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August 24, 2023

Via Email
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Re: ***Amending the Carriage of Goods by Sea Act***

Dear Ms. Holland and Mr. Newcomb:

I have been a member of the Maritime Law Association of the United States ("MLA") for 37 years and am a leading international maritime lawyer specializing in cargo claims, representing shippers and insurers subject to the transportation laws discussed herein. It is my intention in this letter to respectfully seek a vote by the MLA Carriage of Goods Committee and then perhaps the entire MLA during its Fall Meeting at the Argonaut Hotel in San Francisco, California in October of 2023 on the above subject.

The topic of the vote would be the need for the MLA, the Carriage of Goods by Sea Committee, and the MLA Membership, to pursue an interim effort to temporarily patch the 1936 Carriage of Goods by Sea Act ("COGSA"), which has been languishing for the past 15 years (while efforts continue to be made to enact the Rotterdam Rules into law, an effort which has been entirely unsuccessful thus far).

As the MLA is well aware, COGSA was enacted in 1936 and has literally never been amended or updated, not even once. COGSA's $500 per package limit of liability woefully antiquated, not to mention having been virtually nullified by inflation over the past 87 years, and additionally, has been so far eclipsed by the progress that other maritime nations have made in recognizing updated liability limits based not only upon package, but also upon weight.

COGSA is now literally a rusty old barge that no one should be using anymore, which has been sorely neglected, which has thoroughly rusted and has developed substantial holes,

but which no one has even bothered to patch, let alone replace. The slow sinking of COGSA from neglect threatens to bring the U.S. maritime bar down with it.

We propose, as an alternative temporary measure to our continual wait for the Rotterdam Rules to be enacted, that a simple "pump and patch" of rusty old leaky barge that is COGSA be done.

We attach a proposed simple bill, which literally fits on one piece of paper, ready to submit to Congress, which has three simple patches to stop the four biggest leaks that COGSA has. Specifically, the proposed bill:

1) Updates the $500 COGSA limit of liability to modern Hague Visby partially weight-based limits, along with the rest of the world.

2) Reconfirms that Non Vessel Operating Common Carriers are bound by COGSA's duty to provide a seaworthy vessel, thus correcting the overbroad holding of *Chubb Seguros Peru S.A. v. As Fortuna Opco B.V.*, No. 1:20-CV-3392 (ALC), 2022 WL 973708, at *2-3 (S.D.N.Y. Mar. 31, 2022).

3) Revises the law on covenant not to sue clauses in bills of lading, and thus correcting the overbroad holding of *Sompo Japan Ins. Co. of Am. v. Norfolk S. Ry. Co.*, 762 F.3d 165, 178-84 (2d Cir. 2014).

4) Revises the law on forum selection clauses and thus correcting the overbroad holding of *Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer*, 515 U.S. 528 (1995).

We attach the following documents which provide more detail regarding the issues with COGSA in its current form, and the corrections that are needed to it:

Attachment 1: Letter to Transportation Secretary Pete Buttigieg dated March 14, 2022, which reviews just how truly antiquated COGSA is.

Attachment 2: Letter to the MLA dated May 10, 2022, which reviews in greater detail the three legal issues which the proposed "Patch COGSA" concerns. If you will recall, following this letter, I gave a presentation to the MLA on this very topic.

Attachment 3: A simple proposed bill to amend COGSA, ready to present to both the Senate and the House of Representatives, a bill which is small enough to literally fit on one single page, which we propose the MLA, the Carriage of Goods Committee, and the MLA membership make a push for Congress to enact.

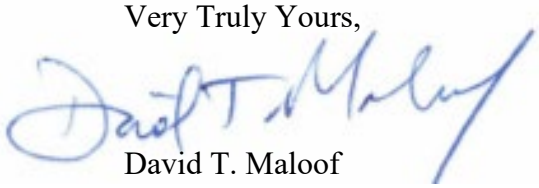
It is respectfully submitted that new congressional legislation, such as the simple one-page bill to amend COGSA attached to this letter, is now urgently required to patch the four most outdated provisions, with the hope that such a quick patch will assist the industry until the Rotterdam Rules are finally (someday) enacted into law.

I therefore request the opportunity to present this for a vote during the MLA's Fall meeting at the Argonaut Hotel in San Francisco, California.

I thank you in advance for your consideration in respect of the foregoing, and respectfully request that you contact me at your earliest convenience so we can discuss this matter further.

We respectfully request that you circulate this letter to the full Carriage of Goods Committee.

Very Truly Yours,



David T. Maloof

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Enc.

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March 16, 2022

Via Email

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Re: Need to Update U.S. Law From 1936 - Carriage of Goods by Sea Act ("COGSA") - 46 USCA § 30701

Dear Secretary Buttigieg and Mr. Putnam:

I am a leading international maritime lawyer specializing for thirty-five years in cargo claims, representing shippers and insurers subject to the outmoded transportation laws discussed herein. It is my intention in this letter to provide the viewpoints of many within the industry and to express the need for updates to current legislation governing cargo disputes.

I wrote about this in the New York Law Journal no less than 13 years ago, as have many others over the years, all to no avail. See David T. Maloof & Jacqueline M. James, Outside Counsel, *U.N.'s New Compensation Treaty: Should United States Ratify It?*, NYLJ, Jan. 7, 2009, Vol. 241 – No. 4, attached hereto as Exhibit A. My biography can be found at my firm's website: https://maloofandbrowne.com/ourattorneys_page/.

Critically missing from the biography: I was so inspired I flew from New York to South Bend and stood in the pouring rain for Secretary Buttigieg's presidential campaign announcement!

I have therefore been watching, with great interest, your recent interviews declaring a federal commitment to repair the neglected 100-year-old bridges in this country, as part of its transportation infrastructure overhaul. While repairing 100-year-old bridges suffering from extended neglect is laudable, and I enthusiastically support it, I would also respectfully submit that repairing 100-year-old transportation laws, also suffering from similar longstanding neglect, should also be a high priority of your office as Secretary of Transportation.

Attachment 1

For example, the laws pertaining to the carriage of goods by ocean to and from the United States, which encompasses the vast majority of goods and products imported to and exported from this country, estimated to be worth $5.6 Trillion in 2019, is governed by a set of laws which have not been updated since they were originally enacted on April 16, 1936. The primary ocean cargo carriage law, which has not been changed at all since Franklin Delano Roosevelt signed it into law, is known as the "Carriage of Goods by Sea Act" or "COGSA."

Though COGSA, as enacted 86 years ago in 1936, certainly fit the circumstance of the time it was enacted, it is woefully archaic in 2022. I would like to give you a citation to the United States Code for COGSA, but remarkably COGSA is so old it is not even in the United States Code. It was in an "Appendix" to Title 46 of the United States Code up to the year 2006, when Title 46 was wholly recodified by Congress pursuant to Public Law 109–304, 120 Stat. 1485. Congress didn't add COGSA to the recodified Title 46 – it was simply left out. To remedy this, the annotated U.S. Code includes the text of COGSA as a "note" after 46 U.S.C. § 30701. Of course, a "note" in an annotated statute is not law. Rather, the actual basis for COGSA being a law of this nation is the original statutory enactment of the act, which as a duly enacted (but uncodified) law is 49 Stat. 1207 (1936).

In other words, you have to retrieve the original bill as enacted, out of a book published in 1936, to find out what the law is which governs liability for cargo loss and damage on containerships loading and unloading cargo at U.S. ports in 2022. I enclose a copy to give you an idea as to how archaic this bill is (the text is attached hereto as Exhibit B). It also, in fact, provided for the Philippine Legislature (then recently changed from a colony to an autonomous commonwealth of the United States) to vote as to whether to exclude its application from Philippine ports. 49 Stat. 1207, 1213, Title II, §13 (1936).

The nearly one century of neglect that COGSA has suffered since enactment extends beyond just the fact that it has been embarrassingly omitted from this nation's official codification of its laws, and still reflects upon America's colonial conquest of Southeast Asia following the Spanish-American War. The very substance of this law, as applied to cargo claims today, in the here and now, is also just as archaic.

COGSA is one of the few statutes which has never been updated to account for inflation. COGSA provided, in 1936, for an ocean carrier to limit its liability to $500 "per package." 49 Stat. 1207, 1211, Title I, §4(5) (1936). This $500 "package" limit was never indexed to inflation. $500 in 1936 was a substantial amount of money – the equivalent of $10,354.60 today per the U.S. Bureau of Labor Statistics.[1] But carriers aren't paying $10,354.60 per package on cargo claims now, just the same $500 they were paying back in 1936. In fact, today's $500 COGSA carrier limit of liability is equivalent to a mere $24.15 per package limit in 1936 dollars, per the same Bureau of Labor Statistics calculation.

Since $500 in 1936 is worth a mere $24.15 today, due to inflation, the practical effect is that ocean carriers today pay a mere 4.8%, in real value, of what they paid on cargo claims when COGSA was enacted. Neglect of this statute has thus for all practical purposes virtually

[1] https://www.bls.gov/data/inflation_calculator.htm

eliminated ocean carrier liability for cargo loss and damage as a concern of ocean carriers. Consider the following historical price comparison:

1936	2022
Gas – 19¢	**Gas – $3.44**
Car - $1,605	**Car - $47,000**
Salary - $1,160	**Salary - $53,490**
Home - $6,300	**Home - $358,000**
Cargo loss - $500 per package	**Cargo loss - $500 per package**

Thus, while virtually every other statutory provision governing the calculation of dollar amounts has been updated since 1936, an ocean carrier's limit of liability under U.S. law for carrying goods to or from the U.S. has never, ever been adjusted to reflect current values.

Consider that more than 98% of goods carried by ocean to and from the United States are carried by foreign-flagged vessels,[2] and thus the neglect of this statute has created in essence a direct subsidy to foreign shipowners, the cost of which falls largely upon on the backs of Americans, American corporations and cargo insurers who import and export products and goods. These foreign flagged ocean carriers can merely shrug off their liability for cargo damage claims, virtually with impunity, by asserting the miniscule and archaic $500 per package limit. The consequences are felt by shippers and consignees of these shipments, largely American, who are virtually entirely foreclosed from recovering for their losses.

This antiquated $500 per-package limit actually has an even worse effect today on marine cargo shipments than could even have been contemplated in 1936, due to change in the structure of ocean transportation itself over the past century. Modern containerization has made the "package" for COGSA purposes much larger than was ever considered back in 1936. Many times, a whole intermodal shipping container of cargo is considered to be the package, based upon self-serving language in carrier bill of lading terms and conditions, which means that a container with hundreds of thousands of dollars' worth of cargo inside will often be considered to be one "package" for COGSA purposes, and thus the carrier need not pay any more than $500 on a several

[2] "The portion of our Nation's international trade carried on U.S.-flag ships, however, has declined from a high of 92.5 percent in 1826 to 57.6 percent 1947 to a low of less than 2 percent today. In fact, today there are no U.S.-flag carriers listed among the top 20 global carriers." https://www.transportation.gov/testimony/state-united-states%E2%80%99-merchant-fleet-foreign-commerce. Note that none of the current top ten ocean carriers are United States companies: APM-Maersk (Denmark), Mediterranean Shipping Company (Switzerland); COSCO (China); CMA CGM (France); Hapag-Lloyd (Germany); Ocean Network Express (Japan); Evergreen Line (Taiwan); Yang Ming Marine (Taiwan); Hyundai Merchant Marine (Korea); Pacific International Line (Singapore). https://www.globaltrademag.com/our-top-ten-list-these-shipping-companies-control-nearly-75-of-the-market/.

hundred-thousand-dollar cargo loss. This is essentially a full exoneration of the carrier under our neglected and archaic laws dealing with marine cargo claims. Perhaps a cargo owner can convince a court to consider the pallets inside the container to be a "package" which raises the limit to perhaps 10 or 20 pallets - $5,000 or $10,000 dollars – again a miniscule amount which is dramatically beneath the intended level of carrier liability established in 1936, back when carriers faced liability for, measured in 2022 dollars, $10,354.60 per package.

In the meantime, the rest of the world has updated their laws concerning this issue, raising their limits, allowing for an alternative limit of liability based on the weight of the cargo, and aligning their laws with the laws of other nations. This includes alternative sets of cargo liability rules which have been enacted by most other nations, typically known as the "Hague-Visby Rules," which provide for an alternative weight limitation of liability at 2 Special Drawing Rights (SDRs) per kilogram, rather than merely per package.

The bottom line then is the following comparison as to the liability of ocean carriers when a large loss occurs – say an actual damaged shipment weighing 49,870 kilograms – to a U.S. importer versus an importer to one of the following countries:

Comparison of Cargo Recovery Limits by Country
49,870 Kg Machine Packaged in 40 Foot Shipping Container

Nation	Legal Limit	Limit of Liability
USA	$500 per package	$500.00
Australia	2 SDR per Kilogram	$136,643.80
Austria	2.5 SDR per Kilogram	$170,804.75
Barbados	2.5 SDR per Kilogram	$170,804.75
Belgium	2 SDR per Kilogram	$136,643.80
Botswana	2.5 SDR per Kilogram	$170,804.75
Cameroon	2.5 SDR per Kilogram	$170,804.75
Canada	2 SDR per Kilogram	$136,643.80
Chile	2.5 SDR per Kilogram	$170,804.75
China (PRC)	2 SDR per Kilogram	$136,643.80
Croatia	2 SDR per Kilogram	$136,643.80
Denmark	2 SDR per Kilogram	$136,643.80
Egypt	2.5 SDR per Kilogram	$170,804.75
Finland	2 SDR per Kilogram	$136,643.80
France	2 SDR per Kilogram	$136,643.80
Germany	2 SDR per Kilogram	$136,643.80
Greece	2 SDR per Kilogram	$136,643.80
Guinea	2.5 SDR per Kilogram	$170,804.75
Hong Kong	2 SDR per Kilogram	$136,643.80
Hungary	2.5 SDR per Kilogram	$170,804.75

Iceland	2 SDR per Kilogram	$136,643.80
India	2 SDR per Kilogram	$136,643.80
Ireland	2 SDR per Kilogram	$136,643.80
Israel	2 SDR per Kilogram	$136,643.80
Italy	2 SDR per Kilogram	$136,643.80
Japan	2 SDR per Kilogram	$136,643.80
Kenya	2.5 SDR per Kilogram	$170,804.75
Latvia	2 SDR per Kilogram	$136,643.80
Lebanon	2.5 SDR per Kilogram	$170,804.75
Liberia	2 SDR per Kilogram	$136,643.80
Luxemborg	2 SDR per Kilogram	$136,643.80
Malawi	2.5 SDR per Kilogram	$170,804.75
Mexico	2 SDR per Kilogram	$136,643.80
Morocco	2.5 SDR per Kilogram	$170,804.75
Netherlands	2 SDR per Kilogram	$136,643.80
New Zealand	2 SDR per Kilogram	$136,643.80
Nigeria	2.5 SDR per Kilogram	$170,804.75
Norway	2 SDR per Kilogram	$136,643.80
Poland	2 SDR per Kilogram	$136,643.80
Romania	2.5 SDR per Kilogram	$170,804.75
Senegal	2.5 SDR per Kilogram	$170,804.75
Sierra Leone	2.5 SDR per Kilogram	$170,804.75
Singapore	$4.69 SGD per Kilogram	$171,303.45
South Africa	2 SDR per Kilogram	$136,643.80
Spain	2 SDR per Kilogram	$136,643.80
Sweden	2 SDR per Kilogram	$136,643.80
Switzerland	2 SDR per Kilogram	$136,643.80
Taiwan	2 SDR per Kilogram	$136,643.80
Tanzania	2.5 SDR per Kilogram	$170,804.75
Tunisia	2.5 SDR per Kilogram	$170,804.75
Uganda	2.5 SDR per Kilogram	$170,804.75
Ukraine	2 SDR per Kilogram	$136,643.80
UAE	30 Dirhams per Kilogram	$407,238.42
United Kingdom	2 SDR per Kilogram	$136,643.80
Ukraine	2 SDR per Kilogram	$136,643.80
Yugoslavia	2 SDR per Kilogram	$136,643.80
Zambia	2.5 SDR per Kilogram	$170,804.75

This is crazy stuff! If you think the bridges are old, just look at the law! While congressional gridlock may impede a wholesale replacement of COGSA with the Hague-Visby

Rules or the Rotterdam Rules,[3] a simple legislative updating of COGSA to actually have it codified in the United States Code, where it should by all rights be along with the other laws governing commerce, and to update the $500 limit to a reasonable amount considering inflation in the past 86 years, would be simple to do, and ought to be included in any omnibus transportation bill the Department of Transportation submits to Congress. This is a no-brainer. At a very minimum, the COGSA limit should be increased by adding one line to an existing bill to make it $10,000 per package – which is still less than the value, accounting for inflation, that was set when COGSA was originally enacted.

To put in perspective how archaic COGSA is, back in 1936, when the Carriage of Goods by Sea Act was enacted, this was the state of the world:

- The Hindenberg had its first commercial flight.
- Charlie Chaplin's silent movie "Modern Times" was released.
- Alan Turing published "On Computable Numbers" setting out the theoretical basis for modern computers.
- The Federal Register published its 1st issue.
- Joe DiMaggio made his Major League debut.

Charlie Chaplin in "Modern Times"

- The United States Rural Electrification Act was enacted, since most of the United States did not, at that time, even have electrical power.
- Adolph Hitler opened the Summer Olympic Games in Berlin; Nazi Germany reoccupied the Rhineland.
- The Interstate Commerce Commission issued its first common carrier license.
- Dynamite blasting was completed on Thomas Jefferson's head on Mount Rushmore.
- The last public execution in the United States (by hanging) was performed in Owensboro, Kentucky.

[3] The Rotterdam Rules are an international convention governing cargo liability which was finalized by the United Nations in 2009 but not ratified by more than a handful of countries throughout the world, as those nations are waiting on the United States to agree to it, and as of this point it is unclear if it will ever come into force. It is supported by the Maritime Law Association of the United States. It provides for more modern provisions concerning ocean carrier liability. This convention provides for a cargo liability limit of 875 SDR ($1,220) per package, or 3 SDR ($4.18) per kilogram, as well as numerous modern provisions concerning containerized transportation and combined intermodal carriage (neither of which existed in 1936 when COGSA was enacted).

- The first Prefrontal Lobotomy was performed, in a procedure then considered innovative and now universally recognized to be a horrible abomination.
- The 1st Issue of Life Magazine was published.
- The first unemployment benefit paid under a state law, in Madison Wisconsin ($15).

The world has been updated dramatically since 1936, and it is respectfully submitted that the laws governing carrier liability for transportation of goods by ocean have been entirely neglected, and should be given some attention. Even if there is no congressional interest in a wholesale replacement of COGSA with something more modern, at the very least COGSA ought to be given some minor maintenance, similar to the neglected 100-year-old bridges you have committed to repairing.

The simplest remedy would be a one sentence amendment to U.S. COGSA raising the limitation of liability from $500 per package to $10,000 per package.

Thank you for your consideration.

Sincerely,

David T. Maloof

DTM/crd
Encl.

CC via Email:
David J. Farrell, Jr., President of the Maritime Law Association, Email: dfarrell@fsofirm.com

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OUTSIDE COUNSEL

Expert Analysis

U.N.'s New Compensation Treaty: Should United States Ratify It?

On Dec. 11, 2008, the U.N. General Assembly adopted the newest version of its "Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea," culminating a six-years drafting effort.[1]

The convention, if adopted by the United States and its trading partners, will, among other changes, set the parameters for the compensation available to shippers of goods, which are lost or damaged in international ocean transit. Since the last time the United States adopted such a law was in 1936 with the passage of the U.S. Carriage of Goods by Sea Act, which, though clearly outdated, remains in effect, shipping interests have watched these once-a-century developments with keen anticipation.

Domestically, the Maritime Law Association of the United States (MLA) and its members are considering whether or not the United States should ratify the Draft Convention. An international signing ceremony is scheduled in Rotterdam on Sept. 21-23, 2009. It will then be up to each U.N. member country (including the United States) to decide whether or not to ratify these rules.

The convention seeks "harmonization and modernization of the legal regime...which in many countries date back to the 1920s or earlier..." and the convention will be called the Rotterdam Rules.[2]

History

The convention is the result of 13 working sessions of the UNCITRAL spanning a six-year period from April 2002 to July 2008. The call for a new convention dates even further back to 1996, when the UNCITRAL invited the Comité Maritime International (CMI) to begin work on a draft instrument that would "adjust[] and moderniz[e] the rules of international cargo transport, which should become the basis for international uniformity in this area for the 21st century."[3] Thus this

By **David T. Maloof**

And **Jacqueline M. James**

treaty marks the culmination of years of work towards creating a new international shipping compensation convention seeking to account for technological advancements in shipping and to establish a sensible increase in a carrier's liability limitation.[4]

The Scope

The scope of transport covered by the treaty includes any international carriage with an international sea leg. The convention provides U.S. shippers with a significant increase in carrier liability limits for cargo loss or damage. Based on this it is widely hoped, that the passage of the convention will at a minimum act as a wake up call and stimulate the U.S. Congress to update its own shipping compensation statute, the Carriage of Goods by Sea Act (COGSA), which, at over 70-years-old, has been widely criticized for its inability to account for modern developments and still applies the outdated $500 per-package limitation.

For, many years there has been a consensus in the United States that a change to the United States' shipping compensation scheme is long overdue. This revelation is not new, the statute's shortcomings have been well-documented by courts and commentators alike. In fact in response, in the late 1990s, the U.S. Maritime Law Association (MLA) attempted to update U.S. COGSA.

It was that effort that prompted, at least in part, the present U.N. undertaking. Among the more notorious complaints is COGSA's inability to account for containerization and multi-modalism, its outdated package limitation, lack of a per-weight limitation and its stubborn liability regime.[5]

Moreover, COGSA has been criticized because it does not expressly prohibit a carrier to limit its liability under any circumstances and courts have upheld liability limits even in the face of egregious facts, like a carrier stealing cargo.[6]

In addition, inflation has diminished COGSA's package limitation to a negligible amount.[7] While a $500-per-package limitation was a triumph for shippers in 1936, inflation has essentially nullified it as a form of reasonable compensation today. A rudimentary survey of staple prices then and now is startling. Consider that in 1936 the average home cost $3,925, a gallon of gasoline was $0.10, and a loaf of bread cost just $.08.[8] Today, those same items average $206,000, $3.50 and $1.28, respectively. The rate of inflation from 1936 to 2008 is a whopping 1,429 percent, meaning that $500 in 1936 equals roughly $7,145 today.

Previously, virtually every other nation has effectively dealt with low limit problems by adopting more contemporary international treaties.[9] The present difference is illustrated by the review of actual damage to a large consignment of machinery weighing 49,870[10] kilograms shipped overseas. In China, Japan and the United Kingdom (2 SDRs/kg) the recovery would be $146,617 as opposed to the U.S. recovery of $500 per package.

As the example demonstrates, foreign shippers suing under their own laws currently recover roughly 3,675 times what a U.S. shipper would recover suing in the United States for the identical loss under identical circumstances. The open question is whether the convention resolves this deficiency and, if so, at what cost.

Key Provisions

The convention is a wholesale update from previous conventions, attempting to account for contemporary issues such as containerization, multi-modal shipments, the proliferation of electronic records and, of course, outdated liability limitation amounts. A few key features of the draft are:

- **Modified Door-to-Door Coverage. Art. 26.** Otherwise known as "maritime plus," the convention would apply for carriage under a contract of carriage where "The contract shall provide for carriage by the sea and may provide for carriage by other modes of transport in addition to the sea carriage,"

DAVID T. MALOOF *is senior partner at Maloof Browne & Eagan, which specializes in maritime and transportation law and sale of goods law.* JACQUELINE M. JAMES, *of counsel to the firm, coauthored the article.*

EXHIBIT A

thus covering maritime carriers, even for inland losses (unless "it can be proven that the damage occurred during land transport that, absent this convention, would have been subject to a mandatory applicable international convention").

Currently, COGSA only covers sea carriage. But the convention does not cover subcontractors engaged in transport outside of a sea terminal, such as truckers or railroads.

• **Applicability to "Maritime Performing Parties." Art. 1¶6(a) & Art. 19 ¶(b)(iii).** The convention defines "maritime performing parties" as a performing party undertaking any of the carrier's obligations during the period between "the arrival of the goods at the port of loading and their departure from the port of discharge of a ship." The Draft Convention applies therefore to maritime service providers associated with a particular carriage, and entitles them to the carrier's defenses and limits of liability when the loss occurred while the maritime performing party was performing any activity "contemplated by the contract of carriage." Currently, COGSA generally only covers parties who issue a bill of lading. Thus, the new convention would cover, for example, stevedores, marine terminals and ship managers.

• **Enhanced Limitations of Liability. Art. 59 ¶1&3.** The convention limits liability "for breaches of its obligations under this convention" to "875 units of account per package or other shipping units, or three units of account per kilogram of the gross weight of the goods…whichever amount is higher, except when the value of the goods has been declared by the shipper and included in the contract particulars…." "Units of account" referred to is the Special Drawing Rights as defined by the International Monetary Fund.[11] As of today, this would equal a package limitation of approximately $1,260, and a per-kilogram limitation of about $4.44. Currently, COGSA limits, are much lower.

• **Retention of the "Container Clause." Art. 59 ¶2.** The convention expressly provides that "[w]hen goods are carried in or on a container, pallet, or similar article of transport used to consolidate goods, the packages or shipping units enumerated in the contract particulars as packed in or on such article of transport are deemed packages or shipping units. If not so enumerated, the goods in or on such article of transport are deemed one shipping unit. Currently, many U.S. courts interpret COGSA consistent with the "Container Clause."

• **Burden of Proof and Liability Changes. Art. 17 ¶3&6 & Art. 20.** Previously, under U.S. law, if one or more causes contributed to cargo loss, one attributable to the carrier and one not attributable to carrier, the court was required to attribute the entire loss to the ocean carrier.[12] Now, the court will be required to apportion the loss between the parties. Defenses arising out of errors in navigation are now eliminated and defense for fire are limit to fires onboard a ship.

• **Special Rules for Volume Contracts. Art. 80 ¶1.** The convention provides that notwithstanding the otherwise applicable liability provisions and limit to liability a carrier and a shipper may enter into a "volume contract" which "may provide for greater or lesser rights, obligations and liabilities than those imposed by this convention." Currently, COGSA has no such exception. The volume contract exception, as discussed infra, may be the most controversial section of the proposed new convention.[13]

Foreign shippers suing under their own laws recover 3,675 times what a U.S. shipper would recover suing in the United States. The question is whether the convention resolves this and, if so, at what cost?

• **Jurisdictional Changes. Art. 66.** The convention also sets forth new jurisdictional criteria. It is reported that this provision was added at the urging of the United States to correct the U.S. jurisdictional problems of *Vimar Seguorosy Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 199 (1995). Under *Sky Reefer* forum selection clauses are enforceable no matter how inconvenient the foreign jurisdiction may be. Under the convention, even if a bill of lading contains a choice-of-forum clause, cargo interest may file suit in either: the place of origin; the first port of loading; the carrier's principle place of business; the last port of discharge; or the place of destination. However, once again the convention allows for parties to a "volume contract" to include a choice of forum clause. Art. 67 & 72. Apparently therefore, carriers will continue to be permitted to designate undesirable forums for shippers in volume contracts. (Member states can, if they wish, opt out of the convention's jurisdictional provisions). Moreover, volume contracts can include an arbitration clause that may be binding on "a person that is not a party to the volume contract…." Art. 75 ¶(4).

• **A New Recklessness Standard. Art. 61.** The convention sets forth a standard for the loss of the benefit of limits of liability worded as follows: "a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result." This language suggests a new wilful misconduct standard.[14]

The Volume Contract

As noted, the new convention departs dramatically from the framework of existing treaties—largely in effect worldwide since roughly 1924—because for the first time it permits carriers to opt out of the convention liability scheme and in theory to be subject to very limited liability by virtue of entering into "volume contracts" with particular shippers.[15] The argument in favor of freely negotiated contracts is often raised. However, there are several reasons, beyond the recent unhappy outcomes associated with financial deregulation, why some argue that deregulated liability limits for the first time since the 1930s may not be beneficial. Some would argue that regulation is necessary because there is here a classic "asymmetry of information" problem: not even an experienced maritime lawyer can easily comprehend and effectively evaluate the risks arising out of the tortuous lexicon of a current multi-country transportation contract.[16] In addition, it has been recognized that while not always the case, in the liner trade "a certain inequality of bargaining power between the shipper and the carrier is assumed to exist."[17]

Finally, it is well-known that under the present limits of liability prudent shippers often purchase their own cargo insurance. This is prudent behavior and to insure one's belongings is encouraged. However when part of the motivation of purchasing the insurance is to avoid de minimus low liability limits public policy is further frustrated. Such low liability limits could have the unfortunate consequence of stripping much of the incentive for carriers to perform diligently.[18] While it is the cargo insurers who in the first instance foot the bill for COGSA's shortcomings, it is the consumers of goods who ultimately feel it with increased costs. As the world's largest nation of importers, this in the long run could impact American business more acutely than any other nation's.

Will New Convention Satisfy?

The true long-felt need in the United States for higher package limits, will surely cause many to advocate strongly for the swift passage of the convention. However, the larger question now is whether the convention will indeed de facto provide the modernization sought, or whether COGSA's limits of liability should simply be revised upwards. The sought-after remedy of more equitable shipper compensation may unravel if in fact there is a proliferation of the "volume contracts" under which the convention's limits and liabilities can simply be contracted down to limits below those of U.S. COGSA. The exception for volume contracts thus seems poised to swallow the balance of the proposed rules set forth in the convention, potentially defeating the entire purpose of the "reform" effort.

Liability and its limits are over-arching themes in the convention and the fear is that without these two pillars in place the whole liability and damage scheme may fall apart. The quid pro received and provided by all interested

parties, may lose there import if by a simple edit to a master agreement a carrier can slip in a "derogation" clause that will bind the shipper for all transport for the duration of the contract.

No economic studies appear to have been performed to gauge the potential effect of the new convention. Thus, it has been met with both support and criticism. For example, the European Shipper's Counsel has come out forcefully against the convention asserting the improvements for shipper "are at best uncertain as they are usually qualified in such a way that they prove illusory";[19] however, others view the convention as a fair compromise between the competing interests. For example, a spokesman for the National Industrial Transportation League, representing large U.S. shippers, has called the new treaty "a major improvement over the status quo."[20]

One temporary alternative if the convention (especially the new volume contract provisions) is viewed as potentially flawed would be to retain the current COGSA's structure but to adopt the Rotterdam Rules limits of liability. Another option would be to partially adopt the convention as domestic U.S. law, excluding any objectionable provisions.

How the U.S. Congress ultimately deals with the new convention will be closely watched by all interested in shipping and related liability.

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1. See Press Release, dated Dec. 11, 2008 Administration of Justice, Criminal Accountability of U.N. Officials on Mission Among Issues, as General Assembly Adapts 18 Texts Recommended by Legal Committee, available at http://www.un.org/News/Press/doc./2008/gall0798.doc.htm; see also; Press Release dated Oct. 20, 2008, Links Between Commercial Law Reform and 'Culture of Rule of Law', available at http://www.un.org/News/Press/docs//2008/gal3346.doc.htm. The draft convention has been posted by the Maritime Law Association (MLA) of the United States by the Carriage of Goods Committee under the header Rotterdam Rules posted at www.mlaus.org. (herein after the "convention").

2. Press Release, "United Nations Commission on International Trade Law Working Group Adopts New Draft Convention on the Contract for the International Carriage of Goods Wholly or Partly by Sea," UNIS/L/117 (July 7, 2008), available at http://www.unis.unvienna.org/unis/pressrels/2008/unis117.html. See also note 1, Dec. 11, 2008, Press Release.

3. 1 Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW, §10-15 at 649 (4th ed. 2004); Mary Helen Carlson, "U.S. Participation in the International Unification of Private Law: The Making of the UNCITRAL Draft Carriage of Goods by Sea Convention," 31 Tul. Mar.L.J. 615, 625 (Summer 2007).

4. See Michael F. Sturley, "Setting the Limitation Amounts for the UNCITRAL Transport Law Convention: The Fall 2007 Session of Working Group III," 5 Benedict's Mar. Bull. 149, 149 (3d/4th Qtr. 2007).

5. See Carlson, supra note 3 at 625. For a thorough discussion of the so-called "package problem," see 1 Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW, §10-13 at 718 & n.17. See, e.g., *Hayes-Leger Assoc. Inc. v. M/V Oriental Knight*, 765 F.2d 1076, 1079 (11th Cir. 1985) ("[T]he term 'package'...has no legislatively supplied definition. Rather, the task of defining and applying the term has fallen to the courts."); *Binladen BSB Landscaping v. M.V. "Nedlloyd Rotterdam,"* 759 F.2d 1006, 1011 (2d Cir. 1985) ("[T]he principal difficulty has lain in defining the meaning and scope of the word 'package,' a term left undefined by Congress.").

6. Almost every other nation prohibits limitation in such circumstances. See, e.g., Protocol to Amend the Hague Rules ("Hague-Visby"), Feb. 23, 1968, 1977 Gr. Brit. T.S. No. 83 (Cmnd. 6944), art. IV, par. 5(e); Convention on the Carriage of Goods by Sea ("Hamburg Rules"), March 31, 1978, 17 I.L.M. 608, art. 8, par. 1. See also 1 William Tetley MARINE CARGO CLAIMS, Chapter 5 pp. 247-250.

7. Rod Sullivan, COGSA $500 Package Limitation Is Really an Exoneration From Liability, FLORIDA MARITIME ACCIDENT LAWYER (July 12, 2006), available at http://floridamaritimelawyer.clarislaw.com/general/cogsa-500-package-limitation-is-really-an-exoneration-from-liability.html. The authors of this article have not re-calculated these figures.

8. The People History, 1936, available at http://www.thepeoplehistory.com/1936.html; This figure reflects the national median home price as of the last quarter of 2009, as reported on Feb. 14, 2008, by CNN Money, available at http://money.cnn.com/2008/02/14/; Energy Information Administration, U.S. Department of Energy, March 11, 2008 Report, available at, http://www.eia.doe.gov/emeu/steo/pub/mar08.pdf; Robert Gavin, Surging Costs of Groceries Hit Home, The Boston Globe (March 9, 2008), available at, http://www.boston.com/business/personalfinance/articles/2008/03/09/surging_costs_of_groceries_hit_home/; These calculations are based on the Consumer Price Index, available at, http://inflationdata.com/Inflation/Inflation.

9. For instance, the 1968 Hague-Visby Rules and a subsequent protocol in 1979—operative in roughly 70 percent of countries that trade with the United States—increased the per-package limitation to 666.67 Special Drawing Rights (SDR), added an alternative per-kilogram limitation of 2 SDRs, whichever is higher, and included a "container clause," which expressly defines the number of packages for limitation of liability purposes. The Hague-Visby limitations equal roughly $1,080 per package and $3.24 per kilogram. There are also the Hamburg Rules. Rolled out in 1978 as an updated alternative to the Hague-Visby Rules, this convention boasts a reputable presumption of carrier liability and sets the liability limitation at 835 SDRs per package or 2.5 SDRs per kilogram, whichever is greater. This package limit equals about $1,353 and $4.05 per kilogram. Only the United States lags behind in setting appropriate shipper compensation, affording one of the lowest statutory per-package limitations of liability on earth and offering no per-weight limitation.

10. Package and Kilo Limitations of 148 Countries (Updated Weekly), available at, http://www.mcgill.ca/maritimelaw/glossaries/package-kilo/. The limitation amounts are based on the value of the dollar compared to the SDR as of Dec. 22, 2008, according to the International Monetary Fund's Web site at www.imf.org.

11. The International Monetary Fund offers daily valuations of the SDR in U.S. Dollars at http://www.imf.org.

12. Carlson note 3 at p. 632, see also *Schell v. The Vallescura*, 293 U.S. 296, 307 (1934).

13. See also Carlson note 3 at 636; see also Convention defines "volume contract" as "a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time" art. 1 ¶2.

14. This language is a departure from the fundamental breach concepts used in the Hague/Visby Rules or applicable under COGSA and is not consistent with past maritime jurisprudence relating to forfeiture of liability limits based on the acts of a defaulting carrier. See 1 William Tetley, MARINE CARGO CLAIMS, Chapter 5 at 227 (4th ed. 2008); see also (The Visby Rules), Protocol to the Brussels Convention on Bill of lading 1924 signed at Brussels, Feb. 23, 1968 at art. 4(5)(h).

15. Draft Convention, art. 80¶4 (Prohibiting "volume contracts" from opting out of liability in very limited circumstance).

16. E.g., *The Delaware*, 161 U.S. 459, 473 (1896) ("That bills of lading have thus become so lengthened, complex, and involved that in the ordinary course of business it is almost impossible for shippers of goods to read or check their various conditions...."); *Royal Ins. Co. v. Orient Overseas Container Line Ltd.*, 514 F.3d 621, 637 (6th Cir. 2008) (describing a multi-modal bill of lading as a "byzantine labyrinth of clauses meant to govern liability").

17. Carlson note 3 at p. 630.

18. This situation is known as "underdeterrence." As explained by Judge Richard Posner in his classic text Economic Analysis of Law (Little Browne, 3rd ed. 1986) at pp. 186 & 187:

> To permit the defendant to set up my insurance policy as a bar to the action would result in underdeterrence. The economic cost of the accident, however defrayed, is $10,000, and if the judgment against him is zero, his incentive to spend up to $10,000 (discounted by the probability of occurrence) to prevent a similar accident in the future will be reduced.
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> ***
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> If compensation is the only purpose of the negligence system, it is a poor system, being both costly and incomplete. Its economic function, however, is not compensation but the deterrence of inefficient accidents.

19. http://www.europeanshippers.com/Position Paper April 2007. See also Carlson note 3 at 625; see also generally Sturley note 4.

20. Rotterdam Rules: U.N. Group American Shipper Completes draft of Cargo Liability Convention, by Chris Dunn. September 2008, American Shippers Magazine.

the United States, and having particularly in mind the probable ability of such water users, districts, associations, or other reclamation organizations to meet such water-right charges regularly and faithfully from year to year, during periods of prosperity and good prices for agricultural products as well as during periods of decline in agricultural income and unsatisfactory conditions of agriculture.

Appropriation authorized for expenses.

SEC. 2. There is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $5,000, which shall be available for expenditure, as the Secretary of the Interior may direct, for expenses and all necessary disbursements, including salaries, in carrying out the provisions of this Act. The commission is authorized to appoint and fix the compensation of such employees as may be necessary for carrying out its functions under this Act without regard to civil-service laws or the Classification Act of 1923, as amended.

Employees.

U. S. C., pp. 81, 85.

Relief to water users, extended.
Ante, p. 337.

SEC. 3. That all the provisions of the Act entitled "An Act to further extend relief to water users on the United States reclamation projects and on Indian irrigation projects", approved June 13, 1935, are hereby further extended for the period of one year, so far as concerns 50 per centum of the construction charges, for the calendar year 1936: *Provided, however*, That where the construction charge for the calendar year 1936 is payable in two installments the sum hereby extended shall be the amount due as the first of such installments. If payable in one installment, the due date for the 50 per centum to be paid shall not be changed.

Proviso.
Construction charges, 1936.

Approved, April 14, 1936.

[CHAPTER 228.]

AN ACT

April 16, 1936.
[S. 754.]
[Public, No. 520.]

To amend section 21 of the Act approved June 5, 1920, entitled "An Act to provide for the promotion and maintenance of the American merchant marine, to repeal certain emergency legislation, and provide for the disposition, regulation, and use of property acquired thereunder, and for other purposes", as applied to the Virgin Islands of the United States.

Virgin Islands of the United States.
Vol. 41, p. 997.
U. S. C., p. 2066.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 21 of the Act approved June 5, 1920 (41 Stat. L. 997), entitled "An Act to provide for the promotion and maintenance of the American merchant marine, to repeal certain emergency legislation and provide for the disposition, regulation, and use of property acquired thereunder, and for other purposes", is hereby amended by adding thereto the following proviso: "*And provided further*, That the coastwise laws of the United States shall not extend to the Virgin Islands of the United States until the President of the United States shall, by proclamation, declare that such coastwise laws shall extend to the Virgin Islands and fix a date for the going into effect of same."

Extension of coastwise laws to, deferred until date fixed by Presidential proclamation.

Approved, April 16, 1936.

[CHAPTER 229.]

AN ACT

April 16, 1936.
[S. 1152.]
[Public, No. 521.]

Relating to the carriage of goods by sea.

Carriage of Goods by Sea Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this Act.

EXHIBIT B

Title I.

TITLE I

Terms defined.

SECTION 1. When used in this Act—

"Carrier."

(a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

"Contract of carriage."

(b) The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

"Goods."

(c) The term "goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

"Ship."

(d) The term "ship" means any vessel used for the carriage of goods by sea.

"Carriage of goods."

(e) The 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.

RISKS

Risks.
Post, p. 1211.

SEC. 2. Subject to the provisions of section 6, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.

RESPONSIBILITIES AND LIABILITIES

Responsibilities and liabilities.

SEC. 3. (1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

Bill of lading; contents.

(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

Identification marks.

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

Number or weight of packages, etc.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

Order and condition of goods.
Proviso.
Exceptions.

(c) The apparent order and condition of the goods: *Provided*, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

Evidence of receipt.

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3) (a), (b), and (c), of this section: *Provided*, That nothing in this Act shall be construed as repealing or limiting the application of any part of the Act, as amended, entitled "An Act relating to bills of lading in interstate and foreign commerce", approved August 29, 1916 (U. S. C., title 49, secs. 81–124), commonly known as the "Pomerene Bills of Lading Act."

Proviso. Existing law not affected. Vol. 39, p. 538; U. S. C., p. 2742.

Accuracy of marks, etc., guaranteed by shipper; indemnity for error.

(5) The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

Removal to be prima facie evidence of delivery; exception.

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Notice of loss when damage not apparent.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

Exception.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

Failure to bring suit; discharge of liability.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: *Provided*, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

Proviso. Right of shipper.

Mutual rights of inspecting, etc., goods, in case of loss.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

"Shipped" bill of lading.

(7) After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading: *Provided*, That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

Proviso. Substitution of, for document of title previously taken up, etc.

Covenant relieving from liability for negligence, etc., void.

(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

Rights and immunities.

RIGHTS AND IMMUNITIES

Loss from unseaworthiness.

SEC. 4. (1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 3. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

Burden of proof.

Exemption from liability from designated causes.

(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, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

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

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

(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, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, that nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

Proviso. Carrier's own acts.

(k) Riots and civil commotions;

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

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

Other causes not the fault of carrier; burden of proof in claiming benefits of.

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or 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.

Shipper not responsible for damage to carrier, etc., without fault.

(3) The shipper shall not be responsible for 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.

Certain deviations not deemed breach of Act or contract.

(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this Act or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however*, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

Proviso. Unreasonable deviation.

Amount of carrier's liability for loss.

(5) 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 of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

Different maximum by agreement.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Proviso. Lowest maximum.

Misstatements; effect of.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

Inflammable, etc., goods.

(6) Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

Treatment, disposition, etc.

SURRENDER OF RIGHTS AND IMMUNITIES AND INCREASE OF RESPONSIBILITIES AND LIABILITIES

Surrender of rights, etc., and increase of responsibilities, etc.

SEC. 5. A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this Act, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

Act not applicable to charter parties.

The provisions of this Act shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this Act. Nothing in this Act shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

Special conditions.

SPECIAL CONDITIONS

Agreements between carrier and shipper permitted.

SEC. 6. Notwithstanding the provisions of the preceding sections, a carrier, master or agent of the carrier, and a shipper shall, in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea: *Provided*, That in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.

Proviso. Terms to be embodied in nonnegotiable receipt.

Legal effect.

Any agreement so entered into shall have full legal effect: *Provided*, That this section shall not apply to ordinary commercial shipments made in the ordinary course of trade but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

Proviso.
Shipments excluded.

Liability for goods prior to loading and after discharge from ship.

SEC. 7. Nothing contained in this Act shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

Rights and obligations of carrier under designated Acts.
Vol. 39, p. 728; U. S. C., p. 2054.
R. S., secs. 4281-4289, p. 826.
U. S. C., p. 1998.

SEC. 8. The provisions of this Act shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916, or under the provisions of sections 4281 to 4289, inclusive, of the Revised Statutes of the United States, or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels.

Title II.

TITLE II

Discrimination between competing shippers not permitted.

SECTION 9. Nothing contained in this Act shall be construed as permitting a common carrier by water to discriminate between competing shippers similarly placed in time and circumstances, either (a) with respect to their right to demand and receive bills of lading subject to the provisions of this Act; or (b) when issuing such bills of lading, either in the surrender of any of the carrier's rights and immunities or in the increase of any of the carrier's responsibilities and liabilities pursuant to section 5, title I, of this Act; or (c) in any other way prohibited by the Shipping Act, 1916, as amended.

Ante, p. 1211.

Through bills of lading issued by railroad carriers.
Vol. 41, p. 498; U. S. C., p. 2234.
Sea carriage subject to this Act.

SEC. 10. Section 25 of the Interstate Commerce Act is hereby amended by adding the following proviso at the end of paragraph 4 thereof: "*Provided, however*, That insofar as any bill of lading authorized hereunder relates to the carriage of goods by sea, such bill of lading shall be subject to the provisions of the Carriage of Goods by Sea Act."

Where cargo weight is ascertained or accepted by third party.

SEC. 11. Where under the customs of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in this Act, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

Existing provisions not affected.
Vol. 27, p. 445.
U. S. C., p. 1999.

SEC. 12. Nothing in this Act shall be construed as superseding any part of the Act entitled "An Act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property", approved February 13, 1893, or of any other law which would be applicable in the absence of this 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.

Scope of Act.
"United States" defined.

SEC. 13. This Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this Act the term "United States" includes its districts, terri-

tories, and possessions: *Provided, however*, That the Philippine Legislature may by law exclude its application to transportation to or from ports of the Philippine Islands. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. 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, 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 by sea 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: *Provided further*, That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this Act.

Proviso. Action by Philippine Legislature.

"Foreign trade" defined.

Domestic coastwise, etc., trade.

Application of Act to bills of lading issued for, by agreement.

Foreign trade; statement required.

SEC. 14. Upon the certification of the Secretary of Commerce that the foreign commerce of the United States in its competition with that of foreign nations is prejudiced by the provisions, or any of them, of title I of this Act, or by the laws of any foreign country or countries relating to the carriage of goods by sea, the President of the United States may, from time to time, by proclamation, suspend any or all provisions of title I of this Act for such periods of time or indefinitely as may be designated in the proclamation. The President may at any time rescind such suspension of title I hereof, and any provisions thereof which may have been suspended shall thereby be reinstated and again apply to contracts thereafter made for the carriage of goods by sea. Any proclamation of suspension or rescission of any such suspension shall take effect on a date named therein, which date shall be not less than ten days from the issue of the proclamation.

Suspension of Title I by Presidential proclamation.

Rescission of proclamation.

Effective date.

Any contract for the carriage of goods by sea, subject to the provisions of this Act, effective during any period when title I hereof, or any part thereof, is suspended, shall be subject to all provisions of law now or hereafter applicable to that part of title I which may have thus been suspended.

Applicable laws during suspension.

SEC. 15. This Act shall take effect ninety days after the date of its approval; but nothing in this Act shall apply during a period not to exceed one year following its approval to any contract for the carriage of goods by sea, made before the date on which this Act is approved, nor to any bill of lading or similar document of title issued, whether before or after such date of approval in pursuance of any such contract as aforesaid.

Effective date.

SEC. 16. This Act may be cited as the "Carriage of Goods by Sea Act."

Citation of Act.

Approved, April 16, 1936.

[CHAPTER 230.]

April 16, 1936.
[S. 2524.]
[Public, No. 522.]

AN ACT

To amend section 51 of the Judicial Code of the United States (U. S. C., title 28, sec. 112).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 51 of the Judicial Code (U. S. C., title 28, sec. 112) is amended to read as follows:

United States district courts.
U. S. C., p. 1237.

SEC. 51. CIVIL SUITS; WHERE TO BE BROUGHT.—Except as provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before a district

Civil suits; where to be brought.

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Re: ***The Result Together of Sompo and AS Fortuna Decisions: The Collapsing World of Shipowner Liability Under U.S. Law for Mass Shipping Casualties***

Dear Ms. Holland and Mr. Newcomb:

I have been a member of the Maritime Law Association of the United States ("MLA") for 36 years and am a leading international maritime lawyer specializing in cargo claims, representing shippers and insurers subject to the transportation laws discussed herein. It is my intention in this letter to respectfully request an opportunity to address the MLA (alone or as part of a panel discussion) during its October meeting at the Hotel Del Coronado in San Diego, California, on the above subject.

The topic of my presentation will be the suddenly collapsing and radically changing world of liability under United States law for mass shipping casualties in view of the two seemingly irreconcilable decisions in the Second Circuit (and other similar decisions) concerning Covenant Not To Sue / Exoneration Clauses on one hand, and the restricted scope of liability of Non-Vessel Operating Common Carriers on the other.

1) In a case that I handled, *Sompo Japan Ins. Co. of Am. v. Norfolk S. Ry. Co.*, decided in 2014 (copy enclosed), the Second Circuit ruled that so-called Covenant Not To Sue or Exoneration Clauses which have been customarily included in bill of lading terms, but rarely, if ever, enforced, are suddenly enforceable and entirely forbid an aggrieved cargo owner or insurer from filing suit for cargo damage and loss against the actual Carmack (and, presumably, COGSA) carrier in whose custody caused the loss, and instead require suit to be filed against the carrier issuing the first bill of lading, who may or may not actually be a performing carrier, and who might not have ever handled the cargo

Attachment 2

at all. 762 F.3d 165, 178-84 (2d Cir. 2014) (hereinafter, the "Sompo Decision"). This would presumably cover bills of lading issued by a Non-Vessel Operating Common Carrier ("NVOCC"), many of whom routinely issue bills of lading containing these same clauses.

2) In another case that I handled, *Chubb Seguros Peru S.A. v. As Fortuna Opco B.V.*, a district court in the Southern District of New York recently decided (copy enclosed), that a NVOCC, being a shipper with respect to the actual performing carrier, has no liability which would be premised upon any duty to provide a seaworthy vessel, insofar as a NVOCC, in its capacity as shipper with respect to the actual performing carrier, has no ability to inspect the condition of, or direct the operation of, the vessel. No. 1:20-CV-3392 (ALC), 2022 WL 973708, at *2-3 (S.D.N.Y. Mar. 31, 2022) (hereinafter the "AS Fortuna Decision").

Insofar as it has become the norm in the maritime industry that any one consignment of cargo might be booked through one, two, or even three NVOCCs before finally being booked by the last NVOCC with an actual vessel operating common carrier (or, perhaps, with an ocean carrier that does not in fact even operate the vessel, but instead shares space on another company's vessel pursuant to a vessel sharing agreement), any of which intermediary carriers would likely have a Covenant Not To Sue / Exoneration Clause in the fine print of its bill of lading, the decisions in the Sompo and AS Fortuna Decisions would seem to be in direct opposition to each other. **Indeed, if both decisions are followed to their logical conclusions, few carriers will now even be held liable for the consequences of the vessel's unseaworthiness. This is a radical change!** The vessel owner/operator would be entirely precluded from any liability, and be shielded from even being named as a defendant in court, pursuant to the Sompo Decision, and the NVOCC that is supposed to be the only party subject to suit pursuant to the Sompo Decision would have no liability for any unseaworthy condition on the vessel pursuant to the AS Fortuna decision.

These decisions will wreak havoc in the context of large containership losses, specifically the pending litigations concerning the Yantian Express, Maersk Essen and Maersk Eindhoven casualties, to name only a few. Though the cases cited above are in the Second Circuit, it is a fact that similar cases, and the same resulting problems, are emerging in the other significant federal circuits in this country.

It is respectfully submitted that new congressional legislation, such as an amendment to the Carriage of Goods by Sea Act, is now urgently required to repair the unintended damage that these cases has caused, in a way that makes practical sense and recognizes that it makes no sense at all for the Courts to be issuing decisions that have the practical result of entirely precluding suit against an actual vessel owner, to recover for damage caused by an actual unseaworthy condition on that vessel.

I therefore request the opportunity to address the membership of the MLA during the MLA's its October 24-30, 2022, meeting at the Hotel Del Coronado in San Diego, California.

I thank you in advance for your consideration in respect of the foregoing, and respectfully request that you contact me at your earliest convenience so we can discuss this matter further.

Very Truly Yours,

David T. Maloof

DTM/crd
Encls.

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118TH CONGRESS
1ST SESSION

S. [ ]

AN ACT

To amend the Carriage of Goods by Sea Act, and for other purposes.

Be it enacted by the Senate of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Carriage of Goods by Sea Modernization and Equity for American Shippers Act".

SECTION 2. MODERNIZING THE CARRIAGE OF GOODS BY SEA ACT TO PROVIDE EQUITY TO AMERICAN SHIPPERS

(a) The Carriage of Goods by Sea Act, April 16, 1936, ch. 229, 49 Stat. 1207, as amended by Pub. L. 97–31, §12(146), Aug. 6, 1981, 95 Stat. 166, is amended–

1) by striking "$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 another currency" from Title I, Sec. 4(5) and inserting "666.67 units of account (Special Drawing Rights as determined by the International Monetary Fund) per package or unit or 2 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher" in its place.

2) by striking "the owner or the charterer" from Title I, Section 1(a) and inserting "the owner or the charterer or a Non Vessel Operating Common Carrier pursuant to 46 U.S.C. § 40102(17)(B)" in its place.

3) by striking "obligations provided in this section" from Title I, Sec. 3(1)(8) and inserting "obligations provided in this section, or otherwise requiring that claims or suits be filed against only one specific carrier and/or precluding claims or suits being filed against any other carrier or servant or subcontractor hired by the carrier, and/or precluding suit from being filed against the Carrier in the port of shipment or the port of delivery" in its place.

(b) Effective Date.—This Act and the amendments made by this Act take effect on January 1st on the year following enactment.

Attachment 3

118TH CONGRESS
1ST SESSION

H.R. [ ]

AN ACT

To amend the Carriage of Goods by Sea Act, and for other purposes.

Be it enacted by the House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Carriage of Goods by Sea Modernization and Equity for American Shippers Act".

SECTION 2. MODERNIZING THE CARRIAGE OF GOODS BY SEA ACT TO PROVIDE EQUITY TO AMERICAN SHIPPERS

(c) The Carriage of Goods by Sea Act, April 16, 1936, ch. 229, 49 Stat. 1207, as amended by Pub. L. 97–31, §12(146), Aug. 6, 1981, 95 Stat. 166, is amended–

4) by striking "$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 another currency" from Title I, Sec. 4(5) and inserting "666.67 units of account (Special Drawing Rights as determined by the International Monetary Fund) per package or unit or 2 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher" in its place.

5) by striking "the owner or the charterer" from Title I, Section 1(a) and inserting "the owner or the charterer or a Non Vessel Operating Common Carrier pursuant to 46 U.S.C. § 40102(17)(B)" in its place.

6) by striking "obligations provided in this section" from Title I, Sec. 3(1)(8) and inserting "obligations provided in this section, or otherwise requiring that claims or suits be filed against only one specific carrier and/or precluding claims or suits being filed against any other carrier or servant or subcontractor hired by the carrier, and/or precluding suit from being filed against the Carrier in the port of shipment or the port of delivery" in its place.

(d) Effective Date.—This Act and the amendments made by this Act take effect on January 1st on the year following enactment.