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THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

SPRING MEETING — MAY 5, 1995

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JAMES F. MOSELEY
HOWARD M. MCCORMACK
WILLIAM R. DORSEY, III
MARSHALL P. KEATING
LIZABETH L. BURRELL
GEORGE W. HEALY, III

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David W. Martowski
Warren J. Marwedel
Raymond L. Massey
Stephen E. Mattesky
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Marion E. McDaniel, Jr.
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Elizabeth McDougall-Tural
Peter A. McLauchlan
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James F. Moseley, Jr.
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Carl R. Neil
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David A. Nourse
George W. Nowell

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Michael D. O'Keefe
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Richard W. Palmer
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J. Ashley Roach
Kenneth E. Roberts
Jack S. Rockafellow
Antonio J. Rodriguez
James E. Ross
Thomas S. Rue
Thomas A. Russell
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Michael J. Ryan
Gary T. Sacks
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Janis G. Schulmeisters
Jerome Scowcroft
Dennis J. Seider
Gary F. Seitz
David J. Sharpe
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James D. Skeen
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Kevin Beauchamp Smith
Howard J. Sobczak
Mark J. Spansel
Anthony J. Staines
Brian D. Starer
Graydon S. Staring
Alvin L. Stern
Prof. Dennis J. Stone
William T. Storz
Hugh R. Straub
Prof. Michael F. Sturley
James R. Sutterfield
Prof. Joseph C. Sweeney
James W. Tarlton, III
C. Peter Theut
Robert K. Tisdall
A. Andrew Tsukamoto
Alan Van Praag
Braden Vandeventer
John P. Vayda
David N. Ventker
Kenneth H. Volk
George L. Waddell
Thomas J. Wagner
Brian D. Wallace
Campbell E. Wallace
Kevin P. Walters
Guilford D. Ware
Charles S. Wassell
Craig L. Watson
Dennis A. Watson
Harold K. Watson
William H. Welte
Stephen F. White
James F. Whitehead, III
M. Hamilton Whitman, Jr.
David McI. Williams

Frank L. Wiswall, Jr.
A. Christopher Young
James F. Young
George R. Zacharkow
Robert J. Zapf
JoAnne Zawitoski
Wayne G. Zeringue, Jr.

and the following ten guests

Michael Bird
Lee-Sik Chai
Peter Crowley
Johanne Gauthier
J. M. Guarch, Jr.
Capt. David J. Kantor
Ian Maitland
Karin Niesyn
Timothy Robenhymer
Benjamin L. Willey

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PROCEEDINGS

MR. HOOPER: I think we should start fairly soon. Could you ask anyone at the door to bring the people in from outside. We might as well start anyway. It's about 25 of. Hopefully, we'll finish by noon. Can you hear me?

AN AUDIENCE MEMBER: Just barely.

MR. HOOPER: Just barely. Is that better? The problem is that you have to swallow the microphone. We'll start with the secretary's report.

MR. DORSEY: Good morning, ladies and gentlemen. As usual, I remind you that you will not be recorded as being present at this meeting unless you signed the cards that are outside, and I encourage the guests of the Association to sign the cards, as well.

Also, you probably noticed that the latest edition of the MLA Report is on the table outside the door. You're invited to take an extra copy. You will be mailed a copy and that will be put in the mail sometime next week. Once again, we want to express our appreciation to Gordon Paulsen, LeRoy Lambert and Matthew Marion of New York for publishing and editing this very useful and informative report.

Those of you that are going to give an oral address, it would be helpful, if you have one, to give a card to our court reporter, Mr. Johnson, so that you can be properly identified.

The Proceedings of the Association meeting of November 5th, 1994, document number 713, has been mailed to all of the members, and, Mr. President, if there are no modifications and objections I would move that they be adopted and approved.

AN AUDIENCE MEMBER: So moved.

AN AUDIENCE MEMBER: Second.

MR. HOOPER: Any discussion? All in favor? Opposed? The Motion is adopted.

MR. DORSEY: Thank you. The Board of Directors met yesterday morning in this building. The minutes of the Board's meeting in New Orleans, which took place on March 14, 1995, were accepted and approved. Those minutes have already been mailed to the members.

Treasurer Marshall P. Keating of New York and Membership Secretary Lizabeth L. Burrell of New York distributed their respective reports, which were accepted and approved, and you'll be hearing from them this morning.

Second vice-president Howard McCormack of New York reported on the meeting of all of the committee chairs that took place this Tuesday. At that meeting the committee chairs reported to the Board on their activities and the plans of their respective committees.

President Hooper announced that next week the Certificates of Appreciation will be mailed to all immediate past chairs.

Board Member John Edginton of Emeryville, the Chairman of the Committee on Practice and Procedure, reported on the activities of his committee, and you're going to hear from him this morning. Of particular concern was the fact that it was just learned, I think it was on Wednesday afternoon of this week, that in the new Coast Guard authorization bill, HR 1361, there is a provision that allows factual findings in Coast Guard casualty reports to be put into evidence but denies supporting testimony by Coast Guard personnel without permission of the Secretary of Transportation.

On motion duly made and seconded, the Board approved a recommendation that the Committee on Practice and Procedure communicate to Congress the Association's position that this provision should be removed from the bill and be subjected to a full discussion.

Board Member Neal D. Hobson of New Orleans reported on the activities of the IMO Legal Committee. It appears that there may be a diplomatic conference in April or May of 1996 to consider the draft HNS Convention. The Association's Committee on the Transportation of Hazardous and Noxious Substances will study what position the Association should take and will report its recommendation in due course.

Also on the docket for action at the IMO Legal Committee meeting scheduled for October of this year are the Convention on Offshore Mobile Craft and the Arrest Convention, and, in addition, there will be discussion of a Wreck Removal Convention.

Board Member David A. Nourse of New York reported on the Committee on Alternative Dispute Resolution. That committee is in the process of modifying the Association Rules of Conciliation.

In addition, the Committee requested that a questionnaire be mailed to all members to obtain information that would form the basis for creation of an Association roster of conciliators.

President Hooper indicated that this request would be taken under consideration and that he would probably be consulting on this with appropriate other organizations.

Edward B. Cattell, Jr., of Cherry Hill, the Chairman of the Ad Hoc Committee on the Marine Insurance Act of 1906, reported on the activities of his committee and a project to draft a United States Marine Insurance Act, and he'll be reporting on that further this morning.

The Chairman of the *Ad Hoc* Committee on Amendments to the Bylaws presented the report of his committee on proposed bylaw amendments. Most of these amendments were of a cosmetic nature, but there were three substantive amendments.

The first is one that would change the date of the regular fall meeting to the third Friday in October. The second is one that would limit the president's term in office to two terms of one year each, and all that does, really, is codify our existing practice.

And the third would add a provision to the effect that no member of the nominating committee is eligible for any office under consideration by that committee.

On motion duly made and seconded, the Board approved a technical amendment to the committee's recommendation with respect to the second sentence in Section 801, and as so amended, upon motion duly made and seconded, the Board unanimously approved and adopted the bylaw changes recommended by the committee.

A full copy of all of these changes is going to be included in the proceedings and will be mailed to you. At this time I would like to dispel a rumor that on motion by the treasurer, Marshall Keating, the Board approved a bylaw provision that muffins would not be permitted at the Association's meeting. There's no truth to that at all.

David McI. Williams of Baltimore, Chairman of the Committee on Marine Financing, reported on the activities of his committee, and he's going to be reporting later this morning, but again of particular note was the fact that the Coast Guard has issued a notice of proposed regulation that would permit the filing of documents by fax. However, some doubt is being expressed as to whether or not there is any statutory authority for this regulation.

As a consequence, Mr. Williams sought approval of the Board to send a letter to the Coast Guard asking that this regulation be held in abeyance until clear statutory authority existed for such filing. The Board approved this recommendation and authorized the President or his designee to testify before Congress in support of this position as appropriate.

Philip A. Berns of San Francisco, as Chair of the Committee on Government Liaison, recommended, and the Board approved, that Vice Admiral (Retired) A.J. Herberger, the Maritime Administrator, Rear Admiral Grant,

Advocate General of the United States Navy, and Rear Admiral John Shkor, Chief Counsel of the Coast Guard, be elected honorary members, ex officio, for the terms of their respective positions.

Robert J. Zapf of New York reported on the activities of the Joint Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects. That really is the full name of that organization, and you're going to be hearing from him today.

Your Secretary reported that in accordance with Bylaw 504 he had mailed to the members the Resolution proposed by the Committee on Carriage of Goods, the *ad hoc* study group report on which it was based, and all committee dissenting reports.

Board Member George Chandler of New York City, the Chairman of the Committee on Carriage of Goods, reported that his committee had approved and adopted, at a meeting on Wednesday, a motion to recall its proposed resolution so that further review and discussion on the proposal could be had, and he's going to be reporting later today on those developments.

Board Member Joseph Cheavens of Houston, the Board liaison for the Committee on the International Law of the Sea, reported that this committee had taken under consideration a request by the Coast Guard that the Association lend its support to efforts to obtain ratification to the Law of the Sea Convention which the President has submitted to the Senate. The chairman of that committee, Winston Rice, is going to be reporting on this later this morning.

Warren Marwedel of Chicago, the chairman of the 1995 Planning and Arrangements Committee, reported on the attractions that awaited us in Hawaii, and you'll be hearing more on that later.

Christina Whitaker of New York, the chairman of the Dinner Committee, reported on those arrangements, and she'll be addressing you this morning as well.

The President gave his reports and thanked Member Warren F. Farris of New Orleans for representing the Association at the British Maritime Law Association dinner.

He also announced that he has received a number of invitations to the Commercial Court centenary dinner which takes place in London on October 2nd, 1995, and anyone interested in attending, on his own nickel, can contact President Hooper.

He also indicated that he would be attending the Canadian Maritime Law Association meeting next month and will be speaking at the SEALI conference in June of this year.

Mr. President, that concludes my report, and I would move that it be accepted and approved.

MR. HOOPER: Second?

AN AUDIENCE MEMBER: Second.

MR. HOOPER: Any discussion? All in favor? Opposed? The report is approved. Thank you. The Treasurer's report.

MR. KEATING: Good morning, Mr. President, fellow members and guests. Looking around at the empty chairs, I'm wondering whether it was anticipation of the Carriage of Goods Committee's report or the lack of muffins that has emptied the house this morning. The good news is that financially we continue to manage at the same dues level and maintain sufficient funds by which to operate, and as of the end of our fiscal year on April 30, 1995, we had on hand some $385,000, which compares with a year ago when we had on hand some $410,000. The difference is not significant, in my opinion.

We have now successfully completed the transfer of our data processing from the old firm of Barrister to the new firm of Brock, Schechter & Polakoff, an accounting firm which has taken over the data processing. The new system has now been functioning now for several weeks, and we're pleased with the results so far.

That constitutes the Treasurer's report, and I respectfully move for its adoption.

MR. HOOPER: Second?

AN AUDIENCE MEMBER: Second.

MR. HOOPER: Any discussion? All in favor? Opposed? The report is approved. Thank you. Membership Secretary Liz Burrell.

MS. BURRELL: Good morning, Mr. President, members and guests. After yesterday's Board meeting, the total membership of the Association now stands at 3,474, with members in the following categories: Three honorary members, 175 judicial members, 57 academic members, 1,838 proctor members, 1,111 associate members and 290 non-lawyer members.

Our new judicial member is the Honorable G. Thomas Porteous, United States District Judge for the Eastern District of Louisiana.

We had twenty-six (26) members advance from associate to proctor status. These members are:

Richard D. Bertram
John A. Boyd
Robert M. Dees
Richard J. Feinson

Alan K. Goldstein
Richard Graffam
George Hasappis
K.L. Krishnan
David W. Leefe
Edward K. Lenci
Michael W. Lodwick
Marie J. Lucca
Mark C. Manning
David M. McQuiston
Don P. Murnane, Jr.
Mark William Nelson
Neil T. O'Donnell
Norman A. Peloquin
Robert T. Peltz
James H. Rodgers
Randall K. Schmitt
T. Gregory Serwich, II
Jacob Shisa
Peter Thompson
J. Michael Veron
George G. Zarubin

We had also thirty-seven (37) new associate members. Since that number is a little bit below what has been the usual number of associate member admissions at a May meeting, I would urge you all to make sure that all the lawyers in your office are signed up, because we wouldn't want them to miss out on these events. The 37 new associate members are:

Tim Akpinar
Jordan B. Allen
Dania Cay Baldwin
Susan V. Belanger
K. Wynne Bohonnon
Robert T. Coniam
Jon M. Dumont
Daniel J. Finnerty
Peter W. Fudali
Jason William Gaarder
Albert R. Galik
Allen E. Graham
David K. Hall
Melissa Anne Hall
Jeffrey Alden Healy
Lawrence D. Jackson
James M. Jansing
Craig P. Kalil
Sandra M. Kelly
Mel Lamelas
Richard L. Lionberger
Matthew T. Loesberg
William H. Lynch, Jr.
Hendrik P. Milne
Thomas P. Mundy
James J. Musial
Patricia L. Parker
James E. Prendergast
Miguel A. Quinones-Suarez
Carol L. Saboda
James R. Sanislow
Renée F. Seblatnigg
Betsy A. Stone
James R. Swanson
John Hilary Sweeney
H. Coleman Switkay
Richard S. Tweedie

Also, the nine new nonlawyer members are: James H. Falstrault, Richard J. Horan, Claire C. Jones, Charles F. Killian, Dierdre H. Littlefield, Captain Alexandros Mastoras, Robert H. Pouch, Roy Salley and Peter J. Scrobe.

While I always have the pleasure of reporting the new members, I also have the unhappy task of reporting the deaths as well. I regret to report that we've learned since the last meeting of the Board of the following deaths: The Honorable Bernard G. Barrow of Charlottesville, Andrew C. Hecker of Philadelphia, Harry J. Ottaway of New York and John H. Tappan of Point Clear.

That concludes my report, and I respectfully move its admission.

MR. HOOPER: Is there a second?

AN AUDIENCE MEMBER: Second.

MR. HOOPER: Any discussion? All in favor? Opposed? The report is approved. Thank you, Liz.

Now we're honored and pleased to have with us Johanne Gauthier, the President of Canada's Maritime Law Association, and I'd like to ask Johanne to say a few words to us this morning.

MS. GAUTHIER: Good morning. When I spoke with Chet last week he asked me if I wanted to relay greetings from the CMLA, and on the same day I received some relevant information from a spy among your ranks, a Canadian sympathizer who was sending me an article from the New York Times entitled "Oh, Canada, Oh, Canada." I thought it would be appropriate to say a few words about it.

Now, in this article the author deals with the problem of why the American public has so much difficulty being interested in Canadian news. Having reviewed all the facts, he concludes that it's just that we're too boring. We're just a bunch of polite, law-abiding citizens. Who wants to hear about that?

Being very kind, mainly because he lived in Canada a few years, he decided to give us a few recommendations. One was that we should invent a new sexy dance, because in his opinion the tango did marvels for Brazil and the saxophone did a lot for Arkansas.

The second one was that we should dust off or try to revive the war plan or invasion plan of the United States we used to have in the early 1920's. So the CMLA's executive looked at those two recommendations, and our first thought was that although people may look at us as being a little boring, we (members of the CMLA) certainly were not bored.

As a matter of fact, even though we have not yet invented our new dance (we have a subcommittee working on this), I can report that our Canadian government has at least kept us dancing this year.

Apart from our regular activities, which are very similar to all of the activities which you will be discussing here, we had to participate in numerous rounds

of public consultation because our Minister of Transport wishes to bring forth some sweeping changes to the Canadian marine policy.

The CMLA developed a very close working relationship with the government. So we have been intimately involved in those public consultations. Just this month I'll have to make five presentations across Canada on proposed changes with respect to ports, the St. Lawrence Seaway, pilotage, and ferries.

Every aspect you can think of is under review, and I can assure you that on the national scene at least things are not boring.

Now, with the second recommendation we had a bit more of a problem, because this was a closer call.

With OPA '90 and your proposed new version of COGSA we had enough to fuel a pretty lengthy discussion, but I am pleased to report that, in the end, our Association concluded that not only do we not wish to be at war with the US MLA, but on the contrary, we want to have closer ties with you. I must say that your president has been very open to the suggestion and this year we have communicated on a number of issues of common interest.

I also want to thank him and the American delegation to Sydney for their excellent cooperation and their good advice throughout the CMI conference. We had regular discussions of the various topics under review. We had joint meetings in the mornings, and I think that this was truly beneficial to both Associations.

In Canada, we truly think that the force of the European countries within the CMI has always been that they talk things over among themselves and always try to take a position and do things in a way that favors them as a group; we feel that it is very important that in North America we adopt a similar approach so that whenever we can, we try to have a common position on issues of interest and hopefully we can develop other friendships for we have some natural allies, such as Australia, and on some issues sometimes even European countries can be encouraged to be — how could I call them? — black sheep. I think for example of the UK, and even of the French, they were very helpful and supportive, in Sydney.

This is especially important at this time when the CMI is really trying to define its future and maybe new role among numerous players, such as IMO, UNCTAD, UNCITRAL. This is an area where we have to work together. Because of all this, I'm very pleased to be with you this morning, and I look forward to hearing the reports of your numerous committees.

Finally, a little bit of advertising. We will be holding our own general annual meeting in Halifax on June the 1st, and it will be followed by the 1995 edition of "New Directions in Maritime Law" on June the 2nd and the 3rd. Your

president will be making a presentation. I think they have a very, very interesting program, and we hope that you will join us in great numbers. Thank you.

(Applause.)

MR. HOOPER: Thank you very much, Johanne. Next I'd like to have a little report from our immediate past president, Bunky Healy. Last year we mentioned that he was taking part in an argument before the Supreme Court. I'd like to read just a few lines from the opinion and then Bunky will explain it in a few words to us.

This is the trial case. Perhaps this is a theory that only the — this is referring to one of Bunky's theories — perhaps this is a theory that only the most removed appellate court would love. This theory is that there is a reasonable probability that the jury would have changed its mind about the eyewitness presentation because the Brady material would have permitted his defense to argue that the eyewitnesses only got a good look at the killer when he was sitting in the car and thus could not identify him by his build but only by his face.

And to that remark the Supreme Court added, Justice Scalia: Facial features are the primary means by which human beings recognize each other. And that is the reason why bank robbers wear stockings over their faces instead of a cape. It is why the Lone Ranger wears a mask on his face.

Now, that remark came from the dissent, so I'd like to ask Bunky to comment.

MR. HEALY: Thank you, Mr. President. Somebody once said — I think it was Winston Churchill — that there's nothing more exhilarating than being shot at and missed. Well, I think it's equally exhilarating to —

AN AUDIENCE MEMBER: Use the mike.

MR. HEALY: I think it's equally as exhilarating to represent a man who has been sentenced to death for seven years and who has had four definite appointments with the executioner and ultimately gets a landslide opinion from the Supreme Court, five to four, granting a new trial. But it's really not been a bad experience at all. Curtis Kyles is the most happy client I've ever represented.

When I called him to give him the news he said, his words, he was ecstatic. He said he ran up and down death row hollering and giving hope to the other 37 inmates there.

Another benefit of this type of case is he never once complained about the fee, and never asked for a time sheet. We didn't have to have a — what do they call it? — an engagement letter. Also, he did not mind that it took over seven

years. He didn't mind the pace of the litigation whatsoever, given the alternative.

As a result of this wonderful experience, I've been invited to join the ACLU.

Our client has suggested that for his new trial we continue the same "dream team" we've had before. I suspect he's been watching the O.J. trial on cable TV. I tried to explain to him that my job was now over because the post-conviction process has been completed.

It's really been a lot of fun and quite a thrill. However, in case any of you want to experience it yourself and you happen to live in a state that's progressive enough to have capital punishment, before you seek an appointment, I think you ought to call another member of this Association, who lives in Mobile, Alabama.

I won't mention his name, but he wrote a letter to the Alabama Bar Journal about four years ago in which he said that he had been appointed to handle two habeas corpus capital punishment cases, both shortly before the scheduled execution.

He said, although he didn't want this mentioned in Martindale-Hubble, he had the privilege of representing 50 percent of all the persons executed in Alabama over the last 32 years. I'll give you his name if you have a compulsion to volunteer for that type work.

If you really want the details, the case, *Kyles v. Whitley*, is reported in the Supreme Court Reporter, Federal Third, Federal Supplement, and Louisiana Reporter, and if you can wait until next year it will be one of the chapters in my book. Thank you.

MR. HOOPER: Thank you, Bunky. Now we'll get to the reports. I want to take out of turn Winston Rice of the Committee on International Law of the Sea for five minutes, because Winston has to get back.

MR. RICE: Thank you, Mr. President, members, guests, ladies and gentlemen. The Committee on International Law of the Sea held its regular semi-annual meeting this past Wednesday, the day before yesterday, at which time I began to say my good-byes as outgoing chairman, having served the length of time allowed me by the by-laws of this Association. As of yet, no successor has been appointed, so just watch this space and something should come.

Nevertheless, we reviewed from where we've come and where we're going. The work of this committee is performed largely through its two subcommittees, the first being its subcommittee concerned with the United Nations Convention on the Law of the Sea which came into force in the fall of 1994

following the United States having signed on Board the agreement last summer, that is to say July 28, 1994.

Mr. Secretary, the request to our Association for assistance, that is to say, the request for our assistance in securing ratification with the advice and consent of the United States Senate came not from the Coast Guard, although they do welcome any help, but from the State Department, which has requested this Association's assistance in securing ratification through the Senate process of the United Nations Convention on the Law of the Sea.

Toward this end, it was the unanimous view of the Committee on the Law of the Sea that this is a worthwhile effort, and we are beginning to undertake that work. However, we realize that there are other committees of this Association, the subject matter of whose jurisdiction might be of some concern to various parts of the Law of the Sea Convention.

Therefore, we are undertaking to distribute to the committee chairs of the Association copies of the Distribution Summary of the Law of the Sea Convention, that is to say, the summary prepared and distributed by the Department of State, which sets forth the official position of the Clinton administration on the Law of the Sea, in order to solicit by that means input from the various committees.

We're on a short timetable. Looking towards next fall, this is work that is going to need to be done within the next two or three months, and we'll look forward to hearing from you and your committees.

Also, our Committee on Offshore Exploration and Development continues in its efforts to assist the CMI in what has been to date 17 years of lack of success in submitting to IMO anything on the subject of Off-Shore Mobile Craft which the IMO Legal Committee might find usable as a foundation for an international agreement.

Toward this end, President Hooper has nominated me to serve as advisor to the State Department at the 73rd Session of the IMO Legal Committee to be held in London on the 11th to 13th of October and preparations for which are already in the works, including a meeting this afternoon with our friends from the Canadian MLA. Thank you very much.

MR. HOOPER: Thank you very much.

(Applause.)

MR. HOOPER: I'll ask Ms. Whitaker to tell us what — the Chair of the Dinner Committee to tell us what her plans are for tonight.

MS. WHITAKER: Thank you, Mr. President. Good morning. This evening's dinner will be held at the Marriott Marquis Hotel on West 45th Street and

Broadway. I'm happy to report that as of this morning there will be 1,374 members and guests attending.

I'm also happy to report that there will be 15 judges and other distinguished guests attending. They include:

— Honorable Roger J. Miner, Judge of the United States Court of Appeals for the Second Circuit;

— Honorable Louis L. Stanton, Judge of the United States District Court, S.D.N.Y.;

— Honorable Charles L. Brieant, Jr., Judge of the United States District Court, S.D.N.Y.;

— Honorable John E. Sprizzo, Judge of the United States District Court, S.D.N.Y.;

— Honorable Harold Baer, Jr., Judge of the United States District Court, S.D.N.Y.;

— Honorable Alfred M. Wolin, Judge of the United States District Court, D.N.J;

— Honorable Lewis A. Kaplan, Judge of the United States District Court, S.D.N.Y.;

— Honorable John G. Koeltl, Judge of the United States District Court, S.D.N.Y.;

— Honorable Michael L. Orenstein, Magistrate Judge of the United States District Court, E.D.N.Y.;

— Ian Maitland, President of the Maritime Law Association of Australia and New Zealand;

— Johanne Gauthier, President of the Canadian Maritime Law Association;

— Captain Henry E. Englebrecht, President of the Society of Maritime Arbitrators;

— William Mack, Chairman of the American Institute of Marine Underwriters;

— James H. Falstrault, Chair of the Executive Committee of the association of Average Adjusters.

This evening's dinner will include a cold pasta salad, Sonoma field greens salad, a choice of twin medallions of beef or broiled salmon and a Grand Marnier mousse for dessert. The general reception will begin at 6:45 on the fifth floor of the hotel. The VIP reception will begin at 6:45 on the seventh floor of the hotel and the main dinner will begin at 8:00 p.m. on the 6th floor of the hotel.

Thank you very much, and I look forward to seeing everyone this evening.

MR. HOOPER: Thank you very much.

(Applause.)

MR. HOOPER: We also thank Christina — this is her last dinner as chair. We thank her for all the work that she has done, particularly in going through all of the experimentation with different hotels. Thank you for an awful lot of work.

Next we'll go into our regular reports. Warren Marwedel for both the ABA Relations report and the Fall Meeting 1995, this fall, report.

MR. MARWEDEL: Mr. President, members and guests, the ABA will be meeting in Chicago this August. That's one of the two best months to come to Chicago. There will be a program on intermodalism on Monday, August 7 from 9:00 to 12:00. There are a couple of other maritime related programs that are in the planning, but I don't have anything to report on it. If they do go ahead, it will either be Monday afternoon or Tuesday.

The most important report that I have, though, is about the fall meeting in Hawaii. The dates are going to be October 16th through 20th. We will be mailing out the brochures next week. I think you're going to find this to be one of the finest hotels, certainly, we've ever gone to and probably one of the finest hotels anyone has gone to.

We have planned an ambitious seminar program. There are a lot of tours and activities to do on the island, both pre- and post activities. We've gotten discounts at hotels at all of the islands in Hawaii. They have built it and we should all come.

MR. HOOPER: Thank you very much.

(Applause.)

MR. HOOPER: Next we have the Carriage of Goods Committee report. George Chandler.

MR. CHANDLER: Thank you, Mr. President. Members; Distinguished guests. As you've heard from the Secretary in his report, the debate and vote that was to take place today regarding the Committee on the Carriage of Goods' proposed resolution by the Association to revise the Carriage of Goods by Sea Act has been deferred.

The resolution has been recalled by the Committee, and it's expected that we will take up the issue again in approximately one year. Some thought had been given to doing it at the next meeting, but since that will be in Hawaii, and the intervening six months affords little time to have many meetings or really explore the issue further, it was felt it was necessary to take a year. So it will be next May's meeting where we'll take up the proposed resolution again.

The basis for the recall is that we've heard from many members who aren't part of the Committee on the Carriage of Goods, but who felt that in voting for this issue they hadn't had enough information or enough time, and that they were being pressed to make a decision on something for which they weren't ready.

We've heard what they have been saying, and will make provision for a series of meetings. Approximately six meetings, perhaps more if we can tie in with other organizations, but four here in New York City. We'll split up various topics to be taken up at each time, the first one of which will be on June 26th, a Monday.

And then we will also attempt to have meetings on the Gulf Coast and West Coast and other places if it ties in, as well. This will give the maximum opportunity for everyone to participate, to find out what the issues are, and why it's being done.

Also, additional modifications to the proposal are not foreclosed. Within the presentations and the debate that will take place will be the opportunity for further suggestions from those who feel that they haven't been heard. So there is the possibility that when the committee comes back to you in one year there may be a modified approach, or a slightly different approach.

What we don't expect to do is to start from the beginning; that is, wipe the slate clean and then just start off fresh, because that process just takes far too long. But this is what will be taking place, and this is why the big debate that was to take place today will not be taking place.

It was best exemplified in one of the letters I received from one of the members, not on the committee, but someone who was concerned, and let me read sections of the letter to you.

"Dear George:

I bet there are times, my friend, when you may wish that you elected to work on some other committee. Out here I'm being earnestly solicited by telephone and letter from friends, clients and total strangers, all of who want my darn proxy for the vote on the proposed revisions. I suspect the same process is going on all over the country.

"George, that concerned me. I've already given my proxy to my partner. I have instructed him to vote in the first instance for deferring the consideration of the amendment until the fall meeting. While I did this for several reasons, this uncomfortable rush for proxies has been the best justification for delay.

"George, you and your committee have labored very hard and long for a proposed resolution for the committee. I'm afraid that our spring meeting is going to be dominated by people strongly in favor of or in opposition to the vote, each of whom will be coming with a fistful of proxies solicited in the last few weeks.

"This proposal is important enough to us in the industry in general that it should not stand or fall based on who does the most effective job of soliciting proxies.

"I know that you, George, have probably worked very hard on this proposal and that you are very much in favor of its acceptance by the membership. Regardless of which of the two sides may have their way, there may be much to be said in terms of deferment."

This letter, to me, sums up the need for the deferment very well, and, as my friend Mike Ryan mentioned, at the committee meeting, for a number of people, the lights have just gone on. Now that the light is on, I beg you not to turn it off, or to wait for a year to think about this. If you don't have the documents and the understanding, please utilize the meetings and get that understanding.

Now, I also challenge those who as part of their dissent have indicated we should try harder for Hague-Visby. You now have one year in which to do that. This committee has, for the twenty-two years that I've been on it, attempted to get it enacted and been rebuffed each and every time. For those of you who feel that a little harder effort is all that's needed, you have that year, and I challenge you to make your best effort on that to get Hague-Visby enacted.

This is my last meeting as the chair of the Committee as this is my fourth year. I've been privileged to serve this committee for those four years. It's a lot of work. It's indeed a challenge, particularly with what we've been going through, but it's been well worth it.

While there was some possibility of extending my term to see the proposal through, I believe it is best to have someone else take it from here, so that the merits of this proposal are the focus, rather than the personalities and the motivations of the people behind it.

I certainly will do everything I can to back my successor, and all those who work to get this proposal through. I wish them the very best, and we will give them our best efforts. But in the further discussions that are to take place, I urge all of you to address it on their merits, and consider the ramifications for our Association and our practice. One of the reasons this effort was taken up in the very first instance three years ago, was the great concern of the cargo practice; that is the decline in the cargo practice. We felt very strongly we had to do

something to bring us up — if not equal to our many trading partners — on some level close to it.

On that, I leave the floor open to those who wish to make additional comments, and I thank the Association for the privilege of having served for you. Thank you.

(Applause.)

MR. HOOPER: Thank you very much, George. I think we should discuss the procedures. People will realize how hard George has worked on this effort, a very important effort. By the way, for those standing, there are many seats over on this side. It may be difficult to escape, but that is part of the plan. Feel free to walk in there.

AN AUDIENCE MEMBER: Mr. President, could I rise to a point of personal privilege. I simply cannot hear. Is there any way in which these loudspeaker systems could be jiggered up?

MR. HOOPER: I don't know. Is that better?

AN AUDIENCE MEMBER: Yes.

MR. HOOPER: You practically have to touch this thing. I hope that those of you who know the Heimlich maneuver will run forward if I swallow. I'd like to hear someone from the working group to explain the proposal as currently drafted.

We set aside 45 minutes this morning — we've used up about 10 so far — for this discussion, and I think that now that everyone has had a chance to read it, that everyone's attention has been drawn, I'd like to have some comments from the membership.

George, would you like to succinctly explain the proposal or do you think someone else — do you have someone else?

MR. CHANDLER: I would suggest Professor Michael Sturley as being perhaps one who could do that more succinctly than I.

MR. HOOPER: Michael Sturley is the main drafter. Professor Sturley, if you could just come up and explain in outline what the proposed change is.

MR. STURLEY: Is it also necessary for me to swallow the microphone in order to be heard?

AN AUDIENCE MEMBER: Yes.

MR. STURLEY: We've received criticisms of our report from two fronts. One criticism is that the report is too long for anybody to be able to read, and the

other is that we have not fully justified all the points that we wished to make and that we should have had further explanation.

To try to summarize the 50-some pages of this report is quite a challenge. I think the principal thing that we all need to remember is that we're looking at a compromise proposal here, that no one involved in this process is fully happy with every single aspect of the proposal. Even I, the one who has put the compromise into words, have been dissatisfied with some of the positions the group has taken. But I think that's inherent in the nature of a compromise.

Probably the most significant thing we have proposed has been the expansion of COGSA to govern the entire time that the bill of lading applies. We would no longer have the tackle-to-tackle limitation. We would no longer have all the preliminary disputes that we're all familiar with as to when the damage occurs.

If the bill of lading is from port to port, the amended COGSA would apply from port to port; if the bill of lading is from one location inland to another inland location, the amended statute would apply from inland location to inland location.

In conjunction with that, we have also proposed extending COGSA to govern domestic shipments so that we would not have disparities between shipments from New York to Rotterdam on the one hand and New York to Puerto Rico on the other hand.

We've also extended the bill of lading definition to cover the modern substitutes for bills of lading that are being adopted. If there's any doubt as to whether EDI is covered under current law, there should be no doubt that it's covered under our proposal.

In my view, that's probably the most significant extension. I say that not as something for the benefit of carriers or something for the benefit of cargo, but as something for the benefit of the industry as a whole. This will help to bring the statute into the 21st century rather than leaving it in the 19th century, which is really where it's based now.

We have modified the navigational fault exception. We have not eliminated it completely, as many had suggested, or in the form that many have suggested. We have eliminated it to the extent that cargo is able to prove that there is in fact negligence in the navigation or management of the vessel.

Unit limitation under our proposal is essentially an adoption of the Hague-Visby Rules, which increase the package limitation, and also add a weight-based limitation.

Probably the next most significant proposal is described in the report under "Qualifying Statements." These are modifications to section 3(3) to protect carriers in situations where they're, in essence, not in a position to protect themselves. It is common for carriers to receive a sealed container unaware of the contents of the container. Obviously no one wants the carrier to unseal the container, inventory the contents, and verify the description in the bill of lading.

The amended statute will protect the carrier in situations where the carrier in fact does not know the contents. It will not apply in situations where the carrier in fact does open the container, and is thus able to verify the contents.

You'll see a number of what might be described as "clean-up" provisions or changes proposed to give full effect to some of the changes I've already mentioned. For example, our proposal would make Himalaya clauses unnecessary in conjunction with the extension of the statute from inland point to inland point for a through bill of lading. Everybody who is performing the through contract of carriage would have both the benefits of the Carriage of Goods by Sea Act and the burden of the Carriage of Goods by Sea Act.

In another "clean-up" provision, many of the significant sections of the Pomerene Act have been included in section 3(4), primarily because there were changes made in COGSA that would have required changing the Pomerene Act, but only for oceangoing shipments. We thought it was better to make the changes in COGSA rather than trying to make changes in Pomerene that would not be appropriate for other areas in which the Pomerene Act applies.

Perhaps the final point I'll mention, given that this is intended to be a very brief review is Forum selection. The proposal in essence codifies the *Indussa* doctrine to ban foreign forum selection clauses. This has been the law that most courts in this country have adopted to date, so many view this as not a big change in the law. As many of you know, however, the *M/V Sky Reefer* is now pending in the U.S. Supreme Court. There is a possibility that the Supreme Court will change the law as we previously understood it. I'd say there's a very good possibility that the Court will affirm the First Circuit holding that foreign arbitration clauses are enforceable. This provision will prohibit any clause that tries to require a cargo claimant to sue outside the United States or bring arbitration outside the United States.

I apologize that this is such a hurried outline of the material, but I think I've hit at least the high points, and obviously I'll be happy, if anyone wishes further details, to respond to any points that other speakers make. Thank you very much.

MR. HOOPER: Thank you. Thank you very much.

(Applause.)

MR. HOOPER: Technically, as Michael said, it increases the package limitations to the Hague-Visby package, unified with the rest of the world.

We've asked those who have submitted dissenting reports to request for time if they want to speak and one does. Michael Marks Cohen would like to speak.

I'd like to give you five minutes, Michael, and then we'll hear some other comments. Michael indicates that he doesn't need five minutes.

MR. COHEN: Mr. President, thank you. My views about the proposal were distributed to everybody in writing, and I really only want to make two points this morning.

First, I want to respond to George's challenge concerning Hague-Visby. In the past the approach of this Association has been to try to convince the State Department to send the Visby Amendments up for ratification. We have been unsuccessful because the State Department says they're not going to send anything to the Senate, since the experience they had with the Montreal Protocol, unless the industry is unified. The Department refuses to risk a fight in the Senate about ratification.

Now, what really is different about the new proposal is that it recommends the Association commit itself to a legislative struggle, because there will be segments of the industry which will not be in favor of one aspect of it or the other. The real question, then, as far as I'm concerned, is who do you want to pick a fight with.

Do you want to struggle with the people who oppose Hague-Visby? Up to now, that is the position which this Association took many years ago, on which it was, and in my opinion, remains, quite unified.

Or do you want to come forward with a new proposal which will split the Association into segments opposing each other in Congress, while that new proposal is being considered? My own view is, if we're going to have a fight on the floor of Congress, let's go forward together in support of Hague-Visby.

As many of you recognize from the Dissenting Report, my second principal objection to this proposal isn't on the merits. I am against considering it now because it wasn't fully debated in the Carriage of Goods by Sea Committee.

To be sure, it was discussed by a small group of committed, interested, real servants of the law who spent a tremendous amount of time on it and became very wedded to the product that they had come up with. But there was not a full, frank and informed debate within the Carriage of Goods by Sea Committee. Over the next year there will be such opportunities.

I don't want to take the time to go into details this morning. I only want to indicate that, personally, I have an open mind on the subject.

This is Bar Association work. Generally speaking, we should leave our clients at the door when we do Bar Association work. I'm willing to be persuaded. I simply haven't been persuaded up to now. Thank you.

MR. HOOPER: Thank you, Michael.

(Applause.)

MR. HOOPER: I will mention the hope that we all have is to get Hague-Visby ratified and amended, but we have been fighting for it for an awful long time, and also the need for a debate in the Carriage of Goods Committee.

Does anyone want to speak against the proposal or for any other reason? Yes, Herb?

MR. LORD: Mr. President, members and guests, I really rise to a point of order. I think that would be the correct description of what I'm trying to do. I think many of us may have feelings on this. Many of you may have views on this fascinating proposal, and I think every one of us admires the work that the committee has done to bring this rather massive project before us.

On the other hand, I think to welcome further comments at this stage is to open up a debate, you see, and I think there are so many people here who would like to have something to say that I think it would be much better to see what happens when the compromises perhaps are made during the course of the coming year, and then we can have a debate on the revised proposed resolution at the meeting a year from now.

I'd like to say things about the present draft, but it may not be necessary to do so when we're going to come around to this subject again a year from now. So I suggest that rather than welcoming a number of comments from the floor, Mr. President, that we defer these comments until a later date.

MR. HOOPER: Thank you very much. What we want to do, and we have about 15 more minutes to do it, is to receive some comments from the floor, not looking at this proposal as a final proposal, but in an effort to advise the Committee for Carriage of Goods or the drafting committee now, what changes should be made, what interests we have.

Members came prepared to vote at this meeting and perhaps came prepared to say something. I think they would be frustrated if we didn't allow them to say something at this time.

I think whatever we hear from the members will be considered by the committee. Perhaps there will be people that are here that are not members of the committee that wish to be heard. It will be limited. I'll continue it in that vein.

Does anyone else have another issue he or she wants to speak to which is against the proposal? Anyone have any rebuttal he or she wants to make to those who spoke against it or anyone who wants to say anything else in favor of the proposal?

That will cut it shorter. Any general discussions? You were right, Herb. Thank you.

Next we have Carrier Security, David Nourse.

MR. NOURSE: I have an "early warning" for those of you who are interested in matters relating to carrier security.

As you know, this committee deals with such exotic matters as piracy, the illicit carriage of narcotics on Board vessels and, more recently, with the carriage of stowaways, all of which cause problems for carriers in various manners.

The early warning relates to legislation that was announced on Wednesday of this week by Senator Kennedy. I have the bill number, which is S. 754. The legislation is the Immigration Enforcement Improvement Act of 1995, and it's a major piece of legislation supported by the Clinton Administration designed to seal off our borders to the extent possible and deal with the burgeoning problems of illegal immigration into this country.

Why, you might ask, are we concerned with that legislation in this Association? Well, the maritime industry is affected by the bill to the extent that in Section 5 of S. 754, announced on May 3, is a section relating to inspections and administration. It's down towards the end. It's in just before the measures relating to control of illegal prostitution, but we should not, I think, bemoan our position.

Hopefully, the focus of this legislation will be on the matters covered by the earlier sections dealing with border enforcement, control of unlawful employment and verification, illegal alien removal and alien smuggling control.

As you know, these are all major problems. What the Immigration and Naturalization Service has sought in this new bill is to tack onto the end of a measure for which I think that we'll agree there will be wide public support for some provisions which are designed to undo what was done last year both in a case called *DIA Navigation v. Pomeroy*, 34 F.3d 1255 (3d Cir. 1994), in which the Third Circuit invalidated the Immigration and Naturalization Service's procedures with respect to detention of stowaways, and also in the Immigration and Nationality Technical Corrections Act of 1994 passed by Congress last year, in

which the carriers' obligation to detain stowaways was deleted from 8 U.S.C. § 1323(d) in a last-minute maneuver. We've waited six months since that Congressional action for a response from INS, and now on the eve of this meeting we have a brand new proposed bill in Congress. Hearings will start later this month, and obviously there will be a lot of interest in the major parts of the legislation.

What can be done on the provisions relating to stowaways remains to be seen. Obviously, the provisions are designed to increase the penalties on the carrier for having stowaways on board. The dollar amount of the penalty is going up from $3,000 to $5,000.

Unfortunately, I think the impact of punitive legislation of this sort is to encourage those elements in our maritime community that would prefer to see stowaways going "over the side" rather than becoming a problem when the ship arrives in the United States.

Unfortunately, we have had a number of instances of such conduct. The pressure here is on those people who man ships in international trade. Unfortunately stowaways may be the objects of their hostility, and indeed their efforts to minimize the impact of the penalties on the carrier and on the employment that seamen have. Accordingly, I think the measure is one which deserves our attention.

We need to determine who our allies are with respect to dealing with the issues, and the Committee on Carrier Security will be reporting to you further about that. Thank you very much.

(Applause.)

MR. HOOPER: Thank you. Next for five minutes we have Frank Wiswall for the Comité Maritime International Committee.

MR. WISWALL: The Comité has had no meetings, either of the executive council or of the assembly, since our last meeting, so I will try to keep it to five minutes, Mr. President.

In the interim, the CMI has continued its activities on several fronts, most notably being increasingly represented at meetings of the intergovernmental organizations, and particularly over this period monitoring the work of the European Commission, for which purpose a special section of the CMI has been set up to have consultative status with the Commission in the European Union.

The CMI is represented at all of the meetings of the IMO Legal Committee, and perhaps it signifies the branching out of the Comité's interests under the new constitution that this month, for the first time, it will be represented at a meeting of the IMO Maritime Safety Committee.

Another ongoing work of the Comité is that on Classification Societies. There have, since our last meeting, been two meetings of the Joint Working Group of International Organizations with regard to Classification Societies. There will be perhaps more to say about that at our fall meeting.

And also, regarding the working group of the CMI Executive Council on Uniformity of Carriage of Goods by Sea, you may recall that I'd reported to you last fall that a questionnaire was to be sent to the member national associations, stressing that the present situation gives us between 11 and 15 different regimes of carriage of goods by sea, depending on how you view the individual variances. The replies to that questionnaire have been analyzed and collated and the summary has just been delivered. The President of the Association has received one, and it has been copied, to the Chairman of the Carriage of Goods Committee.

You will probably not be surprised to learn, firstly, that no national Association found the present situation satisfactory. All national Associations, with a slight reservation by one association, felt that the CMI should be involved in an effort to do something about the growing disuniformity. Of the approaches that the Comite might undertake, the overwhelming view of the national Associations is that the Hague-Visby Rules should form the basis of further work.

However, there was not one Association that felt that the Hague-Visby Rules did not need some sort of amendment. There has been no decision reached yet as to how the work will proceed or indeed as to what the working group's recommendation will be. I would not exclude the possibility that the Comite might do work on the basis of the Hamburg Rules, perhaps in addition to Hague-Visby.

At the meeting of our Association's Committee on the Comité yesterday afternoon, the Committee voted to recommend to the Board of this Association that we extend an invitation to the Comité to host a colloquium on an appropriate subject in June of 1999 in conjunction with our Association's centenary, and the Committee on the CMI urges you, Mr. President, to make that offer to the Assembly of the Comité which will take place in Brussels on the 20th of this month.

The Comité itself is preparing for its centenary, which will be held in Antwerp in June of 1997, and there will be more information forthcoming as plans are developed, but it is going to be — literally — a once-in-a-lifetime celebration.

I'll conclude, Mr. President, by saying that, a little over two years ago, I wrote to your predecessor pointing out that I had served rather longer as chairman than is now normal in our Association, the reason being that the longevity

of officers of CMI has traditionally been great — in office, not necessarily in life.

I have found it increasingly difficult to wear two hats, one as an impartial member of the Executive Council and the other as the Chairman of the U.S. Association's relevant committee on what the Comité should be doing.

And so I'm one of those who will be yielding up this morning, gratefully in my case, the chairmanship of a committee. But I think you should all be aware that you're seeing the passing of the age of the dinosaurs: it's been my privilege and pleasure and honor to serve this Association as a committee chairman for 12 consecutive years. Mr. President and fellow members, thank you all very much.

I yield the floor to Nick Healy to say a few words about the CMI American Foundation.

(Applause.)

MR. HOOPER: Thank you very much, Frank. We should realize that the MLA has relied very much on Frank for our work with the CMI, and we'll continue to do so with the CMI.

MR. HEALY: Mr. President, honored guests, ladies and gentlemen, I have very little to report except the receipt of a very handsome gift of $500 from American Maritime Cases. They are really fine supporters of the CMI American Foundation.

We haven't had any other contributions since the last meeting, and I would encourage you to please get out your pens and send us some checks.

We haven't as yet received any contributions of essays for the second Elliott Nixon Prize for the best essay on a subject which affects the uniformity of the maritime law, but this isn't surprising.

I expect that once exams are over some of the students will get busy with writing essays which they will send in to us for the competition. I would again urge all of you to encourage your family members who are young lawyers or law students, and associates, young associates in your firms, to send in contributions.

The prize, as you know, is $1,000, which isn't a huge fortune these days, but at least it might help pay some tuition or some family bills. Thank you.

MR. HOOPER: Thank you very much, Mr. Healy.

(Applause.)

MR. HOOPER: Next we have Limitation of Liability, Donald C. Greenman.

MR. GREENMAN: Thank you, Mr. President, members, guests. I rise only to report that there is some activity going on in the international field on limitation of liability having to do with the 1976 Convention. The HNS Convention, which you will hear about later, and the Limitation Convention have been more or less proceeding on parallel paths at IMO with a view toward amending the 1976 Convention essentially to increase the limits to account for inflation.

The proposed increased limits will also give a break, somewhat, to smaller size vessels by increasing the limitation amount available to them. It is also planned to do something to increase the limitation amount for passenger claims and do away with the overall cap on those claims.

Although the United States is not a party to the Convention, our Committee is following it with interest, because one of the reasons that the convention was never considered in the United States was the low limits back in 1976. I do not anticipate that the limits are going to go up significantly, other than to increase for inflation, but we are keeping watch.

There is also a problem between the Limitation Convention of 1976 and the HNS Convention with respect to what to do if, say, the Limitation Convention limits are $10 million for a ship and the HNS Convention limits for the ship owner are $100 million. Where do you fill in the gap? That is a subject which is so complicated that if I tried to explain anything about it this morning we would be here until after lunch. With that, I shall conclude my remarks.

MR. HOOPER: Thank you very much, Don.

(Applause.)

MR. HOOPER: Jack Vayda will give the report of the Marine Ecology Committee.

MR. VAYDA: Good morning, Mr. President, ladies and gentlemen. The principal focus of the Marine Ecology Committee ever since 1990 has been following the updates of OPA and its progeny throughout the federal regulatory agencies as well as the various state statutes and regulations which it has spawned.

I'm pleased to tell you that at this point we're no longer in a reactive stage and we hope to move into a proactive stage. Since the election of the new Congress this last November there has been a much more receptive audience to modification of OPA.

Members of the committee and various other people from the general community have been working directly and speaking frequently with the new congressmen and senators in Washington, together with their staffs, to try to identify specific issues that may be subject to amendment.

I'm pleased to tell you that now for the first time the first two substantive, actually the first two amendments, to OPA have now cleared committee, and they are now attached to the Coast Guard reauthorization bill which is now in front of the entire Congress and probably will be subject to vote in the next weeks. Those two amendments are very narrow and deal with very specific issues.

The first one merely clarifies that vegetable oils are not included within the scope of OPA. The second one attempts to insure that recreational marinas also have a lesser burden from OPA.

The people we've been speaking with in Washington suggest that further broader amendments to OPA are possible. We're still not talking about a frontal attack on OPA that would try to hit any of the main principal provisions, but, instead, merely deal with legislative incremental fixes of OPA.

We also understand from people in Washington that this summer is probably the time frame in which OPA will be considered on a broad basis for the first time. And that may well include congressional oversight hearings.

So what the committee has been trying to do since we've been picking up these indications this winter is to put ourselves into a position to advise the Association of these matters which should be subject to amendment in a timely frame. What we've tried to do is to identify specific areas — this has been the project for the past several months — to identify specific areas that do need amendment.

Specific areas which we think at this moment probably should be looked at closely are natural resource damage assessments; the supremacy and/or exclusivity of federal regulation of oil spills, which in a prior generation was called federal preemption, but those are phrases that we tried to avoid right now; and also concursus.

We've broken ourselves at this point into three separate subcommittees to try to look at each of those areas to develop position papers and topics on exactly how to modify the statutory language itself to deal with those principal points.

There are other committees and other members of the Association which are all, obviously, keenly interested in some or all of these areas, and we will work very closely over the coming weeks with them in order to make sure that we all pull together as closely as possible to achieve the desired results.

We hope to be able to report back to the Executive Board within the next six to eight weeks on these particular areas so that we could be in a position to assess what we're going to do as an assembly of the whole in the summer time frame.

Simultaneously, the committee has been following legislation in the state arena. One of the more interesting areas has been happening out in the State of Washington, where, as you may all know, the Washington State statutes and the implementing regulations are much, much tighter than is OPA itself, particularly in terms of vessel operations.

The State of Washington is attempting to or has stated that it will attempt to enforce those new regulations with respect to innocent passage for vessels which are going to and from Canada. We understand that there is at least one international organization which is about to file suit against the State of Washington to try to overturn or block that statute and its regulations.

We're going to follow that very closely, because in the name of uniformity, it may be an issue in which the Association may wish to file an amicus brief. We will keep the Association advised. Thank you.

MR. HOOPER: Thank you. I'd like to depart from the reports briefly and welcome Ian Maitland, the president of the Australian —

AN AUDIENCE MEMBER: We can't hear you.

MR. HOOPER: I'm sorry. I'd like to depart briefly from the reports and welcome Ian Maitland, the president of the Maritime Law Association of Australia and New Zealand, and ask you if you would like to say a few words. Thank you for all the hospitality that that Association showed us in Sydney last fall.

MR. MAITLAND: Thank you, Mr. President. I bring you a good day from Australia. I'm not sure what I should do from New Zealand. We were privileged to welcome your delegates to Sydney last year, and we've been asked by one of the vice presidents to assure you all that they behaved themselves the whole time. I leave that to you to believe it or not.

Can I just briefly mention that our Annual Conference is being held in Wellington, New Zealand from the 4th to the 8th of November, and we would certainly welcome any of you people to come to that Conference. I'd just like to conclude by thanking the president and the Executive Committee and the other committees for their welcome to me here today, and I wish you well for the rest of the meeting. Thank you.

MR. HOOPER: Thank you.

(Applause.)

MR. HOOPER: Now we'll hear from Marine Financing, David McI. Williams.

MR. WILLIAMS: Thank you, Mr. President. The Marine Financing Committee met Wednesday, as is its custom. Unfortunately, as our agenda has gotten longer, so have our meetings. Fortunately our meeting was well attended by many members, including some helpful guests from Washington, whose attendance we greatly appreciated.

Tom Willis of the Coast Guard was with us once again, as was Captain David Kantor, who is with us today, together with Lieutenant Commander Steve Poulin, also from the International Legal Affairs Division. Ned Sommers of the Office of Legal Counsel of MARAD was also kind enough to join us.

The Marine Financing Committee has been involved in many projects. Some months ago we submitted an amicus brief in the Eleventh Circuit in the *Dietrich v. Key Bank* case regarding the *Fogle* problem. Recently Bob McIntosh argued the appeal on behalf of the Bank and he has reported that the argument went very well. We are very optimistic about the outcome.

Of principal note to the Association is the passage of HR 1361 by the House of Representatives. This bill is on a fast track because it is the U.S. Coast Guard Authorization Act for fiscal 1996. It includes several legislative proposals that our Committee has recommended and the Association has approved. One of these, interestingly, now that we finally have the *Fogle* problem before the Eleventh Circuit, is our Committee's proposal for legislative relief on this problem through the "alternate remedy amendment."

Also included in HR 1361 is the Committee's proposal for the elimination of the citizenship requirement applicable to mortgagees. Although there is a concern about the language of the bill, we are sending a letter to the House staff to address this technical issue and we are pleased to see this issue finally addressed.

Finally, HR 1361 includes provisions for the filing of instruments by facsimile. This has been introduced to accommodate the consolidation of Coast Guard vessel documentation offices in Falling Waters, West Virginia. Tom Willis reports that the Offices of Vessel Documentation are actually now packing up their boxes and that they expect to have a ribbon falling ceremony opening the new office in Falling Waters by the end of this year. Despite the previous controversy about consolidation, it is about to happen.

Recently the Coast Guard issued a regulation to accommodate the consolidation by providing for facsimile filing of instruments. Some folks in our Committee thought that the regulation was perhaps premature because it was not at all clear to them that the existing legislation provided support for filing by facsimile. The Coast Guard has taken the position that there is adequate legislative support, but our Committee voted to submit a comment letter saying essentially

that we think it appropriate to hold the regulation in abeyance until the new legislation clearly authorizing filing by facsimile is enacted.

Our comment letter on the regulation was due today, so yesterday I appeared before the Association's Board of Directors for authority to send it. I might add that, to get the letter in on time, I had to call the Coast Guard to get their fax number.

On a more problematic note is the matter of the impact of the vessel identification system in vessel documentation. Tom Willis discussed with us some of the problems that we foresee coming out of the implementation of the vessel identification system. Just last week the interim regulations were published which will implement a provision in the documentation statute, 46 U.S.C. § 12102(a). In some circumstances, the effect of this may be to prohibit a boat titled in a state from becoming federally documented.

Our Committee previously submitted a comment letter on the regulations because it must remain possible for a boat that is titled in a state to pass from state boat titling to vessel documentation. This has been the customary practice in literally hundreds of millions of dollars of yacht financing in this country in recent decades. Indeed, in the interim final regulation just published, there is a new provision which will provide for the surrender of state boat titles by submission to the Coast Guard so that a boat can go from titling to documentation.

But there remain a number of serious problems. One is that for vessels not required to be documented, that is, not in commercial trade, existing certificates of documentation are going to become invalid on April 25, 1997, if the boat is also titled. There are many, many recreational boats which are both titled and documented. Presumably, the preferred mortgages on such boats should be preserved under the savings statute, section 12111(c).

Also, hereafter there will be a continuing problem because the Coast Guard won't necessarily know if a boat for which an application for documentation is submitted is also already titled. The Coast Guard will, if an application is filed in the proper form, proceed to issue the documentation, even though it will be defective under the statute. Obviously, mortgages also may be filed. Under the regulations, those mortgages apparently will not be perfected because of the defect in documentation.

Finally, there are three states, including New Jersey, that require titling in the state if the boat is principally used in that state even if the boat is also documented. Most states' laws provide that if the boat is documented, then the state law requiring titling do not apply. Three states' laws require titling even if the boat is also documented. Those states would have to change their laws in order to meet all the requirements of the vessel identification system, but it must be remembered those requirements are optional, not mandatory, to the states.

It is not yet clear how these issues may be resolved, particularly as respects the three states that require titling even for federally documented vessels. Our Committee will attempt to prepare a comment letter in response to the latest rule-making, which is due by July 25, 1995. I would encourage all those who are interested in these issues to contact our Yacht Financing Committee Chairman, Bob McIntosh, or me and express your interest.

Our Committee has been active in a number of other areas. I'd be remiss if I didn't mention the work of Bruce King on the revision of Article IX of the U.C.C. This is a major project in the ABA which will have an impact on marine financing.

Still to come is a report on the work of the OPA '90 Concursus Subcommittee, co-chaired by Bob Zapf and Mike Marion. Bob will be reporting speaking as part of the Practice and Procedure Committee report, so, if I may, I'll defer that presentation to him. With that, I'll conclude my report. Thank you.

(Applause.)

MR. HOOPER: Next our Marine Insurance, General Average and Salvage.

MR. LeBRETON: Good morning. I am going to report on the highlights of the meetings of our subcommittees. The first one is Salvage, which is under the chairmanship of Paul Poliak.

He reported with respect to the 1989 Convention on Salvage. This Association leads the way for the United States to be one of the first nations to ratify the Convention.

Fourteen of the necessary 15 nations have ratified, so it will go into effect in the United States one year after the 15th country ratifies, and that may affect any salvage cases you have.

The subcommittee is continuing work on a form of contract for salvage for recreational boats. They have a draft, but they would appreciate more input. Anybody who thinks they might have an idea about this should write Jim Shirley. He'll send you a copy of the draft, and he'd appreciate comments back.

Also, a working group now has been formed to respond to the request of the National Resource Council that we review and update the *Blackwall* standards for compensation. The Working Group had its organizational meeting this week, and we'll be hearing more about that later.

The P&I subcommittee met under Tom McGowan, and the principal matters on which he reported are business developments. The Clubs are working on possible revisions to the no limit of liability for P&I coverage, and the International Group is seeking a further extension of their exemption to the European Community anti-competition rules.

He said to watch these, because they might ultimately have an effect on the practice involving insurance here. The committee also is renewing its efforts to complete the P&I Annotation.

This leads to the Cargo Insurance Subcommittee under Raymond Hayden of New York, which has completed an annotation of the cargo policy. This week it was approved for publication by the ABA, and it will be available for purchase from the ABA within the next several weeks.

This is a quite active subcommittee. They've completed a paper on rejection insurance which they project to publish in the fall MLA report, and they're working on a paper on debris removal which they expect to complete this year and publish in the spring MLA report. They're starting work on a paper on the recent extensions of "all risks" insurance and would appreciate comments on that subject.

Otherwise, the subcommittees reviewed recent developments. One which I'd like to mention is that an amicus brief was filed in the United States Supreme Court in a suit filed in *Wilton v. Seven Falls.*

The court already had accepted writs with respect to this case which involves declaratory judgments and when the federal courts should exercise their discretion to retain jurisdiction over a declaratory judgment. The brief was in favor of the federal courts keeping declaratory judgments more often, especially since this affects a number of marine matters such as marine insurance.

The case was argued in March and the decision will be forthcoming. It will have a great effect on this area.

Is Ed Cattell here? Ed Cattell is now going to address you about the *Ad Hoc* Committee on the British Marine Insurance Act of 1906.

MR. HOOPER: Thank you.

MR. CATTELL: Thank you, Mr. President, and Bret. The work of the 1906 Marine Insurance Act Committee proceeds apace. Our goal is a federal act which will return marine insurance to maritime law instead of the current chaotic situation which we have under *Wilburn.* In that context, I'd like to quote a treatise.

It says, "The object of the bill is to reproduce as exactly as possible existing law without making any attempt to amend. The codifying bill in its inception ought to be a mere reproduction of existing law. If amendments in the law are to be made in the initial stage, the whole bill becomes controversial. If amendments are desirable they should be inserted by the legislature only after due deliberation."

Now, what I've just read to you could come from an American Law Institute comment on the purpose of the Restatement of Law. In fact, it comes from the first edition of *Chalmers* on the Marine Insurance Act of 1906, which work was published in 1901. It was actually published to persuade Parliament to enact the Marine Insurance Act of 1906, because Parliament also had problems with this idea of regulating marine insurance until they were persuaded that they were not regulating insurance, that they were merely codifying the existing law to reduce the amount of litigation that was arising concerning provisions of policies.

That's what we're attempting to do. It's important that everybody who thinks about this project or who has asked about this project be very clear that we are not seeking federal regulation of marine insurance. This would be legislation like COGSA which codifies the principles of law that are deemed to be settled and noncontroversial.

If we have a principle of law that is controversial it would probably be appropriate, at least in this instance, to eliminate it rather than have it drag down an otherwise good bill.

The committee has had several recent additions, being representatives of the American Institute of Marine Underwriters. What we've done to date is produce a research paper. We've taken each section of the Marine Insurance Act of 1906 — there are 91 — and we've researched it to see what is U.S. law today on that topic.

We were very much surprised to find that in spite of our history under *Wilburn* we have a very high degree of correlation between present U.S. law and the Marine Insurance Act itself.

Now, that could be attributed to the fact that there are many areas of controversy existing today under *Wilburn* which are not addressed by the Marine Insurance Act.

The research memo appears in a report to the committee, and fortunately for my Xerox machine and postage bill we've arranged with Gordon Paulsen, editor of the MLA report, to include our research memo in the forthcoming edition of the MLA report so every member of the Association will have it and be able to review the research done to date.

We've also included the Canadian Marine Insurance Act. In 1993 Canada passed a new act basically taking the 1906 Act and reworking it into a much more modern and, with compliments to Canada, common-sense approach in terms of the order of the sections.

It's much more readable and I think much more workable. It also reflects some changes that were necessary to bring the 1906 Act into accord with contemporary Canadian law.

That is not necessarily the language of our Act, but it certainly gives us a model to look at. That Act will also be in the MLA Report, as will the minutes of our *ad hoc* Committee meeting.

Where are we going from here? We are very conscious of the fact that the National Association of Insurance Commissioners are jealous of their turf. We need to persuade them that we are not attempting to infringe on state regulation of insurance.

It is our belief — and we're going to do research to confirm this — that most states, such as my state of New Jersey, have a specific statute that says we do not regulate marine insurance. Most states are like that.

California has a statutory code which addresses marine insurance, but not so much from the regulatory aspect. They adopted a statute very similar to the 1906 Act as California law. So that research will be forthcoming —

MR. HOOPER: Five minutes are up.

MR. CATTELL: Two seconds?

— as will the initial draft produced by our committee of an American Marine Insurance Act. That will be disseminated in the near future, hopefully shortly before the fall meeting, for consideration and comment by members of the Association.

MR. HOOPER: Thank you.

MR. CATTELL: Thank you, Mr. President.

(Applause.)

MR. HOOPER: Next is Maritime Arbitration, Glenn Bauer.

MR. BAUER: Mr. President, the Maritime Arbitration Committee has had four meetings since the November meeting of this Association, and two active subcommittees of our committee have also had an equal number of meetings.

We have been working on a form of escrow agreement for arbitrators' fees, and that agreement was finalized and made a document of the committee at our meeting in January — no, in March.

We have an Education Subcommittee which works together with the Society of Maritime Arbitrators to hold seminars on important questions in arbitration. The power of the arbitrators to order security for claims was one subject

discussed, and another was the award of attorneys fees to the winning party. The latter has been an ongoing topic.

We have had a very active liaison committee with the Society of Maritime Arbitrators in New York, and that committee is now working on a recommendation that can be addressed to the arbitrators on how to award security for the claims if there's a request for security. It's controversial in that it is not a court order, but an arbitrators' order of security for the claims.

We have not done much on ADR since last fall. There's still a subcommittee of ours on ADR, but, actually, we have left that to the ADR Committee and have not worked on ADR to any great extent.

We also have a subcommittee to improve arbitration in the United States, and that subcommittee has been working on a number of ideas that are going to be followed up. These are on what was developed in previous years when we had users of arbitration actually attend our meetings and advise us of some of their objections and difficulties that they have had with arbitration.

We also are very concerned about the proposal of the Carriage of Goods Committee in amending COGSA as it pertains to arbitration. We held a special meeting of our committee to discuss the provisions in Section 3 of the proposed act, which provide basically that it will be unlawful for a bill of lading to contain an arbitration clause requiring arbitration in a foreign country.

The proposed act also contains a provision that an arbitration clause which provides for arbitration in a foreign country will not be absolutely outlawed, but that a motion can be made in district court to require the arbitration to proceed in the United States.

Some of the members of our committee felt that this latter proviso might cause a problem under a treaty obligation we have in the New York Convention for Enforcement and Recognition of Foreign Arbitral Awards. In that treaty there is a provision requiring the enforcement of arbitration agreements as well as arbitration awards.

So we held our special meeting and the subject was very thoroughly discussed. We finally, after voting on it, decided upon a majority view that the proposal of the Carriage of Goods Committee would be acceptable provided further study was given to the question about the conflict or suspected conflict with the New York Convention.

Another part of the new COGSA that the Arbitration Committee was concerned about was the broad definition of a contract of carriage, which, although COGSA still excludes charter parties, it does not seem to cover contracts of affreightment and other contracts that under the present act are exempted, so that question we also asked the Carriage of Goods Committee to reconsider.

Now that the bill is going over for another year, why, we'll have a chance to discuss it further with the Carriage of Goods Committee. Thank you.

MR. HOOPER: Thank you, Glenn.

(Applause.)

MR. HOOPER: Now we've got George Koelzer, who is able to report in one minute for the Maritime Fraud and Crime Committee. George?

MR. KOELZER: The committee met yesterday and was privileged to have before it Mr. Michael Ryan of New York, who discussed with us the events in the Carriage of Goods by Sea Committee and the proposed amendments to the Carriage of Goods at Sea Act and the carrying over of them until next year.

Secondly, the work continues on the projects that have been under way: first, to publish a paper later this year on the maritime aspects of the 1994 Crime Control Act; second, a monograph which we hope to have done very soon on the criminal aspects of OPA '90, particularly how to deal with criminal procedures that would arise at the time of a casualty.

There was also some ongoing discussion about the interest and the utility, if not the necessity, of underwriters, particularly in London, in respect of becoming involved in dealing with criminal parts of a casualty, particularly such as oil pollution.

All these works are continuing, and we will have papers published probably later this year, and I thank you very much, Mr. President.

MR. HOOPER: Thank you George.

(Applause.)

MR. HOOPER: Next we have Maritime Legislation, two speakers, Mark Spansel for two minutes and Bruce Hoefer for five. Mark?

MR. SPANSEL: Thank you, Mr. President, ladies and gentlemen. I will be surrendering most of my time to Bruce Hoefer, who's the chairman of the *Ad Hoc* Committee on Punitive Damages. In the meantime, you should know that our committee is continuing to study the feasibility of a uniform general statute of limitations, in essence trying to replace the doctrine of laches for more certainty.

We also received a report from David Sharpe and one of his students, Peter Nosek. They introduced a paper that proposes to fold the Suits in Admiralty Act as well as the Public Vessels Act into the Federal Tort Claims Act. We're going to give that further consideration and perhaps be reporting to you in the future.

Finally, we've been assisting many of the committees that you've heard report today from the legislative standpoint, trying to give some support and coordination to them.

With that, Bruce, would you give the report for the *ad hoc* Committee. Thank you.

MR. HOEFER: Thank you, Mark. Mr. President, ladies and gentlemen. As background, for those of you who don't know, *Miles v. Apex Marine* was decided in 1990. It was decided by the U.S. Supreme Court, and it held that there is no recovery for loss of society from a general maritime claim for wrongful death of a Jones Act seaman.

Miles was not a punitive damages case, although there has been some progeny out of *Miles* that determined favorably for ship owners that punitive damages are not allowed under the general maritime law and under the Jones Act specifically.

A little bit of history about our committee. About seven years ago, Frank Byrn started the movement to draft a uniform statute for punitive damages in admiralty.

After about three years Frank Byrn, John Schaffer, Mark Spansel and I drafted a statute which was brought to the floor of the general meeting of this Association last year. It was perceived by some to be a one-sided, defense-oriented bill, and there was a motion to table. There was a close vote, but it passed.

So then President Hooper appointed a balanced *ad hoc* Committee consisting of three plaintiffs' lawyers and three defense lawyers.

The *ad hoc* Committee has had a number of meetings over the last year, and we've come up with a surprising statute, really.

The American Trial Lawyers Association (ATLA) has agreed on most of the language we have proposed on all of the topics in our draft statute, including standard of conduct, burden of proof, pre-trial procedure, bifurcation, post-trial procedure and vicarious liability. But the most significant point of agreement between the ATLA group and the MLA defense-oriented group is a cap of three times the compensable award or $250,000, whichever is greater.

We feel that this comports with the ratio limits of punitive damages around the country and also with the versions by the U.S. Senate and the U.S. House of Representatives debating the Products Liability Act now in Congress.

However, there's a catch to the ATLA participation. The linchpin to all of their concessions to us is the reversal of *Miles v. Apex Marine* on the issue of loss of society. They want that back into the general maritime law and Jones Act, and one of the reasons that they give is the unfairness that, for instance, the

widow of a passenger can recover loss of society when the widow of a seaman on the same vessel cannot.

ATLA is also willing to consider caps on loss of consortium awards, but that is a brand-new development that we have to work on a little bit more.

Our punitive damages statute leaves intact the *Miles* progeny that holds that there are no punitive damages under the general maritime law or Jones Act. In other words, we are not creating a new cause of action for punitive damages in our statute where there is none present in the general maritime law now.

Of course, we all have to recognize that there is a potential that the U.S. Supreme Court could decide later on that punitive damages are available under the general maritime law — in other words, that the *Miles* rationale does not apply to punitive damages — which have been recognized in maritime law since the early 1800's.

That's a risk that I think all of us are taking, and that is why this might be a very good window of opportunity to compromise loss of consortium and loss of society with a cap on punitive damages.

That's the actual threshold question. That's the trade-off: whether we want to get a bipartisan bill passed through Congress with a cap on punitive damages if we allow loss of society and loss of consortium to get back into the maritime law.

Yesterday we took two straw votes, one in the Maritime Legislation Committee and one in the Maritime Personnel Committee. Maritime Legislation had a majority of those who wanted us to continue negotiating with the ATLA interests.

Others were opposed to it, but in the Maritime Personnel meeting, there was a fairly adamant majority against going forward with negotiations with ATLA. I think their view was that they do not want anybody to tinker with *Miles*, because it is generally favorable for defendants and shipowners now. In other words, why should we fix something that's not broken?

The question at this point is: what is the future of the *Ad Hoc* Committee on Punitive Damages? Frankly, I think we have to sit back for the time being and watch Congress debate the Products Liability Act. We also are waiting on the *Gueverra* case, which will be decided by the *en banc* Fifth Circuit. This case involves punitive damages in the maintenance and cure context.

Finally, if anyone has any comments or suggestions about which way to go on the trade-offs of loss of society versus punitive damages cap, the *Ad Hoc* Committee would really appreciate your comments, because I know it is a vola-

tile issue, and a lot of people have their own specific strong comments. So I would appreciate hearing from you all. Thank you.

MR. HOOPER: Thank you, Bruce.

(Applause.)

MR. HOOPER: Next is Maritime Personnel, Warren Daly.

MR. DALY: Thank you, Mr. President, members and guests. Our committee met Thursday afternoon, approximately 30-plus strong. We had a very lively meeting, a great deal of which was spent discussing the work of the *Ad Hoc* Committee on Punitive Damages about which you've just heard and about which I won't comment any further.

We also had updates on a number of cases of interest, which are in the various appellate courts of the United States and which I won't comment on specifically this morning.

I did want to take a few minutes to give you some information on another topic that we discussed at considerable length yesterday, which is legislation pending in the Congress of the United States at the moment on products liability.

In fact, the course of that legislation, I think, is an interesting illustration of the difficulty of dealing with the current Congress and knowing what can be expected. The history, briefly, is that the House of Representatives had introduced HR 956 this term, which is called the Common Sense Product Liability Reform Act of 1995.

It was part of the Republican Contract With America. It was pursued in the House with one day of hearings, initially reported in late February and passed by the House on March 10, 1995.

The interest of our committee, obviously, is the extent to which this bill may have an impact on maritime law in the United States. Of interest is a provision in Section 101 of the bill stating that the legislation governs any product liability action brought in any state or federal court. Rather broad.

Later in the bill, however, it says, nothing in this act shall be construed to supersede any federal law. The legislative history, not surprisingly, is silent with respect to the extent to which this legislation is intended to or does impact maritime law.

The bill is of interest to the committee in that it contains several elements which are inconsistent with the current state of maritime law in the United States, to wit: A provision providing for several liability only for non-economic damages; a provision which would bar a plaintiff from recovery if the plaintiff is intoxicated either by drugs or alcohol and that intoxication is more than a 50

percent factor in causing the harm; and a punitive damages cap which Bruce referred to a few moments ago which would be the greater of three times economic damages or $250,000, whichever is larger.

With that background, that bill passed in the House. The Senate then began consideration of S. 565, introduced in the Senate on March 15 of this year. It's called the Product Liability Fairness Act of 1995. As originally introduced in the Senate, a provision of that bill stated that nothing in the act may be construed to supersede any federal law except the FELA and the Longshore and Harbor Workers' Compensation Act.

On April 18 there was by amendment substituted an entirely different bill in its place, which tracked many of the key provisions that were in the original S. 565 but which amended the language I just quoted you, so that it now reads, nothing in the act shall be construed to supersede any federal law, period, without exceptions.

Of course, one might wonder whether by eliminating the reference to FELA and the Longshore Act it's now the intent of Congress that they be affected by the legislation now pending.

S. 565, as amended on April 18, contained all of the anomalies that I referred to a couple of moments ago, the divergences from current maritime law, and added a two-year statute of limitations and a section stating that if an employer is negligent in contributing to a product injury, that the employer's lien cannot be recovered and that the manufacturer or other liable defendants get a credit in the amount of benefits payable under whatever compensation act would be applicable.

That, if applicable, obviously, to maritime law, would legislatively undo the *Edmonds* case in the Supreme Court.

On top of all that, the New York Times reported yesterday on the front page that another amendment had been offered by Senator Dole, which would have the effect of broadening the provisions of S. 565 as they now exist to extend them beyond product liability so that they would then govern all federal and state civil cases, period.

It also contained a modification of punitive damages cap so that it would be two times compensatory damages, reducing the multiplier, but concurrently broadening the base from economic recovery so that pain and suffering would be included in the amounts that would be subject to a multiplier.

There was considerable speculation at our meeting yesterday about whether this would fly, and indeed it was reported in this morning's New York Times that when Senator Dole attempted to bring it to a vote on the Senate floor yester-

day he needed 60 votes to get it on the floor and it came up on two occasions 12 and 13 votes short.

As a result of that, apparently the Republican leadership in the Senate is now going back to the drawing board and preparing to jettison various parts of S. 565 until they get to the point where they get something that they believe they can bring 55 votes to 60 votes to the floor. What will be left at that point is unclear.

I just want to read very briefly one sentence from the New York Times today. In commenting on yesterday's events, to say the least, the action today left the situation in considerable confusion about which there can be no doubt.

A subcommittee is being formed of this committee and the products liability committee to follow all of this and determine how it will impact maritime law and what our views on that should be. Thank you, Mr. President.

MR. HOOPER: Thank you.

(Applause.)

MR. HOOPER: Next we have the Maritime Products Liability Committee report, David Salentine.

MR. SALENTINE: Mr. President, ladies and gentlemen, Warren Daly has brought you up to date well on what's happening with products liability. The answer is we don't know. We had a meeting of my committee on Wednesday at which Warren Daly addressed us on this subject. What he said on Wednesday was no good on Thursday. What he said on Thursday was no good today. We will have more to report to you in Hawaii. Thank you very much.

(Applause.)

MR. HOOPER: Next, Navigation and Coast Guard Matters. Pat Bonner.

MR. BONNER: Thank you, Mr. President. We had our annual meeting down in Washington on Tuesday. We had an excellent turnout. We had about 35 members and guests there, including many Washington members of the Association. This is one of the few functions of the Association we hold in Washington, and we get a really good turnout there.

I'd like to thank Lieutenant Commander Steve Poulin and Captain David Kantor. They put together another excellent program for us. They're here in the audience. They gave us a complete update on everything that the Coast Guard was doing. We also had presentations from two admirals on two issues.

Admiral Shkor spoke about President Clinton's guidelines on regulations. What we're going to have is a lot more negotiated rule making in the future, and

I think you're going to see a lot more Coast Guard officers out from Washington in the various districts.

Our keynote speaker was Admiral Card. He spoke on the Port States Control Program. I discussed this with you last year. This is an enhanced inspection program the Coast Guard has where they're going to put a lot more marine-type inspectors on the ship and go after really serious problems such as cracks rather than the charts and publication violations that they had looked at in the past.

I have a lot of literature. If anyone would like to see anything on that I'd be happy to provide it to you. Thank you.

(Applause.)

MR. HOOPER: Thank you. I'd like to add our thanks to Captain Kantor and Lieutenant Commander Steve Poulin for all your help. It's a pleasure to work with you on all these various matters. Practice and Procedure, we have John Edginton.

MR. EDGINTON: Thank you, Mr. President, ladies and gentlemen. We will submit a written report as usual with most of the detail of our committee work, because it gets to be fairly complex in some areas. I will report on a few highlights.

First, at this stage of my report I would normally call your attention to the Practice and Procedure Newsletter. This version, issue Number 27 which would be in back, is there. It is just in a different form. It is now a part of the MLA Report, thanks to Gordon Paulsen's excellent system of getting these items in advance, getting them published and available to you in printed form rather than being Xeroxed. Congratulations to Ed Cattell for another fine job.

Reporting on progress, our position to modify Rules C and E to eliminate the confusion of the use of the term "claimant", particularly in Rules C-4 and C-6, in some portions of Rule E has been transmitted. We finally received the high sign from Mark Kasanin, who is a member of the Federal Civil Rules Advisory Committee, that it would be an appropriate time to submit our views on this subject, which were adopted by the Association probably about three meetings ago.

My letter passing those views along to the Advisory Committee will be attached to our written report.

As you have heard in the Secretary's Report of Board actions of yesterday, a portion of HR 1361 came to our attention just on Wednesday. It contains Section 414, which would add a new section to 46 USC Section 6308 which would make some significant modifications in the potential use of Coast Guard reports

at trial and the ability to call witnesses from the Coast Guard in connection therewith.

Essentially, what the new section would do would be to supersede all other law in respect of what the section covers. This would include the Federal Rules of Evidence, apparently.

Essentially, it would allow factual findings in a Coast Guard report to be admissible. It would continue the pattern in most circuits of not allowing any opinions contained in those reports, but it would place a restriction on the use of any Coast Guard witnesses with respect to testifying about the reports or other factual matters within the, let's say, bureaucratic approval of the Secretary of Transportation.

The proposed legislation provides certain benefits to the government and not to private parties in connection with such reports. It also prohibits any part of the report from being used as an admission against the government. We found some of those provisions unacceptable.

The Subcommittee on Rules and Statutes met Wednesday afternoon. We brought our views to the Board of Directors yesterday, and the result of that you have heard. The bill is on a very fast track, as David Williams has reported, and apparently was reported out of the Rules Committee yesterday. It is to be taken to the floor next week.

We will be working with President Hooper to communicate the views of the Association that this should be derailed and subjected to debate to get a better product to Representative Schuster, the chairman of the Transportation and Infrastructure Committee. We'll start working on that immediately following the meeting.

We certainly do not want to derail in any way the whole of HR 1361, because that contains many desirable provisions that you've heard about. We have discussed this matter with Captain Kantor and Commander Poulin, who are here with us today, and, if their approach to this is any evidence, I think we can expect a very cooperative working arrangement with the Coast Guard to hopefully deal with this matter in a very amicable way.

The discussion and debate may have to occur on a very short fuse, because it's possible that this will have to occur in the short period of time between when this bill finds its way from the House to the Senate, because certainly I would assume that some parts of the bill are going to be passed.

Another project of the committee relates to some concerns about unpublished opinions that Michael Marks Cohen has brought to our attention. We will be looking at that to see if we think it is an appropriate project for the Practice and Procedure Committee and report back on it further.

It is with a sense of impending nostalgia that I tell you that this is my final report as Chairman of the Practice and Procedure Committee. I, too, have had the privilege of serving for four years in this role. It's been a very rewarding time, and I would like to thank the Association and President Hooper for that opportunity.

I'd like to yield the microphone now to Robert J. Zapf, who has been appointed to be the new chairman of the Practice and Procedure Committee, who will report to you on our work with regard to achieving concursus under OPA '90 and the International Arrest Convention. Bob?

(Applause.)

MR. ZAPF: Thank you. Mr. President, ladies and gentlemen, John. Briefly, with respect to OPA '90 concursus, this is an *ad hoc* joint subcommittee which now has three parents, the Marine Financing Committee, the Practice and Procedure Committee and the Marine Ecology Committee.

Initially, the focus was upon potential problems of arrest or rearrest of vessels in connection with a significant oil spill.

We determined in a basically common-sense approach that it was very unlikely a ship would be rearrested in the event of a significant oil spill, because it would have been arrested the first time and disposed of, sold, so that there will be no common ownership to form the basis for a subsequent rearrest, so that our focus then became upon the other element of the task of the committee, and that was, was there a means by which a concursus of the litigation and the claims that arise involving an oil spill could be maintained?

Initially we focused upon the question of whether the current federal rules, and specifically Rule F, which has its genesis in the Limitation of Liability Act, would form the basis of forming a concursus of all claims arising out of an oil spill. There was a feeling that the rule itself would not provide a sufficient basis to achieve that result.

That issue is currently being litigated in the Maritrans oil spill in Tampa Bay and also in an oil spill in Puerto Rico, and we were advised at our meeting of Thursday afternoon that the decisions on the motions concerning the availability of Rule F concursus will be rendered in the next month or two in the Tampa Bay litigation, so that case will be monitored to determine whether or not Rule F procedures are available in the context of a significant oil spill involving but not limited to OPA claims.

Given the perceived opportunity for legislative fixes in OPA, we have then turned to an additional prospect of seeking an amendment to OPA to provide for a concursus of claims. A draft of an amendment to 33 USC Section 2717 was prepared and circulated to the joint subcommittee.

It has also been circulated to the Committees of Marine Ecology, Practice and Procedure and will be forwarded to Marine Financing with the mailing that's going out after this meeting, for comment on not just the text of the proposed amendment, but the concept and whether there are other areas that need to be addressed in terms of a statutory fix.

Again, this will probably move on a very fast track. We will be coordinating extensively with Marine Ecology and Marine Financing and Practice and Procedure to develop that approach.

The other area that I would like to report upon deals with the current proposal for a new Arrest Convention, which would basically be a modification and updating of the 1952 Arrest Convention which has been adopted by, I believe it is 62 states around the world, nation states around the world.

The particular impetus for the current focus on the Arrest Convention is the promulgation of the 1993 Maritime Liens and Mortgages Convention which is now out for ratification and adherence, and the issue was then decided that it is time to focus now upon the Arrest Convention.

The seventh session of the Joint Intergovernmental Group Of Experts on Maritime Liens and Mortgages and Related Subjects met in Geneva in December to address specifically the Arrest Convention.

It was initially decided that the primary basis for this effort would be the 1985 CMI draft which came out of the Lisbon meeting which many of our members at this Association were very active in working on.

Initially there was an attempt made to broaden the focus of the Arrest Convention to bring into play not just what claims can give rise to a right of arrest, but also the procedure by which an arrest will be effected and what would happen post-arrest and, in particular, the concept of an interlocutory sale in the event of the failure of the owner to post security promptly and a possibly deteriorating asset.

Again, the focus of the U.S. delegation was not that this Convention would be ultimately ratified by the United States, because there are many provisions of it which are at great variance with our own law, but, rather, an effort on the part of our delegation to focus the debate and form it so that whatever ultimately is arrived at might be useful to us in our international practice so that when we are pursuing claims abroad, procedures that are available under this Convention might be of benefit to our own individual interests as individual claimants in foreign proceedings.

There were a number of areas that were of significant debate in the seventh session and that were unresolved after the seventh session. The primary issue arose out of Article IV —

MR. HOOPER: Bob, your time is up.

MR. ZAPF: Let me say quickly, we're going to be working with the CMI. We hope to have appointment of an intercessional working group to address the specific areas that remain outstanding. The eighth session of the JIGE will meet in October in London and these issues will be revisited and we'll keep you all apprised of what is developing in that area. Thank you very much.

MR. HOOPER: Recreational Boating.

MR. McCAULEY: Thank you, Mr. President. Ladies and gentlemen, the Recreational Boating Committee met yesterday. Thirty-seven members and guests were in attendance. Our first order of business was to salute Peter Theut of Detroit, the immediate past Chairman of the Committee, for his wise and dedicated leadership in past years.

Recreational boating cases and controversies continue to proliferate across the country, as noted by many members. This is not surprising, since the most recent statistics indicate that there are over 20 million recreational boaters using our nation's waters.

This, of course, has generated many important maritime decisions, the most recent notable example, of course, being the Supreme Court decision in *Sisson v. Ruby*. Increasingly new decisions are coming down of interest to the membership at large, many having been generated out of recreational boating disputes.

The Subcommittee on Education, chaired by Thomas Russell of Long Beach, publishes a newsletter called "Boating Briefs" which attempts to capture the more significant decisions coming out of the recreational boating area. Copies can be found at the back of the room.

We were favored by a presentation from Scott Gallen of the Marine Index Bureau concerning the results of their 1993 study of recreational boating accidents. Their estimates indicate that in 1993 there were over 170,000 recreational boating accidents, including 35,000 disasters, more than 33,000 thefts and over 7,000 injuries, with dollar losses estimated in excess of $1.1 billion.

Not surprisingly, many of these accidents stemmed primarily from collisions.

For some time now the committee's Subcommittee on Legislation, chaired by Almer W. Beale of Jacksonville, Florida, has been studying whether the MLA should take a position on the licensing and training of recreational boaters. The Committee resolved to renew this effort and to make a recommendation to President Hooper in due course.

That concludes the report of the Committee. Thank you.

MR. HOOPER: Thank you very much.

(Applause.)

MR. HOOPER: John Lillis, the Chair of the Transportation of Hazardous and Noxious Substances Committee.

MR. LILLIS: Thank you, President Hooper. This is the first time that I'm addressing you as the new Chair of the Transportation of Hazardous and Noxious Substances Committee. We have very important things going on in this area, and it's very important that everyone in the Association, and also constituents and clients, pay attention.

Most probably there will be a Diplomatic Conference in April of '96, less than 12 months away. That's very important news indeed, because probably there will be a convention resulting from that Conference.

Historically, our committee has been functioning very well under the chair of Neal Hobson, and I wish to thank him for all of his effort. Also under Neal's guidance and shepherding, there has been an excellent relationship with the United States Coast Guard, and we had the pleasure of hosting Captain Kantor and Commander Poulin the other day.

We decided that it would be best to have a call for input now over the next coming months for any more input that any of you may have or your clients or constituents. The Coast Guard is also ready to receive any more input from the public.

We have identified already the Captain, who is sitting over there on one side of the room. If anyone has input they should write to me. We will be tallying input in the coming months, and the committee will be discussing with President Hooper concerning our program in October. But we want very much to test exactly what the reaction and input is going to be from the Association, from your clients and constituents.

There is a draft convention available. Anybody that wants it can get it from the Captain or can get it from me, and we'd like your considered input. Thank you very much.

(Applause.)

MR. HOOPER: Young Lawyers, Andy Tsukamoto.

MR. TSUKAMOTO: Thank you Mr. President. First of all, I'd like to thank publicly Denise Blocker of San Francisco, who has led our committee for the last four years. She's single-handedly laid the keel, launched the vessel, outfitted the vessel and commanded it. Now all I have to do is basically to steer it,

which is a much easier task than what Denise had to go through. I'm sure you'd all agree that her dedication and enthusiasm are unparalleled.

As to our committee's work, as you all know, we strive to expose the younger members of the Association to the substantive activities of the Association. To this end, we have been largely successful; and we hope to continue our efforts in the future.

If you do have any interesting projects that you would like for us to take on, please let me know. We're here to serve you. We're here to help you. We're here to get involved. In essence, we want to be like you, and I think we are well under way in that effort.

This concludes my brief remarks, Mr. President. Thank you.

MR. HOOPER: Thank you.

(Applause.)

MR. HOOPER: Next we have the Committee on the Centennial, Theodore Cunningham, who claims to be able to give a report in much less than one minute.

MR. CUNNINGHAM: Thank you. I trust, though, that it will take longer for me to arrive here than to speak.

We're still in the planning stage. However, we have a number of definite possibilities under consideration, and one of these would be publication of photographs, a collection of photographs in connection with the 1999 centennial. We would ask your help in that connection. If any of you have or know where we can obtain photographs of U.S. ports, famous vessels or infamous marine losses, please let me know.

Thank you, Mr. President.

MR. HOOPER: Thank you.

(Applause.)

MR. HOOPER: Now we'll hear the report of the Nominating Committee.

MR. HEALY: Thank you, Mr. President.

I'm pleased to report that the committee met here in this building on May 3rd, and after spirited debate and discussion we agreed to nominate the following officers for the 1995-1996 year: As President, Chester D. Hooper; First Vice President, James F. Moseley; Second Vice President, Howard M. McCormack; Secretary, William R. Dorsey, III; Treasurer, Marshall P. Keating; Membership Secretary, Lizabeth L. Burrell.

We also nominate for directors for three-year terms, ending in 1998, Pat Bonner of New York, Don Greenman of Baltimore, Ray Massey of St. Louis and Jerome Scowcroft of Seattle.

That concludes the report.

MR. HOOPER: Thank you very much. Jim, do you have something? Mr. Higgins.

MR. HIGGINS: Thank you, Mr. President. Forgive me for appearing somewhat frail and handicapped, but it's due primarily not to any medical condition, but rather, the sparse buffet provided by the Treasurer. Permit me to request time once more — I was surprised mildly that Frank Wiswall, in his remarks about the CMI, failed to mention that only a few years ago, in 1965, the CMI met in this room. If you think this morning's proceedings were crowded — but there was one advantage. In that more gentler time, smoking was permitted!

To the business of the day, fellow members, you have heard the unanimous report of the nominating committee. If there are no dissenters I would move that it be accepted.

AN AUDIENCE MEMBER: Second the motion.

MR. HOOPER: Any discussion? All in favor? Opposed? The Motion is carried.

MR. HIGGINS: I would next move that nominations be closed.

AN AUDIENCE MEMBER: Second.

MR. HIGGINS: Hearing the seconder, do I hear any objection? Hearing none, the nominations are closed. I would now move that the Secretary be authorized to cast one ballot on behalf of the members of the Association in favor of those persons named in the report for the offices designated. I so move.

AN AUDIENCE MEMBER: Second.

MR. HOOPER: Any discussion? All in favor? Opposed? The Motion is carried.

MR. HIGGINS: And please, Mr. President? Remind the Secretary to cast it.

MR. DORSEY: Don't worry.

MR. HIGGINS: I have one thing in conclusion. For the benefit of the reporter, I do not have a card. I have no known address. However, as a form of identification, I hand you my blank check. Thank you, Mr. President.

(Applause.)

MR. HOOPER: I would like to thank the outgoing Board members who have completed their terms of office for all the help they've given the Association and for all the help they will continue to give the Association, Richard C. Binzley, Denise S. Blocker, Joseph B. Cheavens and David A. Nourse.

(Applause.)

MR. HOOPER: I call on Nick Healy, perhaps.

MR. HEALY: Mr. President, ladies and gentlemen, until Wednesday afternoon when I learned that the resolution concerning the amendment of COGSA or the revision of COGSA was being withdrawn, I was afraid that if I were called upon to make the motion which I'm about to make I would have two problems; first of all, the hour would be much later than it is now; and secondly, that I would probably be looking at a sea of bloody noses following a very vigorous debate.

But, happily, that is at least postponed for a year, and so I now move that we adjourn.

AN AUDIENCE MEMBER: Second.

MR. HOOPER: Thank you. I'd like to make one announcement before we leave, and that's to remind you of the CLE program in this room at 2:30 this afternoon.

The meeting adjourned.

(Time noted: 12:02 p.m.)

[10682]

PROPOSED RESOLUTION BY THE COMMITTEE ON THE CARRIAGE OF GOODS OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

WHEREAS, the Maritime Law Association of the United States recognizes the need to revise and update the Carriage of Goods by Sea Act of 1936; and

WHEREAS, members of this Association from various maritime industry sectors have been engaged in a three year effort to find common grounds for agreement on the revision and modernization of the Carriage of Goods by Sea Act; and

WHEREAS, that effort has been successful in providing a draft proposing revision of the Carriage of Goods by Sea Act; and

WHEREAS, the Committee on the Carriage of Goods has, at a special meeting on March 10, 1995, by a majority of those voting, has accepted the proposed revisions as put forward in the Final Report of the Ad Hoc Study Group dated February 15, 1995, and recommended that this Association propose that Congress enact such revisions to COGSA, it is

HEREBY RESOLVED, that the Maritime Law Association of the United States joins with other interested maritime groups and recommends and urges that the Congress of the United States of America take the necessary steps to enact these proposed revisions to the Carriage of Goods by Sea Act.

IT IS FURTHER RESOLVED, that the President of Maritime Law Association of the United States or his delegate is authorized to make known this resolution to the Congress and such other bodies or organizations as the President may consider to be desirable.

COMMITTEE ON THE CARRIAGE OF GOODS
MEMBERS VOTING FOR THE RESOLUTION

*David V. Ainsworth, Esq.
*Sanford E. Balick, Esq.
*Nathan J. Bayer, Esq.
Raul Betancourt, Jr., Esq.
*Denise S. Blocker, Esq.
Allan G. Bowdery, Esq.
*Mr. Thomas J. Bradshaw
*William C. Bullard, Esq.
*Dr. Lucienne C. Bulow
*Lizabeth L. Burrell, Esq.
George F. Chandler, III, Esq.
*Leroy S. Corsa, Esq.
*Rae M. Crowe, Esq.
*Vincent M. DeOrchis, Esq.
Randolph H. Donatelli, Esq.
*John M. Elsley, Esq.
*Gerald M. Fisher, Esq.
Prof. Robert Force
*John B. Gooch, Jr., Esq.
Donald C. Greenman, Esq.
*Hyman Hillenbrand, Esq.
*William J. Honan, III, Esq.
Chester D. Hooper, Esq.
*George J. Koelzer, Esq.
Leroy Lambert, Esq.
Manfred W. Leckszas, Esq.
*Edward K. Lenci, Esq.
*Patrick V. Martin, Esq.
David L. Mazaroli, Esq.
*James E. Mercante, Esq.
*Brian J. Miles, Esq.
*Dennis Minichello, Esq.
*John C. Moore, Esq.
*Mr. Walter R. Muff
*Francis J. O'Brien, Esq.
*Richard W. Palmer, Esq.
Jon H. Roethke, Esq.
Michael J. Ryan, Esq.
*David M. Salentine, Esq.
*Gordon D. Schreck, Esq.
*Jerome C. Scowcroft, Esq.
*Gary F. Seitz, Esq.
*D. Gary Sesser, Esq.
*Ralph M. Sharpe, Jr., Esq.
*George V. Spanos, Esq.
*C. Eugene Spitz, Esq.
*Graydon S. Staring, Esq.
Professor Michael F. Sturley
*James J. Tamulski, Esq.
*Mr. Michael A. Van Gelder
*Braden Vandeventer, Esq.
*Steven P. Vangel, Esq.
*Kenneth H. Volk, Esq.
*James F. Whitehead, III, Esq.
George R. Zacharkow, Esq.
Peter J. Zambito, Esq.

MEMBERS RECORDED AS ABSTAINING

*Dr. Francesco Berlingieri
Patrick J. Bush, Esq.
John B. Conway, Esq.
*David W. Martowski, Esq.
*Professor William Tetley, Q.C.

MEMBERS OPPOSED

R. Glenn Bauer, Esq.
Helen M. Benzie, Esq.
Michael Marks Cohen, Esq.
Peter D. Fenzel, Esq.
*Frank M. Marcigliano, Esq.
*Richard E. Repetto, Esq.
Charles E. Schmidt, Esq.
*Richard H. Sommer, Esq.
Professor Joseph C. Sweeney
Ms. Alice E. Teal

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*Voting by Proxy

REVISING THE CARRIAGE OF GOODS BY SEA ACT: Final Report of the Ad Hoc Lability Rules Study Group

Study Group Members*

William J. Augello
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The Tokio Marine and Fire Insurance Group

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Sea-Land Services, Inc.

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Introduction

In 1936, the United States adopted the Carriage of Goods by Sea Act (COGSA),[1] which is the domestic enactment of a 1924 international convention commonly known as the Hague Rules.[2] The Hague Rules, in turn, were based on a 1910 Canadian statute[3] which was itself directly modeled on the United States' 1893 Harter Act.[4] The Hague Rules, and thus COGSA, were designed to allocate financial responsibility for cargo loss or damage that occurs during ocean transportation. In their time, COGSA and the Hague Rules were a major improvement in commercial maritime law. The commercial world, however, has changed significantly in the intervening years. Considering its age, COGSA has kept pace remarkably well, but there are areas where it is simply inadequate for modern needs. Most significantly, COGSA did not (and could not) anticipate the so-called "container revolution," in which the industry moved from traditional "break bulk" methods to the wide-spread use of large, metal containers measuring eight feet by eight feet by up to forty feet.

Efforts to update the Hague Rules began in the late 1950s. In 1968, a diplomatic conference completed the Visby Protocol,[5] which amends the Hague Rules in several significant respects and addresses some of the specific problems that have arisen. The Hague-Visby Rules (the name given to the Hague Rules as amended by the Visby Protocol and the subsequent SDR Protocol[6]) are now in force for most of our important trading partners.[7]

Shortly after the completion of the Visby Protocol, the United Nations Commission on International Trade Law (UNCITRAL) began a complete revision of the Hague Rules. The resulting United Nations Convention on the Carriage of Goods by Sea[8] (known as the "Hamburg Rules"), completed in 1978,

[1] Ch. 229, 49 Stat. 1207 (1936), *codified as amended at 46* U.S.C. App. §§ 1300-15 (1988).

[2] Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155, *reprinted in* 6 Benedict on Admiralty Doc. 1-1 (7th ed. 1993).

[3] Water Carriage of Goods Act, 1910, 9-10 Edw. 7, ch. 61.

[4] Ch. 105, 27 Stat. 445 (1893), *codified at* 46 U.S.C. App. §§ 190-96 (1988).

[5] Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, 1977 Gr. Brit. T.S. No. 83 (Cmnd. 6944) (entered into force June 23, 1977), *reprinted in* 6 Benedict on Admiralty Doc. 1-2 (7th ed. 1993).

[6] Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Dec. 21, 1979, 1984 Gr. Brit. T.S. No. 28 (Cmnd. 9197) (entered into force Feb. 14, 1984), *reprinted in* 6 Benedict on Admiralty Doc. 1-2A (7th ed. 1993).

[7] Countries that have ratified the Visby Protocol, or have adopted the Hague-Visby Rules by domestic legislation, include: Canada, Japan, Singapore, Hong Kong, Australia, and most of the nations of Western Europe.

[8] United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 17 I.L.M. 608, *reprinted in* 6 Benedict on Admiralty Doc. 1-3 (7th ed. 1993).

recently went into effect for the countries that have ratified it.[9] (These countries represent only a small portion of our international trade.)

In the United States, carriers and some cargo interests have favored the adoption of the Visby Protocol (and opposed the Hamburg Rules on their merits) while some cargo interests have favored the adoption of the Hamburg Rules (and opposed the Visby Protocol as inadequate by comparison). Thus there has been wide spread agreement that COGSA and the Hague Rules are outdated and must be amended or replaced, but there has been disagreement on which course the updating should follow. The resulting deadlock has ensured that no action has been taken on either the Visby Protocol or the Hamburg Rules, and the United States remains with a statute designed in the nineteenth century and drafted in the early twentieth century.

The present Ad Hoc Liability Rules Study Group, convened by Chairman George F. Chandler (who also chairs the Committee on the Carriage of Goods of The Maritime Law Association of the United States), seeks to break this long-standing deadlock and propose a compromise solution that — taken as a whole — will be acceptable to all of the affected interests in the maritime industry. The members of the Study Group participated in its work as individuals, and not as representatives of the organizations with which they are affiliated. Nevertheless, it is important to note that (with one exception) they approached the project from the points of view of the principal participants in the relevant commercial transaction, including shippers, carriers, charterers, cargo insurers, P & I clubs, stevedores, and terminal operators. (The Reporter, Prof. Michael F. Sturley, was the only member of the Study Group who does not regularly represent a particular point of view. He was included in the project to provide a neutral perspective and to draft the final report in a manner that would reflect the commercial compromise achieved without unduly favoring any interest.)

The chairman, the reporter, and individual members of the Study Group met with representatives of affected interests to explain the project and solicit suggestions from the industry. Although not every suggestion could be adopted while maintaining a commercially acceptable compromise, every suggestion was seriously considered-and even rejected suggestions frequently received extensive discussion.

The Study Group's proposed bill is contained in Appendix 1. The impact of this bill on current law is shown in Appendix 2. As can be seen, the proposal builds on the 1936 COGSA and the experience that has developed under it. In many respects, existing law will remain unchanged. In other respects, the propo-

[9] The twenty-two countries that have ratified the Hamburg Rules are: Austria, Barbados, Botswana, Burkina Faso, Cameroon, Chile, Egypt, Guinea, Hungary, Kenya, Lebanon, Lesotho, Malawi, Morocco, Nigeria, Romania, Senegal, Sierra Leone, Tanzania, Tunisia, Uganda, and Zambia.

sal simply restores U.S. law to the original understanding of the Hague Rules, rejecting inconsistent judicial doctrines that have departed from the internationally accepted intent. But even where genuine changes are proposed, the framework is that established by the Hague Rules and continued in the Hague-Visby Rules. The final result is a legal regime that is not only better suited to the modern needs of the commercial world but is also closer than the 1936 COGSA (as currently applied) to the legal regimes in force in our major trading partners.

This report comments on individual changes contained in the bill. It is essential to stress, however, that the bill does not represent a series of proposed changes in the law. Rather, the overall compromise must be taken as a whole, for individual sections of the bill are acceptable to specific segments of the industry only because they are balanced by other changes to the law found elsewhere in the proposed legislation. Indeed, even within the Study Group no member fully supports every proposed change considered in isolation. But each member of the Study Group believes that the overall commercial compromise is better than any alternative that is reasonably likely to be enacted in this country.

Scope of Coverage

The 1936 Carriage of Goods by Sea Act applies to ocean shipments to or from the United States, but there are several limitations on this coverage. First, the 1936 COGSA applies only to "the period from the time when the goods are loaded on to the time when they are discharged from the ship" (the "tackle-to tackle" period). The Harter Act continues to apply to the period before loading and after discharge, although in many cases the bill of lading will extend COGSA's application as a matter of contract law. Second, the 1936 COGSA applies only to shipments "in foreign trade." Under the "coastwise option," the bill of lading may extend the 1936 COGSA to govern domestic trade with the force of statute, but in the absence of such an extension the Harter Act applies. Third, the 1936 COGSA applies only to shipments under "a bill of lading or any similar document of title." It is uncertain whether this formulation includes more recent innovations, such as electronic bills of lading. Fourth, the 1936 COGSA does not govern shipments of "live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried." The proposed bill makes revisions in each of these four areas.

The "tackle-to-tackle" limitation. When the Hague Rules were originally negotiated, the international delegates were unwilling to apply the new rules to the periods before loading or after discharge on the theory that during these periods the goods were under the jurisdiction of a single, clearly-identified nation, and there was thus no need for regulation by an international convention. National laws, such as the Harter Act in the United States, were thought ade-

quate for the pre-loading and post-discharge periods. As a result, goods have been subject to at least two liability regimes during a single shipment.

In the United States trade, the bill of lading will customarily seek to avoid the problem of two liability regimes by explicitly calling for the application of the Carriage of Goods by Sea Act throughout shipment, including during the pre-loading and post-discharge periods. (Section 7 of the 1936 Act has been held to permit this extension of COGSA, at least to the extent that COGSA is consistent with the Harter Act.) This solution has not always been effective, however, and the tackle-to-tackle limitation has therefore been subject to considerable criticism.

The Study Group's bill eliminates the tackle-to-tackle limitation and applies the proposed Carriage of Goods by Sea Act "from the time the goods are received by a carrier to the time they are delivered to a person authorized to receive them." Subsection l(e).[10] For traditional port-to-port shipments, this will generally make the coverage of the proposed Act equivalent to the original coverage of the Harter Act. The proposed bill therefore repeals section 12 of the 1936 COGSA, which had pre served the application of the Harter Act outside the tackle-to tackle period.

For shipments to or from an inland location under a through bill of lading that includes (or is expected to include) carriage by sea, the proposed Act will apply to the entire period.[11] The definition of "contract of carriage" is accordingly expanded to recognize this broader coverage. Subsection l(b).

It must be stressed that the proposed Act will cover only the carriers' responsibilities under the "contract of carriage" from the place of receipt to the place of delivery identified in the contract of carriage. It would not, for example, govern inland transportation to the place of receipt or from the place of delivery. The following illustrations may help to clarify the intended scope of the proposed Act:

Illustration 1. The shipper wishes to have goods transported from Chicago to Hong Kong. The contracting carrier issues a through bill of lading in which Chicago is named as the place of receipt and Hong Kong is named as the place of delivery. The proposed Act applies to the entire period from receipt in Chicago to delivery in Hong Kong.

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[10] For a discussion of the meaning of the phrase "delivered to a person authorized to receive them," see Ward, *The Floundering of "Delivery" Under Section 3(6) of COGSA: A Proposal to Steady its Meaning in Light of its Legislative History,* 24 J. Mar. L. & Com. *287 (1993).*

[11] The proposed Act will be compulsorily applicable in the United States. Some foreign courts may be constrained by foreign choice of law rules to apply other law during some or all of the period governed by the proposed Act. But to the extent that the proposed COGSA is the proper governing law, it will apply to the entire period of the contract of carriage.

Illustration 2. The shipper wishes to have goods transported from Chicago to Hong Kong. The shipper arranges to have the goods carried from Chicago to Seattle by rail under an inland bill of lading, and from Seattle to Hong Kong under an ocean bill of lading. In the ocean bill of lading, Seattle is named as the place of receipt and Hong Kong is named as the place of delivery. The proposed Act does not apply to the inland rail transportation. The proposed Act applies to the period from the carrier's receipt of the goods in Seattle to delivery in Hong Kong.

As part of the geographical expansion of coverage, the Study Group's bill creates a comprehensive scheme to cover all of the participants in a contractual shipment that includes carriage by sea. Thus the proposed Act establishes the rights and duties of everyone performing the contract (including, for example, ocean carriers, stevedores, terminal operators, freight forwarders, in land carriers, and all of their servants, agents, and independent contractors and sub-contractors, all of whom are covered by the new "carrier" definition) and everyone who is interested in the cargo (including, for example, shippers, consignees, cargo owners, freight forwarders, creditors claiming security interests, insurers claiming subrogation rights, and all of their servants, agents, and independent contractors and sub-contractors). In short, the proposed bill will cover everyone involved in the contract of carriage from the time when the goods are received by the ocean carrier or any person acting on behalf of the carrier to the time when they are delivered to a person authorized to receive them. The proposed Act will not only establish the substantive rules (preempting state law), but will confer jurisdiction on the federal courts to resolve claims involving the performance of a contract that includes carriage by sea. See *also* "Suits Outside of COGSA," *infra* page 10699; "The 'Himalaya' Problem," *infra* page 10698; "Admiralty Jurisdiction," *infra* page 10700.

Domestic trade. Just as the Hague Rules were considered unnecessary for the pre-loading and post-discharge periods (because the goods were under the jurisdiction of a single, clearly-identified nation), so they were considered unnecessary for domestic trade. Under section 13 of the 1936 COGSA, however, a bill of lading could explicitly call for the application of the Act and COGSA would apply with the force of law. Bills of lading in domestic trade commonly include such a provision.

Under the Study Group's bill, the proposed Act will apply to all domestic shipments involving carriage by sea for some or all of the journey. References to "foreign trade" in the enacting clause and section 13 have thus been eliminated. (As a result of this change, among others, the Harter Act will be essentially irrelevant to the carriage of goods by sea.)

Voluntary extensions of COGSA. Because the Study Group's bill applies the proposed Act to the periods before loading or after discharge, section 7 of

the 1936 Act (which permits such an extension of COGSA) is no longer necessary. Similarly, because the bill applies the proposed Act to domestic trade, the portion of section 13 that permitted such an extension of the 1936 COGSA is no longer necessary.

Bills of lading. There is some uncertainty as to the meaning of "a bill of lading or any similar document of title." Some observers have questioned whether sea waybills, for example, are included in the definition.[12] It is also uncertain whether the 1936 COGSA applies when no document has been issued, as in a "paperless" transaction involving electronic data interchange (EDI). To avoid any uncertainty, the bill clarifies that the proposed Act will apply to all contracts calling for the carriage of goods by sea except charter parties. Subsection l(b). Thus sea waybills and electronic or "paperless" bills of lading are explicitly covered. See subsections 3(4)(b)(1) and l(b). As technology evolves, new creations will also come within the scope of the proposed Act. In recognition of this change, most references to "bills of lading" throughout the Act have been altered to refer to "contracts of carriage," which have been broadly defined in subsection l(b). (Remaining references to "bills of lading" are in situations in which the negotiable character of the document may be relevant.)

The Hague Rules' exception for charter parties is continued in the proposed Act. In current practice, charter parties often call for the application of COGSA as a matter of contract, and courts have treated this as part of the contract. But a clause extending the application of COGSA in this fashion is simply a contractual term — to be construed in conjunction with other terms in the charterparty. If a specific clause elsewhere in the charterparty is inconsistent with COGSA, the court must decide which one to enforce. The proposed Act makes no change that would affect this practice. Furthermore, if a bill of lading or other contract arises under or pursuant to a charterparty, the proposed Act will govern the transaction once a third party's rights are governed by that contract. Once again, the proposed Act makes no change to current law (except in recognizing a broader class of "bills of lading or other contracts" that might arise "under or pursuant to a charterparty").

Deck carriage and live animals. When the Hague Rules were originally negotiated, the international delegates were unwilling to apply the new rules to deck carriage on the theory that it was particularly risky and carriers should not be held to the high standards of the Hague Rules in such circumstances. Today, deck carriage is routine for some shipments, such as containers and yachts. Indeed, many vessels are specifically designed to carry containers on deck. Furthermore, many bills of lading specifically provide for the application of

[12] This is a greater problem in countries, such as England, where it is generally thought that documents must be negotiable to qualify as "bills of lading." In the United States, there is less of a problem because the Pomerene Act defines bills of lading very expansively (and explicitly recognizes nonnegotiable bills of lading).

COGSA to deck cargo as a matter of contract. In recognition of these developments, the bill includes deck carriage within the scope of the proposed Act.

Including deck carriage within the scope of the proposed Act simply means that COGSA will define the parties' responsibilities and rights. In many circumstances, deck carriage would still be a breach of the ocean carrier's responsibilities. In some circumstances, deck carriage could even be a breach justifying the loss of unit limitation under proposed subsection 4(5)(e). But if a court (or other tribunal) denies a carrier the benefit of unit limitation, it must be on subsection 4(5)(e)'s terms, and not on the basis of a per se rule prohibiting deck carriage. See also "'Unbreakable' unit limitation," *infra* page 10696; "Deviation," *infra* page 10703.

The Hague Rules also exclude shipments of live animals from their scope. Such shipments are rare, and the maritime industry sees no reason to change the law to include them under the proposed Act. Because the proposed Act will apply in all of the other situations involving ocean carriage (see "The 'tackle-to tackle' limitation," *supra* page 7; "Domestic trade," *supra* page 10690), shipments of live animals will be the one remaining area of ocean carriage still governed by the Harter Act.

The Navigational Fault Exception

Under subsection 4(2)(a) of the 1936 Carriage of Goods by Sea Act, the carrier is not responsible for loss or damage due to the "[a]ct, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship." In other words, the carrier benefits from proving the negligence of its own employees.

Although this provision has probably been the most criticized aspect of the 1936 Act, carrier interests have been unwilling to surrender their rights under it. Among other concerns, they have feared that the elimination of the navigational fault exception would have the effect of depriving them of the benefit of all of the exceptions found in subsection 4(2). A simple hypothetical illustrates these fears. Suppose that a ship is lost during a storm for reasons that are not entirely clear. It may be that the ship was brilliantly navigated, but the storm was simply too powerful. In that case, the carrier is protected from liability to the cargo under subsection 4(2)(c), the exception for perils of the sea. Alternatively, it may be that the ship was so poorly navigated that an otherwise harmless storm proved fatal. In that case, the carrier would be protected under subsection 4(2)(a) of the 1936 Act, but would lose this protection if the navigational fault exception were eliminated. The most likely scenario, however, is that the loss resulted from some combination of heavy weather and negligent navigation. Under the 1936 COGSA, the carrier escapes liability in this joint fault scenario without regard for the proportion of fault attributable to each cause because an exception

applies to each. But with the total elimination of the navigational fault exception, the rule in *Schnell v. Vallescura,* 293 U.S. 296 (1934), would require the carrier either to prove absence of negligence or to prove the extent to which the loss is attributable to each cause. Carrier interests suspect that in many courts this burden would be impossible to carry, and that they would lose the benefit of all of the exceptions found in subsection 4(2) of the Act whenever navigational fault was a plausible argument.

The Study Group's bill responds to cargo interests' concerns by the effective elimination of the navigational fault exception when the facts are clear. Under the proposed Act, there will be no more unseemly attempts by carriers to prove the negligence of their own employees! The bill also addresses the carriers' concerns by imposing on the cargo claimant the burden of proving the carrier's negligence. In the classic hypotheticals that have subjected the navigational fault exception to such criticism — running the vessel aground on a clear day, for example — this should be an easy burden to carry. But in cases where the carrier has a legitimate defense to liability, that defense will not be lost on mere allegations of negligence unless the cargo claimant can prove the case.

A proposed proviso to subsection 4(2) establishes the allocation of responsibility in cases where loss or damage is partially attributable to a cause within the carrier's responsibility and partially attributable to one of the other excepted perils listed in subsection 4(2). The proviso overrules *Schnell v. Vallescura* and adopts the modern approach of comparative fault as applied by the Supreme Court to collision cases in *United States v. Reliable Transfer Co.,* 421 U.S. 397 (1975). (Indeed, the continued vitality of the rule in *Schnell v. Vallescura* is questionable in light of *Reliable Transfer.*) If the cargo claimant can prove that the loss was partially attributable to the carrier's fault and the carrier can prove that the loss was partially attributable to one of the excepted perils listed in subsection 4(2), then the court (or other tribunal) shall determine the relative degree of fault and apportion the damages accordingly. If it is impossible to determine the relative degree of fault, then the damages shall be divided equally between the cargo claimant and the carrier. In short, a rigid rule requiring one party or the other to bear the entire loss (which could operate to the detriment of either party) would be replaced by a flexible rule recognizing the true situation, including the possibility of shared responsibility.

The Fire Exception

The fire exception has traditionally protected the ocean carrier (assuming an absence of fault and privity), but it does not protect other entities performing the contract of carriage that are included in the Study Group's bill's broad definition of "carrier." Thus if a longshore worker employed by an independent stevedore causes a fire on a vessel and cargo is damaged, the stevedore is liable for

the damage (subject to possible limitation of liability under subsection 4(5)) even though the negligent worker is not senior enough to bring the cause of the fire within the actual fault or privity of the stevedore. The stevedore may not rely on subsection 4(2)(b) under current law, and the proposed Act continues this rule.

Under proposed subsection 4(2)(b)(i), an ocean carrier can claim the benefit of the exception unless the fire was caused by its actual fault or privity. An ocean carrier can only claim the exception, however, with respect to a fire on a ship that it has furnished. Under proposed subsection 4(2)(b)(ii), a contracting carrier can claim the benefit of the exception for any fire on a ship unless the fire was caused by its actual fault or privity. Thus a contracting carrier could escape liability for fire on a ship caused by the fault of an independent stevedore and its employees, even though the contracting carrier generally assumes responsibility for the performance of all the performing carriers.

The following illustrations may help to clarify the intended operation of the proposed fire exception:

> *Illustration 1.* Cargo is destroyed by fire on a ship. The fire was caused by the fault of a junior member of the crew. Accordingly, the fire was not caused by the actual fault or privity of the ocean carrier. The responsible crew member is liable for the fire, but the ocean carrier and the contracting carrier may claim the benefit of the fire exception.
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> *Illustration 2.* Cargo is destroyed by fire on a ship. The fire was caused by the fault of a senior management employee of the ocean carrier, which was not the contracting carrier. Accordingly, the fire was caused by the actual fault or privity of the ocean carrier. The ocean carrier may not claim the benefit of the fire exception, but the contracting carrier may still claim the benefit of the fire exception because the fire was not caused by its actual fault or privity.
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> *Illustration 3.* Cargo is destroyed by fire on a ship. The fire was caused by the fault of a longshore worker employed by an independent stevedore who was unloading the ship. The ocean carrier and the contracting carrier may claim the benefit of the fire exception, but the stevedore may not.
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> *Illustration 4.* Cargo is destroyed by fire on a ship. The fire was caused by the combined fault of a junior member of the crew and a longshore worker employed by an independent stevedore. The ocean carrier and the contracting carrier may claim the benefit of the fire exception, but the stevedore may not.

Unit Limitation

Section 4(5) of the 1936 Carriage of Goods by Sea Act, which limits the carrier's liability to $500 per package or customary freight unit, has been one of the most controversial provisions in the Act. Problems have-arisen on two separate fronts. First, cargo interests complain that $500, which represented a fairly high limitation amount for a single package in the 1920s and '30s, is unreasonably low today. They argue that it should be increased. Second, modern technology has enabled the industry to handle very large items as a matter of course. Single items weighing several tons and qualifying as one package under COGSA, which were rare in the 1920s and '30s, have become commonplace today. Cargo interests argue that the package limitation concept is inappropriate when very large "packages" are involved.

The Visby and Hamburg solutions. The Visby Protocol and the Hamburg Rules addressed both of these concerns. For shipments in packages weighing less than about 735 pounds, the Visby Protocol (as amended by the SDR Protocol) increases the limitation amount by roughly 95 percent (to roughly $975) and the Hamburg Rules increase the limitation amount by roughly 145 percent (to roughly $1220).[13] For other shipments, both regimes establish a weight based limitation: roughly $1.33 per pound under Visby and roughly $1.66 per pound under Hamburg.

The weight-based limitation was expected to make the package limitation essentially irrelevant because most packages would weigh more than 735 pounds. This expectation was defeated, however, by the so-called "container clause," which declares that for containerized shipments each individual package within the container shall be a "package" for limitation purposes (if the number of internal packages is enumerated in the bill of lading). *See* Hague-Visby Rules art. 4(5)(c); Hamburg Rules art. 6(2)(a). If the packages within containers had remained the same size as packages shipped without containerization, this clause might not have had much impact. One benefit of containerization, however, is that shipments require less preparation. As a result, individual packages within containers often weigh less than 735 pounds and, for such packages, the weight-based limitation is irrelevant.

The proposed package limitation, weight limitation, and container clause. The net effect of changing technology, the container clause, and higher limitation amounts has been to bring most cargo within the Visby limits. In other words, most packages, particularly if shipped in containers, are worth less than

[13] The Visby and Hamburg limitation amounts are defined in terms of the International Monetary Fund's Special Drawing Right (SDR). The figures discussed in the text of this Report assume an exchange rate of $1.464 per SDR, the approximate rate at the time the Report was written. The rate varies constantly according to the values of the currencies used to calculate the SDR. Current rates are reported daily in the financial press.

$975. Most other shipments are worth less than $1.33 per pound. The Study Group's bill therefore adopts the Visby limitation amounts: 666.67 Special Drawing Rights (SDRs), as defined by the International Monetary Fund (IMF), per package and two SDRs per kilogram (roughly $1.33 per pound). Subsection 4(5)(a)(1). Because liability will be limited to the higher of these two figures, the practical effect is to impose a weight-based limitation scheme when a package weighs more than 333.335 kilograms (roughly 735 pounds), but to use the traditional package limitation concept (at a higher level) when the package weighs less than 333.335 kilograms.

Under proposed subsection 4(5)(b)(1), as under current law, the shipper always has the option to increase the limitation amount simply by declaring a higher value for the goods prior to shipment and ensuring that this declaration is reflected in the bill of lading or similar document. This option is rarely exercised today because the carrier charges a significantly higher freight rate when a declaration is made. There is no reason to suppose that this will change under the proposed Act. Subsection 4(5)(b)(2) also permits the shipper and the carrier, as between themselves, to establish a different limitation amount by separate agreement. Under the 1936 Act, the parties can only increase the amount. This is sometimes done through service contracts, or even in some bills of lading. The proposed Act gives the parties greater flexibility in the context of service con tracts. *See* "Service Contracts," *infra* page 10703.

"Unbreakable" unit limitation. Finally, the Study Group's bill — following the approach introduced by the Visby Protocol and extended by the Hamburg Rules — protects the predictability and certainty of the limitation provision by making the limitation essentially unbreakable. Under current law, some U.S. courts have ignored the statutory language ("in any event") and denied a carrier the benefit of the package limitation if it, for example, committed an "unreasonable deviation" (*see, e.g., Encyclopedia Britannica, Inc. v. S.S. Hong Kong Producer,* 422 F.2d 7, 18, 1969 AMC 1741, 1756-57 (2d Cir. 1969), *cert. denied,* 397 U.S. 964 (1970)) or failed to give a shipper the "fair opportunity" to declare a higher value (*see, e.g., Pan American World Airways v. California Stevedore & Ballast Co.,* 559 F.2d 1173, 1175-77, 1978 AMC 1834, 1836-38 (9th Cir. 1977) (per curiam)). Both of these doctrines have been severely criticized. Not only do they undermine the commercial risk allocation that the industry has accepted, thus making insurance more expensive, they also undermine international uniformity by making the U.S. COGSA less like other national enactments of the Hague Rules. As part of the commercial compromise, the Study Group's bill eliminates these and all similar doctrines as they now exist.

Under the proposed Act, the carrier will lose the protection of unit limitation (whether at the statutory level of subsection 4(5)(a), the declared level of

subsection 4(5)(b)(1), or the agreed level of subsection 4(5)(b)(2)) only if the claimant can prove that the carrier, in essence, caused the damage intentionally. Subsection 4(5)(e)(1) strips the carrier of its limitation rights when the loss or damage was caused by an act or omission of the carrier "done with the intent to cause such loss or damage." Of course it is often impossible for a claimant to prove the carrier's intent, even when the requisite intent is there, so subsection 4(5)(e)(1) goes on to cover the situation in which the carrier recklessly and knowingly caused the damage in such a way that intent can be presumed. Thus the carrier will be able to limit its liability in negligence cases under the proposed Act, however extreme the negligence may be. And by providing an explicit statutory penalty for a carrier's intentional (or presumptively intentional) misconduct, the proposed Act makes judicial penalties (such as punitive damages) irrelevant.

The historical basis for the deviation doctrine was very similar to the concept embodied in subsection 4(5)(e)(1) of the proposed Act: carriers who commit outrageous breaches of the contract of carriage should not be permitted to rely on limitation clauses contained in the contract of carriage. *See generally* Friedell, *The Deviating Ship,* 32 HASTINGS L.J. 1535, 1539-46 (1981). Over the years, however, the doctrine has developed in such a way that some courts have applied per se rules to treat certain actions as "deviations"-without regard for the seriousness of the carrier's breach of contract. Indeed, the doctrine has become so divorced from commercial reality that some courts have treated trivial departures from the expected route as deviations while enforcing the package limitation in cases of gross negligence that did not fit within the historic deviation definition. The doctrine has been further complicated by a disagreement among the lower courts as to the effect of an unreasonable deviation on the package limitation. *Compare Atlantic Mutual Insurance Co. v. Poseidon Schiffahrt, G.m.b.H.,* 313 F.2d 872, 874-875 (7th Cir.), *cert. denied,* 375 U.S. 819 (1963) (upholding the package limitation despite a deviation), *with Constructores Tecnicos, S. de R.L. v. Sea-Land Service, Inc.,* 945 F.2d 841, 844-845 (5th Cir. 1991) (holding that an unreasonable deviation ousts the package limitation); *Ingersoll Milling Machine Co. v. M/V Bodena,* 829 F.2d 293, 301 (2d Cir. 1987), cert. denied, 484 U.S. 1042 (1988) (same). *See also* "Deviation," *infra* page 10703.

Subsection 4(5)(e)(2) is a compromise provision that retains a connection with the heart of the historic doctrine but overrules the position that some modern courts have taken in reliance on the doctrine. Under the proposed Act, a carrier will not lose the benefit of unit limitation simply because an action happens to fall within the historic definition of "deviation." But if an unreasonable deviation is so serious that the carrier "knew or should have known" that it "would result in [the] loss or damage [sustained]," then subsection 4(5)(e)(2) strips the carrier of its limitation rights.

With the expanded scope of the proposed COGSA (from receipt to delivery), a large number of separate parties may perform the carrier's obligations under the contract of carriage. Although the carrier entering into the contract assumes responsibility for the contract's performance, the contracting carrier's responsibility is on COGSA's terms — including unit limitation. Subsection 4(5)(e) provides for the loss of this right in cases of intentional (and presumptively intentional) misconduct, but it also recognizes the need to distinguish different situations according to the person having the requisite intent.

The theory is simple: each party is penalized for its own misconduct. Subsection 4(5)(e)(1) provides that a carrier loses the benefit of subsection 4(5)(a) when the intentional (or presumptively intentional) misconduct is "within the privity or knowledge of that carrier." The concept of "privity or knowledge, in which has been found in federal maritime statutes since at least 1851, ensures that the carrier will not lose its statutory protection as the result of misconduct (even intentional misconduct) by low-level employees or other parties performing the con tract. Similarly, subsection 4(5)(e)(2) provides that a carrier loses the benefit of subsection 4(5)(a) only for its own unreasonable deviation when that carrier itself had the requisite knowledge. A stevedore does not lose the benefit of unit limitation on the basis of the ocean carrier's deviation! Subsection 4(5)(e) thus concludes with the provision that those who are not guilty of the relevant misconduct retain the benefit of subsection 4(5)(a) even though other parties performing the contract of carriage may lose their rights under this subsection. See "The 'Himalaya' Problem," *infra* page 10698. Thus a cargo claimant may be entitled to recover more from a knowingly reckless stevedore, for example, than it can recover from the contracting carrier.

The "Himalaya" Problem

In an attempt to avoid the carrier's limitations and defenses, many cargo claimants have brought suit against entities other than the carrier who were involved in performing the contract of carriage. For example, if a shipment had been damaged during loading the consignee might sue both the carrier and the stevedore who performed the loading. Thus if the carrier obtained the benefit of the package limitation, the plaintiff might still recover full damages from the stevedore.

Carriers responded to these suits by including clauses in their bills of lading — known as "Himalaya clauses" — that extended the benefit of the carrier's limitations and defenses to the carrier's servants and agents, such as stevedores, terminal operators, inland carriers, and other independent contractors. Courts have generally upheld these clauses if properly drafted, but there has been significant litigation over such issues as the clarity of individual clauses and the extent to which contractual privity is required.

The Study Group's bill, with its expansive "carrier" definition, extends the statutory limitations and defenses to any person performing any of the carrier's functions under the contract of carriage. In other words, Himalaya clauses will be unnecessary under the proposed Act. Anyone who could have been protected by an appropriate clause will be automatically protected with the force of law under the statute. This extension of protection goes hand-in-hand with the imposition of liability on all those performing the contract. Under the proposed Act's comprehensive scheme to cover all of the participants in the transaction (see *supra* page 10690), claimants whose cargo has been lost or damaged will be able to sue the responsible parties directly in federal court. See also "Suits Outside of COGSA," *infra* page 10699; "Admiralty Jurisdiction," *infra* page 10700. Thus everyone performing any of a carrier's functions under the contract of carriage will receive both the benefit and the burden of the proposed Act.

Suits Outside of COGSA

In an attempt to avoid the carrier's limitations and defenses, some cargo claimants have brought suit under theories that did not rely on the Carriage of Goods by Sea Act. For example, rather than suing for a breach of the contract to carry the goods (which is undoubtedly subject to COGSA), the plaintiff would bring an action in bailment or in tort for having damaged the goods. Some cargo claimants have sought to avoid the carrier's limitations and defenses under COGSA by bringing their actions under state law, sometimes in state court.

Similarly, some carriers have attempted to avoid the duties and responsibilities imposed by COGSA with the argument that the Act did not apply in particular situations. In such cases, the carriers have sought the benefit of bill of lading clauses that are not permitted under COGSA, but which might be valid under the Harter Act or general maritime law.

The Study Group's bill provides that the proposed Act shall govern the rights and responsibilities of the relevant parties regardless of the form of the action or the court in which suit is brought. If the plaintiff's case could properly have been filed under the proposed Act, an attempt to bring it under a different theory will be pointless. Distinctions between contract and tort will be essentially irrelevant,[14] and inconsistent state law will be preempted. *See also* "The 'tackle-to-tackle' limitation," *supra* page 10688.

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[14] A COGSA suit is a statutory action that courts have described as "'a maritime action in the nature of a mixed tort, contract and bailment cause of action.'" *Texport Oil Co. v. M/V Amolyntos,* 11 F.3d 361, 367, 1994 AMC 815, 823 (2d Cir. 1993) (quoting *Texport Oil Co. v. M/V Amolyntos,* 816 F. Supp. 825, 844 (E.D.N.Y. 1993)). Nothing in the Study Group's work is intended to affect a cargo claimant's lien priority, which can depend on whether an action is characterized as in contract or tort. *See, e.g., Associated Metals & Minerals v. M/V Alexander's Unity,* 41 F.3d 1007, 1011-17 (5th Cir. 1995); All *Alaskan Seafoods, Inc. v. M/V Sea Producer,* 882 F.2d 425, 428-430, 1989 AMC 2935, 2939-42 (9th Cir. 1989); *Oriente Commercial, Inc. v. M/V Floridian,* 529 F.2d 221, 222-223, 1975 AMC 2484, 2485-88 (4th Cir. 1975).

Admiralty Jurisdiction

Suits under the 1936 Carriage of Goods by Sea Act have routinely been held to be within the admiralty jurisdiction of the federal courts. This is generally not a contentious issue, however, because the 1936 Act is typically limited to situations that would otherwise be within admiralty jurisdiction under 28 U.S.C. § 1333(1). The Study Group's bill specifies that the proposed Act shall provide an independent basis for admiralty jurisdiction even in cases that might not otherwise be within the admiralty jurisdiction under 28 U.S.C. § 1333(1). This result is justified because the goods are in the stream of maritime commerce throughout the period governed by the contract of carriage. The Study Group's bill thus answers, with respect to the proposed Act, the question that the Supreme Court has explicitly left open with respect to the Limited Liability Act, 46 U.S.C. App. § 181 *et seq.*, and the Admiralty Extension Act, 46 U.S.C. App. § 740. *See Sisson v. Ruby,* 497 U.S. 358, 359 n.1 (1990); *see also Foremost Insurance Co. v. Richardson,* 457 U.S. 668, 677 n.7 (1982) (declining to decide if the Admiralty Extension Act provides an independent basis for admiralty jurisdiction).

The Study Group's bill has no impact on the availability of a non-admiralty forum under the "saving to suitors clause" of 28 U.S.C. § 1333(1). Thus cargo claimants will have the same rights they now have to bring cases in state courts or on the "law" side of federal court under 28 U.S.C. § 1331 (federal question), § 1332 (diversity), or § 1337 (commerce regulations); the bill neither limits not expands the COGSA plaintiff's forum choices outside of admiralty. But it does require all courts to apply the proposed Act in covered cases. See "Suits Outside of COGSA," *supra* page 10699.

Qualifying Statements

Under subsection 3(3) of the 1936 Carriage of Goods by Sea Act, the carrier is required to issue a bill of lading if the shipper desires one, and the bill of lading must show certain things, such as the number of packages or pieces, or the quantity or weight of the cargo. A proviso to subsection 3(3), however, excuses the carrier from the obligation to indicate the number, quantity, or weight of the cargo when there is no reasonable means of checking the accuracy of the statement.

With containerized cargo, in particular, this rule has created difficulties. The carrier is generally unable to determine the number of packages or pieces inside a container without opening the container, and opening a sealed container is among the last things that either party desires. There are also situations in which the carrier is unable to verify this information for non-containerized cargo. In some ports and under some circumstances, the carrier may even be unable to determine the weight of the cargo. Although the carrier would be enti-

tled to omit statements regarding number or weight from the bill of lading in all of these cases, the shipper — for independent commercial reasons — would nevertheless like to have the information included in the bill of lading. Thus the carrier will typically rely on information provided by the shipper but will qualify the relevant statement. For example, the description of the goods might read, "one container *said to contain* 500 packages of electronic parts." Or a clause such as "shipper's weight, load, and count" might be included in the description.

The impact of these clauses has been a source of some confusion under the 1936 Act. To resolve this confusion, the Study Group's bill modifies the existing subsection 3(3), which becomes subsection 3(3)(i), and adds two new paragraphs to subsection 3(3). Proposed subsection 3(3)(ii) covers non-containerized shipments. It permits the contracting carrier to qualify the description of the goods with respect to marks, number, quantity, or weight information (but not with respect to the apparent order and condition of the goods) when no carrier had a reasonable means of checking the information furnished by the shipper. A carrier who has properly qualified the bill of lading description in accordance with this subsection is not responsible for the accuracy of the statement to the extent that it has been qualified. Thus a claimant suing the carrier for cargo loss or damage cannot rely solely on the description of the goods in the bill of lading, to the extent that the description has properly been qualified, to establish a prima facie case. The claimant must either obtain independent evidence to establish a carrier's receipt of the goods as described, or present evidence that a carrier in fact had a reasonable means of checking the information furnished by the shipper (thus forcing the contracting carrier to prove that it was entitled to qualify the description of the goods).

Proposed subsection 3(3)(iii) covers containerized shipments, and it provides separate rules for marks, number, and quantity information (in paragraph (a)) and weight information (in paragraph (b)). Under paragraph (a), the contracting carrier may generally qualify the description of the goods with respect to marks, number, or quantity information (using a phrase such as "said to contain" or "shipper's load, stow, and count") whenever a container is received that has been loaded and sealed by the shipper, or someone acting on behalf of the shipper. A claimant will have no opportunity to show that a carrier had a reasonable means of checking the contents of the container; opening a sealed container for inspection is inevitably too great a burden to impose. There is one exception to this general rule: the contracting carrier may not qualify the bill of lading description of the goods if a carrier has in fact verified the information. Thus if a carrier has an agent present when the container is stuffed who tallies the goods as they are loaded, or if a carrier in fact opens the container to inspect its contents, then the contracting carrier must include the information that has been verified without qualification.

Under paragraph (b), the contracting carrier may generally qualify the description of the goods with respect to weight information when a container is received that has been loaded and sealed by the shipper, or someone acting on behalf of the shipper, and no carrier has weighed the container. In this situation, however, the qualification must be in the form of an express statement that the container has not been weighed. Furthermore, the contracting carrier may not qualify the weight information included on the bill of lading if it agreed with the shipper in writing prior to the receipt of the container that the container would be weighed. Thus the shipper can protect itself at the time it books the cargo if there is a need to have the weight verified.

Under either paragraph of subsection (3)(3)(iii), a carrier is not responsible for the accuracy of the statement regarding marks, number, quantity, or weight information — to the extent that it has been properly qualified — if the container is delivered intact and undamaged with the seal intact and undamaged. Thus if the integrity of the container or the seal has been compromised, the cargo claimant can rely on the bill of lading description to establish a carrier's receipt of the goods as described in the bill of lading, without regard for the qualifying statement. But if a carrier apparently delivered the same item that was received (an undamaged, sealed container), then the burden will be on the claimant to prove with independent evidence that the carrier in fact received the cargo described on the bill of lading. The carrier will not be subject to the presumption (which is often impossible to rebut) that the bill of lading statement regarding the goods inside the container is accurate.

In addition to the requirement regarding marks, number, quantity, or weight information, subsection 3(3) requires a carrier to state the apparent order and condition of the goods — and the proviso to subsection 3(3) does not affect this obligation. Some courts have nevertheless permitted carriers to include standard clauses in their bills of lading that effectively disclaim responsibility for this statement. These clauses have been justified on the ground that the shipper had the option of demanding a different bill of lading that did not contain the offending clause. *See, e.g., Tokio Marine & Fire Insurance Co. v. Retla Steamship Co.*, 426 F.2d 1372 (9th Cir. 1970). The Study Group's bill overrules such decisions and restores the Act to its original meaning. It amends subsection 3(3) of the 1936 Act to clarify that the shipper has the option whether or not to demand a negotiable bill of lading or other contract of carriage, but that once the document is issued it must contain the information required by subsection 3(3) (qualified, as necessary and appropriate, to the extent permitted by subsection 3(3)). Any clause that undercuts this requirement is invalid under subsection 3(8).

Deviation

Under traditional principles, a "deviation" was a geographic departure from the contractual voyage, and it resulted in drastic consequences for the carrier — including the loss of unit limitation. In the late-nineteenth and early-twentieth centuries, courts expanded the doctrine and described certain other actions as "quasi-deviations" attracting the same drastic consequences. Although the 1936 Carriage of Goods by Sea Act does not address the consequences of an unreasonable deviation, most courts have carried forward the traditional doctrine.

In recent years, the entire deviation doctrine has been subject to considerable criticism. In England, where the doctrine originated, there is some question whether it retains any vitality at all. In the United States, the courts have cut back on "quasi-deviations" to the point that geographic deviation and unauthorized deck carriage are now the only activities subject to the doctrine. And — as discussed above — there is widespread recognition that deck carriage is not only routine but also appropriate for some kinds of shipments. See *supra* page 10691.

The principal implication of a finding of deviation is the loss, in most circuits, of the benefit of the package limitation under subsection 4(5). One of the principal changes in the Study Group's bill is the move toward unbreakable unit limitation, and thus under proposed subsection 4(5) the carrier can claim the benefit of unit limitation even in cases of deviation unless the deviation amounts to the type of misconduct covered by subsection 4(5)(e)(2). *See* "'Unbreakable' unit limitation," *supra* page 10696.

In recognition of these developments, proposed subsection 4(4) clarifies that an unreasonable deviation is simply a breach of the carrier's obligations under the Act, not an invitation to ignore the Act. Thus if an unreasonable deviation causes cargo loss or damage, the carrier will be liable, but subject to subsection 4(5). In extreme cases, the unreasonable deviation may be so reckless that it will fall within the terms of the proposed subsection 4(5)(e)(2), resulting in the carrier's loss of unit limitation. Courts will resolve these disputes under the proposed Act, however, rather than by reference to outdated decisions that may suggest a *per se* rule against deck carriage or minor departures from the contractual voyage.

Service Contracts

The Hague Rules and the 1936 Carriage of Goods by Sea Act were negotiated on the assumption that there was inequality of bargaining power between carriers and shippers. Shippers were therefore protected by the rule that the bill of lading could increase a carrier's liability, but never decrease liability below the level established by the Rules. See subsection 3(8). In modern practice, it is undeniable that some shippers are able to negotiate with carriers on an even

footing. In order to give maximum flexibility to companies in this situation without depriving unsuspecting third parties of their rights, the proposed Act permits the immediate parties to a "service contract" to reduce the carrier's liability below COGSA levels. A service contract is defined in section 3(21) of the Shipping Act of 1984, which is codified at 46 U.S.C. App. § 1702(21) (1988). The parties have always had the ability to increase the carrier's liability above COGSA levels, and they retain this ability under the proposed Act — with or without a service contract.

Any agreement to increase (as explicitly permitted in proposed subsection 4(5)(b)(2)) or decrease a carrier's liability through the use of a service contract is binding only on the immediate parties to that agreement. A stevedore, terminal operator, or other person performing any of the carrier's functions or undertaking any of the responsibilities under the contract of carriage is also entitled to rely on the statutory protections found in COGSA. Similarly, a subsequent holder of the bill of lading is entitled to rely on the statutory protections found in COGSA, and need not examine every bill of lading to see if they have been modified by agreement.

Forum Selection Clauses

The 1936 Carriage of Goods by Sea Act does not explicitly regulate forum selection or arbitration clauses, but most U.S. courts (following the lead of *Indussa Corp. v. S.S. Ranborg,* 377 F.2d 200 (2d Cir. 1967) (en banc)) have held that subsection 3(8) prohibits at least foreign forum selection clauses. The lower courts are divided on the enforceability of foreign arbitration clauses, and the issue is now pending before the Supreme Court. *See Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer,* 63 U.S.L.W. 3420 (No. 94-623) (cert. granted, Nov. 28, 1994).

Whether or not the Supreme Court addresses the forum selection clause issue, and whatever the Court may decide on the arbitration clause issue, it is inappropriate for the resolution of such an important issue to turn on the Court's interpretation of the likely intent of Congress and the international delegates. This was not an important issue in the 1920s and '30s, it was not specifically addressed at the time, and it was not an element of the commercial compromise.

Subsection 3(8)(b) of the Study Group's bill is a commercial compromise. If the goods pass through a U.S. port, or if a multimodal shipment begins or ends in the United States, a foreign forum selection clause or a foreign arbitration clause is invalid in cases where the proposed Act applies. Forcing claimants to pursue their remedies overseas in such cases puts too "high [a] hurdle in the way of enforcing [COGSA] liability." G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 146 n.23 (2d ed. 1975). But if a claimant brings an action in the United States solely because it is able to obtain jurisdiction over the ship in this

country, then the validity of a foreign forum selection clause or a foreign arbitration clause is governed by the general maritime law and not by proposed subsection 3(8)(b). The parties are also free to agree on foreign litigation or arbitration *after* the claim has arisen.

If a bill of lading provides for foreign arbitration, the clause will be unenforceable to the extent that it requires arbitration to proceed overseas. But there is no reason why a party should not be permitted to rely on the agreement to resolve disputes through arbitration. A proviso to proposed subsection 3(8)(b) therefore requires a court in these circumstances to order arbitration in the United States if either party requests such a ruling in timely fashion. If neither party seeks arbitration, however, the court shall proceed with the case as if there had been no arbitration clause.

The Pomerene Act

Subsection 3(4) of the 1936 COGSA included a proviso clarifying that the Pomerene Act, 49 U.S.C. §§ 81-124 (1988), remained in full force, and had not been repealed by implication. Indeed, the Pomerene Act, as recodified in July 1994, 49 U.S.C. §§ 80101-80116, remains in force today.

Some of the proposed changes to COGSA, however, require minor changes and updating to the Pomerene Act. (The Pomerene Act dates from 1916, so some updating was desirable in any event. In particular, it is necessary to reconcile the Pomerene Act, at least insofar as it governs international ocean shipments, with the latest versions of the International Chamber of Commerce's Uniform Customs and Practices for Documentary Credits and INCO-TERMS.) Because a direct amendment of the Pomerene Act would have had implications in domestic shipments that did not involve ocean carriage, the Study Group thought it would be better to incorporate the affected provisions into the proposed COGSA and make the necessary changes there. The Group also thought that it would be convenient to incorporate these updated provisions into the proposed COGSA for ease of reference, particularly when cases are tried in foreign courts that are aware of COGSA but less familiar with the Pomerene Act.

Proposed subsection 3(4)(b) incorporates fifteen amended sections of the original Pomerene Act. (The Study Group thought it preferable to start with the original Act, which better corresponds to the usages of international ocean carriage, instead of the 1994 recodification. In any event, the recodification was not intended to affect the substance of the original Act.) Each section has been updated to reflect the application of the proposed COGSA not only to bills of lading but to all "contracts of carriage." (The "bill of lading" terminology is retained in situations where it is important to distinguish non-negotiable or straight bills of lading from negotiable or order bills of lading.) In addition, proposed COGSA subsection 3(4)(b)(8), which corresponds to section 13 of the

Pomerene Act, codified in 1994 as 49 U.S.C. § 80108, reflects the expanded coverage of the proposed COGSA (from receipt to delivery, rather than tackle-to-tackle). A complete list of the corresponding provisions is included in the following table:

Table of Corresponding Provisions

Subsection of the Proposed COGSA	Corresponding section(s) of the Pomerene Act (as enacted) and of Title 49, U.S. Code (as recodified in 1994)
§ 3(4)(b)(1)	Pomerene Act § 2; 49 U.S.C. § 80103
§ 3(4)(b)(2)	Pomerene Act §§ 3, 7; 49 U.S.C. § 80103
§ 3(4)(b)(3)	Pomerene Act § 9; 49 U.S.C. § 80110
§ 3(4)(b)(3)	Pomerene Act § 9; 49 U.S.C. § 80110
§ 3(4)(b)(5)	Pomerene Act § 10; 49 U.S.C. § 80111
§ 3(4)(b)(6)	Pomerene Act § 11; 49 U.S.C. § 80111
§ 3(4)(b)(7)	Pomerene Act § 12; 49 U.S.C. § 80111
§ 3(4)(b)(8)	Pomerene Act § 13; 49 U.S.C. § 80108
§ 3(4)(b)(9)	Pomerene Act § 14; 49 U.S.C. § 80114
§ 3(4)(b)(10)	Pomerene Act § 17; 49 U.S.C. § 80110
§ 3(4)(b)(11)	Pomerene Act § 18; 49 U.S.C. § 80110
§ 3(4)(b)(12)	Pomerene Act § 19; 49 U.S.C. § 80110
§ 3(4)(b)(13)	Pomerene Act § 22; 49 U.S.C. § 80113
§ 3(4)(b)(14)	Pomerene Act § 26; 49 U.S.C. § 80111

The proposed Act eliminates the explicit proviso saving the Pomerene Act from implied repeal. Some parts of the proposed COGSA, particularly in subsection 3(3), are inconsistent with the Pomerene Act, and to the extent there is an inconsistency COGSA's provisions shall govern when the proposed COGSA applies. Of course, to the extent that the proposed COGSA is consistent with the Pomerene Act there is no implied repeal of it. Thus the Pomerene Act remains in full force except to the extent that proposed subsection 3(4)(b) makes explicit changes to it, or other provisions in the proposed COGSA are inconsistent with it. Similarly, in cases outside the scope of the proposed COGSA (i.e., cases that do not involve the carriage of goods by sea) the Pomerene Act is unaffected by the Study Group's bill.

Technical Modifications

Section numbering. Paragraph letters were added to certain subsections, such as subsections 3(6) and 4(5), for ease of reference. In general, however, the 1936 COGSA section numbers are retained to the extent possible.

Updating. Certain provisions of the 1936 Act required updating. References to the Shipping Act of 1916 in sections 8 and 9 were changed to include the Shipping Act of 1984. The effective date in section 15 and the short title in section 16 are both updated to reflect the amendments of the proposed bill.

Repeals. Section 7 of the 1936 Act permitted the extension of COGSA beyond the "tackle-to-tackle" period. Because the proposed Act will apply to this period as a matter of law, see "The 'tackle-to-tackle' limitation," *supra* page 10688, this provision is unnecessary and the Study Group's bill therefore eliminates it. *See* "Voluntary extensions of COGSA," *supra* page 10690.

Section 12 of the 1936 Act preserved the Harter Act from implied repeal with respect to the period before loading and after discharge. The proposed Act will no longer be limited to the "tackle-to-tackle" period, and accordingly the Harter Act will no longer apply to the period before loading and after discharge. See "The 'tackle-to-tackle' limitation," *supra* page 10688. The Study Group's bill therefore eliminates section 12.

Section 13 of the 1936 Act explicitly permitted the extension of COGSA to domestic trade. Because the proposed Act applies to domestic trade as a matter of law, *see* "Domestic trade," *supra* page 10690, this provision is unnecessary and the Study Group's bill eliminates it. See "Voluntary extensions of COGSA," *supra* page 10690.

Section 14 of the 1936 Act was included out of a fear that the Act might put U.S. shipping at a competitive disadvantage. Such fears have proven groundless, and the section has never been invoked. The Study Group's bill eliminates this provision.

Section-by-Section Analysis

Enacting Clause. Under subsection 1(b), the proposed Act applies to every contract of carriage that includes carriage of goods by sea except charter parties. See "Bills of lading," *supra* page 10691. The "bill of lading" reference in this clause has been modified to reflect this change. The clause also clarifies that shipments to, from, or through the United States are subject to COGSA. Thus a shipment from Europe to a Texas port followed by overland carriage to Mexico under a through bill of lading would be subject to COGSA throughout. Similarly, a shipment from Europe to Canada followed by overland carriage to Colorado under a through bill of lading would be subject to COGSA throughout.

The proposed Act applies to domestic trade as well as foreign trade. *See* "Domestic trade," *supra* page 10690. Amendments to this clause and section 13 have been proposed to elect this change.

Two additional sentences have been added to this clause to ensure that the proposed Act is the sole cause of action available for cargo loss or damage claims. See "Suits Outside of COGSA," *supra* page 10699.

Finally, a sentence has been added to the enacting clause to ensure that all suits under the proposed Act shall be within the admiralty jurisdiction of the federal courts. See "Admiralty Jurisdiction," *supra* page 10700.

Section 1(a). In conjunction with the expanded scope of the proposed Act and the comprehensive scheme to cover all of the participants in a contractual shipment that includes carriage of goods by sea (see "The 'tackle-to-tackle' limitation," *supra* page 10688), section 1(a) has been revised to define "carrier" as broadly as possible. The new definition is intended to cover all entities that play (or are supposed to play) any role in transporting the goods between the points of origin and destination under a "contract of carriage." Courts construing the proposed definition should give effect to this broad purpose, and reject any analogy that might be found in decisions such as *Mikinberg v. Baltic Steamship Co.*, 988 F.2d 327, 1993 AMC 1661 (2d Cir. 1993), and *Toyomenka, Inc. v. S.S. Tosaharu Maru,* 523 F.2d 518, 1975 AMC 1820 (2d Cir. 1975), which narrowly construed Himalaya clause definitions designed to expand the class of parties entitled to the benefits of a carrier's exceptions and limitations. One purpose of the proposed legislation is to make Himalaya clauses unnecessary. See "The 'Himalaya' Problem," *supra* page 10698.

Under a through bill of lading, therefore, the proposed "carrier" definition includes ocean carriers, inland carriers, stevedores, terminal operators, consolidators, packers, warehousemen, and their servants, agents, contractors, and subcontractors. Under a shipment covered by a traditional port-to- port bill of lading and a separate inland bill of lading, the proposed definition would not generally include the inland carriers, because they would not be participants in a contractual shipment that includes carriage of goods by sea. They would be performing the carrier's functions under the separate inland bill of lading. *See Illustration 2* on page 10690.

The proposed Act recognizes a distinction between the carrier who enters into a contract of carriage with the shipper (the "contracting carrier") and the carrier who performs the contract of carriage (the "performing carrier"). Although the contracting carrier will often be one of the performing carriers, it is not necessarily the case. The proposed Act also recognizes a distinction between the performing carrier who carries out the ocean voyage (the "ocean carrier") and other performing carriers who participate in the transaction, such as stevedores and inland carriers.

Section 1(b). The "contract of carriage" definition has been expanded to ensure that the proposed Act applies to all contracts for the carriage of goods by

sea (except charter parties) and multimodal contracts that include carriage by sea under a through bill of lading. *See* "Bills of lading," *supra* page 10691; "The 'tackle-to-tackle' limitation," *supra* page 10688. This definition should be considered in conjunction with subsections 3(4)(b)(1) and 3(4)(b)(2), which define non-negotiable and negotiable bills of lading very broadly.

Section 1(c). The "goods" definition has been expanded to ensure that the proposed Act applies to deck carriage. See "Deck carriage and live animals," *supra* page 10691.

Section 1(e). The "carriage of goods" definition has been expanded to ensure that the proposed Act applies throughout the contractual shipment. *See* "The 'tackle-to-tackle' limitation," *supra* page 10688.

Section 1(f). The term "shipper" has been defined. Although the definition is broad, it is narrower than some statutory definitions of the term, which include consignees within the "shipper" definition.

Section 1(g). The term "electronic" has been broadly defined to ensure that the proposed Act continues to apply to paperless transactions as technology develops. See "Bills of procedures, such as the Rules for Electronic Bills of Lading adopted by the Comite' Maritime International. This subsection gives effect to their choice while making clear that the parties may not adopt rules purporting to exclude the operation of the Act.

Section 2. The "carrier" reference has been modified to recognize that the rights and responsibilities of everyone involved in the performance of the contract of carriage are governed by the proposed Act. See "The 'Himalaya' Problem," *supra* page 10698. The list of covered activities has also been expanded in recognition of the expanded coverage of the proposed Act. *See* "The 'tackle-to-tackle' limitation," *supra* page 10688. Finally, two sentences have been added to clarify the respective rights and responsibilities of contracting and performing carriers.

Section 3(1). The "carrier" reference has been modified to recognize that the ocean carrier has primary responsibility for the condition of the ship, and that the contracting carrier is responsible for all aspects of the contract's performance (including the condition of the ship), but that other performing carriers are not responsible for the condition of the ship.

Section 3(2). The "carrier" reference has been modified to recognize that the rights and responsibilities of everyone involved in the performance of the contract of carriage are governed by the proposed Act. *See* "The 'Himalaya' Problem," *supra* page 10698. The list of covered activities has also been expanded in recognition of the expanded coverage of the proposed Act. *See* "The 'tackle-to-tackle' limitation," *supra* page 10688.

Section 3(3). The "bill of lading" reference has been modified to recognize that the proposed Act applies to every contract of carriage of goods by sea except charter parties. *See* "Bills of lading," *supra* page 10691.

In subsection 3(3)(i), paragraph (a) has been modified in recognition of the increased scope of the proposed Act. *See "The* 'tackle-to-tackle' limitation," *supra* page 10688.

The language in subsection 3(3) of the 1936 Act (subsection 3(3)(i) of the proposed Act) has been modified and two new subsections have been added to clarify the carrier's obligations with respect to qualified statements in the bill of lading description of the goods. *See* "Qualifying Statements," *supra* page 10700.

Section 3(4). The phrase "Except as provided in this section" has been included at the beginning of paragraph (a) in view of the fact that amendments to subsection 3(3) in particular provide for cases in which the bill of lading or similar document will not be prima facie evidence of the carrier's receipt of the goods "as therein described." *See* "Qualifying Statements," *supra* page 10700.

The "bill of lading" reference has been modified to recognize that the proposed Act applies to every contract of carriage of goods by sea except charter parties. *See* "Bills of lading," *supra* page 10691.

Proposed subsection 3(4)(b) incorporates fifteen amended sections of the Pomerene Act. *See* "The Pomerene Act," *supra* page 10705.

Section 3(5). The "carrier" references have been expanded to recognize that the rights and responsibilities of everyone involved in the performance of the contract of carriage are governed by the proposed Act. See "The 'Himalaya' Problem," *supra* page 10698.

Section 3(6). Paragraph letters have been added for ease of reference. See "Section numbering," *supra* page 10706.

In paragraph (6)(a), the reference to the "port of discharge" has been eliminated to recognize that under a through bill of lading delivery of the goods under the contract typically occurs at an inland point far removed from the port of discharge, and that the proposed Act applies until this delivery occurs. See "The 'tackle-to-tackle' limitation," *supra* page 10688. The proposed Act also specifies which carriers should receive notice of loss or damage. Finally, the "bill of lading" reference has been modified to recognize that the proposed Act applies to every contract that includes carriage of goods by sea except charter parties. *See* "Bills of lading," *supra* page 10691.

In paragraph (6)(d)(i), the "carrier" reference has been modified to recognize that the rights and responsibilities of everyone involved in the performance

of the contract of carriage are governed by the proposed Act. *See* "The 'Himalaya' Problem," *supra* page 10698.

Paragraph (6)(d)(ii) has been added to establish a limitation period to govern a carrier's action for contribution or indemnity.

Paragraph (6)(d)(iii) has been added to clarify that a claimant satisfies the time-for-suit requirement of subsection 3(6)(d), in cases where the contract of carriage provides for arbitration, *either* by filing suit or by commencing an arbitration proceeding in timely fashion.

Section 3(7). The "bill of lading" reference has been modified to recognize that the proposed Act applies to every contract of carriage of goods by sea except charter parties. *See* "Bills of lading," *supra* page 10691. The "carrier" reference has been modified to recognize that the rights and responsibilities of everyone involved in the performance of the contract or carriage are governed by the proposed Act. See "The 'Himalaya' Problem," *supra* page 10698.

Section 3(8). The "carrier" reference has been modified to recognize that the rights and responsibilities of everyone involved in the performance of the contract of carriage are governed by the proposed Act. See "The 'Himalaya' Problem," *supra* page 10698.

A new proviso permits the immediate parties to a "service contract," as defined in section 3(21) of the Shipping Act of 1984, 46 U.S.C. App. § 1702(21) (1988), to reduce the carrier's liability insofar as it affects only themselves. See "Service Contracts," *supra* page 10703.

A proposed subsection 3(8)(b) makes explicit provision for forum selection and arbitration clauses, a subject that has been regulated by judicial doctrine until now. See "Forum Selection Clauses," *supra* page 10704.

Section 4(2)(a). The proposed amendment effectively eliminates the navigational fault exception in cases where the cargo claimant can prove negligence. See "The Navigational Fault Exception," *supra* page 10692.

Section 4(2)(b). Amendments have been proposed to this paragraph to ensure that ocean carriers and contracting carriers retain their traditional fire exception rights, and that other performing carriers do not acquire new rights under this provision. See "The Fire Exception," *supra* page 10693.

Section 4(2)(g). Amendments have been proposed to this paragraph to ensure that a carrier can claim the benefit of this exception if it can show that neither it nor its agents and servants were negligent, without regard for whether other carriers in the transaction may have been negligent. This change is necessary because the rights and responsibilities of everyone involved in the perform-

ance of the contract of carriage are governed by the proposed Act. See "The 'Himalaya' Problem," *supra* page 10698.

Section 4(2), proviso. This proposed proviso deals with the allocation of responsibility in cases where loss or damage is caused in part by the carrier's negligence and in part by one of the excepted perils listed in subsection 4(2). *See generally* "The Navigational Fault Exception," *supra* page 10692.

Section 4(3). The "carrier" reference has been modified to recognize that the rights and responsibilities of everyone involved in the performance of the contract of carriage are governed by the proposed Act. *See* "The 'Himalaya' Problem," *supra* page 10698.

Section 4(4). The "carrier" reference has been modified to recognize that the rights and responsibilities of everyone involved in the performance of the contract of carriage are governed by the proposed Act. *See* "The 'Himalaya' Problem," *supra* page 10698. A new sentence clarifies that an unreasonable deviation is simply a breach of the carrier's obligations, and that the consequences of the breach shall be determined under the terms of the proposed Act. *See* "Deviation," *supra* page 10703.

Section 4(5). Paragraph letters have been added for ease of reference. *See* "Section numbering," *supra* page 10706.

In proposed paragraph (5)(a)(1), the process of unit limitation has been revised to add a weight-based system and to increase the limitation amount under the traditional package limitation. See "Unit Limitation," *supra* page 10695. The cross reference to subsection 4(5)(b) is in recognition of the ability of the parties to alter the limitation amount, either by declaration or by agreement. The cross-reference to paragraph (5)(e) is intended to stress that subsection 4(5)(e) provides the sole avenue for the loss of unit limitation.

Paragraph (5)(a)(2), the "container clause," provides a rule to determine the number of packages for limitation purposes when individual packages are shipped in containers, on pallets, or in other articles of transport that could also qualify as packages. This provision, following the container clauses in the Visby Protocol and the Hamburg Rules, is somewhat broader than current U.S. law because it applies in non-container cases. *Cf. Standard Electrica, S.A. v. Hamburg Sudamesikanische Dampfschifffahrts-Gesellschaft,* 375 F.2d 943, 1967 AMC 881 (2d Cir.), *cert. denied,* 389 U.S. 831 (1967). With respect to containerized shipments, however, this provision is consistent with existing U.S. law. *See generally Binladen BSB Landscaping v. M/V Nedlloyd Rotterdam,* 759 F.2d 1006, 1015-16, 1985 AMC 2113, 2126 (2d Cir.), *cert. denied,* 474 U.S. 902 (1985).

The references to "the carrier" and "the ship" in paragraphs (5)(a)(1), (5)(c), and 5(d) have been modified to recognize that the rights and responsibilities of everyone involved in the performance of the contract of carriage are governed by the proposed Act. *See* "The 'Himalaya' Problem," *supra* page 10698.

The "bill of lading" references in paragraphs (5)(b)(1), (5)(c), and 5(d) have been modified to recognize that the proposed Act applies to every contract of carriage of goods by sea except charterparties. *See* "Bills of lading," *supra* page 10691.

In paragraph (5)(b)(2), the proviso permits the immediate parties to a "service contract," as defined in section 3(21) of the Shipping Act of 1984, 46 U.S.C. App. § 1702(21) (1988), to reduce the carrier's liability. The final sentence specifies that any agreement to increase or decrease in the liability level is effective only between the immediate parties to the agreement. See "Service Contracts," *supra* page 10703.

Paragraph (5)(e) provides the sole avenue for the loss of unit limitation. See "'Unbreakable' unit limitation," *supra* page 10696.

Section 4(6). The "carrier" references have been modified to recognize that the rights and responsibilities of everyone involved in the performance of the contract of carriage are governed by the proposed Act. *See* "The 'Himalaya' Problem," *supra* page 10698.

Section 5. The "carrier" reference has been modified to recognize that the rights and responsibilities of everyone involved in the performance of the contract of carriage are governed by the proposed Act. See "The 'Himalaya' Problem," *supra* page 10698. The "bill of lading" references have been modified to recognize that the proposed Act applies to every contract of carriage of goods by sea except charter parties. *See* "Bills of lading," *supra* page 10691.

A new paragraph has been added to give cargo claimants the benefit of higher levels of responsibility and liability (if any exist) in performing carriers' contracts or tariffs. Thus if an inland carrier agrees with the contracting carrier that it will transport the goods for the inland portion of the journey under a contract with a higher package limitation than the proposed Act, and this inland carrier loses or damages the goods, then the claimant (who was not a party to the inland carrier's agreement with the contracting carrier) will have the benefit of the higher package limitation in an action against the performing carrier.

The first sentence of the second paragraph of this section in the 1936 Act (the third paragraph of the proposed section), which restated the rule that charterparties are not governed by the Act unless bills of lading are issued under them, has been eliminated. Proposed subsection 1(b) states the rule, and it is unnecessary to restate it here.

Section 6. The "carrier" reference has been modified to recognize that the rights and responsibilities of everyone involved in the performance of the contract of carriage are governed by the proposed Act. *See* "The 'Himalaya' Problem," *supra* page 10698. The list of covered activities has also been expanded in recognition of the expanded coverage of the proposed Act. See "The 'tackle-to-tackle' limitation," *supra* page 10688.

Section 7. The entire section has been eliminated as un necessary. See "Voluntary extensions of COGSA," *supra* page 10690; "Repeals," *supra* page 10707; see *also* "The 'tackle-to-tackle' limitation," *supra* page 10688.

Section 8. The section has been updated. See "Updating," *supra* page 10707.

Section 9. The "bill of lading" references have been modified to recognize that the proposed Act applies to every contract of carriage of goods by sea except charter parties. *See* "Bills of lading," *supra* page 10691.

The section has also been updated. *See* "Updating," *supra* page 10707.

Section 11. The "bill of lading" references have been modified to recognize that the proposed Act applies to every contract of carriage of goods by sea except charter parties. *See* "Bills of lading," *supra* page 10691. The phrase "goods in bulk" replaces "bulk cargo" because "goods" (rather than "cargo") is a defined term.

Section 12. The section has been eliminated in recognition of the fact that the Harter Act no longer applies to the period before loading and after discharge. *See* "Repeals," *supra* page 10707; *see also* "The 'tackle-to-tackle' limitation," *supra* page 10688.

Section 13. The proposed Act applies to domestic trade as well as foreign trade. *See* "Domestic trade," *supra* page 10690. Amendments have been proposed to this section and the enacting clause to effect this change. The proviso permitting the extension of COGSA to domestic trade has been eliminated as unnecessary. *See* "Voluntary extensions of COGSA," *supra* page 10690; "Repeals," *supra* page 10707. This section, along with the enacting clause, also clarifies that shipments *through U. S.* ports (in addition to shipments to or from U.S. ports) are subject to COGSA.

Section 14. The entire section has been eliminated as unnecessary. See "Repeals," *supra* page 10707.

Section 15. The section has been updated. *See* "Updating," *supra* page 10707.

Section 16. The section has been updated. *See* "Updating," *supra* page 10707.

Appendix 1
The Proposed Bill
The Carriage of Goods by Sea Bill

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Carriage of Goods by Sea Act of 1936, 46 U.S.C. App. §§ 1300-1315, is hereby amended to read as follows:

Enacting Clause, 46 U.S.C. App. § 1300

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every contract that includes the carriage of goods by sea covering transportation to, from, or through the United States shall have effect subject to the provisions of this Act. The defenses and limitations of liability provided for in this Act and the responsibilities imposed by this Act shall apply with the force of law in any action against a carrier or a ship in respect of loss or damage to goods covered by a contract of carriage without regard for the form or theory of the action or the court or other tribunal in which it is brought. The remedies available under this Act shall constitute the complete and exclusive remedy against a carrier in respect of loss or damage to goods covered by a contract of carriage. This Act shall be construed as providing an independent basis for admiralty jurisdiction.

Section 1, 46 U.S.C. App. § 1301

When used in this Act —

(a)(i) The term "carrier" includes contracting carriers, performing carriers, and ocean carriers.

(ii) The term "contracting carrier" means the party who enters into the contract of carriage with the shipper of the goods.

(iii) The term "performing carrier" means a party who performs or undertakes to perform any of the contracting carrier's responsibilities under a contract of carriage, including any party that performs or undertakes to perform or procures to be performed any incidental service to facilitate the carriage of goods, regardless of whether it is a party to, identified in, or has legal responsibility under the contract of carriage. The term includes, but is not limited to, ocean carriers, inland carriers, stevedores, terminal operators, consolidators, packers, warehousemen, and their servants, agents, contractors, and

sub-contractors. A contracting carrier may also be a performing carrier.

(iv) The term "ocean carrier" means a performing carrier who owns, operates, or charters a ship used in the carriage of the goods by sea.

(b) The term "contract of carriage" applies to all contracts for the carriage of goods either by sea or partially by sea and partially by one or more other modes of transportation, but does not apply to charterparties. The term "contract of carriage" includes, but is not limited to, negotiable or "order" bills of lading and non-negotiable or "straight" bills of lading, whether printed or electronic. Any bill of lading or other contract arising under or pursuant to a charterparty shall be included in the term "contract of carriage" from the moment at which it regulates the relations between a carrier and a holder of the same.

(c) The term "goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals.

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

(e) The term "carriage of goods" covers the period from the time the goods are received by a carrier to the time they are delivered to a person authorized to receive them.

(f) The term "shipper" means any person by whom or in whose name or on whose behalf a contract of carriage has been concluded with a contracting carrier, or any person by whom or in whose name or on whose behalf the goods are actually delivered to a carrier in relation to the contract of carriage.

(g) In this Act, the term "electronic" shall include Electronic Data Interchange (EDI) or other computerized media. If the parties agree to use an electronic bill of lading, it shall be a "contract of carriage" governed by this Act and the procedures for such bills of lading shall be in accordance with rules agreed upon by the parties.

Section 2, 46 U.S.C. App. § 1302

Subject to the provisions of section 6, under every contract of carriage, the carriers in relation to the receiving, loading, handling, stowage, carriage, custody, care, discharge, and delivery of the goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth. A contracting carrier shall be subject to these responsibilities and liabilities and entitled to these rights and immunities with respect to the entire period covered by its contract of carriage. A performing carrier shall be subject to these responsibilities and liabilities and entitled to these rights and immunities (i) during the period between the time it has received the goods or taken them in

charge and the time it has relinquished control of the goods pursuant to the contract of carriage and (ii) at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage.

Section 3, 46 U.S.C. App. § 1303

(1) The contracting and ocean carriers 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 carriers shall properly and carefully receive, load, handle, stow, carry, keep, care for, discharge, and deliver the goods carried.

(3) (i) After a carrier receives the goods into its charge, the contracting carrier shall, on demand of the shipper, issue to the shipper a negotiable bill of lading or, if the shipper agrees, a non-negotiable bill of lading. This contract of carriage shall show, among other things —

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before a carrier receives the goods, 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;

(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; and

(c) The apparent order and condition of the goods;

Provided, That the contracting carrier shall not be bound to state or show any marks, number, quantity, or weight information which a carrier has reasonable ground for suspecting not accurately to represent the goods actually received, or which a carrier has had no reasonable means of checking.

(ii) If a carrier issues a contract of carriage for non-containerized goods stating any marks, number, quantity, or weight information furnished by the shipper or its agents, and a carrier can demonstrate that no carrier had a reasonable means of checking this information before the contract of carriage was issued, and the statement is qualified in a manner to indicate that no carrier has verified its accuracy (with a phrase such as "said to contain" or

"shipper's weight, load, and count"), then the carriers shall not be responsible for the accuracy of the statement to the extent that it has been qualified.

(iii) (a) If a carrier issues a contract of carriage stating any marks, number, or quantity information furnished by the shipper or its agents for goods shipped in a container loaded and sealed by the shipper or its agents, and a carrier can demonstrate that no carrier verified the container's contents before the contract of carriage was issued, then the carrier may qualify the statement in a manner to indicate that no carrier has verified its accuracy (with a phrase such as "said to contain" or "shipper's load, stow, and count"). If a carrier delivers the container intact and undamaged with the seal intact and undamaged, then a statement in a contract of carriage that has been qualified as provided in this paragraph shall not constitute prima facie evidence that a carrier received the goods from the shipper as described in the contract of carriage, nor shall the qualified statement preclude any carrier from proving that no carrier received the goods from the shipper as described in the contract of carriage, unless the carrier was not entitled to qualify the statement under the requirements of this paragraph or a person relying on the statement in the contract of carriage proves that the contracting carrier was not acting in good faith when issuing the contract of carriage.

(b) If a carrier issues a contract of carriage stating the weight of goods shipped in a container loaded and sealed by the shipper or its agents, or the weight of the container including the goods, and a carrier can demonstrate that no carrier weighed the container before the contract of carriage was issued, then the carrier may qualify the statement of weight with an express statement that the container has not been weighed: *Provided,* That if the shipper and the contracting carrier agreed in writing before a carrier received the goods for shipment that a carrier would weigh the container, then the contracting carrier may not qualify the statement of weight. If a carrier delivers the container intact and undamaged with the seal intact and undamaged, then a statement in a contract of carriage that has been qualified as provided in this paragraph shall not constitute prima facie evidence that a carrier received the goods from the shipper as described in the contract of carriage, nor shall the qualified statement preclude any carrier from proving that no carrier received the goods from the shipper as described in the contract of carriage, unless the carrier was not entitled to qualify the statement under the requirements of this paragraph or a person relying on the statement in the contract of carriage proves that the contracting carrier was not acting in good faith when issuing the contract of carriage.

(4) (a) Except as provided in this section, a contract of carriage issued by or on behalf of a carrier shall be prima facie evidence of the receipt by that carrier of the goods as therein described.

(b) When this Act applies, the rules stated herein shall apply in lieu of inconsistent provisions 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," which is otherwise unaffected by this Act:

(1) A contract of carriage in which it is stated that the goods are consigned or destined to a specified person is a non-negotiable or straight bill of lading. Sea waybills, express bills, and similar non-negotiable bills of lading are straight bills of lading for the purposes of this Act.

(2) A contract of carriage in which it is stated that the goods are consigned or destined to the order of any person named in such contract of carriage is a negotiable or order bill of lading. Any provision in a negotiable or order bill of lading or in any notice, contract, rule, regulation, or tariff that it is non-negotiable shall be null and void and shall not affect its negotiability within the meaning of this Act and the "Pomerene Bills of Lading Act" unless upon its face and in writing agreed to by the shipper. The insertion in a negotiable or order bill of lading of the name of a person to be notified of the arrival of the goods shall not limit the negotiability of the bill of lading or constitute notice to a purchaser thereof of any rights or equities of such person in the goods.

(3) A carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the contract of carriage for the goods or, if the contract of carriage is a negotiable or order bill of lading, by the holder thereof, if such a demand is accompanied by —

(i) An offer in good faith to satisfy the carrier's lawful lien upon the goods;

(ii) If the contract of carriage is a negotiable or order bill of lading, possession of the bill of lading and an offer in good faith to surrender, properly indorsed, the bill of lading which was issued for the goods; and

(iii) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods, in compliance with a demand by the consignee or holder so accompanied, the burden

shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure.

(4) A carrier is justified, subject to the provisions of subsections 3(4)(b)(5), 3(4)(b)(6), and 3(4)(b)(7), in delivering goods to one who is —

(i) A person lawfully entitled to the possession of the goods, or

(ii) The consignee named in a non-negotiable or straight bill of lading for the goods, or

(iii) A person in possession of a negotiable or order bill of lading for the goods by the terms of which the goods are deliverable to that person's order; or which has been indorsed to that person, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee.

(5) If a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to anyone having a right of property or possession in the goods if it delivered the goods otherwise than as authorized by subdivisions (ii) and (iii) of subsection 3(4)(b)(4); and, though the carrier delivered the goods as authorized by either of said subdivisions, it shall be so liable if prior to such delivery it —

(i) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or

(ii) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

Such request or information, to be effective within the meaning of this paragraph, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods.

(6) Except as provided in paragraph (14) of this subsection, and except when compelled by legal process, if a carrier delivers goods for which a negotiable or order bill of lading had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill of lading, such carrier shall be liable for failure to deliver the goods to anyone who

for value and in good faith purchases such bill of lading, whether such purchaser acquired title to the bill of lading before or after the delivery of the goods by the carrier and notwithstanding delivery was made to the person entitled thereto.

(7) Except as provided in paragraph (14) of this subsection, and except when compelled by legal process, if a carrier delivers part of the goods for which a negotiable or order bill of lading had been issued and fails either —

(i) To take up and cancel the bill of lading, or

(ii) To place plainly upon it a statement that a portion of the goods has been delivered with a description which may be in general terms either of the goods or packages that have been so delivered or of the goods or packages which still remain in the carrier's possession,

the carrier shall be liable for failure to deliver all the goods specified in the bill of lading to anyone who for value and in good faith purchases it, whether such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto.

(8) A contract of carriage shall describe the condition of the goods at the time a carrier received them from the shipper: Provided, that an "on board" contract of carriage shall also describe the condition of the goods at the time that they are loaded on board the ship or other mode of transportation. Any alteration, addition, or erasure in a contract of carriage after its issue without authority from the carrier issuing the same, either in writing or noted on the contract of carriage, shall be void, whatever be the nature and purpose of the change, and the contract of carriage shall be enforceable according to its original tenor.

(9) If a negotiable or order bill of lading has been lost, stolen, or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss, theft, or destruction and upon the giving of a bond with sufficient surety, to be approved by the court, to protect the carrier or any person injured by such delivery from any liability or loss incurred by reason of the original bill of lading remaining outstanding. The court may also in its discretion order the payment of the carrier's reasonable costs and counsel fees: Provided, a voluntary indemnifying bond without order of court shall be binding on the parties thereto.

The delivery of the goods under an order of the court, as provided in this paragraph, shall not relieve the carrier from liability to a person to whom

the negotiable or order bill of lading has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods.

(10) If more than one person claim the title or possession of goods, a carrier may require all known claimants to interplead, either as a defense to an action brought against the carrier for nondelivery of the goods or as an original suit, whichever is appropriate.

(11) If someone other than the consignee or the person in possession of the contract of carriage has a claim to the title or possession of the goods, and the carrier has information of such claim, the carrier shall be excused from liability for refusing to deliver the goods, either to the consignee or person in possession of the contract of carriage or to the adverse claimant, until the carrier has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead.

(12) Except as provided in subsections 3(4)(b)(4), 3(4)(b)(10), and 3(4)(b)(11), no right or title of a third person, unless enforced by legal process, shall be a defense to an action brought by the consignee of a non-negotiable or straight bill of lading or by the holder of a negotiable or order bill of lading against the carrier for failure to delivery the goods on demand.

(13) If a contract of carriage has been issued by a contracting carrier or on its behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and the issuing of contracts of carriage therefor, the carrier shall be liable to (a) the owner of goods covered by a non-negotiable or straight bill of lading subject to existing right of stoppage in transitu or (b) the holder of a negotiable or order bill of lading, who has given value in good faith, relying upon the description therein of the goods, or upon the shipment being made upon the date therein shown, for damages caused by the nonreceipt by the carrier of all or part of the goods upon or prior to the date therein shown, or their failure to correspond with the description thereof in the bill of lading at the time of its issue.

(14) After goods have been lawfully sold to satisfy a carrier's lien, or because they have not been claimed, or because they are perishable or hazardous, the carrier shall not thereafter be liable for failure to deliver the goods themselves to the consignee or owner of the goods, or to a holder of the contract of carriage given for the goods when they were shipped, even if such contract of carriage be a negotiable or order bill of lading.

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

(6) (a) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the contracting carrier or the performing carrier making the delivery, or one of their agents, before or at the time of the delivery of the goods to the person entitled to receive them under the contract of carriage, such delivery shall be prima facie evidence of the delivery by the carriers of the goods as described in the contract of carriage. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

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

(c) 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.

(d) (i) In any event the carriers and their ships shall be discharged from all liability in respect of loss or damage unless suit is brought within one year afler 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 any party's right to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

(ii) Notwithstanding the limitation period established in subsection 3(6)(d)(i), if a timely suit is brought against a carrier under this Act, that carrier shall have three months from the date when judgment is entered or a settlement is concluded to bring an action for contribution or indemnity against any other party in the transaction.

(iii) Notwithstanding the limitation period established in subsection 3(6)(d)(i), if the contract of carriage provides for arbitration, a claim shall be timely if a suit or an arbitration proceeding is commenced within one year after delivery of the goods or the date when the goods should have been delivered.

(e) In the case of any actual or apprehended loss or damage the carriers and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods, including joint surveys when appropriate.

(7) After the goods are loaded onto a ship or other mode of transportation the contract of carriage to be issued by the contracting carrier shall, if the shipper so

demands, be a "shipped" contract of carriage: Provided, That if the shipper shall have previously taken up any contract of carriage for such goods, the shipper shall surrender the same as against the issue of the "shipped" contract of carriage, but at the option of the contracting carrier such contract of carriage may be noted at the port of shipment by the contracting carrier 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" contract of carriage.

(8) (a) Any clause, covenant, or agreement in a contract of carriage relieving a carrier or a 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 7 or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect: *Provided,* That this subsection shall not apply to a provision in a service contract, as defined in section 3(21) of the Shipping Act of 1984, to the extent that the provision affects only the rights and liabilities of the parties who entered into the service contract. A benefit of insurance in favor of a carrier, or similar clause, shall be deemed to be a clause relieving a carrier from liability.

(b) Any clause, covenant, or agreement made before a claim has arisen that specifies a foreign forum for litigation or arbitration of a dispute governed by this Act shall be null and void and of no effect if:

(i) the port of loading or the port of discharge is or was intended to be in the United States; or

(ii) the place where the goods are received by a carrier or the place where the goods are delivered to a person authorized to receive them is or was intended to be in the United States;

provided, however, that if a clause, covenant, or agreement made before a claim has arisen specifies a foreign forum for arbitration of a dispute governed by this Act, then a court, on the timely motion of either party, shall order that arbitration shall proceed in the United States.

Section 4, 46 U.S.C. App. § 1304

(1) Neither a carrier nor a 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 subsection 3(1). 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 subsection.

(2) The carriers and their ships shall not be responsible for loss or damage arising or resulting from —

(a) Act of the master, mariner, pilot, or the servants of the ocean carrier in the navigation or in the management of the ship, unless the person claiming for such loss or damage is able to prove negligence in the navigation or management of the ship;

(b) Fire on a ship, provided, however, that this exemption applies only for the benefit of (i) an ocean carrier, unless the fire was caused by its actual fault or privity, with respect to a fire on a ship that it furnished, and (ii) a contracting carrier, unless the fire was caused by its actual fault or privity.

(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, its 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;

(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

(q) Any other cause arising without the actual fault and privity of the carrier claiming the benefit of this exception and without the fault or neglect of its

agents or servants, but the burden of proof shall be on that carrier to show that neither its actual fault or privity nor the fault or neglect of its agents or servants contributed to the loss or damage;

Provided, That where loss or damage is caused in part by a breach of a carrier's obligations or the fault or neglect of a carrier and in part by one or more of the excepted perils specified in this subsection, the carriers shall be liable for the loss or damage to the extent that it is attributable to such breach, fault, or neglect, and shall not be liable for the loss or damage to the extent that it is attributable to one or more of the excepted perils specified in this subsection. If there is no evidence to enable the trier of fact to determine the extent to which the loss or damage is attributable to such breach, fault, or neglect and the extent to which it is attributable to one or more of the excepted perils specified in this subsection, then the carriers shall be liable for one-half of the loss or damage.

(3) The shipper shall not be responsible for loss or damage sustained by a carrier or a ship arising or resulting from any cause without the act, fault, or neglect of the shipper, its agents, or its servants.

(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 carriers and their ships 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. An unreasonable deviation shall be considered a breach of the carriers' obligations under this Act, but the remedies available for the breach shall be governed by the provisions of this Act, including subsections 4(2) and 4(5).

(5) (a) (1) Except as provided in subsection 4(5)(b) and subsection 4(5)(e), the aggregate liability of the carriers and their ships for any loss or damage to or in connection with the carriage of goods shall not under any circumstances exceed 666.67 Special Drawing Rights (as defined by the International Monetary Fund) per package, or two Special Drawing Rights per kilogram of gross weight of the goods lost or damaged, whichever is the higher.

(2) If a container, pallet, or similar article of transport is used to consolidate goods, the number of packages enumerated in the contract of carriage as packed in such article of transport shall be deemed the number of packages for the purpose of this section as far as these packages are concerned. Except as aforesaid, such article of transport shall be considered the package.

(b) (1) The limits mentioned in subsection 4(5)(a) shall not apply if the nature and value of the goods have been declared by the shipper

before shipment and inserted in the contract of carriage. This declaration, if embodied in the contract of carriage, shall be prima facie evidence, but shall not be conclusive on a carrier.

(2) By agreement between the contracting carrier and the shipper different maximum amounts than those mentioned in subsection 4(5)(a) may be fixed: *Provided,* That such maximum amounts shall not be less than the figures above named except in a service contract, as defined in section 3(21) of the Shipping Act of 1984. Any agreement to alter the maximum amounts mentioned in subsection 4(5)(a) binds only the parties who entered into the agreement.

(c) In no event shall a carrier or a ship be liable for more than the amount of damage actually sustained.

(d) The carriers and their ships shall not be responsible in any event for loss or damage to or in connection with the carriage of goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the contract of carriage.

(e) A carrier shall not be entitled to the benefit of the limitation of liability provided for in subsection 4(5)(a) if it is proved that the loss or damage resulted (1) from an act or omission of that carrier, within the privity or knowledge of that carrier, done with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result, or (2) from that carrier's unreasonable deviation which that carrier knew or should have known would result in such loss or damage. One carrier's loss under this subsection of the benefit of the limitation of liability provided for in subsection 4(5)(a) shall not affect the right of any other carrier to claim that benefit.

(6) Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the contracting 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 a 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 a carrier without liability on the part of the carrier except to general average, if any.

Section 5, 46 U.S.C. App. § 1305

A contracting carrier shall be at liberty to surrender in whole or in part all or any of its rights and immunities or to increase any of its responsibilities and liabilities under this Act, provided such surrender or increase shall be embodied in the contract of carriage.

If a performing carrier's contract or tariff applies to the carriage of particular goods and provides for a higher level of responsibility or liability than that provided under this Act, then in an action against the performing carrier for loss or damage to those goods the claimant shall be entitled to the benefit of the higher level of responsibility or liability as provided in the performing carrier's contract or tariff.

Nothing in this Act shall be held to prevent the insertion in a contract of carriage of any lawful provision regarding general average.

Section 6, 46 U.S.C. App. § 1306

Notwithstanding the provisions of the preceding sections, a contracting 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 carriers for such goods, and as to the rights and immunities of the carriers in respect of such goods, or their obligations as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of their servants or agents in regard to the receiving, loading, handling, stowage, carriage, custody, care, discharge, and delivery of the goods carried by sea: *Provided,* That in this case no negotiable bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

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.

Section 8, 46 U.S.C. App. § 1308

The provisions of this Act shall not affect the rights and obligations of the carriers under the provisions of the Shipping Act, 1916, the Shipping Act of 1984, or of any amendments thereto; 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.

Section 9, 46 U.S.C. App. § 1309

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 contracts of carriage, 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 of this Act; or (c) in any other way prohibited by the Shipping Act, 1916, the Shipping Act of 1984, or of any amendments thereto.

Section 11, 46 U.S.C. App. § 1310

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

Section 13, 46 U.S.C. App. § 1312

This Act shall apply to all contracts that include carriage of goods by sea to, from, or through ports of the United States. As used in this Act, the term "United States" includes its districts, territories, and possessions. Every contract of carriage covering a shipment from a port of the United States shall contain a statement that it shall have effect subject to the provisions of this Act.

Sec. 2. This Act shall take effect ninety days after the date of its approval. Cases in which the goods were received by a carrier prior to the effective date of this Act shall be governed by the law that would have applied but for the passage of this Act.

Sec 3. This Act may be cited as the "Carriage of Goods by Sea Act of 1995."

Appendix 2
Changes to Existing Law

The Carriage of Goods by Sea Act
Enacting Clause, 46 U.S.C App. § 1300

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~~ that includes the carriage of goods by sea covering transportation to, ~~or~~ from, or through ~~ports of~~ the United States, ~~in foreign trade~~, shall have effect subject to the provisions of this Act. The defenses and limitations of liability provided for in this Act and the responsibilities imposed bv this Act shall applv with the force of law in anv action against a carrier or a ship in respect of loss or damage to goods covered by a contract of carriage without regard for the form or theory of the action or the court or other tribunal in which it is brought. The remedies available under this Act shall constitute the complete and exclusive remedy against a carrier in respect of loss or damage to goods covered by a contract of carriage. This Act shall be construed as providing an independent basis for admiralty jurisdiction.

Section 1, 4C U.S.C App. § 1301

When used in this Act —

(a) (i) The term "carrier" includes contracting carriers, performing carriers, and ocean carriers.

(ii) The term "contracting carrier" means the party who enters into the contract of carriage with the shipper of the goods.

(iii) The term "performing carrier" means a party who performs or undertakes to perform any of the contracting carrier's responsibilities under a contract of carriage, including any party that performs or undertakes to perform or procures to be performed any incidental service to facilitate the carriage of goods, regardless of whether it is a party to, identified in, or has legal responsibility under the contract of carriage. The term includes, but is not limited to, ocean carriers, inland carriers, stevedores, terminal operators, consolidators, packers, warehousemen, and their servants, agents, contractors, and subcontractors. A contracting carrier may also be a performing carrier. ~~The owner or the charterer who enters into a contract of carriage with a shipper.~~

(iv) The term "ocean carrier" means a performing carrier who owns, operates, or charters a ship used in the carriage of the goods by sea.

(b) The term "contract of carriage" applies ~~only~~ to all contracts ~~of carriage covered by a bill of lading or any similar document of title, insofar as such docu-~~

~~ment relates to~~ for the carriage of goods either by sea or partially by sea and partially by one or more other modes of transportation, but does not apply to charterparties. The term "contract of carriage" includes,~~ing~~ but is not limited to, negotiable or "order" bills of lading and non-negotiable or "straight" bills of lading, whether printed or electronic. ~~a~~Any bill of lading or ~~any similar document as aforesaid issued~~ other contract arising under or pursuant to a charterparty shall be included in the term "contract of carriage" from the moment at which ~~such bill of lading or similar document of title~~ it regulates the relations between a carrier and a holder of the same.

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

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

(e) The term "carriage of goods" covers the period from the time ~~when~~ the goods are ~~loaded on~~ received by a carrier to the time ~~when~~ they are ~~discharged from the ship~~ delivered to a person authorized to receive them.

(f) The term "shipper" means any person by whom or in whose name or on whose behalf a contract of carriage has been concluded with a contracting carrier, or any person by whom or in whose name or on whose behalf the goods are actually delivered to a carrier in relation to the contract of carriage.

(g) In this Act, the term "electronic" shall include Electronic Data Interchange (EDI) or other computerized media. If the parties agree to use an electronic bill of lading, it shall be a "contract of carriage" governed by this Act and the procedures for such bills of lading shall be in accordance with rules agreed upon by the parties.

Section 2, 46 U.S.C. App. § 1302

Subject to the provisions of section 6, under every contract of carriage~~ of goods by sea~~, the carriers in relation to the receiving, loading, handling, stowage, carriage, custody, care, and discharge, and delivery of the ~~such~~ goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth. A contracting carrier shall be subject to these responsibilities and liabilities and entitled to these rights and immunities with respect to the entire period covered by its contract of carriage. A performing carrier shall be subject to these responsibilities and liabilities and entitled to these rights and immunities (i) during the period between the time it has received the goods or taken them in charge and the time it has relinquished control of the goods pursuant to the contract of carriage (ii) at any other time to the

extent that it is participating in the performance of any of the activities contemplated by the contract of carriage.

Section 3, 46 U.S.C. App. § 1303

(1) The contracting and ocean carriers 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 carriers shall properly and carefully receive, load, handle, stow, carry, keep, care for, ~~and~~ discharge, and deliver the goods carried.

(3) (i) After a carrier receives~~ing~~ the goods into its his charge, the contracting carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a negotiable bill of lading or, if the shipper agrees, a non-negotiable bill of lading. This contract of carriage shall show~~ing~~, among other things —

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before a carrier receives the~~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;

(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; and

(c) The apparent order and condition of the goods;

Provided, That ~~no~~ the contracting carrier, ~~master, or agent of the carrier~~, shall not be bound to state or show ~~in the bill of lading~~ any marks, number, quantity, or weight information which ~~he~~ a carrier has reasonable ground for suspecting not accurately to represent the goods actually received, or which ~~he~~ a carrier has had no reasonable means of checking.

(ii) If a carrier issues a contract of carriage for non-containerized goods stating any marks, number, quantity, or weight information furnished by the shipper or its agents, and a carrier can demonstrate that no carrier had a reasonable means of checking this information before the contract of carriage was issued, and the statement is qualified in a manner to

indicate that no carrier has verified its accuracy (with a phrase such as "said to contain" or "shipper's weight, load, and count"), then the carriers shall not be responsible for the accuracy of the statement to the extent that it has been qualified.

(iii)(a) If a carrier issues a contract of carriage stating any marks, number, or quantity information furnished by the shipper or its agents for goods shipped in a container loaded and sealed by the shipper or its agents, and a carrier can demonstrate that no carrier verified the container's contents before the contract of carriage was issued, then the carrier may qualify the statement in a manner to indicate that no carrier has verified its accuracy (with a phrase such as "said to contain" or "shipper's load, stow, and count"). If a carrier delivers the container intact and undamaged with the seal intact and undamaged, then a statement in a contract of carriage that has been qualified as provided in this paragraph shall not constitute prima facie evidence that a carrier received the goods from the shipper as described in the contract of carriage, nor shall the qualified statement preclude any carrier from proving that no carrier received the goods from the shipper as described in the contract of carriage, unless the carrier was not entitled to qualify the statement under the requirements of this paragraph or a person relying on the statement in the contract of carriage proves that the contracting carrier was not acting in good faith when issuing the contract of carriage.

(b) If a carrier issues a contract of carriage stating the weight of goods shipped in a container loaded and sealed by the shipper or its agents, or the weight of the container including the goods, and a carrier can demonstrate that no carrier weighed the container before the contract of carriage was issued, then the carrier may qualify the statement of weight with an express statement that the container has not been weighed: Provided, That if the shipper and the contracting carrier agreed in writing before a carrier received the goods for shipment that a carrier would weigh the container, then the contracting carrier may not qualify the statment of weight. If a carrier delivers the container intact and undamaged with the seal intact and undamaged, then a statement in a contract of carriage that has been qualified as provided in this paragraph shall not constitute prima facie evidence that a carrier received the goods from the shipper as described in the contract of carriage, nor shall the qualified statement preclude any carrier from proving that no carrier received the goods from the shipper as described in the contract of carriage, unless the carrier was not entitled to qualify the statement under the requirements of this paragraph or a person relying on the statement in the contract of carriage proves that the contracting carrier was not acting in good faith when issuing the contract of carriage.

(4) (a) Except as provided in this section, ~~Such~~ a contract of carriage~~bill of lading~~ issued by or on behalf of a carrier shall be prima facie evidence of the receipt by that~~e~~ carrier of the goods as therein described.~~in accordance with paragraphs (3)(a), (b), and (c), of this section;~~

(b) When this Act applies. the rules stated herein shall apply in lieu of inconsistent provisions ~~*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," which is otherwise unaffected by this Act:

(~~2~~1) A contract of carriage~~bill~~ in which it is stated that the goods are consigned or destined to a specified person is a non-negotiable or straight bill of lading. Sea waybills, express bills, and similar non-negotiable bills of lading are straight bills of lading for the purposes of this Act.

(~~3~~2) A contract of carriage~~bill~~ in which it is stated that the goods are consigned or destined to the order of any person named in such contract of carriage~~bill~~ is a~~n~~ negotiable or order bill of lading. Any provision in a negotiable or order bill of lading or in any notice, contract, rule, regulation, or tariff that it is non-negotiable shall be null and void and shall not affect its negotiability within the meaning of this ~~a~~Act and the "Pomerene Bills of Lading Act" unless upon its face and in writing agreed to by the shipper. ~~(7)~~ The insertion in a~~n~~ negotiable or order bill of lading of the name of a person to be notified of the arrival of the goods shall not limit the negotiability of the bill of lading or constitute notice to a purchaser thereof of any rights or equities of such person in the goods.

(~~8~~3) A carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the contract of carriage~~bill~~ for the goods or, if the contract of carriage~~bill~~ is a~~n~~ negotiable or order bill of lading, by the holder thereof, if such a demand is accompanied by —

(~~a~~i) An offer in good faith to satisfy the carrier's lawful lien upon the goods,

(~~b~~ii) If the contract of carriage is a negotiable or order bill of lading, ~~P~~possession of the bill of lading and an offer in good faith to surrender, properly indorsed, the bill of lading which was issued for the goods, if the bill is an order bill; and

(~~c~~iii) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods, in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusa] or failure.

(~~9~~4) A carrier is justified, subject to the provisions of the ~~three following sections~~ subsections 3(4)(b)(5), 3(4)(b)(6), and 3(4)(b)(7), in delivering goods to one who is —

(~~a~~i) A person lawfully entitled to the possession of the goods, or

(~~b~~ii) The consignee named in a non-negotiable or straight bill of lading for the goods, or

(~~c~~iii) A person in possession of ~~an~~ negotiable or order bill of lading for the goods and terms of which the goods are deliverable to that person's ~~his~~ order; or which has been indorsed to that person ~~him~~, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee.

(~~10~~5) If~~Where~~ a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to anyone having a right of property or possession in the goods if it ~~he~~ delivered the goods otherwise than as authorized by subdivisions (~~b~~ii) and (~~c~~iii) of ~~the preceding~~ subsection 3(4)(b)(4); and, though the carrier ~~he~~ delivered the goods as authorized by either of said subdivisions, it ~~he~~ shall be so liable if prior to such delivery ~~it~~the —

(~~a~~i) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or

(~~b~~ii) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

Such request or information, to be effective within the meaning of this ~~section~~ paragraph, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods.

(~~11~~6) Except as provided in ~~section twenty-six~~ paragraph (14) of this subsection, and except when compelled by legal process, if a carrier delivers goods for which ~~an~~ negotiable or order bill of lading had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill of lading, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill of lad-

ing, whether such purchaser acquired title to the bill of lading before or after the delivery of the goods by the carrier and notwithstanding delivery was made to the person entitled thereto.

(~~12~~7) Except as provided in ~~section twenty six~~ paragraph (14) of this subsection, and except when compelled by legal process, if a carrier delivers part of the goods for which a~~n~~ negotiable or order bill of lading had been issued and fails either —

> (~~a~~i) To take up and cancel the bill of lading, or
>
> (~~b~~ii) To place plainly upon it a statement that a portion of the goods has been delivered with a description which may be in general terms either of the goods or packages that have been so delivered or of the goods or packages which still remain in the carrier's possession,

the carrier ~~he~~ shall be liable for failure to deliver all the goods specified in the bill of lading to anyone who for value and in good faith purchases it, whether such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto.

(~~13~~8) A contract of carriage shall describe the condition of the goods at the time a carrier received them from the shipper: *Provided,* that an "on board" contract of carriage shall also describe the condition of the goods at the time that they are loaded on board the ship or other mode of transportation. Any alteration, addition, or erasure in a contract of carriage ~~bill~~ after its issue without authority from the carrier issuing the same, either in writing or noted on the contract of carriage ~~bill~~, shall be void, whatever be the nature and purpose of the change, and the contract of carriage ~~bill~~ shall be enforceable according to its original tenor.

(~~14~~9) If ~~Where~~ ~~an~~ negotiable or order bill of lading has been lost, stolen, or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss, theft, or destruction and upon the giving of a bond with sufficient surety, to be approved by the court, to protect the carrier or any person injured by such delivery from any liability or loss incurred by reason of the original bill of lading remaining outstanding. The court may also in its discretion order the payment of the carrier's reasonable costs and counsel fees: *Provided,* a voluntary indemnifying bond without order of court shall be binding on the parties thereto.

The delivery of the goods under an order of the court, as provided in this paragraph ~~section~~, shall not relieve the carrier from liability to a person to whom the negotiable or order bill of lading has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods.

(~~17~~10) If more than one person claim the title or possession of goods, a ~~the~~ carrier may require all known claimants to interplead, either as a defense to an action brought against the carrier ~~him~~ for nondelivery of the goods or as an original suit, whichever is appropriate.

(~~18~~11) If some-one other than the consignee or the person in possession of the contract of carriage ~~bill~~ has a claim to the title or possession of the goods, and the carrier has information of such claim, the carrier shall be excused from liability for refusing to deliver the goods, either to the consignee or person in possession of the contract of carriage ~~bill~~ or to the adverse claimant, until the carrier has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead.

(~~19~~12) Except as provided in ~~the two preceding sections and in section nine~~ subsections 3(4)(b)(10), and 3(4)(b)(11), no right or title of a third person, unless enforced by legal process, shall be a defense to an action brought by the consignee of a non-negotiable or straight bill of lading or by the holder of an negotiable or order bill of lading against the carrier for failure to delivery the goods on demand.

(~~22~~13) If a contract of carriage ~~bill of lading~~ has been issued by a contracting carrier or on its ~~his~~ behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and the issuing of contracts of carriage ~~bills of lading~~ therefor ~~for transportation in commerce among the several States and with foreign nations~~, the carrier shall be liable to (a) the owner of goods covered by a non-negotiable or straight bill of lading subject to existing right of stoppage in transitu or (b) the holder of a~~n~~ negotiable or order bill of lading, who has given value in good faith, relying upon the description therein of the goods, or upon the shipment being made upon the date therein shown, for damages caused by the nonreceipt by the carrier of all or part of the goods upon or prior to the date therein shown, or their failure to correspond with the description thereof in the bill of lading at the time of its issue.

(~~26~~14) After goods have been lawfully sold to satisfy a carrier's lien, or because they have not been claimed, or because they are perishable or hazardous, the carrier shall not thereafter be liable for failure to deliver the goods themselves to the consignee or owner of the goods, or to a holder of the contract of carriage ~~bill~~ given for the goods when they were shipped, even if such contract of carriage ~~bill~~ be a~~n~~ negotiable or order bill of lading.*

(5) The shipper shall be deemed to have guaranteed to the carriers the accuracy at the time of shipment of the marks, number, quantity, and weight, as

*In subsection 3 (4) (b), paragraphs (1) to (14) are marked to show changes to the original Pomerene Act, ch. 415, 39 Stat. 538, *originally codified at* 49 U.S.C. §§ 81-122, rather than to the 1994 recodification, 49 U.S.C. §§ U.S.C. §§ 80101-80115.

furnished by the shipper ~~him~~; and the shipper shall indemnify the carriers against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carriers to such indemnity shall in no way limit their ~~his~~ responsibility and liability under the contract of carriage to any person other than the shipper.

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

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

(c) 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.

(d) (i) In any event the carriers and their ships 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 any party's ~~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.

(ii) Notwithstanding the limitation period established in subsection 3(6)(d)(i), if a timely suit is brought against a carrier under this Act, that carrier shall have three months from the date when judgment is entered or a settlement is concluded to bring an action for contribution or indemnity against any other party in the transaction.

(iii) Notwithstanding the limitation period established in subsection 3(6)(d)(i), if the contrct of carriage provides for arbitration, a claim shall be timely if a suit or an aribtration proceeding is commenced within one year after delivery of the goods or the date when the goods should have been delivered.

(e) In case of any actual or apprehended loss or damage the carriers and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods, including joint surveys when appropriate.

(7) After the goods are loaded onto a ship or other mode of transportation the contract of carriage ~~bill of lading~~ to be issued by the contracting carrier, ~~master, or agent of the carrier to the shipper~~ shall, if the shipper so demands, be a "shipped" contract of carriage ~~bill of lading~~: *Provided,* That if the shipper shall have previously taken up any contract of carriage for ~~document of title to~~ such goods, the shipper ~~he~~ shall surrender the same as against the issue of the "shipped" contract of carriage ~~bill of lading~~, but at the option of the contracting carrier such contract of carriage ~~document of title~~ may be noted at the port of shipment by the contracting 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" contract of carriage ~~bill of lading~~.

(8) (a) Any clause, covenant, or agreement in a contract of carriage relieving a ~~the~~ carrier or a ~~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: *Provided,* That this subsection shall not apply to a provision in a service contract, as defined in section 3(21) of the Shipping Act of 1984, to the extent that the provision affects only the rights and liabilities of the parties who entered into the service contract. A benefit of insurance in favor of a ~~the~~ carrier, or similar clause, shall be deemed to be a clause relieving a ~~the~~ carrier from liability.

(b) Any clause, covenant, or agreement made before a claim has arisen that specifies a foreign forum for litigation or arbitration of a dispute governed by this Act shall be null and void and of no effect if:

(i) the port of loading or the port of discharge is or was intended to be in the United States; or

(ii) the place where the goods are received by a carrier or the place where the goods are delivered to a person authorized to receive them is or was intended to be in the United States;

provided, however, that if a clause, covenant, or agreement made before a claim has arisen specifies a foreign forum for arbitration of a dispute governed by this Act, then a court, on the timely motion of either party, shall order that arbitration shall proceed in the United States.

Section 4, 46 U.S.C. App. § 1304

(1) Neither a the carrier nor a ~~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~~ subsection 3(1). 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 subsection.

(2) ~~Neither t~~The carriers and ~~nor~~ their ships shall not 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 ocean carrier in the navigation or in the management of the ship, unless the person claiming for such loss or damage is able to prove negligence in the navigation or management of the ship;

(b) Fire on a ship, *provided, however,* that this exemption applies only for the benefit of (i) an ocean carrier, unless the fire was caused by the its actual fault or privity ~~of the carrier;~~, with respect to a fire on a ship that it furnished, and (ii) a contracting carrier, unless the fire was caused by its actual fault or privity.

(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, its ~~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;

(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

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

Provided, That where loss or damage is caused in part by a breach of a carrier's obligations or the fault or neglect of a carrier and in part by one or more of the excepted perils specified in this subsection, the carriers shall be liable for the loss or damage to the extent that it is attributable to such breach, fault, or neglect, and shall not be liable for the loss or damage to the extent that it is attributable to one or more of the excepted perils specified in this subsection. If there is no evidence to enable the trier of fact to determine the extent to which the loss or damage is attributable to such breach, fault, or neglect and the extent to which it is attributable to one or more of the excepted perils specified in this subsection, then the carriers shall be liable for one-half of the loss or damage.

(3) The shipper shall not be responsible for loss or damage sustained by a ~~the~~ carrier or a ~~the~~ ship arising or resulting from any cause without the act, fault, or neglect of the shipper, its ~~his~~ agents, or its ~~his~~ servants.

(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 carriers and their ships 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. An unreasonable deviation shall be considered a breach of the carriers' obligations under this Act, but the remedies available for the breach shall be governed by the provisions of this Act, including subsections 4(2) and 4(5).

5 (a) (1) Except as provided in subsection 4(5)(b) and subsection 4(5)(e), the aggregate liability of ~~Neither~~ the carriers and ~~nor~~ their ships ~~shall in any event be or become liable~~ for any loss or damage to or in connection with the carriage ~~transportation~~ of goods in an amount shall not under any circumstances exceed~~ing $500~~ 666.67 Special Drawing Rights (as defined by the International Monetary Fund) 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,~~ two Special Drawing Rights per kilogram of gross weight of the goods lost or damaged, whichever is higher.

(2) If a container, pallet, or similar article of transport is used to consolidate goods, the number of packages enumerated in the contract of carriage as packed in such article of transport shall be deemed the number of packages for the purpose of this section as far as these packages are concerned. Except as aforesaid, such article of transport shall be considered the package.

(b) (1) The limits mentioned in subsection 4(5)(a) shall not apply if ~~unless~~ the nature and value of the ~~such~~ goods have been declared by the shipper before shipment and inserted in the contract of carriage ~~bill of lading~~. This declaration, if embodied in the contract of carriage ~~bill of lading~~, shall be prima facie evidence, but shall not be conclusive on a ~~the~~ carrier.

(2) By agreement between the contracting carrier, ~~master, or agent of the carrier,~~ and the shipper different ~~another~~ maximum amounts than those ~~that~~ mentioned in subsection 4(5)(a) this paragraph may be fixed: Provided, That such maximum amounts shall not be less than the figures above named except in a service contract, as defined in section 3(21) of the Shipping Act of 1984. Any agreement to alter the maximum amounts mentioned in subsection 4(5)(a) binds only the parties who entered into the agreement.

(c) In no event shall a ~~the~~ carrier or a ship be liable for more than the amount of damage actually sustained.

(d) ~~Neither t~~The carriers and ~~nor~~ their ships shall not be responsible in any event for loss or damage to or in connection with the carriage ~~transportation~~ of ~~the~~ goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the contract of carriage ~~bill of lading~~.

(e) A carrier shall not be entitled to the benefit of the limitation of liability provided for in subsection 4(5)(a) if it is proved that the loss or damage resulted (1) from an act or omission of that carrier, within the privity or knowledge of that carrier, done with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result, or (2) from that carrier's unreasonable deviation which that carrier knew or should have known would result in such loss or damage. One carrier's loss under this subsection of the benefit of the limitation of liability provided for in subsection 4(5)(a) shall not affect the right of any other carrier to claim that benefit.

(6) Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the contracting 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 a ~~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 a ~~the~~ carrier without liability on the part of the carrier except to general average, if any.

Section 5, 46 U.S.C. App. § 1305

A contracting carrier shall be at liberty to surrender in whole or in part all or any of its ~~his~~ responsibilities and liabilities under this Act, provided such surrender or increase shall be embodied in the contract of carriage ~~bill of lading issued to the shipper~~.

If a performing carrier's contract or tariff applies to the carriage of particular goods and provided for a higher level of responsibility or liability than that provided under this Act, then in an action against the performing carrier for loss or damage to those goods the claimant shall be entitled to the benefit of the higher level of responsibility or liability as provided in the performing carrier's contract or tariff.

~~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 contract ~~bill of lading~~ of any lawful provision regarding general average.

Section 6, 46 U.S.C. App. § 1306

Notwithstanding the provisions of the preceding sections, a contracting 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 carriers for such goods, and as to the rights and immunities of the carriers in respect of such goods, or their ~~his~~ obligations as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of their ~~his~~ servants or agents in regard to the receiving, loading, handling, stowage, carriage, custody, care, ~~and~~ discharge~~,~~ ~~and delivery~~ of the goods carried by sea: *Provided*, That in this case no ~~negotiable~~ 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.

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.

Section 7, 46 U.S.C. App. § 1307

~~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 shhip 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.~~

Section 8, 46 U.S.C. App. § 1308

The provisions of this Act shall not affect the rights and obligations of the carriers under the provisions of the Shipping Act, 1916, the Shipping Act of 1984, or of any amendments thereto; 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.

Section 9, 46 U.S.C. App. § 1309

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 contracts of carriage ~~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, the Shipping Act of 1984, or of any amendments thereto ~~as amended~~.

Section 10

[repealed in 1940]

Section 11, 46 U.S.C. App. § 1310

Where under the customs of any trade the weight of any goods in bulk ~~cargo~~ inserted in the contract of carriage ~~bill of lading~~ is a weight ascertained or

accepted by a third party other than a ~~the~~ carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the contract of carriage ~~bill of lading~~, then, notwithstanding anything in this Act, the contract of carriage ~~bill of lading~~ shall not be deemed to be prima facie evidence against the carriers of the receipt of goods of the weight so inserted in the contract of carriage ~~bill of lading~~, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

Section 12, 46 U.S.C. App. § 1311

~~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.~~

Section 13, 46 U.S.C. App. § 1312

This Act shall apply to all contracts ~~for~~ that include carriage of goods by sea to ~~or~~ from, or through ports of the United States ~~in foreign trade~~. As used in this Act, the term "United States" includes its districts, territories, and possessions. ~~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 e~~Every ~~bill of lading or similar document of title which is evidence of a~~ contract of ~~for the~~ carriage ~~of goods by s~~ea covering a shipment from a ports of the United States, ~~in foreign trade,~~ shall contain a statement that it shall have effect subject to the provisions of this Act.

Section 14, 46 U.S.C. App. § 1313

~~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 sahll be not less than ten days from the issue of the proclamation.~~

~~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 tiele I which may have thus been suspended.~~

Section 15, 46 U.S.C. App. § 1314

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 docuement of title issued, whether before or after such date of approval in pursuance of any such contract as aforesaid.~~ Cases in which the goods were received by a carrier prior to the effective date of this Act shall be governed by the law that would have applied but for the passage of this Act.

Section 16, 46 U.S.C. App. § 1315

This Act may be cited as the "Carriage of Goods by Sea Act of 1995."

MARITIME LAW ASSOCIATION OF THE UNITED STATES

DISSENTING REPORT

of Members of the
Committee on Carriage of Goods
About
REVISING THE CARRIAGE OF GOODS BY SEA ACT
April 3, 1995

The undersigned dissent, although not all for the same reasons, from the proposal to revise COGSA. The COG proposal is a splendid example of a bar association project. We regret we cannot endorse it.

1. What's at stake?

Elimination of the carrier's defense of negligence in navigation or management of the vessel.

2. Anything else?

Not really. The balance of the COG proposal either already reflects current law; seeks to reverse small points of practice; or stretches to apply maritime law to cover multimodal carriage. For convenience, these aspects are referred to as "Tidying Up."

3. What drives the proposal?

A. Although it is conceded by all segments of the industry that the Visby Amendments would be an improvement over the Hague Rules, a small group of large self-insured cargo interests has deterred the State Department from sending the Visby Amendments to the Senate for ratification, threatening a political fight in Congress unless the Department sends up the Hamburg Rules instead for Senate consideration. The rest of the shipping industry — including the MLA — opposes the Hamburg Rules and would block their ratification by the Senate. This has resulted in a deadlock because the State Department, as a matter of policy, will not send any technical treaty to the Senate over the objection of a vocal segment of the affected industry.

B. Allegedly, COGSA is obsolete, implying that Visby would update COGSA if only Visby could be ratified.

C. Allegedly, the error in navigation and management defense is not worth saving and, unless something is done, the enactment of the Hamburg Rules will be inevitable as support for them gains momentum in other countries.

4. What are the principal objections to the COG proposal?

A. Cost.

The COG proposal is not cost effective. Except for governments and a few large self-insured companies, cargo damage risks are generally covered by cargo insurance in order to provide reasonably prompt and more-or-less certain reimbursement of losses. Some aspects of crew negligence, like a failure to care for the cargo, puts only the cargo at risk. Such destructive behavior is deterred by making owners vicariously liable for the crew's neglect. But other aspects of crew negligence, like an error in navigation, puts both the cargo and ship equally at risk. There can be no higher deterrence of crew behavior than when the negligence endangers owners' property and the lives of the seafarers themselves. No greater deterrence and nothing else of practical use are gained by making owners vicariously liable for damage to cargo from such neglect.

The shipping business is not a morality play. Crew negligence is not sin. If there is no practical benefit to be gained from risk reallocation, then the decision should be made on economic grounds.

Without doubt, eliminating the error in navigation and management defense would cause an increase in the cost of p. and i. insurance which would need to be recaptured in higher freight rates. But since the requirements for cargo insurance would continue unabated, there is a consensus within the insurance industry that the level of cargo insurance premiums would not diminish proportionally, although the exact scope of disparity has so far resisted prediction. There is no doubt, however, that ocean shipping would be saddled with increased cost without any corresponding commercial benefit.

B. Absence of Equivalent Tradeoffs.

Although touted as a commercial compromise, the COG proposal does not actually involve a trade of major benefits to carriers in exchange for increasing their burdens. The primary consideration is a slight improvement in the existing case law to protect containerships from liability for cargo shortages in sealed containers. There is nothing in the COG proposal of material benefit to owners of tankers or bulk carriers.

C. COGSA is Not Obsolete; Hamburg is Not Inevitable

The overwhelming majority of nations which have endorsed any international regime of liability for cargo damage are adherents of the Hague Rules or the Visby variations of the Hague Rules. The Hamburg Rules are embraced by only a small number of countries, several landlocked, and even some of those, like Egypt, have delayed their coming into force. Mexico, which was a leader of the Group of 77 that promoted the Hamburg Rules, has never ratified them. Australia has postponed applying them for at least three more years.

D. Uniformity

The COG proposal for a peculiar American legal regime is contrary to the policy of promoting uniformity. Since the turn of the century, global efforts have been made to reform private maritime law on a uniform and commercial basis through international organizations like the CMI and IMO. See, e.g., the recent Salvage Convention and revision of the York-Antwerp Rules. It is ironic that the current controversy about carriage of goods by sea has been brought about by two other international agencies, UNCTAD and UNCITRAL, whose avowed purpose was to promote greater uniformity but whose prime motivation was to advance the political agenda of Third World countries.

The COG proposal would not serve as another Harter Act, providing American leadership to the international community. When the Harter Act was enacted, there were no international organizations seeking to promote uniformity in the development of maritime law. Indeed, the CMI was organized just four years later, precisely to meet that need. To abandon an international approach in favor of a nationalistic one would draw the condemnation of the international community upon another example of America's arrogance, as already seen in OPA 90.

In their report, the Committee majority belittles existing uniformity by describing a crisis of international fragmentation which is more apparent than real. To be sure, in a number of countries abroad, where there is no Visby-Hamburg deadlock, opportunities have been taken to tidy up in disparate ways some ancillary points of ocean carriage law. But the core of material uniformity on Hague Rules principles has remained intact — i.e.

(i) the duty of the carrier to prove exercise of due diligence, to care for the cargo, to issue a bill of lading, and to avoid deviation;

(ii) the right of cargo to rely on a clean bill of lading; and

(iii) the availability to the carrier of a fire defense, an error in navigation and management defense, and package limitation of liability.

The vast majority of nations continue to adhere to these core principles.

Other variations of national law are either marginal or simply codify existing practices which generally are already followed.

The major schism continues to be between the large number of maritime countries, on the one hand — who retain the fire defense as well as the error in navigation and management defense — and the small group of mostly non-maritime countries, on the other hand — who have opted to eliminate both. The CMI, in its 1990 meeting in Paris, deplored the gap but concluded it was unbridgeable.

Rather than building a bridge, the COG proposal would open a new fissure, by retaining the fire defense while discarding the error in navigation and management defense.

E. There is a Better Way.

The MLA has long been a supporter of the Visby Amendments and an opponent of the Hamburg Rules. In the past, all MLA efforts to promote Visby have focused on trying to persuade the State Department to send the Amendments to the Senate for ratification. The ABA likewise came out in favor of early ratification of Visby, and tried to head off opposition by urging that a new diplomatic conference be called later, at which elimination of the error in navigation and management defense could be "considered."

The MLA has never made a concerted effort to get a Visby bill introduced because it foresaw a fight with uncertain outcome, especially absent State Department backing. It is clear that, if the COG proposal finds its way into a bill, there will surely be a fight, in which event the MLA membership will be fractured. But if the MLA believes it is now time to battle for reform of ocean carriage legislation, it would be far better to get behind a Visby bill which virtually the entire MLA would support, rather than a peculiar new legal regime which at best only part of the MLA can support.

Steps should be undertaken to prepare the ground for a Visby bill. First, major international shipowning organizations — like BIMCO, ICS, INTERTANKO and INTERCARGO — should be urged to draft a new Clause Paramount embodying the Visby Amendments and circulate it to their members with the recommendation that they incorporate it in all future bills of lading. In point of fact, the MLA earlier this year, in response to a CMI Questionnaire, made precisely such a recommendation. A Visby bill will be far more attractive to Congress if it is presented as simply a codification of existing private arrangements already widely followed.

Secondly, there are a number of tidying up suggestions in the COG proposal which may merit support and can be expected to create little controversy by themselves. Those could be tacked on to a Visby bill, in much the same way as all of the Scandinavian countries tidied up their laws last year when they implemented the Visby Amendments in the Nordic Maritime Codes. Opposition by self-insured companies to such a Visby bill, with all of its additional positive elements, would then more clearly be seen by the Congress as not a rejection of the merits, but simply a political maneuver to hold up law reform as a hostage to parochial interests, thereby improving chances for passage of the bill.

F. Some of the Details of the COG Proposal are Not Well Thought Out.

The full Carriage of Goods Committee actually never got a chance to debate and vote upon any details of the COG proposal. From the outset three years ago, the authors of the proposal made clear that all of the discussions would be carried on only within the 10-person ad hoc subcommittee. Everyone was free to make recommendations to, but not participate in, the discussions of the ad hoc subcommittee. In the end, the subcommittee intended to present the proposal as if it were a finely crafted watch, representing compromises among many different conflicting interests. It was said that since no one piece of the COG proposal could be changed without some interest withdrawing its vital support, no debate about any of the details would be conducted by the whole Carriage of Goods Committee.

Indeed, the COG proposal was presented for the first and only open discussions by the entire Carriage of Goods Committee at a special meeting in New York, limited to 2-1/2 hours, on March 10. Previously, the Committee had received progress reports about the ad hoc subcommittee's work, but the Committee was not permitted to disapprove any of the details, on the ground that such determinations were counterproductive and premature. When the COG proposal finally came before the Committee, it was presented as a unit, with no suggestions for change entertained (except one or two new refinements suddenly found desirable by the ad hoc subcommittee).

It is anticipated that an effort will be made to submit the COG proposal to the MLA on May 5 the same way, as a unit, with little if any opportunity to debate the details.

The March 10 special meeting of the Carriage of Goods Committee was unusual in a number of respects. To begin with, it is not clear why a special committee meeting was called. Ostensibly, it was to expedite consideration of the proposal at the May 1995 MLA meeting, anticipating that there might be a dissent and the need for 30 days notice under the By-Laws. But if the COG proposal had been brought before the regular meeting of the Committee on May 3, the worst that might have happened, if the proposal were approved, would have been to postpone consideration of it by the MLA until the Fall Meeting in Kauai. The need for speed was not manifest. After all, the proposal dealt with changing nearly 60 years of statutory law and was itself three years in the making.

One advantage of delay would have been that more out-of-town members of the Committee could have attended the meeting in person. Instead, at the special meeting, proxies were authorized and the members of the ad hoc subcommittee who drafted the COG proposal walked in with many times over the number of proxy votes needed for approval. There was virtually no time for opponents to draft and circulate comments to the Committee which were critical of the proposal.

Since the March 10 meeting was the first time the proposal had been put to the Committee for even a semblance of binding discussion, those who voted by proxy had no benefit of hearing opposing views. The vote was a foregone conclusion. The special meeting might just as well never have been held.

In the interest of promoting understanding about the nitty gritty of the debate over the Visby Amendments, the Hamburg Rules, and the COG proposal, there are two Appendices to this Dissent, comparing the material innovations and tidying up of all three documents.[1]

It was a pity that the Committee was foreclosed from discussing the details of the proposal. Apart from the basic disagreement, over surrender of the defense for negligence in the navigation or management of the vessel, there were a number of details of the COG proposal which ought to have been reviewed. It is hard to believe that changes in the details would have eliminated chances for enactment of the COG proposal by Congress. For example,

(i) Enacting Clause.

a. The fifth line refers to an "action," a term which does not seem to include an 'arbitration." This deficiency was pointed out to the ad hoc committee which, nonetheless, without explanation, made no change. It is not apparent what vital interest would withdraw support for the proposal if the change were made.

b. The fourth line applies to "defenses and limitations of liability *** and the responsibilities" imposed by the proposed Act, but since the statute would apply as well to "claims" (such as claims against the shipper as well as the carrier) it probably ought to say so. This deficiency was pointed out to the ad hoc committee which, nonetheless, without explanation, retained the original wording. It is not apparent what vital interest would withdraw support for the proposal if the change were made.

c. The last sentence extends an "independent basis for admiralty jurisdiction" to cargo loss during a train wreck while the cargo is being carried from the middle of the country to the port of loading. Virtually every member of the Carriage of Goods Committee, who was not a member of the ad hoc subcommittee and who commented about this provision, suggested that it might well be unconstitutional. Nonetheless, the ad hoc committee, without explanation, made no change. It is not apparent what vital interest would withdraw support for the COG proposal if the provision were deleted.

(ii) Section 1.

[1] The full text of the Visby Amendments is republished in 6 Benedict on Admiralty Doc. No. 1-2. The full text of the Hamburg Rules is republished in 6 Benedict on Admiralty Doc. 1-3.

a. The majority report indicates that the definitions in subsections (b) and (e) are intended to convert COGSA into a multimodal legal regime. This is done almost casually, without any effort to examine whether such a regime would meet all of the concerns addressed in the Multimodal Convention or the Tokyo Rules.[2] There is no indication in the report that either of those documents were even compared to the majority proposal. It is not apparent what vital interest would withdraw support for the COG proposal if its intermodal application were further examined.

b. The proposal preserves the Harter Act just for carriage of live animals, on the ground that such carriage is rare. Both the newly enacted Nordic Maritime Codes and the Hamburg Rules provide some coverage for carriage of live animals and it is unknown why the ad hoc subcommittee felt that the Harter Act should survive solely to apply to such carriage. It is not apparent what vital interest would withdraw support for the COG proposal if it were extended to apply to live animals.

(iii) Section 3. Although the majority report does not refer to the point at all, subsection (4)(b) was intended to extend the Pomerene Act, which now applies only to outbound cargoes, to inbound cargoes as well. Unhappily, while the ad hoc subcommittee was engaged in its work, Congress without notice amended the Pomerene Act. Although informed about this regrettable development, the ad hoc subcommittee persisted in incorporating the superseded terms of the old Pomerene Act into the COG proposal, rather than the new terminology. There is no explanation for this practice which, to say the least, is unique in the history of Federal legislative drafting. It is not apparent what vital interest would withdraw support for the COG proposal if the new terms of the revised Pomerene Act were incorporated instead.

(iv) Section 4.

a. Subsection 2(b) excuses the carrier from liability for employee negligence causing a fire but retains the liability of the employee. It was pointed out to the ad hoc subcommittee that the loophole would simply lead to union demands for owners to extend p. and i. coverage to their employees, which would completely eviscerate the fire defense in the more developed flag states. Nonetheless, without explanation, the majority adhered to the original terms. It is not apparent what vital interest would withdraw support for the COG proposal if the fire defense were extended to the carriers' employees.

b. Subsection 2 also alters the burden of proof on apportionment laid down in *Schnell v. VALLESCURA*, 293 U.S. 196 (1934). The majority report suggests that the continued vitality of *Schnell* was questionable in light of the

[2] The Multimodal Convention is republished at 6 Benedict on Admiralty Doc. No. 1-4. The Tokyo Rules are republished at 6 Benedict Admiralty Doc. No. 1-4A.

proportional fault ruling of the Supreme Court in *Reliable Transfer*. But many other major maritime nations, including the United Kingdom, also apply proportional fault under the 1910 Collision Convention. England's existing case law is consistent with *Schnell* and both the recently enacted Nordic Maritime Codes as well as the Hamburg Rules codify *Schnell.* It is not apparent what vital interest would withdraw support for the COG proposal if *Schnell* were left intact.

c. If *Schnell* deserves to be overruled, a question then arises about how to go about it. The proposal provides that if there is no evidence to enable the trier of fact to apportion fault, the carrier would be liable for one-half of the loss or damage. It has been repeatedly pointed out to the ad hoc subcommittee that there could be more than just two causes of damage, and liability ought to be reduced proportionally rather than solely by halves. Nonetheless, without explanation, the proposal retains the provision for carrier liability to be reduced to no less than half. It is not apparent what vital interest would withdraw support for the COG proposal if *Schnell* were overruled and carrier liability were reduced proportionally.

(v) Section 13. The proposal retains the 1936 terminology extending COGSA to "districts, territories, and possessions." It was pointed out to the ad hoc committee that both Puerto Rico and the Northern Mariana Islands were "commonwealths," a new political status, putatively not within the quoted terms. See *Romero v. United States,* 38 F.3d 1204 (Fed. Cir. 1994). It was suggested to the ad hoc committee that "commonwealths" be added for clarity. Nonetheless, the proposal, without explanation, remained unchanged. It is not apparent what vital interest would withdraw support for the COG proposal if it were explicitly extended to cover all American commonwealths.

There are additional aspects of the COG proposal which are being reviewed by at least one other MLA Committee; for example, the Committee on Maritime Arbitration will meet to discuss it on March 29.

THE COG PROPOSAL SHOULD NOT BE APPROVED BY THE MLA.

Name of COG Committee Member	Parts of Dissent Joined
Michael Marks Cohen	All.
Helen M. Benzie	All
Wade S. Hooker, Jr.	All
John G. Ingram	All
Douglas A. Jacobsen	All
Geoffrey C. Jones	4(D), 4(E), generally 4(F)
Frank M. Marcigliano	All
Rene S. Paysse	All
Richard E. Repetto	All
Charles E. Schmidt	All
Alice E. Teal	All
Donald E. Zubrod	All

Appendix I.

CONTRASTING MATERIAL INNOVATIONS AMONG VISBY, HAMBURG, AND COG PROPOSAL

Subject	Visby	Hamburg	COG Proposal
Liability for delay in delivery	No Change (No liability)	Carrier may be liable**	No change
Liability for negligence in navigation and management	No Change (No carrier liability if carrier proves due diligence)	Carrier is liable unless it proves it took all measures that could be reasonably required*	Carrier is liable if cargo can prove negligence*
Liability for Fire	No change (Carrier is liable only if cargo proves fault and privity)	Carrier is liable if cargo can prove negligence*	No change
Unit Limitation	666.7 SDR per package or 2 SDR per kg	835 SDR per package or 2 SDR per kg	666.7 SDR per package or 2 SDR per kg
Unit Definition	If enumerated, contents of containers are the package	If enumerated, contents of containers are the package	If enumerated, contents of containers are the package
Loss of Limitation	Intentional or Reckless*	Intentional or Reckless*	Intentional or Reckless*
Qualifying Statements for Sealed Container	No change (silent)	No change	Qualifying statements OK in some circumstances*

*New statute probably would be required.

Appendix II.

CONTRASTING TIDYING UP OF LAW AMONG VISBY, HAMBURG AND COG PROPOSAL

Subject	Visby	Hamburg	COG Proposal
Time bar for indemnity	Extended at least 3 months*	Extended at least 90 days*	Extended at least 3 months*
Claim for tort	Visby applies	Hamburg applies	COGSA applies
Agent entitled to unit limitation	Yes	Yes	Yes
One unit limitation applies to liabilities of all parties in the aggregate	Yes	Yes	Yes
Definition of shipper expanded		Yes*	Yes*
Definition of bill of lading expanded		Covers any document for carriage of goods by sea including waybills	Covers documents and EDI
Apportionment of Damage		Burden of proof on carrier	If no evidence, damages evenly split*
Live Animals		Partially covered	Not covered
Deck carriage		Authorized in some circumstances	Authorized in some circumstances
Scope of carriage		Applies to through carriage by sea only (port to port)*	Applies to multimodal (receipt to delivery)*
Freight prepaid and no demurrage due		Unless otherwise endorsed on bill of lading*	

Letter of Indemnity for Clean Bill of Lading	Valid some circumstances	
Notice of loss to carrier	1-15 days*	Retains up to 3 days
Notice of loss to shipper	90 days*	
Time Bar	2 years*	Retains 1 year
Jurisdiction	Expands venue*	Restricts venue*
Arbitration	Authorizes arbitration but expands venue*	Authorizes arbitration but restricts venue*
Admiralty jurisdiction of Federal court to enforce		New basis for multimodal jurisdiction, presumably to preserve maritime liens*
Application of Pomerene Act to inbound cargo		Superseded sections of Pomerene Act incorporated*
Lower limitation for service contracts		Authorized*
Retla Rust Clause		Invalidated*

*New statute probably would be required.

ROYAL INSURANCE
MARINE DIVISION
April 5, 1995

VIA FACSIMILE 410 539 5223
William R. Dorsey, III, Esq.
Secretary
The Maritime Law Association of the United States
250 West Pratt Street
Baltimore, MD 21201

Re: Proposed Revision of The Carriage Goods By Sea Act

Dear Mr. Dorsey:

Enclosed please find a copy of a letter written to Mr. Chandler on November 12, 1993 outlining objections to some of the revisions contained in the above. As Mr. Bilski and the undersigned stated these are objections which form a dissent from a practical point of view and they remain as they were communicated then. I am pleased to receive copies of the dissents as written by Michael Marx Cohen, Esq., Professor Joseph C. Sweeney and Peter D. Fenzel, Esq.

Sincerely,

Alice E. Teal
Senior Adjuster
Marine Subrogation Department

ROYAL INSURANCE
MARINE DIVISION
November 12, 1993

George F. Chandler, III, Esq.
Hill, Rivilins, Loesberg, O'Brien, Mulroy & Hayden
21 West Street
New York, NY 10006-2996

Subject: Revising The Carriage Of Goods by Sea Act

Dear Mr. Chandler:

We are writing to express our opinion with regard to the proposed revisions to the U.S. Carriage of Goods By Sea Act formulated by the Committee on the Carriage of Goods, of the Maritime Law Association.

For the sake of good order, we will comment only on those revisions where we have what we consider a legitimate objection.

As an overview, it appears to us that the revisions are heavily tilted towards the carrier's interest and with rare exceptions, generally appear detrimental to cargo's interest. While we fully realize that the carrier has legitimate need to limit his liability and cannot be responsible for everything that may occur during an ocean voyage. We are certainly not advocates of the Hamburg Rules. We believe these revisions have swung the pendulum too far in the other direction.

It is evident that The Royal has a clear and definable interest in the outcome of these revisions.

We are not attorneys. We will comment only on the practical aspects of the proposed changes. We will leave the legal technicalities to those more qualified than ourselves to either voice objections or acquiesce.

In any event, in our judgment, the matter at hand is too important to not have a proper forum with all sides participating before any motions for adoption be put before the membership.

SCOPE OF COVERAGE - This revision gives the benefit of **COGSA** protection to everyone involved with the transportation of the cargo. In our opinion, this proposal is much too broad. Existing statues and tariffs governing the inland movement are sufficient and beneficial to cargo and the carriers. In many instances, if it can be proven that the damage or loss occurred while in the custody of the railroad or trucker; cargo can and will recover significantly more than the Ocean Carrier's limitation of liability. We see no reason to change this.

This proposal would also allow the ocean carrier with its reduced exposure to engage any party to represent them as handlers of cargo to its ultimate destination. In other words, by making all modes of transportation subject to the ocean carrier's limitation, it doesn't matter if any or all of the subcontractors are qualified, insured or reputable to handle or carry the cargo.

Furthermore, the revision does not focus the problem of Port Authority delivery in foreign countries. The person receiving the cargo in this instance is the Port Authority and once delivered the carriers liability ceases. While addressing the inland movement here in the United States, the revision does nothing to address the problem of **COGSA** shipments delivered overseas. To have all modes of transportation and handling subject to the same limitation is not endorsed by cargo interests and we register our objection to this proposed revision.

DECK CARRIAGE - It is accepted that modern shipping practice dictates that containers will be stowed on deck. However, this revision again gives the carrier carte blanche to stow anything they choose on deck without extended risk and responsibility.

In the past, (as we are all aware) carriers have in fact stowed unsuitable cargoes on deck and have paid dearly in the case where damages resulted from such stowage. It was a risk that they took in any given instance. The key here is that the carrier took the risk willingly and knew the repercussions of their actions. If the risk is removed by the proposed revision the carriers can utilize on deck stowage as a standard practice with no regard for susceptible shipments. This revision is without reason or regard for the accomodation of the kinds of cargo to be carried.

THE HIMALAYA CLAUSE - The wording of the report is our first problem in this case. To begin the paragraph with the words "In an attempt to evade the carrier's limitation and defenses," appears to us to be heavily weighed against cargo. When cargo brings an action against other entities involved with the movement, it is usually because the other entities were the responsible parties. We trust it is agreed that it is commonplace for plaintiffs to proceed in this manner. It stands to reason that cargo is not "evading" anything, but simply seeking out the proper defendant. The Himalaya clause was never extended to cover inland carriers and other independent contractors. Any inference that it does should be deleted as it is an error and is misleading.

Previously, we expressed our opposition to the entire concept of extending the protection of **COGSA** to all parties involved with the carriage of goods. At the risk of being redundant we will once again voice our objection.

THE APPARENT ORDER & CONDITION OF THE GOODS - It is inconceivable to us that the carrier on the basis of this revision, will be able to rubber stamp his way out of liability. The carrier has the ability to verify the accuracy of the B/L contract. Goods received by the carrier in the break-bulk form are accepted in visible (apparent) condition. Bulk cargoes, by virtue of their nature necessitate the carrier's checking the quantity and quality of the goods. Weighing containers on receipt to verify the B/L weight is another example. it is ludicrous to envision a contract of carriage where the carrier is not bound by what is stated on the bill of lading. "Qualifying" statements are a misnomer when used in connection with a contract of carriage. Either the carrier accepts the particulars provided by their customer along with their freight, or the carrier verifies the shipment with the means at their disposal. The proposed wording here is too ambiguous for a bill of lading.

It appears that this revision is relieving the carrier from showing the true condition of the goods even in the instance where he knows that the cargo was damaged on receipt. Here we are flirting with fraud. Banks and insurance companies rely on clean Bills of Lading when conducting their business. This revision degrades the concept of a clean Bill of Lading. it leaves the door open for fraud to be committed on Banks, consignees and underwriters. In summation, it is too broad and therefore totally unacceptable to cargo.

SERVICE CONTRACTS - In this case we are not sure whether to object or not. The statement "In order to give maximum flexibility to companies in this situation without depriving unsuspecting third parties of their rights, the amended Act permits the immediate parties to a service contract to reduce the carriers liability below **COGSA** levels," is unclear to us.

For instance, will this allow shipper and the carrier to enter into a service contract without the knowledge of third parties such as the consignee or even the cargo underwriter? If so, will the consignee and underwriter be bound by the provisions of the service contract. If not, then how does this affect the carrier's liability with respect to unsuspecting third parties? A more detailed explanation on precisely how the rights of involved third parties will be protected, is in order. Until this is explained in more detail we cannot comment further on this revision.

DEVIATION - In our opinion giving the protection of **COGSA** to a carrier who is purposely acting in an unreasonable manner is a violation of acceptable business standards. Business must be governed by acceptable rules and regulations. If those regulations are purposely ignored, then it stands to reason that the benefit of the existing protection should not be afforded. If this were allowed to happen, we would be in effect be rewarding the transgressor while sending a message to the carrier who acts responsibly that it doesn't matter in any case. It encourages carriers to act irresponsibly. We oppose the revision as it is written.

UNIT LIMITATION - We agree in principle to the limitation being set on a weight basis @ 2,75 SDR's. The problem here is placing the limitation solely on a weight which basis does not relate to low weight, high value cargo. Perhaps we should take a page from Visby in this instance. It is our suggestion that this revision be modified to include a package consideration. An example: 2.75 SDR's per kilo or $1,000.00 per package, whichever is greater.

We have previously discussed our objection to the elimination of carrier responsibility, without the benefit of **COGSA**, for unreasonable deviation. The proposal of not allowing Shippers a "fair opportunity" to declare a higher value is unacceptable. If it is not afforded then the unit limitation should be lost as a protection to the carrier. Finally on this subject, it is our opinion that the "Willful Misconduct" doctrine is unworkable and therefore innocuous.

FOREIGN TRADE/HARTER ACT - It is evident that the provisions, as written, are geared to cover all aspects of shipping and are not intended to be limited to cargoes moving to and from foreign ports as is the present case. In principle, we do not oppose this revision, with the exception of those matters already discussed. What we do have in this instance is a question. Is the Act as revised intended to cover all aspects of shipping? For example would barges traveling from St. Louis to New Orleans containing cargo not destined for overseas be subject to the Act? We realize that the key phrase here may be "Carried

by Sea" but these barges also will be involved in sea trade. At what point in transit does the Act apply? For part of the voyage or for the entire voyage even if only a small portion of the actual transit involves carriage by Sea?

The above represents the views of Royal Insurance with respect to the proposed revisions as they are presently written. Royal Insurance has been an active member of the Marine Industry for many years. As members of that industry and The Maritime Law Association we have a vested interest in what hapens to **COGSA.**

We are not opposed to change and it may well be time for change in this instance. It is our opinion however that the revisions put forward are not in the interest of cargo or of cargo underwriters. The revisions appear to work solely towards the benefit of carriers and we vigorously register our opposition.

We know that the *Ad Hoc* Committee worked diligently on this project and we wish to thank them for their dedication to the subject. In closing, we wish to thank you for your attention to this matter and hope that some of our observations will be appreciated.

Donald J. Bilski
Manager
Marine Subrogation Dept.

Alice E. Teal
Senior Adjuster
Member Of The Committee

DONOVAN PARRY WALSH & REPETTO
April 5, 1995

VIA FAX & MAIL (410) 539 5223
William R. Dorsey, III, Esq.
Secretary, Maritime Law Association
250 West Pratt Street
Baltimore, MD 21201

RE: Report of Ad Hoc Study Group
and Resolution of the Committee on
the Carriage of Goods

Dear Mr. Secretary:

Thank you for your letter of March 20, 1995 regarding committee minority reports to the proposed resolution to be presented to the Association on May 5th.

I, too, as a dissenting member of the Carriage of Goods Committee and a member of the Maritime Arbitration Committee, must voice my opposition to the proposed resolution.

While the work of the Ad Hoc Committee shows great scholarship and effort, it does not deal with the practical business considerations of today's dry-cargo world and does not treat the reality that most shippers and consignees do not deal directly with responsible ocean carriers, and do not have any opportunity to bargain for the fate of their cargoes.

The proposed amendments do not address the reality of the U.S. Consignee who parts with his dollars to purchase an N.V.O.C.C. bill of lading for an, unknown to the consignee, consolidated shipment; stuffed, perhaps improperly, into a container of questionable age and ownership; with other goods that may or may not be compatibile. In this age of feeder ships and slot charters, even the name of the carrier or the vessel, if any, on the bill of lading becomes of questionable validity.

The proposed "Enacting Clause, 46 USC APP 1300, and 46 USC APP 1301 create an all encompassing definition of "carrier" and "contract of carriage." Thus, any one who touches the goods becomes entitled to the exemptions, immunities and limitations of the act. There is no reason for an act, which was originally intended to regulate oceans bill of lading, to now be extended to some remote warehouse located in the chain of commerce.

The definition of contract of carriage applies to "all contracts". Thus an act designed or regulate the common carriage of goods is now to be extended to private carriage of law. There is no commercial reason for this to be done.

The proposed amendments are an effort to make the Multi-Modal Convention and/or the old Tokyo Rules part of our domestic legilation. However, unlike the Multi-Modal Convention, there is no provision for granting jurisdiction over the contracting carrier at either the place of shipment or the place of delivery.

Under the amendments a "performing carrier" is responsible only during his performance (Section 2(1)), while the "contracting carrier" is responsible for the entire carriage.

The consignee will often not know who the performing carriers were. It only has a N.V.O.C.C. document that says it is merely a receipt, and not a contract of carriage. The proposed amendments do not deal with this problem.

The expansion of the formally contractual "Himalaya" Clause to a statutory right to limitation of liability for anyone who touches cargo in transit is not commercially necessary or useful.

In an age when extremely sophisticated and expensive equipment is shipped in small and light weight units, the duties ascribed to all the participants

defined as carriers will be meaningless, since their violation now entails no significant liability.

Proposed Section 1303 (2) (ii) and (iii) (a) and (b) deal a severe blow to the negotiability of bills of lading and their ability to act as documents of title. The description, number and weight of the goods, as contracted for, can no longer be relied upon by the innocent purchaser for value of an artfully "qualified" bill of lading. Must all contracts of sale now specify that the goods must be weighed by a carrier?

Proposed, 46 USC APP 1304 (4) extension of the package limitation to "deviation" situations would be welcome only in the 7th Circuit. The buy out of subsection (e) which implicitly places the burden of proving that the carrier acted recklessly on the consignee, is no deterrent to a reckless carrier or anyone defined by the proposed amendments as a carrier

The above addresses only a few of the problems with the proposed amendments. Others will be raised in May.

I trust the membership will heed the words of the other dissenters and vote NO! in May, but also vote yes to a continued study of proper amendments.

Very truly yours,
DONOVAN PARRY WALSH &
REPETTO
BY: Richard E. Repetto

LAW OFFICES OF
PETER D. FENZEL

April 4, 1995

VIA FACSIMILE: (410 539-5223
William R. Dorsey, III, Esq.
Secretary, Maritime Law
Association of the United States
250 West Pratt Street
Baltimore, MD 21201

RE: Report and Resolution of the Committee
on the Carriage of Goods

Dear Mr. Dorsey:

Thank you for your letter of March 20, 1995. I do indeed wish to add my voice in opposition to the majority report and resolution.

The unilateral revision of COGSA by the United States would be an error. This Association, throughout the twentieth century, has labored hard and well to foster internationally uniform systems of maritime law. On the eve of the twenty-first century our Committee would have the MLA abandon those labors. No sophistry can conceal the simple truth that the course the Committee has taken conflicts with well founded, if not essential, policy of the Association.

In saying this, I have only praise for the superb effort of the drafting subcommittee and for the spirit of compromise, which made the draft bill possible. It is not so much the text of the draft (although like any good compromise there is much in it for everyone to hate), as the existence of the draft that is objectionable.

The majority resolution authorizes President Hooper to inform Congress of the draft bill. Before the Association considers embarking upon this misguided lobbying effort, other interested committees should first deliberate and comment upon the draft. These committees include: Uniformity of Maritime Law; Comite Maritime International; Marine Insurance, General Average and Salvage; Maritime Arbitration; Practice and Procedure; and Maritime Legislation.

I share the Committee's frustration with the stalemate in revising the Hague Rules. We cannot have Visby; we will not have Hamburg. But the slow, arduous task of working with our trading partners is far to be preferred to disengagement from the process of developing an international body of law.

Sincerely,
Peter D. Fenzel

cc: Chester D. Hooper, Esq.
George F. Chandler, III, Esq.
R. Glenn Bauer, Esq.
Helen M. Benzie, Esq.
Michael Marks Cohen, Esq.
Mr. Walter M. Kramer
Frank M. Marcigliano, Esq.
Richard E. Repetto, Esq.
Charles E. Schmidt, Esq.
Richard H. Sommer, Esq.
Prof. Joseph C. Sweeney
Ms. Alice E. Teal

[10766]

FORDHAM
UNIVERSITY

April 3, 1995

William R. Dorsey, III, Esq.
Secretary
Maritime Law Association of the U.S.
Messrs. Semmes, Bowen & Semmes
250 West Pratt Street
Baltimore, MD 21201

Dear Mr. Dorsey:

I must respectfully disagree with the Majority Report of the Carriage of Goods by Sea Committee on Draft Legislation to replace the 1936 COGSA and the Pomerene Act. My disagreement arises from the unilateral nature of a solution to a problem that requires multilateral action.

I am grateful to the members of the Ad-hoc Subcommittee for their hard work and the compromises they achieved. In that sense, their draft would be a brillant proposal for a new United Nations Conference to update the 1968 Visby Amendments and the 1978 Hamburg Rules.

Nevertheless, it is not conducive to the uniformity of text that is essential for the maritime industry worldwide. I realize that the text of the Hague Rules does not now result in uniformity because of the vagaries of judicial decision, but at least the courts are interpreting the same words.

Entry of a solely American version of the rules on liability for cargo damage alongside the variations already introduced in China, Scandinavia, France, the Hamburg Rules, the Hague Rules unamended, the Hague Rules amended by Visby alone, and the Hague Rules amended by Visby and the 1979 SDR Protocol will result in confusion that will benefit Conflict of Laws lawyers rather than Admiralty practitioners.

Sincerely,
Joseph C. Sweeney
Professor of Law

FORMAL REPORT OF THE CARRIAGE OF GOODS SUBCOMMITTEE ON CHARTER PARTIES
MAY 1995

Seventeen people provided answers to the Questionnaire about Shipping Agents which was circulated by the Comit Maritime International. The answers were collated and sent on for inclusion in the MLA's responses.

BIMCO has issued the final texts of the new BARGEHIRE as well as revisions of GENCON, RUSWOOD and PANSTONE. At its meeting later this Spring, the Documentary Committee is expected to consider final drafts of FUELCON, MULTIDOC, COMBICONBILL, a FONASBA International Brokers Commission Contract, and a Return of Containers Clause. Anyone who would like copies of one or more of these documents should let me know.

New and continuing work of the Documentary Committee includes:

a proposed GENTIME (a general time charter);

a proposed CRUISETIME (passenger ship time charter);

a proposed GENWAYBILL (a general form for waybills);

CONLEASE (a container leasing contract);

revision of the World Sugar Charter Party 1969, last revised in 1977;

and an endorsement for bills of lading about delivering cargo against Letters of Indemnity.

Help is needed to review and comment about the drafts. Anyone interested should please drop me a line.

Finally, Texaco has issued a new TEXACOVOY 94 voyage tanker charter. Copies are available from Bob Phillips at Texaco.

Respectfully submitted,
Michael Marks Cohen, Chairman

FORMAL REPORT OF THE CRUISE LINES AND PASSENGER SHIPS COMMITTEE

The Cruise Lines and Passenger Ships Committee of the Maritime Law Association met in New York City on May 3, 1995, with 33 members and 1 guest present.

The Committee was fortunate to have as its guests, the attorneys who were involved in a case recently argued before the United States Supreme Court, *Latsis v. Chandris*. Latsis was a port engineer with a cruise ship company, who sustained an eye injury while working aboard one of its vessels. The attorneys shared the valuable insights and lessons which they learned during the trial and appellate process of this very interesting case. There was an extended question and answer session which demonstrated the interest of all members regarding the case.

Extensive discussions were held regarding cases of interest to the Committee.

The Committee members were advised as to the status of the agenda for the fall meeting in Hawaii. It is hoped that a "Cruise Ship Disaster" scenario can be worked out and planned during this meeting.

Respectfully submitted,
Reginald M. Hayden, Jr.,
Chairman

FORMAL REPORT OF
THE COMMITTEE ON MARINE FINANCING

David McI. Williams, Chairman, called the Committee Meeting to order on May 3, 1995 at 2:30 p.m. at the office of Haight, Gardner, Poor & Havens, New York City, New York. The Members of the Committee, additional Member of the Association and Guests listed on Exhibit A[1] to these minutes were in attendance. The Agenda of the Meeting is attached as Exhibit B.

I. The Chair announced that Bob McIntosh recently argued on appeal the case of *Dietrich v. Key Bank, N.A.*, 693 F, Supp 1112 S.D. Fla, 1988, representing the Bank. The case involves a *Fogle* self-help-repossession pursuant to a ship mortgage. The lower court rejected the attack on the repossession under the *Fogle* doctrine. A decision is expected soon from the appellate court. The Committee filed a amicus brief on the side of the Bank.

H.R. 1361, the Coast Guard appropriation bill for fiscal year 1996, was introduced on March 30, 1995 and contains a number of this Committee's Legislative proposals. 46 U.S.C. § 31321 (a) will now provide for electronic filing (fax filing) of bills of sale, conveyance, mortgage, assignment and related documents with the Coast Guard, provided the original documents are received by

[1] Copies of this and all other Exhibits are attached to the original of this report. Copies can be obtained from the Committee Secretary, Charles D. Brown of New York.

the Coast Guard with ten days of fax filing. The restrictions contained in § 31329 will not apply to fishing vessels or yachts. § 31322(a) will be amended to completely remove the citizenship requirements for mortgagees and § 31328 will be repealed to eliminate citizenship requirements for trustees. Section 9 of the Shipping Act, 1928 (46 App. U.S.C. § 808) which prohibits certain transfers to non-U.S. citizens without Marad approval, will be amended to eliminate the word "mortgage." § 12106 will be amended to permit certain non-U.S. citizens leasing companies to own vessels in the coastwise trade provided such vessels are bareboat chartered to apple pie U.S. citizens. § 31325(b) will be amended to make available extrajudicial remedied for default on preferred mortgage liens on vessels.

II. Thomas L. Willis, Chief of the Vessel Documentation & Tonnage Branch of the U.S. Coast Guard, announced that a new central registration location for the documentation of vessels (the National Vessel Documentation Command) will be operational by mid-summer not at a blue water or brown water location but at a Falling Water, West Virginia location which is near Martinsburg. Existing Documentation Offices will commence moving June 30, 1995 but will continue to accept documents for filing until September 30, 1995. Six out of the 14 documentation offices, such as New Orleans, St. Louis, and Norfolk, will move earlier. Ribbon cutting at Falling Waters will be July 28, 1995. The new regulations are contained in N.P.R., 60 Fed. Reg. 12188 (Mar. 6, 1995) for fax filing of instruments. Mr. Willis suggested that instead of faxing a 100 page ship mortgage, that the mortgage be sent down in advance and then fax the bill of sale on transfer of title (effective upon transfer clause or an effective date). There will be ten unattended fax machines that can handle 18,000 pages. The requirement for a 8 1/2 by 10 inch page may lead to a relaxation of the present requirements that the original marine document be surrendered at the time of the transfer of a vessel. There is no need for the old marine document now that the mortgage endorsement is no longer required. The backlog for recording commercial documents has been cut in half. With respect to the validity of fax filing, the Coast Guard has an opinion from counsel that such filing is valid under existing law. This is contrary to the view of several members of the Committee that such filing may cause serious legal problems.

Mr. Willis commented on the hidden time bomb waiting to go off because of the amendment to 46 U.S.C. § 12102(a), that would render a vessel titled in a State ineligible for documentation by the Coast Guard. This statutory provision will become effective on April 25, 1997. It is the practice in yacht financing to register or title a yacht under State law pending final documentation under federal law. Previous to the 1989 recodification, this was necessary during the so-called gap period. The amendment to § 12102(a) states that a vessel is not eligible for documentation if it is titled in a State. There will be problems in 1996 when the Vessel Identification System final rule will come into effect. The pro-

posed regulations 60 Fed. Reg. 20315 (April 25, 1995), provide that a State must deem a title invalid when a vessel owner surrenders title to the U.S. Coast Guard for vessel documentation purposes. Since the Coast Guard may not be aware of the vessel being titled in a State, a vessel may be federally documented and a preferred mortgage recorded on the vessel. Since the documentation would be defective, then the mortgage would not be a preferred mortgage. Three States now require that all vessels be titled in such a State whether documented or not.

III. Subcommittee Reports

A. *Maritime Liens and Mortgages.*

Charlie Donovan reported that Tom Willis attended the subcommittee meeting to discuss the centralization for filing documents with the Coast Guard and fax filings (See II. above), and that the Committee thought that fax filings was a good idea despite the fact that it was not crystal clear whether, under existing law, the Coast Guard had the authority to accept a fax when the Ship Mortgage Act by terms requires a document to be signed and acknowledged. Even though the time for comments for the new regulations for fax filing will shortly end, Mr. Willis stated that he would accept late comments. There is a possibility of pulling abstracts for vessels and have the abstract remain in the local offices until the very last moment to move so that transactions may be done locally rather than in West Virginia. A mass mailing will go out to explain the procedure. It is suggested by Mr. Willis that documents be mailed ahead of time and maybe the first and last pages bearing the date and signature be faxed.

B. *Coast Guard Documentation, U.S. Citizenship.*

Bob Poster reported that his committee was not opposed to fax filings, but because of existing statutory language, the Marine Financing Committee should send a letter to the Coast Guard in the Form attached hereto as Exhibit C. Upon motion duly made and seconded and unanimously adopted, the Marine Financing Committee adopted a resolution requesting Dave Williams to send such a letter after approval by the Executive Committee of the MLA. Bob Poster then remarked that H.R.1361 Sec. 409(c) be modified to clarify that a mortgage or security interest should not be considered a "transfer" of a vessel for the purpose of elimination of the removal of mortgage restrictions and that § 409(d) will provide foreign capital for the Jones Act fleet by permitting foreign leasing companies to own Jones Act vessels, and bareboat charter such vessels to U.S. citizens. Dave Williams will submit a letter to Congressional staff on this point.

C. *Taxation.*

Bruce Garrison presented his report and attached as Exhibit D are the minutes of his committee meeting.

D. *Yacht Financing.*

Robert Fisher, Acting Chair, summarized the meeting of the Yacht Finance Subcommittee. Thomas Russell commented on the formation of the American Vessel Documentation Association, Inc. ("AVDA"), and handed out its official newsletter. The organizational meeting was held at Ft. Lauderdale in February. On electronic filing many of the yacht consumer oriented forms are computer generated but are on 14 inch paper, two sided and may have to be revised for fax filing which requires ten inch paper. Many of the forms have carbons without identifiable originals. Tom Willis suggested that eventually a diskette could be sent or macros can be made by the Coast Guard for all forms except for the mortgage. The new present system will be fax filing and eventually E-Mail in the future. Bob sees a need for a Uniform State Title Elimination Act. Even if a title is surrendered to the Coast Guard, there should be a State law that would recognize the surrender of such title. The U.C.C. revision draft permits a non-resident yacht owner to obtain a title in any State. Owners will shop for the cheapest title such as Rhode Island, which has no sales or use tax. If a fishing vessel of over 5 net tons is required to be titled by a State, is the vessel no longer eligible for federal documentation? If ineligible, then such a commercial vessel cannot continue in business. A copy of the Agenda for the meeting is attached as Exhibit E together with enclosures 3 and 4 referred to therein.

IV. Joint & Ad Hoc Committee Reports.

A. *Vessel Foreclosure and Insolvency.*

Bruce King, as Chair, stated that Lars Fosberg has assembled the various federal forms for ship foreclosure and has asked clerks for unique forms. Eventually, these forms and comments will be sent to Benedict for publication. Minutes of the meeting for the Subcommittee are attached as Exhibit F.

B. *Ad Hoc Committee on OPA '90 Concursus.*

Bob Zapf chaired the Committee and will maintain the narrow scope of the Committee, i.e., concursus for oil spill claims. Other issues will be left to its parent committees. A copy of the minutes of the Committee is attached as Exhibit G. Bob Edgington, Bob Zapf and Laurie Frost were appointed as this Committee's reporters for the Practice and Procedure Committee, Marine Finance Committee and Marine Ecology Committee, respectively. Robert Parrish reported on the Maritrans Tampa Bay Spill. In general, States do not want concursus and want to use State courts. Ed Catell reported that the Tampa and Puerto Rico spills may show a way concursus can occur because claimants will go after the National Pollution Fund using the federal district courts.

V. Old Business.

A. Jovi Tenev discussed his memorandum of April 26, 1995 (attached as Exhibit H), concerning the proposed amendment to Section 1110 of the Bank-

ruptcy Code. The present Section 1110 that can override a bankruptcy court's power to use the automatic stay or enjoin taking possession of certain lease property, is limited to aircraft and vessels that are owned or operated by a water carrier holding a certificate of public convenience and necessity or permit issued by the Interstate Commerce Commission. Such limitation has discouraged lenders, both domestic and foreign, from making ship loans or sale and lease backs. One of the main objects of the amendment is to get capital back into shipping by doing the same thing for vessels that are now permitted for aircraft. The issue will be studied further and represented.

B. Revisions to UCC Article 9, See Exhibit F. Bruce King reported that with the Marine Finance Subcommittees on Yacht Financing and Mortgages, subcommittee members are reviewing the ongoing revisions to Article 9 of the Uniform Commercial Code and the effects of the revisions on ship and yacht financing. Committee members will report back with their recommendations and whether the Association should take a position in regard to the revisions.

C. Report on Joint Intergovernmental Group of Experts on Maritime Liens & Mortgages — Draft Articles for a Convention on the Arrest of Ships. Bob Zapf is our representative for the new draft arrest convention. Dave Kantor from the U.S. Coast Guard gave an historical introduction going over the 1993 Maritime Lien Convention and the new draft arrest convention. Attached as Exhibit I is Bob Zapf's report dated May 2, 1995 which he discussed at the meeting. The Seventh Session of the Joint Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects was held in December 1994 in Geneva and the Draft Articles for a Convention on Arrest of Ships was adopted for consideration for modernization and replacement of the 1952 Arrest Convention in light of the adoption of the International Convention on Maritime Liens and Mortgages in 1993. Under the new draft of the proposed Arrest Convention, a ship can only be arrested for a maritime claim. If there was an ownership change between the time the claim arose and the time of arrest, only a maritime claim that gives rise to a maritime lien under the 1993 Maritime Lien Convention will suffice. Article 6 of the Draft provoked considerable discussion with respect to posting of security for a wrongful arrest claim.

VI. New Business.

A. CMI Questionnaire on Maritime Agents - Attached as Exhibit J is the Questionnaire, Frank Nolan's answers, and answers of the Committee on Charter Parties of the MLA.

B. Revisions to the Carriage of Goods by Sea Act ("COGSA") as well as the Pomerene and Harter Acts. To allow the entire MLA more time to consider the proposed amendments because of the indication of a close vote, the matter has been tabled and further meetings and discussions will take place in the

future. Sandy Knapp reviewed the revisions on behalf of the Committee, and her initial comments to George Chandler was to delete references to cargo tort claims from footnotes 14, 26 and 27. Sandy then discussed the recent case of *Associated Metals v. Alexanders Unity,* 1995 AMC 1006, 5 Cir., in which a cargo claim primed a prior mortgage lien on grounds that the cargo claim was based in tort and not in contract. Len Rambusch had previously reminded the Committee that this case states that COGSA is neutral in determining whether a claim is based in tort or contract. Len suggested that if COGSA is sent back to Congress for amendment, that this Committee might have recommendations.

C. *Recent Court Decisions.*

In *Maryland National Bank v. Madam Chapel,* 1995 AMC 850, 9 Cir., Tom Russell argued the case for the Bank. Chapel bought a yacht and immediately applied for federal documentation. Chapel filed a Builder's Certificate and a Bill of Sale with the Coast Guard to prove good title. Chapel also gave Key Bank a purchase money first preferred ship mortgage (the "Key Mortgage"). Chapel later used a Manufacturer's Statement of Origin for the yacht to obtain a New York State title but did not inform the State that the vessel was federally documented with a preferred mortgage. Chapel then sold the yacht "free and clear" to Santiago who with the aid of Chapel, again federally documented the yacht in St. Louis with the Coast Guard based on the New York State title and a "lost Builder's Certificate." Santiago then sold the yacht to Jones who sold it to another bona fide purchaser. Jones, who in turn, took back a preferred ship mortgage (the "Jones Mortgage"). Key, in the interim, had assigned the Key Mortgage to Maryland National Bank. The lower court determined that the second mortgage in favor of Jones should have priority on grounds of equitable subordination in that the Key Bank failed to control Chapel's ability to title the yacht in New York by picking up the extra MSO that the Key Bank did not require or see to it that the official number of the yacht was marked as stated in a marking card submitted by Chapel under oath to the Coast Guard. On appeal, the Court held that mere negligence on the part of Key in policing the MSO and the marking card was insufficient to support equitable subordination since all the requirements to perfect a first preferred ship mortgage on behalf of Key had been met.

The case highlights the need for the Committee to seek regulations such that only one title document can be issued and "extra titles" or documentation is eliminated. The regulations under the Vessel Identification System may provide an opportunity for this.

There being no further business, the meeting was adjourned.

Respectfully submitted,
Charles D. Brown, Secretary

[10774]

FORMAL REPORT OF THE COMMITTEE ON PRACTICE AND PROCEDURE

I. SUBCOMMITTEE REPORTS:

A. Federal Rules and Statutes:

Robert N. Dunn, Chair, reported that the Federal Rules Advisory Committee is prepared to move on the proposed amendments to Rules C and E of the Supplemental Rules for Certain Admiralty and Maritime Claims (the "Admiralty Rules"). (A copy of the letter forwarding the proposed changes accompanies this report.)[1] The DOJ proposal to the arrest procedures with respect to civil forfeitures is included as a separate subsection.

The "Stylistic Changes" to the Admiralty Rules are on the back burner for now.

Phil Berns reported that amendments to Rule B to conform to Rule C regarding Marshal's service of process on vessels and tangible property have also been forwarded to the Federal Rules Advisory Committee.

The amendment to Rule 9(h) to allow interlocutory appeals in mixed admiralty and non-admiralty cases has been approved by the Federal Rules Advisory Committee and will be forwarded to the Supreme Court.

A further study item for this subcommittee will be what, if any, changes to the Admiralty Rules and Local Admiralty Rules might be advisable in light of the promulgation of the 1993 Maritime Liens and Mortgages Convention.

The conflict between Rule E(5) and 28 U.S.C. § 2464(b) regarding the amount of release bonds and the limitation to six percent interest on such bonds will be further studied.

Appeals from MarAd citizenship decisions currently go to the U. S. Court of Appeals under 28 U.S.C. § 2342(3)(a), whereas decisions of the Coast Guard on similar citizenship issues go to the U.S. District Court under the Administrative Procedures Act. Ted Perlman has provided a case study update, circulated with these minutes. MarAd has not responded to any approaches for their view on the proposed amendment, which would have appeals from MarAd citizenship decisions also go to the District Court. The specific statutory proposal which has been previously published to the Committee, a copy of which also accompanies these minutes, will be on the agenda for the Fall Meeting, with the proposal that the Committee approve a request that the MLA as a whole approve a resolution in favor of the proposed legislation.

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[1] Attachments to this report can be obtained from John Edginton of Emeryville.

David Sharpe reported that a research paper on the proposed repeal of the Suits in Admiralty Act and Public Vessels Act, and amendments to the Federal Torts Claims Act, has been presented to the Maritime Legislation Committee and is out for circulation. Anyone interested in the paper should let David know. The project has now shifted to the attention of the Maritime Legislation Committee. Phil Berns remarked that the FTCA has problems of its own and that it may not be the appropriate vehicle to achieve the proposed reform.

Mr. Dunn reported that the issue of the admissibility of U.S. Coast Guard reports in civil litigation has become of immediate concern in light of HR 1361, the 1996 Coast Guard Authorization Bill now being considered by the House of Representatives. A copy of the relevant portion of the bill is enclosed with this report. Case law has held that Coast Guard reports are admissible, sometime with and sometimes without the conclusions, whereas, pursuant to 28 U.S.C. § 1154(b), reports of investigations by the NTSB are not admissible. The subcommittee has unanimously concluded that Coast Guard reports should be inadmissible in their entirety, just as the NTSB reports are not admissible. However, HR 1361 contains a provision that would allow the admissibility of the findings of fact on Coast Guard investigation reports, but not the opinions or conclusions. The bill also provides that Coast Guard investigating officers, the authors of these reports, could not be called as witnesses in civil litigation unless the Secretary approved, in his or her sole discretion. The subcommittee unanimously disapproved of this legislation.

Capt. David Kantor, Chief of the Maritime and International Law Division of the Coast Guard, advised of the background of the proposal in HR 1361. The concern arose over last minute subpoenas being issued requiring the attendance of the investigating officers at civil trials. The disruption of operations, together with the anticipated restructuring of the Coast Guard which will result in a 16% loss of personnel over the next four years, were primary motivating factors for the proposed legislation. In the past, when reasonable notice has been given, Marine Safety Offices have cooperated in making witnesses available. Lt. Cdr. Steven Poulin pointed out that the 49 CFR Part 9 regulations deal with the method of obtaining testimony. He was not aware if different regulations were presently being contemplated to implement the proposed discretion of the Secretary. Phil Berns also reported that this legislation was supported by the DOJ, whose attorneys were often brought in on short notice to seek to quash subpoenas.

It was pointed out that the purpose of these investigations is to advance marine safety, not to assess civil responsibility for casualties. The subcommittee will be further focusing on the means of achieving the proposal to ban the admissibility of these reports, and will report further at the Fall Meeting.

John Edginton advised that the Board of Directors of the MLA approved an approach to Congress seeking the elimination of this provision of HR 1361, with a view to further study of the issue. The Board also suggested that, to the extent the legislation is driven in part by budgetary concerns, there be further study of the feasibility of the establishment of an appropriate fee structure for making witnesses available.[2]

Robert J. Zapf will liaise with the Coast Guard regarding alternative legislation.

B. Forfeitures:

Edward V. Cattell, Jr., Esq. reported for Jeffrey S. Moller, Chair. He first reviewed the history of the effort to standardize the practices and procedures of forfeiture actions in various agencies. He reported that no feedback from the various committees to which the Draft Uniform Forfeitures Act had been forwarded has been received; the draft will now be forwarded to appropriate departments and agencies of the U.S. government for review and comment. Once these agencies have had a chance to review the draft, a meeting will be scheduled to discuss any comments and proposed changes.

C. Local Admiralty Rules:

The last draft of the MLA's Model Local Admiralty Rules was issued in 1988. It is time to re-visit them, and determine whether changes need to be made to have them more widely adopted. Also, the LARs should be checked because of the 1993 amendments to the FRCivP. to ensure cross-references are correct.

It was also pointed out that the reference to Rule 4(e) in Rule B(1) of the Admiralty Rules should be Rule 4(n), due to the renumbering of subparagraphs of Rule 4 in the 1993 amendments to the FRCivP.

II. JOINT SUBCOMMITTEE REPORTS:

A. Ad Hoc Committee on the 1906 Marine Insurance Act:

Edward V. Cattell, Jr. reported on the comparison of the English 1906 Marine Insurance Act against U.S. law. The goal is to attempt to remove *Wilburn Boat* from U.S. law.

The study revealed that 95% of the sections of the 1906 Marine Insurance Act are in conformity with U.S. law. The proposal would be to have Congress codify existing law, with the goal of establishing a uniform federal law on

[2] Secretary's Note: a letter was addressed to the General Counsel of the Subcommittee on Coast Guard and Marine Transportation of the House Committee on Infrastructure and Transportation seeking withdrawal of the proposal from the Act. However, on Tuesday, May 9, 1995, the House passed the bill with the provision in it. The Senate has yet to act on their version of the bill, and will be asked to oppose the inclusion of this element of the bill in the final law passed by Congress.

marine insurance, pre-empting state law, and overruling *Wilburn Boat.* There are several sections which do differ, but some of this is due to the Wilburn Boat approach, which drags into the marine insurance law state law concepts.

The research will be published in a special MLA Report.

B. Joint Subcommittee On Foreclosures and Insolvency:

Bruce A. King, Chair, reported that the Department Of Justice foreclosure forms project is almost completed. If anyone is interested in reviewing the forms, a request can be sent to Lars Forsberg or Bruce King for a copy of the package.

Article 9 of the UCC is being redrafted. Charles Brown has reviewed the draft, and didn't note anything alarming regarding the treatment of assignment of insurance or creation of security interests in bank accounts. Regarding the lien on subfreights, the present state of the law is good, and no changes are presently contemplated. Charles Brown and Charles Donovan will report back on whether any changes should be sought.

The Young Lawyers Committee will assist in looking at the venue provisions of the Federal Fair Debt Collection Practices Act, which may affect pursuit of deficiency judgments.

HR 1361 contains provisions to permit sale of fishing vessels or recreational vessels to foreign interests in the context of foreclosure sales. The bill also contains the Anti Fogle legislation which the MLA has been pursuing for a number of years.

Finally, the Vessel Identification System has gone into effect. This will trigger the provisions of 46 U.S.C. § 31322(d) and (e) which gives preferred mortgage status to security interests created under state law.

A proposed amendment to § 1110 of the Bankruptcy Act to exempt secured parties from the automatic stay after 60 days will be passed to other interested MLA committees for review and comment.

III. Liaison With Other Committees:

A. Recreational Boating:

A petition for certiorari has been filed in the *Calhoun v. Yamaha Motor Corporation*, 40 F.3d 622 (3rd Cir. 1994), but the MLA had decided not to file

an *amicus* brief in support. A poll of the Recreational Committee members in attendance supported the filing of an amicus brief.[3]

It was also reported that requirements for the licensing of recreational boaters has drawn the support of a number of states, based upon the model legislation prepared by Almer Beale under the auspices of the Recreational Boating Committee.

A request for the filing of an amicus brief to the Ninth Circuit Court of Appeals in the *Kanoa* case was received too late for action. This is another case involving a commercial scuba diving operation where the District Court determined that there was no admiralty jurisdiction.

B. Joint Ad Hoc Committee On OPA '90 Concursus:

Matthew Marion reported that the Recreational Boating Committee's three major concerns were concursus, pre-emption of state law, and NRDA (Natural Resources Damage Assessment). There is a view that "surgical" amendments to OPA might be possible, but pre-emption and NRDA are very controversial issues. Concursus, on the other hand, is a narrowly focused issue which might be possible to achieve. Minutes of the OPA '90 Concursus meeting accompany these minutes, as well as a proposed statutory change. The focus has moved away from a Rule change as an approach. Comments on the proposed legislation are sought. Opposition from state interests may arise to the concept of being required to litigate state law claims in a federal forum, when OPA claims are also asserted.

C. Status of 1993 Federal Rules Amendments:

The Regional Representatives are asked to provide an updated written report on the status of the amendments for the next meeting. The minutes of the meeting of May 5, 1994 contain a summary of the status as of that date.

IV. OTHER ACTIVITIES:

A. Arrest Convention:

Captain Kantor reported on the status of the discussions of the Joint Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects (the "JIGE") at Geneva December 5–9, 1994. The first six sessions of the JIGE dealt with the Maritime Liens and Mortgages Convention, which has now been promulgated and is being circulated for ratification and adoption. The focus is now on the Arrest Convention. There are significant differences between the 1952 Arrest Convention and U.S. law. Arrest in the 1952 Arrest

[3] Secretary's Note: since the date of the meeting, The Supreme Court has granted the petition for certiorari, and the MLA is reconsidering whether to file a brief in support of the appellant, in favor of the application of federal maritime law in the case.

Convention is akin to our Rule B attachment procedures, both in its concept of obtaining jurisdiction over the owner who is personally liable, and in its provision for sister ship arrests. Also, under the 1952 Arrest Convention, arrest does not grant jurisdiction over the merits of the case to the arresting court.

The U.S. delegation in Geneva sought to create changes more in line with U.S. law, but unfortunately without much success. For example, the majority of the delegations were not in favor of the concept of interlocutory sales. The most significant issue discussed involved Article 3 of the proposed Arrest Convention, which for almost all claims required the personal liability of the owner, with the exception of the preferred maritime liens recognized in the 1993 Maritime Liens and Mortgages Convention, or for mortgages. These preferred maritime liens do not include suppliers' liens. During the debate over Article 3 of the Arrest Convention, there was strong opposition to permitting arrest for liens created under national laws, as permitted in Article 6 of the 1993 Maritime Liens and Mortgages Convention. A separate report accompanies these minutes.

B. Succession:

John Edginton expressed his thanks and appreciation for the assistance rendered by all the subcommittee chairs and officers in the last four years. President Chet Hooper has chosen Robert J. Zapf as the next chair.

John Edginton
Chairman

MINUTES OF THE BOARD OF DIRECTORS MEETING OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES
Held at the
Association of the Bar of the City of New York
on
Thursday, May 4, 1995

The meeting was called to order by Chester D. Hooper at 9:05 a.m. In addition to President Hooper, the following officers were present:

James F. Moseley, First Vice-President
Howard M. McCormack, Second Vice-President
William R. Dorsey,III, Secretary
Marshall P. Keating, Treasurer

Lizabeth L. Burrell, Membership Secretary
George W. Healy, III, Immediate Past President

The following Board members were present:

Richard C. Binzley
Denise S. Blocker
Joseph D. Cheavens
David A. Nourse
George F. Chandler, III
John A. Edginton
Brendan P. O'Sullivan
Thomas S. Rue
George William Birkhead
George D. Gabel, Jr.
Neal D. Hobson
James B. Kemp, Jr.

Joining the meeting in progress by invitation were Warren J. Marwedel of Chicago, Christina M. Whitaker of New York, Edward V. Cattell, Jr. of Cherry Hill, Kenneth H. Volk of Portsmouth, David McI. Williams of Baltimore, Philip A. Berns of San Francisco, and Robert J. Zapf of New York.

SECRETARY'S REPORT

Secretary, William R. Dorsey, III, of Baltimore, reported that the Minutes of the Board of Directors Meeting held at the Plimsoll Club, New Orleans, on Tuesday, March 14, 1995 had been circulated to all of the members of the Board and to the membership. Upon motion duly made and seconded, the Minutes of the Board of Directors Meeting of March 14, 1995 were approved and accepted.

Secretary Dorsey reported that in accordance with By-Law Section 504 he had mailed to all Association members a copy of the Resolution proposed by the Committee on Carriage of Goods, the Ad Hoc Study Report on which said Resolution was based, and all Committee Dissenting Reports. He also reported that in accordance with Section 801 relating to Amendments of the By-Laws, he had circulated to all the members of the Board, more than ten days prior to this meeting, a copy of the report by the Ad Hoc Committee to amend the By-Laws, a proposed Resolution on the By-Law changes, and a further amendment proposed by Secretary Dorsey.

On motion duly made and seconded, the Secretary's Report was approved and accepted.

TREASURER'S REPORT

Treasurer, Marshall P. Keating of New York, reported on the cash on hand and investments as of March 31, 1995, which reflected the Association's sound financial position. He also advised that the transfer of our data processing and mailing services from Barrister to Messrs. Brock, Shechter & Polakoff was going smoothly and had all but been completed. He also reported that collections on the dues bills were proceeding satisfactorily.

Upon motion duly made and seconded, the Treasurer's Report was approved and accepted.

MEMBERSHIP SECRETARY

Membership Secretary, Lizabeth L. Burrell, reported that the Association's total membership is 3,426 as of May 4, 1995. She presented the names of thirty-seven applicants for Associate membership, and one applicant for Judicial membership, the Honorable G. Thomas Porteous, United States District Judge for the Eastern District of Louisiana.

Upon motion duly made and seconded, the thirty-seven Associate applications and one Judicial application were unanimously elected.

Membership Secretary Burrell also reported that the Proctor Admissions Committee had recommended that twenty-six Associate members be advanced to Proctor status. Upon motion duly made and seconded, the recommendations of the Proctor Admissions Committee were approved and the twenty-six Associate members were granted Proctor status.

In addition, Membership Secretary Burrell indicated that nine Non-Lawyer applicants had been recommended for Non-Lawyer membership. Those recommended are: James H. Falstrault, Richard J. Horan, Claire C. Jones, Charles F. Killian, Deirdre H. Littlefield, Capt. Alexandros Mastoras, Robert H. Pouch, Roy Salley, and Peter J. Scrobe.

Upon motion duly made and seconded, the nine Non-Lawyer applicants were unanimously elected to Non-Lawyer membership.

Membership Secretary Burrell also moved the admission of Professor Charles Black, as an Academic member. Upon motion duly made and seconded, Professor Charles Black was unanimously elected to Academic membership.

The list of all of the successful candidates for membership and admission to Proctorship status, and Ms. Burrell's written report, is attached to the original of these Minutes.

Membership Secretary Burrell also reported, with regret, the death of the following members: The Honorable Bernard G. Barrow of Charlottesville,

Andrew C. Hecker of Philadelphia, Henry J. Ottaway of New York, and John H. Tappan of Point Clear.

Upon motion duly made and seconded the Membership Secretary's report was approved and accepted and is appended to the original of these Minutes.

AUGUST 1995 OFFICERS' AND BOARD OF DIRECTORS' MEETING

The Board unanimously agreed upon the date of August 11, 1995, for the next Officers' meeting, and Saturday, August 12, 1995, for the next Board of Directors meeting. Both of these meetings will take place in Baltimore.

MEETING OF COMMITTEE CHAIRS

Second Vice-President Howard M. McCormack of New York reported that a meeting of all Committee Chairs had been held on Tuesday, May 2, 1995. At this meeting, all of the Committee Chairs reported on the plans and activities of their respective Committees.

CERTIFICATE OF APPRECIATION TO PAST CHAIRS

President Chester D. Hooper indicated that the Certificates of Appreciation for immediate past Chairs have been prepared, and that he expects that they will be mailed within the next week.

COMMITTEE ON PRACTICE AND PROCEDURE

Board member, John A. Edginton of Emeryville, Chair of the Committee on Practice and Procedure, reported that the stylistic amendments to the letter Rules of the Federal Rules of Civil Procedure were still under consideration by the Federal Rules Advisory Committee. His Committee was continuing to liaise with Mark O. Kasanin of San Francisco, a member of the Association who is also on the Advisory Committee. Mr. Edginton reported that he had received indications that it was appropriate for him to forward the Association's comments with respect to the confusion in letter rules C and E concerning the use of the word "claimant." The comments of the Association had been approved at a previous meeting, and Mr. Edginton reported that he had now forwarded these comments on to the Advisory Committee.

Mr. Edginton also indicated that he was pleased to report that the Advisory Committee has agreed with and accepted the Association's position that interlocutory appeals should be permitted in maritime claims where cases involve both maritime and non-maritime claims. The Advisory Committee will be preparing an amendment to Rule 9(h) on this point.

Mr. Edginton then indicated that Association member Michael Marks Cohen had written President Hooper expressing concern about the unacceptable

number of unpublished opinions in the Federal Courts, and the fact that there was no unanimity among the various districts as to how unpublished opinions could be used or treated. President Hooper had designated the Committee on Practice and Procedure to look at this problem, and Mr. Edginton indicated that his Committee would be taking up that question to see what, if any, remedial action would be appropriate.

Finally, of particular concern, Mr. Edginton indicated that he had only recently learned on Wednesday, May 3, 1995, that the new Coast Guard authorization bill, H.R. 1361, contained a provision that would allow introduction into evidence of factual findings in Coast Guard casualty reports, but would deny supporting testimony by Coast Guard personnel without permission of the Secretary of Transportation unless the government was a party. Discussion was had on the ramifications of this proposed provision. After discussion, on motion duly made and seconded, the Board approved a recommendation that the Practice and Procedure Committee communicate to the Congress the Association's position that this provision should be removed from the Bill and subjected to full discussion.

IMO LEGAL COMMITTEE

Board member Neal D. Hobson of New Orleans reported on the IMO Legal Committee. It appears that there may be a diplomatic conference in April or May of 1996 to consider a draft HNS Convention. The Association's Committee on the Transportation of Hazardous Substances will study the position the Association should take and will report its recommendation in due course.

In addition, Mr. Hobson indicated that there was on the IMO Legal Committee docket, for action at its meeting in October of this year, the Convention on Off-Shore Mobile Craft and the Arrest Convention. In addition, it appears that the IMO Legal Committee will discuss a Wreck Removal Convention.

ALTERNATE DISPUTE RESOLUTION

Board member David A. Nourse of New York reported on the activities of the Committee on Alternate Dispute Resolution. He indicated that that Committee was in the process of modifying the Association's Rules of Conciliation. In addition, he indicated that the Committee was requesting that a questionnaire be mailed to all members to obtain information that would form the basis for the creation by the Association of a roster of Conciliators. He was also requesting that information on educational programs on Conciliators be mailed to the membership. President Hooper indicated that the request would be taken under consideration, and that he intended to consult as appropriate with other organizations concerning this matter.

AD HOC COMMITTEE ON MARINE INSURANCE ACT OF 1906

Edward V. Cattell, Jr. of Cherry Hill, Chair of the Ad Hoc Committee on the Marine Insurance Act of 1906, reported on the activities of his Committee and the study of the British Marine Insurance Act of 1906. He indicated that the chaos created by *Wilburn Boat* had prompted this study and a project to draft a U.S. marine insurance act. He stressed that any such act would be a clarification of existing law and not a bill that would provide for regulation of marine insurance.

AMENDMENT TO BY-LAWS

Past President Kenneth H. Volk of Portsmouth, Chair of the Ad Hoc Committee on Amendments to the By-Laws, presented the report of his Committee on proposed By-Law amendments. Many of the recommended amendments were cosmetic in nature, but three were substantive. The first was a change of the date of the Fall Meeting to the third Friday in October. The second was to limit the President of the Association to two terms of one year each. This is consistent with our present practice. The third substantive position was to add a By-Law that provided that no member of the Nominating Committee was eligible for any office under consideration by that Committee. A resolution incorporating the amendments recommended by the Ad Hoc Committee was proposed and seconded. Thereupon, upon motion made by Secretary Dorsey and duly seconded, a change to the second sentence of the proposed amendment to By-Law 801 was made as follows:

> "These By-Laws may also be amended by a majority vote of those present at any meeting of the members of the Association, provided the Secretary, or his designee, shall have mailed the text thereof to the members at least fifteen (15) days prior to the meeting at which the amendment is to be acted upon."

This amendment was passed unanimously. Thereupon the resolution embodying the changes recommended by the Ad Hoc Committee, as amended, was unanimously passed. A copy of the Resolution, as amended and as passed, is attached to the original of these Minutes.

President Hooper then discharged Mr. Volk's Committee, expressing the appreciation of the Association for the fine work of Mr. Volk and his Committee.

There followed a discussion of other possible amendments. Board member George Chandler of New York suggested that the Board should be empowered to waive the notice provision of By-Law Section 801 pertaining to the Board's authority to amend the By-Laws. Board member John A. Edginton of Emery-

ville suggested that the By-Laws should provide for voting by written absentee ballot by the members in addition to the present proxy provision. There was also discussion of the timing requirements of By-Law Section 504. President Hooper indicated that he would appoint a new Ad Hoc Committee to review these and other proposals.

COMMITTEE ON MARINE FINANCING

David McI. Williams of Baltimore, Chair of the Committee on Marine Financing, reported on the activities of his Committee. Of particular note was the fact that the Coast Guard had issued a Notice of Proposed Regulation that would permit the filing of documents by fax. There appears to be some doubt as to whether any statutory authority exists for this regulation. Accordingly, Mr. Williams sought approval from the Board to send a letter to the Coast Guard asking it to hold this Regulation in abeyance until clear statutory authority exists. He pointed out that the Coast Guard Authorization Bill, H.R. 1361, which is presently on a fast track before Congress, did contain such clear authority.

Upon motion duly made and seconded, the Board voted the approval sought by Mr. Williams and authorized him, or his designee, to forward such a letter to the Coast Guard and further authorized the President, or his designee, to testify before Congress as appropriate in support of this position.

Mr. Williams also reported that a joint subcommittee of his Committee and the Committee on Practice and Procedure has prepared mortgage foreclosure forms. These forms total some 200 pages, and Mr. Williams was soliciting ideas as the best way to have these forms printed and distributed to members. The suggestion was made that the publisher of *Benedict on Admiralty* should be contacted to explore possible inclusion in that publication.

HONORARY MEMBERS EX OFFICIO

Philip A. Berns of San Francisco, Chair of the Committee on Government Liaison, recommended that the Federal Maritime Administrator, the Judge Advocate General of the United States Navy, and the Chief Counsel of the Coast Guard be elected Honorary Members. It was pointed out that the By-Laws make no provision for membership by position, but merely refer to individuals obtaining membership. Accordingly, the Board approved the election as Honorary Members Ex Officio for the term of their respective offices the following: VADM (Ret.) A. J. Herberger, Federal Maritime Administrator; RADM Harold E. Grant, Judge Advocate General, United States Navy; and RADM John Shkor, Chief Counsel of the Coast Guard.

The Board will consider appropriate amendments to the By-Laws so that Ex-Officio Honorary members named by position only can become members.

ARREST CONVENTION

Robert J. Zapf of New York reported on a Joint Inter-governmental Group of Experts on Maritime Liens and Mortgages and Related Subjects in connection with the JIGE draft articles for a convention on arrest of ships. He indicated that since the Seventh Session of the JIGE concluded there has been considerable discussion and correspondence over the most efficient way to address the substantive issues left open at that Session. A decision has been made to encourage the appointment of an IMO/UNCTAD joint intersessional working group to address these issues. Mr. Zapf delivered a written report on the status of the Arrest Convention, a copy of which will be attached to the original of these Minutes.

CARRIAGE OF GOODS

Board member George F. Chandler, III, of New York, Chair of the Committee on the Carriage of Goods, reported that at a meeting on Wednesday, May 3, 1995, his Committee had approved and adopted a Motion to Recall its proposed Resolution so that further review and discussion could be had on the proposal. He indicated that a schedule of meetings which would be circulated to all members indicating the dates, times, and places at which various aspects of the proposed resolution would be discussed.

REQUEST TO SUPPORT RATIFICATION OF THE LAW OF THE SEA CONVENTION

Board member Joseph D. Cheavens of Houston, the Board liaison for the Committee on International Law of the Sea, reported that this Committee has taken under consideration a request by the State Department that the Association lend its support to efforts to obtain ratification of the Law of the Sea Convention, which the President has submitted to the Senate.

HAWAII MEETING

Warren J. Marwedel of Chicago, Chair of the 1995 Committee on Arrangements, reported on the preparations for the Fall Meeting in Hawaii. He indicated that the first mailing on this meeting will go out sometime shortly after the Association's meeting on Friday, May 5, 1995. He also indicated that it appears that the registration fee will be in the $400 range. He noted that his Committee is being asked to absorb costs that in the past were absorbed by the Association in general, including, for instance, the cost of the CLE program. This is one of the reasons for the rise in the registration fee. It was noted by a number of board members that, given the number of activities and events covered by the registration fee, the fee compares favorably with what other organizations charge.

AMICUS CURIAE BRIEFS

Board member George F. Chandler, III, of New York, reported that the *Sky Reefer* case, in which the Association had filed a brief Amicus Curiae, had been argued before the Supreme Court, but had not yet been decided.

PRESIDENT'S REPORT

President Chester D. Hooper expressed his appreciation to Warren M. Faris of New Orleans for attending, at his own expense, the British Maritime Law Association Dinner in London on behalf of our Association. President Hooper also indicated that he had received a number of invitations to the Commercial Court Centenary Dinner to be held in London on October 2, 1995. Any members of the Association who wish to attend that dinner should contact Mr. Hooper.

President Hooper also indicated that he would be attending the Canadian Maritime Law Association meeting in Nova Scotia next month and the SEALI Conference in June of this year.

President Hooper expressed his appreciation to out-going Board members, Richard C. Binzley of Cleveland, Denise S. Blocker of San Francisco, Joseph D. Cheavens of Houston and David A. Nourse of New York, for their contributions as members of the Board for the past three years.

The meeting then adjourned to the Harvard Club for lunch. During lunch the following report was made:

COMMITTEE ON DINNER ARRANGEMENTS

Christina M. Whitaker of New York reported on the arrangements for the dinner to be held at the Marriott Marquis on Friday, May 5, 1995. Over 1,350 members and their guests are expected to attend. President Hooper expressed the gratitude of the Association to Ms. Whitaker and her Committee for all their efforts in planning and supervising this event.

There being no further business to come before the Board, the meeting adjourned at approximately 2:00 p.m.

Respectfully submitted,
William R. Dorsey, III
Secretary

RESOLUTION AMENDING BY-LAWS

Resolved: That the following Amendments to the By-Laws of the Maritime Law Association of the United States be, and they hereby are, adopted:

1. Section 201 is amended to read as follows:

201. MEMBERSHIP CLASSES

Any person who is interested in the objectives of the Association and who can satisfy the qualifications required for membership in any of the below designated classes shall be eligible for membership. There shall be seven (7) classes of members:

1. Proctor in Admiralty
2. Associate Lawyer
3. Non-Lawyer
4. Honorary
5. Judicial
6. Academic
7. Life

Members shall be elected by the Board of Directors, with the exception of Life Members, who shall automatically be elevated to that category in accordance with the requirements of Section 209.

2. Section 209 is amended to read as follows:

209. DUES

The amount of annual dues of members shall be fixed by the Board of Directors and shall be payable on May 1 of each year. The following classes of members shall be exempt from the payment of dues:

1. Honorary, Judicial and Academic members.
2. Members in good standing who have, as of May in any year, maintained membership in the Association for 40 years. Members so exempted shall be designated as Life Members.

3. Section 210 is amended to read as follows:

210. REGULAR MEETINGS

Unless the President, with the concurrence of the Board of Directors, shall fix some other date, the annual meeting of the Association shall be held on the first Friday of May, and a Fall meeting shall be held on the third Friday of October of each year. The presence of one hundred (100) members entitled to vote shall constitute a quorum at any meeting of the Association and, except as provided in Arti-

cle 7 of the Articles of Incorporation, actions shall be taken by a majority of those present and voting.

4. Section 211 is amended to read as follows:

211. PROXY VOTING

In all instances in which proxy voting is authorized by the President, any member entitled to vote may deliver to the Secretary, or his designee, not less than twenty-four (24) hours before the date appointed for the meeting at which the vote is to be taken, or within such later time as the Secretary, or his designee, may fix, which shall not be later than the time appointed for the opening of the meeting, a duly signed instrument as appears in the form annexed in Appendix A to these By-Laws.

Only the member appointed in such instrument shall be authorized to cast the vote, and such vote shall have the same effect as any other vote.

In addition to his own vote, a member may cast one (1) vote for each proxy held.

5. Section 301 is amended to read as follows:

301. OFFICERS

Officers of the Association shall be a President, a First Vice-President, a Second Vice-President, a Secretary, a Treasurer and a Membership Secretary. They shall be elected at the annual meeting of the Association to serve for one (1) year and until their successors have been elected. Only a Proctor member shall be eligible for election as an officer. The President shall serve no more than two (2) terms.

6. Section 302 is amended to read as follows:

302. BOARD OF DIRECTORS

There shall be a Board of Directors composed of twelve (12) elected members, divided into three (3) classes, and the President, the Vice-Presidents, the Secretary, the Treasurer, the Membership Secretary and the Immediate Past President of the Association.

Four members of the Board of Directors shall be elected at the annual meeting of the Association to serve for a term of three years.

The Board of Directors shall fill vacancies in all elective offices, with the exception of the office of President, and the persons so appointed shall hold office until the next annual meeting.

7. Section 305.3 is amended to read as follows:

   305.3

   The **Secretary** shall keep a record of the proceedings of all meetings of the Association and of such other matters as directed by the President or the Board of Directors.

   He shall notify the Officers and all committee members of their election or appointment, shall issue notices of all meetings, and, in case of special meetings, shall add a brief notice of the purpose of the meeting.

   He shall be the keeper of the seal of the Association and shall perform such other duties as may from time to time be delegated to him by the President or by the Board of Directors.

8. Section 305.4 is amended to read as follows:

   305.4

   The **Treasurer** shall collect and disburse all funds of the Association and shall keep regular records and accounts.

   At meetings of the Association and the Board of Directors, he shall report in writing on the Association's financial condition.

   He shall perform such other duties as may from time to time be delegated to him by the President or by the Board of Directors.

9. Section 305.5 is amended to read as follows:

   305.5

   The **Membership Secretary** shall keep a complete roll of the members, process applications for membership, notify new members of their election, and publish and distribute a directory of the members.

He shall perform such other duties as may from time to time be delegated to him by the President or by the Board of Directors.

10. A new Section 305.6 shall be added to read as follows:

305.6

Wherever a masculine pronoun appears in these By-Laws, it is to be read as applying to either gender.

11. Section 402 is amended to read as follows:

402. DUTIES OF THE NOMINATING COMMITTEE

The Nominating Committee shall propose a slate of nominees for election as officers and directors and present it to the membership at the annual meeting of the Association. No member of the Nominating Committee shall be eligible for election to any office under consideration by that Committee.

12. The fourth paragraph of Section 504 is amended to read as follows:

The Secretary shall, at least *twenty (20)* days prior to the date of the meeting at which such reports are to be acted upon, mail copies of both reports, together with a notice of such action by the President, to each member of the Association at his recorded address.

13. Sections 703.4, 703.5, 703.6, and 703.7 are misnumbered and are renumbered as Sections 702.4, 702.5, 702.6, and 702.7 respectively.

14. Renumbered Section 702.4 is amended to read as follows:

702.4

Upon receipt of the request, the President shall consult with the First and Second Vice-Presidents, and may consult with the Chair(s) of the appropriate Association Committee(s), and if after such consultation the President considers there is merit to the request, he shall then promptly send copies of all relevant material, including the written request, opposition papers and lower court decisions, if any, to each director, calling for a vote. For this purpose the President, or his designee, may poll the Board of Directors by any form of communication.

15. Renumbered Section 702.5 is amended to read as follows:

702.5

If after consulting with the First and Second Vice-Presidents, the President considers there is no merit to the request or if, after submitting the request to the Board of Directors, less than two-thirds of the total membership of that Board approve *amicus* participation, the President shall advise the requesting person that the Association will not enter the litigation as *amicus curiae.*

16. Renumbered Section 702.6 is amended to read as follows:

    702.6

    If the Board of Directors approves the request by a vote of at least two-thirds of the Board membership, the President shall thereupon assign the responsibility for preparing the *amicus* brief and other necessary documents for action on behalf of the Association in favor of the views authorized by the Board of Directors.

17. Section 801 is amended to read as follows:

    801.

    These By-Laws may be amended by a two-thirds vote at any meeting of the Board of Directors; provided, however, that notice of any proposed amendment, together with its text, shall have been distributed by the Secretary, or his designee, to the Directors at least ten (10) days prior to the meeting at which the amendment is to be acted upon. These By-Laws may also be amended by a majority vote of those present at any meeting of the members of the Association, provided the Secretary, or his designee, shall have mailed the text thereof to the members at least fifteen (15) days prior to the meeting at which the amendment is to be acted upon.

18. The Section relating to the Seal of the Association is renumbered as Section 10 and Section 1001.