.S.C. § 190-96. See *supra* note 68 and accompanying text.

105. See *Pan Am World Airways v. California Stevedore & Ballast Co.*, 559 F.2d 1173 (9th Cir. 1977) (in contracts for domestic carriage, where COGSA is incorporated by reference, terms inconsistent with COGSA are invalid).

106. See *PPG Indus., Inc. v. Ashland Oil Co.*, 527 F.2d 502, 507 (3rd Cir. 1975) (COGSA may apply by contract, but only to the extent that parties manifested intent that it should apply).

107. See *Commonwealth Petrochemicals, Inc. v. S.S. Puerto Rico*, 607 F.2d 322, 328 (4th Cir. 1979) (in contracts for domestic carriage, where COGSA's provisions agreed to by parties, inconsistent terms given force as well).

108. See *Ralston Purina v. Barge Juneau*, 619 F. 2d 374, 375-76 (5th Cir. 1980) (in contract for domestic carriage, where parties incorporated only portions of COGSA, terms inconsistent with excluded sections may govern).

109. See *supra* notes 105-08.

The circuits have been more uniform in their treatment of COGSA's terms where foreign shipments are involved.¹¹⁰ In *North River Insurance Co. v. Fed-Sea/Fed Pac-Lines*,¹¹¹ the Ninth Circuit stated that "we reject the view that COGSA preempts all contract terms when its sole force is by incorporation into a contract for foreign transportation."¹¹² In *North River*, the bill of lading specified Canada as the forum for disputes.¹¹³ The Ninth Circuit upheld the foreign forum provision.¹¹⁴

IV. THE COURT'S ANALYSIS

A. INCORPORATION OF COGSA

In *Institute of London Underwriters v. Sea-Land Services, Inc.*,¹¹⁵ the Ninth Circuit held that terms inconsistent with COGSA, but which are otherwise valid contract terms, may be given force concurrent with COGSA.¹¹⁶ The court had previously articulated this finding in *North River Insurance Co. v. Fed.-Sea/Fed.-Pac. Lines*.¹¹⁷ In *North River*, the Ninth Circuit enforced a foreign jurisdiction clause¹¹⁸ where COGSA did not ap-

110. See *Croft & Scully Co. v. M/V Skulptor Vucketich*, 664 F.2d 1277, 1280 (5th Cir. 1982) (when COGSA's terms are merely contractual, judicial interpretation is permissible); *North River Ins. Co. v. Fed.-Sea/Fed.-Pac. Line*, 647 F.2d 985 (9th Cir. 1981) (foreign jurisdiction clause upheld when COGSA applied by contract); *But see Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967) (when COGSA applies as a matter of law, foreign jurisdiction clause inappropriate); *Pannell v. United States Lines Co.*, 263 F.2d 497 (2nd Cir. 1959) (terms inconsistent with COGSA treated as ordinary contract terms).

111. 647 F.2d 985 (9th Cir. 1981).

112. *North River Ins. Co. v. Fed-Sea/Fed-Pac Lines*, 647 F.2d 985, 989 (9th Cir. 1981).

113. *Id.* at 987. Ordinarily, the United States is the chosen forum for disputes arising out of contracts made in the United States, although COGSA contains no prohibition against choosing an alternate forum. *Id.* at 989.

114. *Id.* at 990.

115. *Institute of London Underwriters v. Sea-Land Serv.*, 881 F.2d 761 (9th Cir. 1989).

116. *Sea-Land Serv.*, 881 F.2d at 763 (9th Cir. 1989). The court held that "terms inconsistent with COGSA, but which are otherwise valid contract terms, may be given force where COGSA is incorporated into a contract for foreign carriage to which it would not apply *ex proprio vigore*." *Id.* at 766.

117. 647 F.2d 975 (9th Cir. 1981) (foreign jurisdiction clause upheld where COGSA incorporated by contract).

118. *North River*, 647 F.2d at 990. The bill of lading specified Canada as the forum for disputes. *Id.* at 987.

ply *ex proprio vigore*, but was incorporated by contract.¹¹⁹

In *Sea-Land*, the Ninth Circuit emphasized that the finding in *North River* was *dicta* and thus did not control in the instant case.¹²⁰ However, the court stated that *North River* indicated a direction for Ninth Circuit law,¹²¹ and accordingly allowed the parties in *Sea-Land* to define “goods” contrary to COGSA’s definition.¹²²

B. OPPORTUNITY TO DECLARE HIGHER VALUE

The Ninth Circuit found that the shipper had been given and waived an opportunity to declare a higher value for its cargo.¹²³ The court found that the bill of lading,¹²⁴ expressly provided the shipper with the requisite fair opportunity.¹²⁵

The court stated that if a bill of lading contains notice to the shipper of an opportunity to declare a higher cargo value than \$500 per package or CFU, in language equivalent to section 1304(5) of COGSA,¹²⁶ he is bound by the \$500 per package or CFU limitation unless he declares a higher value.¹²⁷ The court noted that this position had been articulated in *Carman Tool & Abrasives, Inc. v. Evergreen Lines*¹²⁸ and *Tessler Bros. (B.C.) v. Italpacific Lines*¹²⁹ and supported the determination that the

119. *Id.* at 987.

120. *Sea-Land*, 881 F.2d at 766.

121. *Id.*

122. *Id.* 46 U.S.C. § 1301(c) specifically excludes cargo carried on deck (as the yacht in *Sea-Land* was).

123. *Sea-Land*, 881 F.2d at 766.

124. *Id.* *Sea-Land*’s bill of lading contained both a valuation and a declared value clause. The valuation clause (paragraph 17) stated, in part, “In the event of loss, damage, or delay to or in connection with goods exceeding an actual value to the equivalent of \$500 . . . per package or . . . per shipping unit . . . unless the nature and higher value of the goods have been declared by the shipper herein and extra charge paid as provided in Carrier’s tariff.” *Sea-Land*, 881 F.2d at 766.

The Declared Value Clause (clause 23) appeared on the face of the bill of lading. It provided, “(23) Declared value \$_____. If shipper enters a value, carriers’ “package” limitations [sic] of liability does not apply and the ad valorem rate will be charged.” *Id.*

125. *Sea-Land*, 881 F.2d at 766.

126. 46 U.S.C. 1304(5). See *supra* note 73 for full text.

127. *Sea-Land*, 881 F.2d at 766.

128. 871 F.2d 897, 899 (9th Cir. 1989). See *supra* notes 98-101 and accompanying text.

129. 494 F.2d 438, 443 (9th Cir. 1974). See *supra* notes 92-94 and accompanying text.

burden of proof shifted to the shipper to show that fair opportunity to declare a higher value for the yacht was denied.¹³⁰

After considering the language within paragraph 17 of the carrier's bill of lading,¹³¹ the court held that the shipper failed to meet this burden of proof, because the bill of lading explicitly limited liability and thus, the \$500 limitation was found to apply.¹³²

C. EXTENSION OF COGSA'S LIMITATION OF LIABILITY TO THE STEVEDORE

The Ninth Circuit found the bill of lading effectively extended COGSA's protections to the stevedore as well as the carrier under the bill's Himalaya clause.¹³³ In the Ninth Circuit, a valid Himalaya clause had been previously found to extend the benefits of a bill of lading to stevedores when that intent is clearly expressed.¹³⁴ In *Sea-Land*, the Ninth Circuit found an expression of the requisite intent¹³⁵ in the Himalaya clause of the bill of lading.¹³⁶

D. CLASSIFICATION OF THE YACHT FOR CALCULATING LIMITATION AMOUNT

The Ninth Circuit found that the yacht was one package, and not forty-five CFU's as previously determined by the dis-

130. *Sea-Land*, 881 F.2d at 766.

131. *Id.* Paragraph 17 provided, in part,

In the event of loss, damage or delay to or in connection with goods exceeding an actual value to the equivalent of \$500 . . . per package or . . . per shipping unit . . . unless the nature and higher value of the goods have been declared by the shipper herein and extra charge paid as provided in Carrier's tariff . . .

Id.

132. *Id.*

133. *Sea-Land*, 881 F.2d at 767.

134. *Id.* (citing *Tessler Bros.*, 494 F.2d at 442).

135. *Sea-Land*, 881 F.2d at 767.

136. *Id.* The Himalaya clause read, "If it shall be adjudged that any person other than the owner . . . (including the master . . . agents, stevedores . . . and other independent contractors) is the carrier or the bailee of the goods . . . all rights, exemptions, and limitations of liability . . . shall be available to such other persons." *Id.* (emphasis added).

strict court.¹³⁷ Relying on *Pannell v. United States Lines Co.*,¹³⁸ the court concluded that “since the shipper could have declared the value of his yacht and had full protection against damage by paying a higher freight rate, we cannot regard the \$500 limitation as in the nature of a trap.”¹³⁹ The Ninth Circuit held that as the bill of lading clearly defined “package” to include yachts carried on deck,¹⁴⁰ the yacht was a COGSA “package.”¹⁴¹ Accordingly, the shipper was entitled to recover only \$500 and not the \$22,500 as determined by the lower court.¹⁴²

V. CRITIQUE

In *Sea-Land*, the Ninth Circuit aligned itself with the Second¹⁴³ and Fifth¹⁴⁴ Circuits, declaring that in a contract for foreign carriage where COGSA would not apply unless it is incorporated by contract, terms inconsistent with COGSA may nonetheless be given effect.¹⁴⁵ The court formally adopted the dicta expressed in *North River Ins. Co. v. Fed-Sea/Fed-Pac Lines*, when it held that “we reject the view that COGSA preempts all contract terms when its sole force is by incorporation into a contract for foreign transportation.”¹⁴⁶ With this holding, the court furthered Congress’ initial goal for the adoption of COGSA, promoting uniformity in maritime commerce.¹⁴⁷

Both the facts in *Sea-Land*¹⁴⁸ and Ninth Circuit prece-

137. *Sea-Land*, 881 F.2d at 767.

138. 263 F.2d 497 (2d Cir. 1959).

139. *Sea-Land*, 881 F.2d at 768 (quoting *Pannell v. United States Lines Co.*, 263 F.2d 497, 498 (2d Cir. 1959)).

140. *Sea-Land*, 881 F.2d at 768. The bill of lading listed “package” to include “cargo shipped in a cradle” (as the yacht was). *Id.*

141. *Id.*

142. *Sea-Land*, 881 F.2d at 768.

143. See *Pannell v. United States Lines Co.*, 263 F.2d 497 (2d Cir. 1959) (terms inconsistent with COGSA treated as ordinary contract terms).

144. See *Croft & Scully Co. v. M/V Skulptor Vucketich*, 664 F.2d 1277 (5th Cir. 1982) (when COGSA’s terms are merely contractual, judicial interpretation is permissible).

145. *Institute of London Underwriters v. Sea-Land Serv.*, 881 F.2d 761, at 763 (9th Cir. 1989).

146. *Sea-Land*, 881 F.2d at 765 (quoting *North River Ins. Co. v. Fed-Sea/Fed-Pac Lines*, 647 F.2d 985, at 989.).

147. Uniformity was Congress’ goal in its initial adoption of COGSA. A. KNAUTH, ON OCEAN BILLS OF LADING 99-110 (1942).

148. *Sea-Land*, 881 F.2d at 763.

dent¹⁴⁹ clearly dictated that the court would find that the bill of lading validly incorporated COGSA. This finding represents no departure from the court's previous positions; rather, it reiterates and approves of the common practice of using a clause paramount to incorporate COGSA by reference¹⁵⁰ as the means to accomplish this end.

Therefore, the Ninth Circuit correctly affirmed the district court's application of COGSA to limit damages liability. Further, the Ninth Circuit's reversal of the district court's calculation of the customary freight unit was also proper. Given the case facts, and the relevant language of the bill of lading,¹⁵¹ it is clear that the district court erred in its calculation that the yacht was forty-five CFUs, since the bill of lading stated that "package" included cargo shipped in a cradle.¹⁵² The reduction in the amount of liability to \$500, (representing a single COGSA package) is supported by an earlier parallel case in the Second Circuit, which also determined that one yacht comprised one package,¹⁵³ as the Ninth Circuit noted.

VI. CONCLUSION

This decision follows sound principles of contract and maritime law, and logically extends the principle of uniformity in modern maritime trade. The court provides appropriate freedom to the parties to define their contract terms within COGSA's applicable limits,¹⁵⁴ yet still corrected the erroneous finding by the district court regarding the package limitation.¹⁵⁵

While this finding represents a financial loss to the subrogated insurer, such a loss is an inherent risk in maritime com-

149. See *Nemeth v. General S.S. Corp.*, 694 F.2d 609 (9th Cir. 1982); *Tessler Bros. (B.C.) Ltd. v. Itaipacific Line*, 494 F.2d 438 (9th Cir. 1974); *Grace Line, Inc. v. Todd Shipyards Corp.*, 500 F.2d 361 (9th Cir. 1974). See *supra*, notes 92-101 and accompanying text.

150. *Sea-Land*, 881 F.2d at 764.

151. See *supra* note 131.

152. *Sea-Land*, 881 F.2d at 768. The specific definition of package included the yacht which was shipped in an on-deck cradle. *Id.*

153. *Sea-Land*, 881 F.2d at 768. See *Pannell v. United States Lines Co.*, 263 F.2d 497 (2d Cir. 1959) (yacht is one package).

154. 46 U.S.C. §§ 1300-13, generally, and discussion in Part III, C for application.

155. *Sea-Land*, 881 F.2d at 768.

merce, and is clearly allocated by COGSA's own terms, which specifically limit a carrier's liability.¹⁵⁶ Further, although the subrogated insurer suffers financially, he is still free to require his insured to declare a higher value on future shipments, thus lessening the chances of his sustaining such a loss on subsequent claims. Alternatively, he may raise premiums to cover these losses.

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156. 46 U.S.C. § 1304(5). *See supra* note 73 and accompanying text.

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