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MURPHY'S LAW: THE PAN AM COROLLARY

By David V. Ainsworth*

The venerable tension between marine protection and indemnity underwriters and marine cargo risk underwriters has increased materially as the result of a 1977 decision by the United States Court of Appeals for the Ninth Circuit in Pan American World Airways, Inc. v. California Stevedore and Ballast Co.† (Pan Am). This decision is already breeding litigation,‡ and there will certainly be more to come. Unfortunately, due to a scholastically and technically erroneous reading of the case by some members of the admiralty bar and bench, it is also causing practical problems for carriers and cargo interests alike.

In Pam Am, the defendant stevedore, seeking to invoke the "Himalaya" clause§ in Barber Line's bill of lading, attempted to limit its liability for $20,785 in damages caused by its negligent handling of an aircraft scissors lift to $500 under provisions of the United States Carriage of Goods by Sea Act¶ (COGSA). Although the Barber Line bill of lading incorporated COGSA, including the $500 package limitation and agreed valuation provision,‖ into the

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† 559 F.2d 1173 (9th Cir. 1977) (per curiam).


§ A Himalaya clause in an ocean bill of lading is one which extends the carrier's benefits and limitations on liability under the transportation agreement to stevedores, terminal services contractors and other independent contractors performing under the transportation agreement. The name refers to the vessel involved in Adler v. Dickson, 1 Q.B. 158 (1955).


‖ 46 U.S.C. § 1304(5) (1976) provides in pertinent part:

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value

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clause paramount *ex contractu* in conventional language, elsewhere, the bill of lading was patently conflicting.

Clause 18 read:

The responsibility of the carrier shall *in no case, whether governed by the U.S. Carriage of Goods by Sea Act, the Hague Rules, or not, exceed the amount of $500 per package or customary freight unit*. It is agreed that the word "package" shall include any container, flat pallet, van, trailer, vehicle, animal, pieces and all articles of any description except goods shipped in bulk.

The defendant stevedore argued that, notwithstanding the patently contradictory language in Clause 18, the shipper, a commercially sophisticated corporation, should be imputed with knowledge of its option to declare the true value of the scissors lift before shipment, pay a higher *ad valorem* freight charge, and avoid the COGSA limitation as incorporated by reference through the clause paramount. The shipper's failure to so declare and pay, it was argued, should be inferred as assent to the agreed valuation provision so as to limit the defendant's liability in the manner averred. The court of appeals, per curiam, rejected this argument, and affirmed the district court's award of full damages to the plaintiff.

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6. By its terms, COGSA's application is limited as a matter of law. It applies only, for example, to goods shipped in U.S. foreign, but not domestic, commerce (id. §§ 1300, 1312); from ship's tackle at loading to ship's tackle at unloading (id. § 1301(e)); to goods stowed underdeck (id. § 1301(c)); and to cargoes other than livestock (id.). Ocean transportation agreements may extend the application of COGSA's provisions to such excluded activities as a matter of contractual agreement (*ex contractu*) where such provisions do not apply by law and of their own force (*ex proprio vigore*). (Id. § 1312).

7. The Barber Line clause paramount included the following language:

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

The defendant contended that this language was intended to extend the provisions of COGSA *ex contractu* to the shipment in question, a domestic trade shipment being transported from Alameda, California, to Balboa, Canal Zone.

8. 559 F.2d at 1175 (emphasis added).
A. THE SOURCE

The *Pan Am* court concluded its opinion with a paragraph containing the following contribution to Murphy's, as well as admiralty, law:

We reject appellant's argument that an experienced shipper should be deemed to have knowledge of an opportunity to secure an alternative freight rate, and higher carrier liability, by reason of his knowledge of COGSA, . . . made applicable by a "Paramount Clause" in the bill of lading, where such opportunity does not present itself on the face of the bill of lading.  

The italicized language can be read as meaning two very different things. One reading may be harmonized with apposite precedent, makes good sense and is almost certainly what was intended. The alternate reading, although bizarre in its application, has been given effect in at least two cases which rely on *Pan Am*'s ruling.

When the *Pan Am* court stated that the requisite opportunity must be presented "on the face of the bill of lading," it surely meant "face" in the sense of "expressly," not in the sense of the front side as distinct from the reverse side of the document. Construction of the term "face" in the sense of expressly would place the decision in *Pan Am* in accord with the court's prior pronouncement on the validity of an agreed valuation device incorporated as a matter of contract into an ocean bill of lading. In *Tessler Brothers (B.C.) Ltd. v. Italpacific Line*, the Ninth Circuit held that the carrier had established, prima facie, that an opportunity to declare valuation and avoid the package limitation was provided if its bill of lading evidencing the transportation agreement expressly provided that the $500 package limitation applied "unless the nature of the goods and a valuation higher than $500 shall have been declared in writing by the shipper upon delivery to the carrier and . . . extra freight paid if required."
On the other hand, if the court's reference to "face" is to be understood as referring to the front, as opposed to the reverse side of the bill of lading, a number of peculiarities appear. First, the terms and conditions of an ocean bill of lading are generally set forth on the reverse side because the front side, usually printed in an internationally standard format, is full. The agreed valuation provision is, by no means, the only provision in a carrier's bill of lading, or in COGSA, which has the effect of limiting the carrier's liability or even of avoiding it altogether.\textsuperscript{14} Yet the Pan Am court is believed by some to have singled out the agreed valuation provision, without explanation, for a place of intended prominence on the front side of the bill of lading.

Additionally, the Pan Am holding, if so construed, would be an unwarranted and wholly gratuitous act of liberality toward carriers which author "Catch-22" bill of lading provisions. Such a reading would authorize patently conflicting liability-limitation provisions, if only the opportunity to declare the value of the goods presents itself on the front side of the bill of lading. The rules of construing contracts of adhesion favor the opposite reading.\textsuperscript{15}

Most significantly, a shipper does not sign or even receive an ocean bill of lading before shipment.\textsuperscript{16} Ocean bills of lading are issued unilaterally by the carrier and furnished to the shipper after the goods have been received for shipment. In many, if not most, cases, a bill of lading is issued after the vessel has sailed with the goods aboard. The ocean bill of lading is said to "evidence" the transportation agreement.\textsuperscript{17} It is common but not universal practice in the industry, for carriers to invite shippers to furnish shipping information on carrier supplied shipping documents. These forms, typically multi-part, may contain a dock receipt, United States Customs shipper's export declaration or other shipping documents, one of which is sometimes used by the carrier as a master for the preparation of its bill of lading. If the

\textsuperscript{14} For example, COGSA also contains a one year period of limitations (46 U.S.C. § 1303(6)) and an exculpatory clause from any liability whatever for loss or damage negligently caused by "the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship" (46 U.S.C. § 1304(2)(a)).

\textsuperscript{15} See note 19 infra and accompanying text.

\textsuperscript{16} Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer, 422 F.2d 7, 19-20 (2d Cir. 1969).

\textsuperscript{17} 46 U.S.C. §§ 1300, 1312 (1976).
shipper, or a connecting carrier, freight forwarder or customs house broker for the shipper, prepares the initial shipping documents, the carrier either prepares its bill of lading using the information provided by such documentation, or completes any bill of lading master form contained in the shipper-supplied shipping documents by filling in the transportation charges, on-board date, if required, marks, quantity and other required information. Thereafter, the carrier issues the bill of lading as required by law. 18

One unfamiliar with industry documentation practices might be misled by the language of the provision of COGSA under consideration. The $500 package limitation and agreed valuation provision applies “unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.” 19 The compounding of verbs in this provision is confusing. Although it is clear that the shipper must declare the nature and value of the goods before shipment, it is not expressly stated that the carrier inserts such provision into the bill of lading. It is not clear what, if anything, Congress intended by this misleading mincing of words, 20 although the insertion of the declared value by the carrier clearly benefits holders of negotiable bills of lading and others having an interest in the goods.

While shippers may avail themselves of any number of methods to declare to a carrier, before shipment, the true value of their cargoes, the bill of lading is not such a method. Any distinction between the front and reverse side of the bill of lading, believed by some to have been made by the Pan Am court is, therefore, wholly meaningless.

18. Id. § 193 (1976).
20. The words of Chief Judge Brown of the Fifth Circuit seem appropriate, although in a different context:
   Our principal task in this case is to determine what Congress would have thought about a subject about which it never thought or could have thought and one about which we have never thought nor any other Court has thought. Technology has created a maritime transportation system unlike any which was in existence in 1936 when Congress enacted COGSA.
Wirth Ltd. v S.S. Acadia Forest, 537 F.2d 1272, 1276, rehearing en banc denied, 541 F.2d 281 (5th Cir. 1976).
B. Choice of Doctrine

The choice between the two readings of the court’s reference to presenting an opportunity to declare valuation “on the face of the bill of lading” also offers a choice between established and novel doctrine.

The Pan Am case might have been decided on conventional grounds by invoking one of two rules, which the defendant must have satisfied before being permitted to take advantage of the limitation of liability provision desired. The simplest and most preferred is the rule, well settled in admiralty, that ambiguities in adhesion contracts of carriage will be construed strictly against the carrier which authored them. Perhaps the Pan Am court had this rule in mind when it observed, “[t]he bill of lading is usually a boilerplate form drafted by the carrier, and presented for acceptance as a matter of routine business practice to a relatively low-level shipper employee.”

The alternative basis for the appropriate result in Pan Am would have been to find that a lack of knowledge of and assent to the valuation provision existed on the part of the shipper before the contract was formed, hence, preventing inclusion of the provision in the contract. Provisions limiting a carrier’s liability in a standardized contract drafted and imposed by the carrier are effective against the shipper, who has the opportunity to adhere to or reject them, only if the provisions give clear notification of such limitations to the shipper.

A non-admiralty court which has correctly analyzed the issue illustrates the general rule. In Bauer v. Jackson, a shipper’s horses were loaded on a carrier’s departing truck at a prearranged time. The carrier’s bill of lading, under rules applicable

21. See generally Tessler Bros. Ltd. v. Italpacific Line, 494 F.2d 438, 445 n.11 (9th Cir. 1974); Encyclopaedia Britannica, Inc. v. S. S. Hong Kong Producer, 422 F.2d 7 (2d Cir. 1969). See also, 3 CORBIN, CONTRACTS § 559 (1960).

22. 559 F.2d at 1177.


to land carriers, contained an agreed valuation provision, this
clause was not discussed with the shipper's representative, who
signed the bill of lading, but was not given a copy. The evidence
implied that the shipper's representative believed the document
to be a receipt for the horses. In reversing the trial court's ruling
that the shipping contract effectively limited the carrier's liabil­
ity as a matter of law, the court of appeals, citing Chandler u.
Aero Mayflower Transit Co.26 stated:

In analyzing the meaning of the statutory phrase,
"value declared in writing . . . or agreed upon in
writing . . . ," as used in section 20(11) of the In­
terstate Commerce Act, the court stated:
"Congress no doubt used these words to indicate
that a shipper should agree in the same sense that
one agrees or assents to enter into a contractual
obligation. And such assent is effective only if
given after a fair opportunity to choose between
higher or lower liability by paying a correspond­
ingly greater or lesser charge. . . . "27

The plain focus of the quoted language is on whether the
shipper had actual knowledge of the provision and received an
opportunity to exercise the option provided by it. Whether or not
such knowledge and opportunity existed is a question of fact.

If the Pan Am court did base its decision partially upon the
rules of construction of adhesion contracts, it failed to say so. If
it based its decision on the carrier's failure to meet its burden of
proving, according to the applicable evidentiary standard, that
the opportunity in question had been given to the shipper, again,
it failed to clearly state this conclusion.

Instead, the court held that "where such opportunity does
not present itself on the face of the bill of lading" knowledge of
the agreed valuation provisions will not be imputed to the ship­
per. Anyone interpreting this language to refer to the front side
of the bill of lading would have to conclude that providing a space
or other "opportunity" to declare valuation on the front side of
the bill of lading would meet the carrier's burden of proof. Thus
the carrier's burden would be met even if the terms and condi­
tions of the bill of lading, as in Pan Am, were patently contradic­

26. 374 F.2d 129, 135 (4th Cir. 1967).
27. 15 Cal. App. 3d at 368, 93 Cal. Rptr. at 49 (citations omitted).
tory. Such an act of liberality toward carriers in derogation of the general rule of construction of bills of lading as adhesion contracts is implausible.

The trial court’s holding in Pan Am, and what should be read as the court of appeals’ intended holding in that case, was:

In the instant case, however, the limitation in Clause 18, which does not provide any opportunity for the shipper to declare higher value, . . . is so inconsistent with 46 U.S.C.A. § 1304(5) as to: (1) render the bill of lading provision null and void; (2) distinguish the instant action from Tessler Bros.; and (3) place on defendant the burden of proving that an opportunity did in fact exist for the shipper to avoid the limitation.28

The Pan Am court’s distinguishing of Tessler Brothers is important. In that case, the Ninth Circuit declared that the carrier had established, prima facie, that an opportunity to declare valuation and avoid the limitation was provided if its bill of lading evidencing the transportation agreement expressly provided for the declared valuation option contained in COGSA.29

Thus, the parameters of the problem have been established, at least insofar as the Pan Am case is concerned. If the bill of lading expressly and substantially tracks the COGSA agreed valuation provision language, the limitation of liability applicable ex contractu will be enforced, absent proof rebutting the prima facie case that a fair opportunity to avoid it had been provided.30

Where, however, the bill of lading does not contain such language and is patently contradictory on whether or not the shipper has the required opportunity, the limitation will not be enforced absent rebuttal evidence that the shipper did have a fair opportunity to avoid it.

C. SPECIFIC MISCHIEF

Apart from the fact that some readers of the Pan Am court’s
problematic language are not sufficiently among shipping industry cognoscenti to know that shippers neither declare nor insert anything on the bill of lading evidencing the transportation agreement, and apart from the doubtful doctrine resulting from a mistaken reading of *Pan Am*, does the holding do any real mischief? It does.

**Shippers Needlessly Prejudiced**

Using the *Pan Am* decision as a springboard, it is now being argued that absent an express provision setting forth the shipper's option as approved in *Tessler*, it is necessary to insert a "spot" or "space" on the front side of the bill of lading. A strong implication arises from such a contention, however, that, having done so, a carrier establishes, prima facie, that the required opportunity has been provided. This would apparently be true notwithstanding ambiguous or patently contradictory language elsewhere in the bill of lading on the subject of limitation of liability, as, for example, in *Pan Am*, and notwithstanding the fact that no opportunity actually existed, as in *Bauer v. Jackson*. It is apparently not even necessary to set forth the shipper's option in *Tessler*-sanctioned language. It would be enough to merely provide an opportunity to declare valuation by insertion of a "space" or a "spot" on the front side of the bill of lading. Yet, as we have seen, the placing of such provisions on the front side of an ocean bill of lading is the one method by which such knowledge may not be gained and the opportunity to act will not be afforded before shipment. What difficulties may arise in the future for cargo interests over this aspect of the popular misreading of the *Pan Am* holding is as yet, unknown.

**Carriers Needlessly Prejudiced**

Whether intended by the *Pan Am* court or not, some practitioners for both carriers and cargo interests are reading *Pan Am* as declaring that the form of marine transportation agreements of all common carriers by water in United States interstate and foreign commerce must conform to the Ninth Circuit's notions on bill of lading format design. Failure to do so, it is feared, may in any instance result in frustration of the agreed valuation provision of the Hague Rules as promulgated by United States

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32. See notes 25 to 27 supra and accompanying text.
COGSA. Thus, carriers are being advised to reprint their bills of lading in conformity with what is perceived to be the Pan Am design. Such advice is not without foundation.

In General Electric Co. v. M. V. Lady Sophie,\textsuperscript{33} the carrier's bill of lading provision which stated, \textit{ex contractu}, "that the Hague Rules as enacted in the country of shipment shall apply to the contract" was held to be insufficient notice of the shipper's option to declare value and pay a higher freight charge as provided by COGSA.\textsuperscript{34} The Lady Sophie court first reasoned that the carrier's bill of lading which incorporated by reference only the "Hague Rules as enacted in the country of shipment" simply did not raise an inference of the shipper's knowledge of the agreed valuation provision and opportunity to avoid it. The court, borrowing from Pan Am, then added, "[t]he next infirmity in the carrier's bill of lading is the absence of a designated spot for a shipper to insert the declared value of the goods."\textsuperscript{35} Thus, the red herring dragged across the trail by Pan Am received a further airing by the Lady Sophie court.

Unless the carrier has obediently, if pointlessly, placed a declared value "spot" on the ocean bill of lading, any carrier which has incorporated the Hague Rules by reference without tracking the language of section 1304(5) now risks having the agreed valuation provision of a longstanding multilateral treaty among maritime nations turned aside by United States admiralty courts, with whatever violence to the structure of its freight rates results. Lord Diplock has expressed a point of view which recognizes the commercial realities in these matters: "Any proposal to solve the anomaly arising from the package limitation in the Hague Rules . . . will be based on the practical economies of insurance and not on any high moral grounds."\textsuperscript{36} He continues, "it is more practical and economical from the point of view of insurance to spread the risk to the cargo in excess of a fixed limit among a number of cargo insurers rather than to concentrate it in the carrier's [protection and indemnity] insurer."\textsuperscript{37}

\textsuperscript{34} Id. at 621.
\textsuperscript{35} Id. at 622.
\textsuperscript{36} Diplock, Conventions and Morals - Limitation Clauses in International Maritime Conventions, 1 J. MAR. L. & COM. 536 (1970).
\textsuperscript{37} Id. at 528-29.
The Constructive Notice Issue

The issue in the Pan Am case was the conventional contract question whether the contracting parties had achieved a meeting of the minds over the agreed valuation provision. It should be remembered that even this issue does not arise where COGSA applies ex proprio vigore.\(^\text{38}\) To the extent, however, that the transportation agreement evidenced by the bill of lading or other shipping document incorporates COGSA ex contractu, the issue does arise.

The mutual assent issue is a question of whether the shipper, under the facts, knew or should have known of and assented to the agreed valuation provision. If so, the shipper is bound. If not, the carrier may not limit its liability in accordance with the disallowed provision.

Maritime regulation, however, raises the additional issue of constructive notice. To what extent should shippers and consignees be conclusively bound by provisions incorporating COGSA ex contractu by reason of their publication in tariff form and filing with the Federal Maritime Commission under the shipping laws?\(^\text{39}\) Such publication, at least of provisions limiting the carrier's liability as opposed to those specifying rates and other matters required to be in every tariff, will not conclusively bind cargo interests in the absence of actual knowledge.\(^\text{40}\) However, nonenforcement of the agreed valuation provision of a tariff-published transportation agreement can directly cause the end of discriminatory application of rates which is anathema to maritime regulation. A shipper that desires full carrier liability may declare its desires in good faith by some timely, operative method.

\(^\text{38}\) In an unreported case consolidated with another case pending before the Western District of Washington, a contrary ruling has been issued, incorrectly in the author's view. In Komatsu, Ltd. v. M. V. Colorado, No. C77-737B (D. Wash., filed August 24, 1978), the court granted the shipper's motion for summary judgment striking the defendant carrier's and co-defendant stevedore's package limitation defense. COGSA applied as a matter of law to the cargo in question. With respect to the stevedore, the court did not find the Himalaya clause inapplicable or even discuss this issue. Asserting that it was bound by Pan Am, the court declared, inexplicably, that the package limitation provision of COGSA did not apply. Unlike the Pan Am case, where COGSA's application was sought ex contractu, there was no patent conflict in the carrier's bill of lading and COGSA applied of its own force. The court's order illustrates the "Murphyesque" effects of Pan Am on the admiralty trial courts.


\(^\text{40}\) See text accompanying note 23 supra.
(not, however, on the front of the bill of lading), and pay the ad
valorem freight charge on the excess valuation. That shipper is
penalized in comparison with the litigious shipper that remains
silent, accepts the lower freight charge and then successfully
challenges the enforceability of section 1304(5) of COGSA incor-
porated by reference ex contractu. Because of this potential for
direct, discriminatory rate treatment of shippers where the
agreed valuation provision of COGSA is disallowed, this provision
seems to clearly fall under that category of rate provisions re-
quired to be published in every tariff under the shipping laws.

The shipping public’s interest in freedom from discrimina-
tory rate treatment by common carriers demands that an admiral-
ty court considering the enforceability of an agreed valuation
provision require evidence and rule on the issue of whether avoid-
ance of the provision would result in unlawful discrimination
among shippers. The Pan Am court did not even discuss the
constructive knowledge issue or its regulatory ramifications.

The Short Form Problem

Lastly, the Pan Am case has been observed to be an impedi-
ment to progress in ocean transportation documentation. Short
form bills of lading are playing an increasingly important role in
ocean transportation. A short form shipping document or bill of
lading incorporates by reference the regular form terms and con-
ditions of the transportation agreement, rather than setting them
forth at length. In the domestic trades, the wide use of short forms
is protected by statute. In the United States foreign trades,
while short form shipping documents have not been widely used
as a matter of carrier convenience, a need has developed for such
documents for the shipper’s convenience.

Shippers that have a recurring need for ocean transportation
services to or from the United States request carriers to issue the
shipper’s own form of shipping document produced by a machine
system. Such a document can be transmitted by courier or mod-
ern telecommunications to the destination country so that neces-
sary commercial functions can be performed in preparation for
the anticipated arrival of the goods on vessels and intermodal
transportation systems, which shorten transit times as the result
of advancing technology. A shipper’s commercial needs are thus

aided if the carrier will accept the shipper's form of shipping document as its master document for issuing the bill of lading, "waybill"42 or other shipping document evidencing the transportation agreement.

How does the Pan Am case tend to frustrate such progress? It does so by calling into question the effectiveness of the incorporation-by-reference mechanism. In order for the new, shipper-desired short form shipping document to be used, the only text on the form making reference to the terms and conditions of carriage must be a brief statement incorporating by reference the carrier's regular form terms and conditions as published in the carrier's tariff. The form would be used with any carrier whose services were used by that shipper.

Although in Pan Am the failure of incorporation by reference of the agreed valuation provision of COGSA, can and should be explained in terms of the patent conflict in the Barber Line's bill of lading, Pan Am's progeny do direct violence to the effectiveness of provisions incorporated by reference into a contract of carriage. In Lady Sophie, the incorporation by reference of the Hague Rules was ineffective in the absence of a designated "spot" for a shipper to insert the declared value of the goods.43 In Komatsu, the court ruled that, in the absence of Tessler's magic language or a "space" for an excess valuation declaration, "the incorporation of COGSA provisions [are rendered] ineffective."44

The plain implication of these cases, then, is that carriers should protect their rate structures by printing either the Tessler-sanctioned language or general incorporation-by-reference language coupled with a "space" or "spot" on the front of their documents which evidence the transportation agreement. Neither of these possibilities is presented when a shipper-prepared short form shipping document is used.45

43. 458 F. Supp. at 622. It remains to be seen what, if any, surprises are in store for carriers and underwriters that believe that the York-Antwerp Rules, 1974, incorporated by reference into virtually all contracts of carriage, are effective.
45. It is beyond the realm of commercial reality to ask shippers all over the world to conform to the vicissitudes of United States courts.
Although it can be persuasively argued that the *Pan Am* result should not occur in cargo cases brought by a shipper whose own short form shipping document was used as evidence of the transportation agreement, this argument is, at best, uncertain. With respect to claims brought by the consignee or a purchaser of a negotiable shipping document, the argument becomes much less certain. Given that uncertainty is unacceptable to preventive law practitioners, the inhibition against using shipper-prepared short form shipping documents in place of the carrier’s regular form bill of lading remains as a pointless court-created clog on progressive documentation practices. This situation will continue to exist until the alternative reading of *Pan Am*, as requiring some form of declared valuation provision on the front side of the document evidencing the transportation agreement, is negated by the Ninth Circuit or the United States Supreme Court.