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THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

# SPRING MEETING — MAY 3, 1996

COMMITTEE ON THE CARRIAGE OF GOODS

## REVISING THE CARRIAGE OF GOODS BY SEA ACT

MAJORITY REPORT, RESOLUTION,
FINAL REPORT OF AD HOC STUDY GROUP WITH
ACCOMPANYING DOCUMENTS, AND
DISSENTING REPORTS AND
COMMENTS

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# FORMAL REPORT OF THE COMMITTEE ON CARRIAGE OF GOODS

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March 18, 1996

William R. Dorsey, III, Esq.
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Re: Revised COGSA Proposal By The Carriage
of Goods By Sea Committee —
May 3, 1996 Meeting
Our File: 900-98

Dear Mr. Dorsey:

On February 9, 1996, the majority of the members present at the meeting of the Committee on Carriage of Goods (CoCoG) voted in favor of the revised proposal for a new Carriage of Goods by Sea Act (COGSA).

In accordance with Rule 504 of the By-Laws of the Association, this letter is submitted together with its enclosures, as the majority report of the Committee.

The Committee will ask The Maritime Law Association of the United States at its May 3, 1996, general meeting to approve the report, and to ask the Association to send the revised proposal to amend the U.S. Carriage of Goods by Sea Act to the Congress.

On behalf of the CoCoG Committee, we thank you in advance for your assistance in presenting our report.

Very truly yours,

DeORCHIS & PARTNERS

By Vincent M. DeOrchis

VMD/af
Enc.
cc: Chester D. Hooper, President
c/o Haight, Gardner, Poor & Havens

## 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 four 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 February 9, 1996, by a majority of those voting, has accepted the proposed revisions as put forward in the Final Report of the Ad Hoc Study Group, 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 The 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.

## COGSA PROPOSAL SUMMARY

The proposal to amend COGSA is intended eventually to bring the United States into unity with the rest of the maritime nations. At the present time, the United States COGSA differs from the many nations that have adopted the Hague/Visby Rules. These nations comprise approximately 70% of the United States' trade by sea. The greatest distinction may be found in the package limitations. United States COGSA limits the carrier's liability to $500 per package or, for cargo not packaged, $500 per customary freight unit. Hague/Visby limits the carrier's liability to 2 Special Drawing Rights of the International Monetary Fund (SDRs) per kilogram or 666.67 SDRs per package, whichever is greater. An SDR is now valued at about $1.45. At this rate, the limit per kilo is $2.90 and per package is $966.67. In addition, the Hague/Visby Rules generally do not consider a pallet as a package while COGSA does.

A small number of developing nations, which represent about 2% of the United States' trade by sea, have adopted the Hamburg Rules. In addition to the developing nations, Norway, Sweden, Finland and Denmark have adopted the liability definition from the Hamburg Rules. Australia has passed a statute providing for the adoption of Hamburg, but is closely following our project to amend the United States COGSA. We think that this project may have helped to prevent (or at least to postpone) Australia's adopting the Hamburg Rules. The greatest disadvantage of Hamburg is its vague definition of liability. Adoption of that definition would discard all the case law that has interpreted COGSA in the United States since 1936.

Some shippers' interests have lobbied the United States to adopt Hamburg, and some people in our government, who consider our nation a cargo shipping rather than a ship owning nation, favor Hamburg over Hague/Visby.

The proposal retains the basic liability definition of Hague/Visby with the exception of the error of navigation or management defense. In exchange for the loss of error of navigation or management, the carrier interests receive more favorable burden of proof rules. Much of the original intent of the drafters of the Hague Rules, and thus COGSA, is retained by the proposal. The proposal would make the following changes:

I. List of Hague/Visby defenses will remain except error of navigation or management.

II. Burden of Proof Rules will be changed to require all parties to bear an equal burden to prove which of more than one event combined to cause damage. The court would apportion liability amongst the parties responsible for the events in the same fashion as the court now apportions liability in collision and grounding cases.

III. Package/Weight Limitation will be essentially the same as Hague/Visby.

IV. Choice of Forum Clauses will be limited. The proposal will overturn *The SKY REEFER,* 115 S.Ct. 2322, 1995 A.M.C. 1817. It will not honor a choice of forum outside the United States for cargo shipped to or from the United States. If the choice of forum clause calls for arbitration outside the United States for cargo shipped to or from the United States, any party may move a United States court to order arbitration somewhere in the United States.

V. Carrier issuing the bill of lading will be liable for entire carriage.

VI. Shipper's Loan, Count and Weight Bill of Lading Clauses will be honored in some circumstances.

VII. The proposal will extend to the entire carriage evidenced by the bill of lading and to all parties participating in the performance of the carriage (except interstate trucking and rail carriers).

Some people worry that an amended COGSA will create disunity. We think that it will, in the long term, foster unity. If we do not amend COGSA, a new CMI Convention, which is now being discussed by an international subcommittee, may very well retain the error of navigation defense. If the new Convention retains the error of navigation defense, the United States will probably ratify it. If an amended COGSA deletes error of navigation, the new CMI Convention will probably delete error of navigation, and the United States may very well ratify that Convention.

# REVISING THE CARRIAGE OF GOODS BY SEA ACT: Final Report of the Ad Hoc Liability Rules Study Group as Revised by the Ad Hoc Review Committee February 9, 1996

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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 inter-vening 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,

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[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 widespread 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 Ad Hoc Liability Rules Study Group, convened by Chairman George F. Chandler (who then chaired the Committee on the Carriage of Goods of The Maritime Law Association of the United States), sought to break this long-standing deadlock and propose a compromise solution that — taken as a whole — would 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 completed its work on February 15, 1995, with the adoption of its Final Report.[10] This Final Report was submitted to CoCoG, which

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[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.

[10] Revising the Carriage of Goods by Sea Act: Final Report of the Ad Hoc Liability Rules Study Group (Feb. 15, 1995), *reprinted in* MLA doc. no. 716, at 10684–10746 (May 5, 1995).

held a special meeting on March 10, 1995, to consider the proposals and make a recommendation to the full MLA membership. After heated discussion, the committee voted to introduce a proposed resolution of the Association endorsing the Study Group's work and urging Congress to enact the proposed legislation. The resolution was scheduled for discussion and a vote at the MLA spring meeting on May 5, 1995. Copies of the Final Report were mailed to the membership, along with the views of dissenting committee members.

A number of MLA members objected that the process was moving too quickly, and that they had not had an adequate opportunity to study the issues. They argued that they needed more time and information to cast their votes intelligently. In response to these objections, CoCoG voted to recall the resolution for the time being, and to postpone a vote on the subject until the 1996 spring meeting. During the year of the postponement, CoCoG (sometimes in conjunction with other organizations) sponsored a series of meetings throughout the country — in New York, Chicago, Houston, Seattle, Los Angeles, and New Orleans — to enable everyone with an interest to become fully acquainted with the issues and to enable members to express their views.

As these special meetings concluded, Vincent M. De Orchis, the new chairman of CoCoG, appointed an Ad Hoc Review Committee to reconsider all of the work of the Study Group, particularly in areas where the special meetings had identified concerns. This Review Committee met three times, and agreed upon a number of changes, which have been incorporated into the Study Group's Report in order to create this revised Report.

The proposed bill, as drafted by the Study Group and revised by the Review Committee, 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 proposal 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 and the

Review Committee no member fully supports every proposed change considered in isolation. But each member 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 adequate 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 proposed 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 by a carrier to a person authorized to

receive them." Subsection 1(e).[11] 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 preserved 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.[12] The definition of "contract of carriage" is accordingly expanded to recognize this broader coverage. Subsection 1(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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> *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 proposed bill creates a comprehensive scheme to cover almost all of the participants in a contractual shipment that includes carriage by sea. Thus the proposed Act establishes the rights and duties of almost everyone performing the contract (including, for example, ocean carriers, stevedores, terminal operators, freight forwarders, inland carriers, and all of their servants, agents, and independent contractors and

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[11] For a discussion of the meaning of the phrase "delivered by a carrier 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).

[12] 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.

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 almost 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 23; "The 'Himalaya' Problem," *infra* page 21; "Admiralty Jurisdiction," *infra* page 24.

**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 proposed 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.)

Extending the application of COGSA to govern domestic shipments created a need to consider the concept of "carriage of goods by sea." Suppose a carrier issued a bill of lading for the carriage of goods from Pittsburgh, down the Ohio and Mississippi Rivers, to New Orleans, where the goods would be delivered to an ocean carrier for transportation under a second bill of lading to Europe. Under the current Act, there is no doubt that the Pittsburgh to New Orleans bill of lading is not subject to COGSA because it covers a domestic shipment. Under the proposed Act, a court might have thought that this was a contract for the carriage of goods "partially by sea" if the court took an expansive view of "sea" to include the final few miles of the journey within the Port of New Orleans. The proposed Act, however, is intended to apply only when "blue water" voyages are involved as part of the contractual transportation. To clarify this intent, subsection 1(b) specifically excludes "contracts for transportation in domestic trade exclusively on the Great Lakes, rivers or other inland waters, or the intercoastal waterway." Thus the Pittsburgh to New Orleans journey discussed here (like other "brown water" voyages) would not be governed by the proposed Act

unless a single contract of carriage (*e.g.*, a through bill of lading) covered the entire transportation from Pittsburgh to Europe.

**Voluntary extensions of COGSA.** Because the proposed 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.[13] 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 charterparties. Subsection 1(b). Thus sea waybills and electronic or "paperless" bills of lading are explicitly covered. See subsections 3(4)(b)(1) and 1(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 1(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 charterparties is continued in the proposed Act. In current practice, charterparties 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").

Because "towage contracts" are not contracts for the carriage of goods, they are not included in this statutory definition. But if bills of lading were issued

[13] 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).

under a towage contract, they would be subject to the amended Act once they were negotiated to a third party (and thus evidenced the contract of carriage) in the same way as bills of lading issued under a charterparty. Similarly, "contracts of affreightment" that are functionally equivalent to charterparties would receive the same treatment as charterparties.

**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 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 19; "Deviation," *infra* page 29.

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 11; "Domestic trade," *supra* page 13), 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 proposed bill responds to cargo interests' concerns with the elimination of the navigational fault exception. 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 with a proviso to subsection 4(2) imposing on the cargo claimant the burden of proving the carrier's negligence in cases where it is necessary to establish such negligence. Thus 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 second proviso to subsection 4(2) would establish 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). This second proviso would overrule *Schnell v. Vallescura* and adopt 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 proposed 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.

*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.

*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 ste-

vedore 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.

*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 94 percent (to roughly $970) and the Hamburg Rules increase the limitation amount by roughly 142 percent (to roughly $1210).[14] For other shipments, both regimes establish a weight-based limitation: roughly $1.32 per pound under Visby and roughly $1.65 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 con-

[14] 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 $1.454 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.

tainers 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 $970. Most other shipments are worth less than $1.32 per pound. The proposed 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 $1.32 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 contracts. *See* "Service Contracts," *infra* page 30.

**"Unbreakable" unit limitation.** Finally, the proposed 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 proposed 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 29.

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," 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 contract. 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 21. 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 proposed bill, with its expansive "carrier" definition, extends the statutory limitations and defenses to almost 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. Almost 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 almost all those performing the contract. Under the proposed Act's comprehensive scheme to cover almost all of the participants in the transaction (*see supra* page 12), 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 23; "Admiralty Jurisdiction," *infra* page 24. Thus almost 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.

There is one significant exception to this otherwise broad coverage: Under subsection 1(a)(v), the proposed Act would not apply to interstate motor or rail carriers (to the extent that they are performing motor or rail services) unless they are contracting carriers. Thus when a railroad damages goods while acting only as a "performing carrier" to conduct the inland portion of a multimodal shipment, the cargo claimant may not sue the railroad under the proposed COGSA, but must rely on the law that would otherwise be applicable. Of course, the claimant will — generally speaking — still have its COGSA remedy against the contracting carrier (and will have a COGSA remedy against interstate motor or rail carriers to the extent that they perform services other than motor or rail transportation under the contract).

The following illustrations may help to clarify the intended operation of the proposed exception for interstate motor and rail carriers:

*Illustration 1.* The ocean carrier, as 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 ocean carrier then arranges for an interstate rail carrier to transport the goods from Chicago to

Seattle, and the rail carrier negligently damages them. The cargo claimant may have an action against the contracting carrier (the ocean carrier), and that action would be governed by the proposed COGSA. The cargo claimant will have no action against the interstate rail carrier under COGSA, but may have an action against the interstate rail carrier under some other statute or source of liability. The cargo claimant may have an action against another performing carrier who is neither an interstate motor carrier nor an interstate rail carrier, and that action would be governed by the proposed COGSA.

*Illustration 2.* An interstate rail 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 rail carrier transports the goods from Chicago to Seattle, but negligently damages them in the process. The cargo claimant's action against the interstate rail carrier would be governed by the proposed COGSA because the interstate rail carrier was the contracting carrier under a contract that includes the carriage of goods by sea.

**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 proposed 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,[15] and inconsistent state law will be preempted. *See also* "The 'tackle-to-tackle' limitation," *supra* page 11.

[15] 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

## 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 proposed 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 proposed 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 proposed 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 23.

## 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

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).

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 entitled 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 proposed 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. A claimant can avoid this result if the carrier was not entitled to qualify the statements (*e.g.*, if the carrier is unable to prove that no carrier verified the contents of the container or weighed the container, as the case may be) or if the claimant can prove that the carrier was not acting in good faith.

The following illustrations may help to clarify the intended operation of the proposed amendments to subsection 3(3):

> *Illustration 1.* A shipper delivered a cargo of iron ore to a carrier with documents indicating the weight. Because no scale was available to the carrier at the port before the ship's scheduled departure, the carrier was not reasonably able to verify the weight. The carrier therefore issued the bill of lading stamped "shipper's weight." On delivery to the consignee, the ore weighed ten percent less than the weight shown on the bill of lading. If the consignee seeks to recover from the carrier for short delivery, it may not rely on the bill of lading as prima facie evidence that the carrier in fact

received the weight shown on the bill of lading. But if the consignee is able to prove with other evidence that the carrier in fact received the weight shown on the bill of lading, the carrier may nevertheless be liable for the short delivery.

*Illustration 2.* A shipper delivered 800 cases of electronic parts to a carrier stacked on ten pallets, each with 80 cases. The cases were banded together on each pallet, and the pallet was shrink-wrapped in opaque plastic making it impossible for the carrier to determine the number of cases on a pallet without cutting the plastic and the bands. The carrier issued a bill of lading for a shipment of "ten pallets of electronic parts," but it was stamped "shipper's count." On delivery to the consignee, there were only nine pallets. If the consignee seeks to recover from the carrier for short delivery, it may rely on the bill of lading as prima facie evidence that the carrier in fact received the ten pallets shown on the bill of lading because the carrier would clearly have had a reasonable means of checking this information before issuing the bill of lading.

*Illustration 3.* Same facts as *Illustration 2,* except that the carrier issued a bill of lading for a shipment of "800 cases of electronic parts" stamped "shipper's count." On delivery to the consignee, there were only 64 cases on each of the ten pallets (for a total of 640 cases). If the consignee seeks to recover from the carrier for short delivery, it may not rely on the bill of lading as prima facie evidence that the carrier in fact received the 800 cases shown on the bill of lading if the carrier can demonstrate that no carrier had a reasonable means of checking this information before issuing the bill of lading. But if the consignee is able to prove with other evidence that the carrier in fact received the 800 cases shown on the bill of lading, the carrier may nevertheless be liable for the short delivery.

*Illustration 4.* A shipper loaded and sealed a container, and delivered it to the carrier with documents indicating that it contained 1000 television sets. The carrier, without verifying the contents of the container, issued a bill of lading for "one container said to contain 1000 television sets." The carrier delivered the container intact and undamaged with the seal intact and undamaged, but the consignee discovered that there were only 997 television sets in the container at the time it was delivered to the consignee. If the consignee seeks to recover from the carrier for the three missing television sets, it may not rely on the bill of lading as prima facie evidence that the carrier in fact received 1000 television sets. But if the consignee is able to prove with other evidence that the carrier in fact received 1000 television sets, the carrier may nevertheless be liable for the three missing television sets.

*Illustration 5.* A shipper loaded and sealed a container with television sets, but an agent of the carrier was present during loading and tallied the television sets as they were being loaded. The carrier may not qualify the description of the goods on the bill of lading. If the carrier does include a phrase such as "said to contain," it will be ineffective under subsection 3(3)(iii)(a).

*Illustration 6.* A shipper loaded and sealed a container, and delivered it to the carrier one hour before the ship was scheduled to sail. Thus the carrier did not weigh the container, but relied on the weight furnished by the shipper to issue a bill of lading that indicated a weight. The carrier stamped the bill of lading with an express statement that the container had not been weighed. The carrier delivered the container intact and undamaged with the seal intact and undamaged, but on delivery to the consignee the container weighed ten percent less than the weight shown on the bill of lading. If the consignee seeks to recover from the carrier for short delivery, it may not rely on the bill of lading as prima facie evidence that the carrier in fact received the weight shown on the bill of lading. But if the consignee is able to prove with other evidence that the carrier in fact received the weight shown on the bill of lading, the carrier may nevertheless be liable for the short delivery.

*Illustration 7.* Same facts as *Illustration 6,* except the bill of lading included a "shipper's weight, load, and count" clause instead of the express statement that the container had not been weighed. The consignee may rely on the bill of lading as prima facie evidence that the carrier in fact received the weight shown on the bill of lading.

*Illustration 8.* Same facts as *Illustration 6,* except the booking note contained an agreement that the carrier would weigh the container. The consignee may rely on the bill of lading as prima facie evidence that the carrier in fact received the weight shown on the bill of lading.

*Illustration 9.* Same facts as *Illustration 6,* except the consignee presents evidence that all containers are routinely weighed in the port of loading and the carrier is unable to prove that this container was not weighed. The consignee may rely on the bill of lading as prima facie evidence that the carrier in fact received the weight shown on the bill of lading.

*Illustration 10.* Same facts as *Illustration 6,* except the seal was cut when the carrier delivered the container to the consignee. The consignee may rely on the bill of lading as prima facie evidence that the carrier in fact received the weight shown on the bill of lading.

*Illustration 11.* Same facts as *Illustration 6,* except the consignee is able to show that the carrier failed to weigh the container because the carrier suspected that it weighed less than the shipper asserted and it feared that the consignee would make a claim for short delivery, but it did not wish to lose the shipper's business. If the finder of fact concludes that the carrier was not acting in good faith when it issued the bill of lading, the consignee may rely on the bill of lading as prima facie evidence that the carrier in fact received the weight shown on the bill of lading.

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 proposed 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 15.

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 proposed 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 19.

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

Until recently, 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) of COGSA prohibits foreign forum selection clauses. Some lower courts also held that foreign arbitration clauses were "null and void and of no effect" under this provision. *See, e.g., State Establishment for Agricultural Product Trading v. M/V Wesermunde,* 838 F.2d 1576 (11th Cir. 1988), *cert. denied,* 488 U.S. 916 (1988). In *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer,* 115 S. Ct. 2322 (1995), however, the Supreme Court overruled these cases and held that subsection 3(8) does not apply to forum selection clauses. The court instead applied the general rule that forum selection clauses are presumptively enforceable. *See Carnival Cruise Lines v. Shute,* 499 U.S. 585 (1991); *The Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1 (1972).

Although COGSA's legislative history supports the view that subsection 3(8) was never intended to cover forum selection clauses, it is equally clear that the international convention does not *require* the enforcement of forum selection clauses. The delegates simply left the issue to national law. Some nations responded to this situation by enacting an explicit statute to prohibit forum selection clauses in bills of lading; other nations left the issue to be determined by general principles. Either course is consistent with the Hague Rules.

As part of the commercial compromise between carrier and cargo interests, subsection 3(8)(b) of the Study Group's proposed bill specifically addresses the issue and recommends greater protection for cargo interests than current law provides. If the goods are loaded or discharged in a U.S. port, or if the carrier receives or delivers the goods in the United States, or if any of these events were intended to occur in the United States, then a foreign forum selection clause or a foreign arbitration clause would be invalid in cases where the proposed Act applies. 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 would be 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 would generally 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 a party requests such a ruling in timely fashion. (If neither party seeks U.S. arbitration, however, the court shall proceed with the case as if there had been no arbitration clause.) This provision may force a party into U.S.

arbitration who would not have agreed to U.S. arbitration, but the alternative is to deprive parties of arbitration entirely. In any event, a party who is willing to consent to arbitration only in a foreign venue can draft an appropriate 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 INCOTERMS.) 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 sixteen 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, and which was recodified 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 § 8; 49 U.S.C. § 80110 |
| § 3(4)(b)(4) | 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 § 25; 49 U.S.C. § 80109 |
| § 3(4)(b)(15) | 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 proposed 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 up-dating. 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 11, this provision is unnecessary and the proposed bill therefore eliminates it. *See* "Voluntary extensions of COGSA," *supra* page 14.

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 11. The proposed 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 13, this provision is unnecessary and the proposed bill eliminates it. *See* "Voluntary extensions of COGSA," *supra* page 14.

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 proposed 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 charterparties. *See* "Bills of lading," *supra* page 14. The "bill of lading" reference in this clause has been modified to reflect this change.

The proposed Act applies to domestic trade as well as foreign trade. *See* "Domestic trade," *supra* page 13. Amendments to this clause and section 13 have been proposed to effect 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 23.

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 24.

**Section 1(a).** In conjunction with the expanded scope of the proposed Act and the comprehensive scheme to cover almost all of the participants in a con-

tractual shipment that includes carriage of goods by sea (*see* "The 'tackle-to-tackle' limitation," *supra* page 7), section 1(a) has been revised to define "carrier" as broadly as possible. The new definition is intended to cover almost 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 21.

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 sub-contractors. 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 12.

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 charterparties) and multimodal contracts that include carriage by sea under a through bill of lading. *See* "Bills of lading," *supra* page 14; "The 'tackle-to-tackle' limitation," *supra* page 11. The definition clarifies the concept of carriage "by sea" with an explicit exclusion of "contracts for transportation in domestic trade exclusively on the Great Lakes, rivers or other inland waters, or the intercoastal waterway." *See* "Domestic trade," *supra* page 13. The "contract of carriage" 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 15.

**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 11.

**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 lading," *supra* page 14. If the parties agree to use electronic bills of lading, they should also agree upon rules governing EDI procedures, such as the Rules for Electronic Bills of Lading adopted by the Comité 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 almost everyone involved in the performance of the contract of carriage are governed by the proposed Act. *See* "The 'Himalaya' Problem," *supra* page 21. 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 11. 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 almost everyone involved in the performance of the contract of carriage are governed by the proposed Act. *See* "The 'Himalaya' Problem," *supra* page 21. 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 11.

**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 charterparties. *See* "Bills of lading," *supra* page 14.

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 11.

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 24.

**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 24.

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 charterparties. *See* "Bills of lading," *supra* page 14.

Proposed subsection 3(4)(b) incorporates sixteen amended sections of the Pomerene Act. *See* "The Pomerene Act," *supra* page 32.

**Section 3(5).** The "carrier" references have been expanded to recognize that the rights and responsibilities of almost everyone involved in the performance of the contract of carriage are governed by the proposed Act. *See* "The 'Himalaya' Problem," *supra* page 21.

**Section 3(6).** Paragraph letters have been added for ease of reference. *See* "Section numbering," *supra* page 33.

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 11. 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 charterparties. *See* "Bills of lading," *supra* page 14.

In paragraph (6)(d)(i), the "carrier" reference has been modified to recognize that the rights and responsibilities of almost everyone involved in the performance of the contract of carriage are governed by the proposed Act. *See* "The 'Himalaya' Problem," *supra* page 21.

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 charterparties. *See* "Bills of lading," *supra* page 14. The "carrier" reference has been modified to recognize that the rights and responsibilities of almost everyone involved in the performance of the contract of carriage are governed by the proposed Act. *See* "The 'Himalaya' Problem," *supra* page 21.

**Section 3(8).** The "carrier" reference has been modified to recognize that the rights and responsibilities of almost everyone involved in the performance of the contract of carriage are governed by the proposed Act. *See* "The 'Himalaya' Problem," *supra* page 21.

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 30.

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 31.

**Section 4(2)(a).** The proposed amendment eliminates the navigational fault exception. *See* "The Navigational Fault Exception," *supra* page 15.

**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 17.

**Section 4(2)(q).** 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 almost everyone involved in the performance of the contract of carriage are governed by the proposed Act. *See* "The 'Himalaya' Problem," *supra* page 21.

**Section 4(2), provisos.** The first proviso deals with the burden of proof allocation in navigational fault cases. *See* "The Navigational Fault Exception," *supra* page 15. The second 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 15.

**Section 4(3).** The "carrier" reference has been modified to recognize that the rights and responsibilities of almost everyone involved in the performance of the contract of carriage are governed by the proposed Act. *See* "The 'Himalaya' Problem," *supra* page 21.

**Section 4(4).** The "carrier" reference has been modified to recognize that the rights and responsibilities of almost everyone involved in the performance of the contract of carriage are governed by the proposed Act. *See* "The 'Himalaya' Problem," *supra* page 21. 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 29.

**Section 4(5).** Paragraph letters have been added for ease of reference. *See* "Section numbering," *supra* page 33.

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 18. 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 Pro-tocol 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 almost everyone involved in the performance of the contract of carriage are governed by the proposed Act. *See* "The 'Himalaya' Problem," *supra* page 21.

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 14.

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 the liability level is effective only between the immediate parties to the agreement. *See* "Service Contracts," *supra* page 30.

Paragraph (5)(e) provides the sole avenue for the loss of unit limitation. *See* " 'Unbreakable' unit limitation," *supra* page 19.

**Section 4(6).** The "carrier" references have been modified to recognize that the rights and responsibilities of almost everyone involved in the performance of the contract of carriage are governed by the proposed Act. *See* "The 'Himalaya' Problem," *supra* page 21.

**Section 5.** The "carrier" reference has been modified to recognize that the rights and responsibilities of almost everyone involved in the performance of the contract of carriage are governed by the proposed Act. *See* "The 'Himalaya' Problem," *supra* page 21. 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 charterparties. *See* "Bills of lading," *supra* page 14.

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 almost everyone involved in the performance of the contract of carriage are governed by the proposed Act. *See* "The 'Himalaya' Problem," *supra* page 21. 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 11.

**Section 7.** The entire section has been eliminated as unnecessary. *See* "Voluntary extensions of COGSA," *supra* page 14; "Repeals," *supra* page 34; *see also* "The 'tackle-to-tackle' limitation," *supra* page 11.

**Section 8.** The section has been updated. *See* "Updating," *supra* page 13.

**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 charterparties. *See* "Bills of lading," *supra* page 14.

The section has also been updated. *See* "Updating," *supra* page 33.

**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 charterparties. *See* "Bills of lading," *supra* page 14. 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 34; *see also* "The 'tackle-to-tackle' limitation," *supra* page 11.

**Section 13.** The proposed Act applies to domestic trade as well as foreign trade. *See* "Domestic trade," *supra* page 13. 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 14; "Repeals," *supra* page 34.

**Section 14.** The entire section has been eliminated as unnecessary. *See* "Repeals," *supra* page 34.

**Section 15.** The section has been updated. *See* "Updating," *supra* page 33.

**Section 16.** The section has been updated. *See* "Updating," *supra* page 33.

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 or from 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.
(v) This Act shall not apply to claims against an interstate motor or rail carrier that is not the contracting carrier to the extent that it is providing motor or rail services.

(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 include (i) contracts for transportation in domestic trade exclusively on the Great Lakes, rivers or other inland waters, or the intercoastal waterway, or (ii) 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 by a carrier 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 his 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 a statement specifying any marks, number, quantity, or weight information 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.

(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 specifying any marks, number, or quantity 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 of weight 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 (15) 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 (15) 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) If a negotiable or order bill of lading is issued, the carrier shall have a lien on the goods therein mentioned for all charges on those goods for freight, storage, demurrage and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill of lading and all other charges incurred in transportation and delivery, unless the bill of lading expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the charges enumerated so far as they are allowed by law and the contract between the shipper and the carrier.

(15) 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 arising 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 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 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, 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) [reserved]

(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 if any person contends that the master, mariner, pilot, or servants of the ocean carrier were negligent in the navigation or management of the ship, the burden shall be on that person to prove negligence in the navigation or management of the ship; and *Provided further,* 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 carrier's 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 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 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 the carriage of goods by sea covering transportation to or from 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 1996."

## Appendix 2
## Change 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 ~~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 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 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.

(v) This Act shall not apply to claims against an interstate motor or rail carrier that is not the contracting carrier to the extent that it is providing motor or rail services.

(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 document 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 include (i) contracts for transportation in domestic trade exclusively on the Great Lakes, rivers or other inland waters, or the intercoastal waterway, or (ii) 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 charter party 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 which 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 by a carrier 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 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, ~~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 a statement specifying any marks, number, quantity, or weight information 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.

(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 specifying any marks, number, or quantity 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 of weight 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 carriagebill of lading issued by or on behalf of a carrier shall be prima facie evidence of the receipt by thate 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:

(21) A contract of carriagebill 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.

(32) A contract of carriagebill in which it is stated that the goods are consigned or destined to the order of any person named in such contract of carriagebill is an 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 aAct and the "Pomerene Bills of Lading Act" unless upon its face and in writing agreed to by the shipper. (7) The insertion in an 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 ~~an~~ 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 refusal 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 by the 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~~he~~ —

(~~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 (15) 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 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.

(~~12~~7) Except as provided in ~~section twenty-six~~paragraph (15) of this subsection, and except when compelled by legal process, if a carrier delivers part of the goods for which ~~an~~ 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)(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~~n~~ 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.

(~~25~~14) If a~~n~~ negotiable or order bill of lading is issued, the carrier shall have a lien on the goods therein mentioned for all charges on those goods for freight, storage, demurrage and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill of lading and all other charges incurred in transportation and delivery, unless the bill of lading expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the charges enumerated so far as they are allowed by law and the contract between the ~~consignor~~ shipper and the carrier.

(~~26~~15) 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 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

*In subsection 3(4)(b), paragraphs (1) to (15) 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. §§ 80101-80115.

delivery ~~removal~~ shall be prima facie evidence of the delivery by the carriers 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 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 ~~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 carrier in the navigation or in the management of the ship;~~ [reserved]

(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 if any person contends that the master, mariner, pilot, or servants of the ocean carrier were negligent in the navigation or management of the ship,

the burden shall be on that person to prove negligence in the navigation or management of the ship; and *Provided further,* 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 carrier's 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 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~~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~~ rights and immunities or to increase 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 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.

~~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 of carriage~~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 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 ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.~~

### 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 the carriage of goods by sea covering transportation to or from ~~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 sea~~ 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 shall 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 title 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 document of title issued, whether before or after such date of approval in pursuance of any such contract as aforesaid~~. <u>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.</u>

**Section 16, 46 U.S.C. App. § 1315**

This Act may be cited as the "Carriage of Goods by Sea Act<u> of 1996</u>."

## Substantive Changes to the Final Report of the Ad Hoc Liability Rules Study Group

This memorandum sets out the substantive changes to the Final Report of the Ad Hoc Liability Rules Study Group (MLA doc. no. 716, pages 10684-10746) as recommended by the Ad Hoc Review Committee and approved by the Committee on the Carriage of Goods. All recommended changes to the proposed statutory language are considered "substantive." Other changes to the Report are set out in full or described in summary fashion.

### CHANGES TO THE EXPLANATORY REPORT

Pages 4-5 of the Report (MLA doc. no. 716, page 10687) were modified to reflect the continuing process, particularly the regional meetings in New York, Chicago, Houston, Seattle, Los Angeles, and New Orleans, and the activity of the Ad Hoc Review Committee.

On page 10 of the Report (MLA doc. no. 716, page 10690), insert the following material at the end of the "Domestic trade" discussion:

> Extending the application of COGSA to govern domestic shipments created a need to consider the concept of "carriage of goods by sea." Suppose a carrier issued a bill of lading for the carriage of goods from Pittsburgh, down the Ohio and Mississippi Rivers, to New Orleans, where the goods would be delivered to an ocean carrier for transportation under a second bill of lading to Europe. Under the current Act, there is no doubt that the Pittsburgh to New Orleans bill of lading is not subject to COGSA because it covers a domestic shipment. Under the proposed Act, a court might have thought that this was a contract for the carriage of goods "partially by sea" if the court took an expansive view of "sea" to include the final few miles of the journey within the Port of New Orleans. The proposed Act, however, is intended to apply only when "blue water" voyages are involved as part of the contractual transportation. To clarify this intent, subsection 1(b) specifically excludes "contracts for transportation in domestic trade exclusively on the Great Lakes, rivers or other inland waters, or the intercoastal waterway." Thus the Pittsburgh to New Orleans journey discussed here (like other "brown water" voyages) would not be governed by the proposed Act unless a single contract of carriage (*e.g.*, a through bill of lading) covered the entire transportation from Pittsburgh to Europe.

On page 12 of the Report (MLA doc. no. 716, page 10691), insert the following paragraph at the end of the "Bills of lading" discussion:

Because "towage contracts" are not contracts for the carriage of goods, they are not included in this statutory definition. But if bills of lading were issued under a towage contract, they would be subject to the amended Act once they were negotiated to a third party (and thus evidenced the contract of carriage) in the same way as bills of lading issued under a charterparty. Similarly, "contracts of affreightment" that are functionally equivalent to charterparties would receive the same treatment as charterparties.

This paragraph responds to the concerns of the American Waterways Operators, who feared that the proposal might be misread to apply to towage contracts. As this was never the intent of the proposal, the Review Committee thought it would be appropriate to include this clarification in the Report.

On page 25 of the Report (MLA doc. no. 716, page 10699), insert the following material at the end of the "Himalaya" discussion:

There is one significant exception to this otherwise broad coverage: Under subsection 1(a)(v), the proposed Act would not apply to interstate motor or rail carriers (to the extent that they are performing motor or rail services) unless they are contracting carriers. Thus when a railroad damages goods while acting only as a "performing carrier" to conduct the inland portion of a multi-modal shipment, the cargo claimant may not sue the railroad under the proposed COGSA, but must rely on the law that would otherwise be applicable. Of course, the claimant will — generally speaking — still have its COGSA remedy against the contracting carrier (and will have a COGSA remedy against interstate motor or rail carriers to the extent that they perform services other than motor or rail transportation under the contract).

The following illustrations may help to clarify the intended operation of the proposed exception for interstate motor and rail carriers:

*Illustration 1.* The ocean carrier, as 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 ocean carrier then arranges for an interstate rail carrier to transport the goods from Chicago to Seattle, and the rail carrier negligently damages them. The cargo claimant may have an action against the contracting carrier (the ocean carrier), and that action would be governed by the proposed COGSA. The cargo claimant will have no action against the interstate rail carrier under COGSA, but may have an action against the interstate rail carrier under some other statute or source of liability. The cargo claimant may have an action against another performing carrier

who is neither an interstate motor carrier nor an interstate rail carrier, and that action would be governed by the proposed COGSA.

*Illustration 2.* An interstate rail 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 rail carrier transports the goods from Chicago to Seattle, but negligently damages them in the process. The cargo claimant's action against the interstate rail carrier would be governed by the proposed COGSA because the interstate rail carrier was the contracting carrier under a contract that includes the carriage of goods by sea.

Throughout the Report (*e.g.*, page 9 of the Report; MLA doc. no. 716, page 10690), statements regarding the scope of the proposed Act were changed to conform with this new approach. For example, statements that the proposed Act would cover "all of the participants" or "everyone involved" in the performance of the contract were changed to "almost all of the participants" or "almost everyone involved" to recognize the exclusion of the interstate motor or rail carriers.

On page 32 of the Report (MLA doc. no. 716, page 10702), add the following language, beginning at the end of the next-to-last paragraph in the section on "Qualifying Statements":

A claimant can avoid this result if the carrier was not entitled to qualify the statements (*e.g.*, if the carrier is unable to prove that no carrier verified the contents of the container or weighed the container, as the case may be) or if the claimant can prove that the carrier was not acting in good faith.

The following illustrations may help to clarify the intended operation of the proposed amendments to subsection 3(3):

*Illustration 1.* A shipper delivered a cargo of iron ore to a carrier with documents indicating the weight. Because no scale was available to the carrier at the port before the ship's scheduled departure, the carrier was not reasonably able to verify the weight. The carrier therefore issued the bill of lading stamped "shipper's weight." On delivery to the consignee, the ore weighed ten percent less than the weight shown on the bill of lading. If the consignee seeks to recover from the carrier for short delivery, it may not rely on the bill of lading as prima facie evidence that the carrier in fact received the weight shown on the bill of lading. But if the consignee is able to prove with other evidence that the carrier in fact received the weight shown on the bill of lading, the carrier may nevertheless be liable for the short delivery.

*Illustration 2.* A shipper delivered 800 cases of electronic parts to a carrier stacked on ten pallets, each with 80 cases. The cases are banded together on each pallet, and the pallet is shrink-wrapped in opaque plastic making it impossible for the carrier to determine the number of cases on a pallet without cutting the plastic and the bands. The carrier issued a bill of lading for a shipment of "ten pallets of electronic parts," but it was stamped "shipper's count." On delivery to the consignee, there were only nine pallets. If the consignee seeks to recover from the carrier for short delivery, it may rely on the bill of lading as prima facie evidence that the carrier in fact received the ten pallets shown on the bill of lading because the carrier would clearly have had a reasonable means of checking this information before issuing the bill of lading.

*Illustration 3.* Same facts as *Illustration 2,* except that the carrier issued a bill of lading for a shipment of "800 cases of electronic parts" stamped "shipper's count." On delivery to the consignee, there were only 64 cases on each of the ten pallets (for a total of 640 cases). If the consignee seeks to recover from the carrier for short delivery, it may not rely on the bill of lading as prima facie evidence that the carrier in fact received the 800 cases shown on the bill of lading if the carrier can demonstrate that no carrier had a reasonable means of checking this information before issuing the bill of lading. But if the consignee is able to prove with other evidence that the carrier in fact received the 800 cases shown on the bill of lading, the carrier may nevertheless be liable for the short delivery.

*Illustration 4.* A shipper loaded and sealed a container, and delivered it to the carrier with documents indicating that it contained 1000 television sets. The carrier, without verifying the contents of the container, issued a bill of lading for "one container said to contain 1000 television sets." The carrier delivered the container intact and undamaged with the seal intact and undamaged, but the consignee discovered that there were only 997 television sets in the container at the time it was delivered to the consignee. If the consignee seeks to recover from the carrier for the three missing television sets, it may not rely on the bill of lading as prima facie evidence that the carrier in fact received 1000 television sets. But if the consignee is able to prove with other evidence that the carrier in fact received 1000 television sets, the carrier may nevertheless be liable for the three missing television sets.

*Illustration 5.* A shipper loaded and sealed a container with television sets, but an agent of the carrier was present during loading and

tallied the television sets as they were being loaded. The carrier may not qualify the description of the goods on the bill of lading. If the carrier does include a phrase such as "said to contain," it will be ineffective under subsection 3(3)(iii)(a).

*Illustration 6.* A shipper loaded and sealed a container, and delivered it to the carrier one hour before the ship was scheduled to sail. Thus the carrier did not weigh the container, but relied on the weight furnished by the shipper to issue a bill of lading that indicated a weight. The carrier stamped the bill of lading with an express statement that the container had not been weighed. The carrier delivered the container intact and undamaged with the seal intact and undamaged, but on delivery to the consignee the container weighed ten percent less than the weight shown on the bill of lading. If the consignee seeks to recover from the carrier for short delivery, it may not rely on the bill of lading as prima facie evidence that the carrier in fact received the weight shown on the bill of lading. But if the consignee is able to prove with other evidence that the carrier in fact received the weight shown on the bill of lading, the carrier may nevertheless be liable for the short delivery.

*Illustration 7.* Same facts as *Illustration 6,* except the bill of lading included a "shipper's weight, load, and count" clause instead of the express statement that the container had not been weighed. The consignee may rely on the bill of lading as prima facie evidence that the carrier in fact received the weight shown on the bill of lading.

*Illustration 8.* Same facts as *Illustration 6,* except the booking note contained an agreement that the carrier would weigh the container. The consignee may rely on the bill of lading as prima facie evidence that the carrier in fact received the weight shown on the bill of lading.

*Illustration 9.* Same facts as *Illustration 6,* except the consignee presents evidence that all containers are routinely weighed in the port of loading and the carrier is unable to prove that this container was not weighed. The consignee may rely on the bill of lading as prima facie evidence that the carrier in fact received the weight shown on the bill of lading.

*Illustration 10.* Same facts as *Illustration 6,* except the seal was cut when the carrier delivered the container to the consignee. The consignee may rely on the bill of lading as prima facie evidence that the carrier in fact received the weight shown on the bill of lading.

*Illustration 11.* Same facts as *Illustration 6,* except the consignee is able to show that the carrier failed to weigh the container because the carrier suspected that it weighed less than the shipper asserted and it feared that the consignee would make a claim for short delivery, but it did not wish to lose the shipper's business. If the finder of fact concludes that the carrier was not acting in good faith when it issued the bill of lading, the consignee may rely on the bill of lading as prima facie evidence that the carrier in fact received the weight shown on the bill of lading.

After extensive consideration, the Review Committee concluded that the proposed amendments to subsection 3(3) were fair as part of the overall commercial compromise, but it thought it appropriate to add further explanation to the Report to clarify the narrow situations in which they would apply.

On pages 35-36 of the Report (MLA doc. no. 716, pages 10704-05), replace the entire section on "Forum Selection Clauses" with the following:

**Forum Selection Clauses**

Until recently, 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) of COGSA prohibits foreign forum selection clauses. Some lower courts also held that foreign arbitration clauses were "null and void and of no effect" under this provision. *See, e.g., State Establishment for Agricultural Product Trading v. M/V Wesermunde,* 838 F.2d 1576 (11th Cir. 1988), *cert. denied,* 488 U.S. 916 (1988). In *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer,* 115 S. Ct. 2322 (1995), however, the Supreme Court overruled these cases and held that subsection 3(8) does not apply to forum selection clauses. The court instead applied the general rule that forum selection clauses are presumptively enforceable. *See Carnival Cruise Lines v. Shute,* 499 U.S. 585 (1991); *The Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1 (1972).

Although COGSA's legislative history supports the view that subsection 3(8) was never intended to cover forum selection clauses, it is equally clear that the international convention does not *require* the enforcement of forum selection clauses. The delegates simply left the issue to national law. Some nations responded to this situation by enacting an explicit statute to prohibit forum selection clauses in bills of lading; other nations left the issue to be determined by general principles. Either course is consistent with the Hague Rules.

As part of the commercial compromise between carrier and cargo interests, subsection 3(8)(b) of the Study Group's proposed bill specifically addresses the issue and recommends greater protection for cargo interests than current law provides. If the goods are loaded or discharged in a U.S. port, or if the carrier receives or delivers the goods in the United States, or if any of these events were intended to occur in the United States, then a foreign forum selection clause or a foreign arbitration clause would be invalid in cases where the proposed Act applies. 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 would be 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 would generally 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 a party requests such a ruling in timely fashion. (If neither party seeks U.S. arbitration, however, the court shall proceed with the case as if there had been no arbitration clause.) This provision may force a party into U.S. arbitration who would not have agreed to U.S. arbitration, but the alternative is to deprive parties of arbitration entirely. In any event, a party who is willing to consent to arbitration only in a foreign venue can draft an appropriate arbitration clause.

This alteration to the Report was made necessary by the Supreme Court's decision in *Sky Reefer,* which was decided after the completion of the Report. There is no change to proposed subsection 3(8)(b).

On page 38 of the Report (MLA doc. no. 716, page 10706), replace the last line on the table with the following:

| | |
|---|---|
| § 3(4)(b)(14) | Pomerene Act § 25; 49 U.S.C. § 80109 |
| § 3(4)(b)(15) | Pomerene Act § 26; 49 U.S.C. § 80111 |

This recognizes (1) the addition of new subsection 3(4)(b)(14), based on section 25 of the Pomerene Act, 49 U.S.C. § 80109, which should have been included in the original proposal, and (2) the renumbering of proposed subsection 3(4)(b)(14) in the original proposal, which becomes subsection 3(4)(b)(15).

## CHANGES TO THE PROPOSED STATUTORY LANGUAGE

On page 1 of Appendix 1 to the Report (MLA doc. no. 716, page 10715), in the enacting clause, change "to, from, or through" to read:

to or from

A corresponding change was made on page 1 of Appendix 2 to the Report (MLA doc. no. 716, page 10730). On pages 40-41 of the Report (MLA doc. no. 716, page 10707), the Section-by-Section Analysis was updated to reflect this change. This change restores the current COGSA language to avoid covering shipments that pass through the United States without being "to or from" the United States. The Review Committee felt that such shipments did not have a sufficient connection with the United States to justify imposing U.S. law.

On page 2 of Appendix 1 to the Report (MLA doc. no. 716, page 10716), add the following as a new subsection 1(a)(v):

This Act shall not apply to claims against an interstate motor or rail carrier that is not the contracting carrier to the extent that it is providing motor or rail services.

A corresponding change was made on page 2 of Appendix 2 to the Report (MLA doc. no. 716, page 10730). (An addition to the text of the Report discussing this new subsection is noted above.) After discussion, the Review Committee agreed that existing federal and state law is adequate for interstate motor and rail carriers. Furthermore, interstate motor and rail carriers have expressed their preference to be governed by existing federal and state law other than COGSA, and some cargo interests have expressed their preference to be able to pursue remedies against interstate motor and rail carriers outside of COGSA. Thus there was no commercial reason to include interstate motor and rail carriers under the proposed new statute.

On page 2 of Appendix 1 to the Report (MLA doc. no. 716, page 10716), in subsection 1(b), change "does not apply to charter-parties." to read:

does not include (i) contracts for transportation in domestic trade exclusively on the Great Lakes, rivers or other inland waters, or the intercoastal waterway, or (ii) charterparties.

A corresponding change was made on page 2 of Appendix 2 to the Report (MLA doc. no. 716, page 10731). An addition to the text of the Report explaining this change is noted above. In addition, the Section-by-Section Analysis on page 43 of the Report (MLA doc. no. 716, pages 10708-107009) was updated to reflect this change.

On page 2 of Appendix 1 to the Report (MLA doc. no. 716, page 10716), in subsection 1(e), change "delivered to a person" to read:

delivered by a carrier to a person

A corresponding change was made on page 2 of Appendix 2 to the Report (MLA doc. no. 716, page 10731). The Review Committee felt that this language would more clearly convey the intent of the proposal.

On page 4 of Appendix 1 to the Report (MLA doc. no. 716, page 10718), in subsection 3(3)(ii), change the final clause ("then the carriers shall not be responsible for the accuracy of the statement to the extent that it has been qualified.") to read:

> then a statement specifying any marks, number, quantity, or weight information 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.

A corresponding change was made on page 4 of Appendix 2 to the Report (MLA doc. no. 716, page 10733). This conforms the language in subsection 3(3)(ii) to the language in subsections 3(3)(iii)(a) and 3(3)(iii)(b).

On page 5 of Appendix 1 to the Report (MLA doc. no. 716, page 10718), in the second sentence of subsection 3(3)(iii)(a), change "then a statement in a contract of carriage that has been qualified" to read:

> then a statement specifying any marks, number, or quantity in a contract of carriage that has been qualified

A corresponding change was made on page 5 of Appendix 2 to the Report (MLA doc. no. 716, page 10733). This eliminates any ambiguity regarding the "statement" at issue.

On page 5 of Appendix 1 to the Report (MLA doc. no. 716, page 10718), in the second sentence of subsection 3(3)(iii)(b), change "then a statement in a contract of carriage that has been qualified" to read:

> then a statement of weight in a contract of carriage that has been qualified

A corresponding change was made on page 5 of Appendix 2 to the Report (MLA doc. no. 716, page 10733). This eliminates any ambiguity regarding the "statement" at issue.

On page 10 of Appendix 1 to the Report (MLA doc. no. 716, page 10722), add the following as a new subsection 3(4)(b)(14):

> If a negotiable or order bill of lading is issued, the carrier shall have a lien on the goods therein mentioned for all charges on those goods for freight, storage, demurrage and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill of lading and all other charges incurred in transportation and delivery, unless the bill of lading expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the charges enumerated so far as they are allowed by law and the contract between the shipper and the carrier.

Proposed subsection 3(4)(b)(14) on pages 10-11 of Appendix 1 to the Report (MLA doc. no. 716, page 10722) was renumbered as subsection 3(4)(b)(15). Corresponding changes were made on page 11 of Appendix 2 to the Report (MLA doc. no. 716, page 10737). An addition to the text of the Report on this subject is noted above. In addition, the Section-by-Section Analysis on page 46 of the Report (MLA doc. no. 716, page 10710) was updated to reflect this change. This change incorporates section 25 of the Pomerene Act, 49 U.S.C. § 80109, which should have been included in the original proposal.

On page 14 of Appendix 1 to the Report (MLA doc. no. 716, page 10725), delete the language in subsection 4(2)(a), and replace it with the following:

> [reserved]

A corresponding change was made on page 14 of Appendix 2 to the Report (MLA doc. no. 716, page 10740). On page 48 of the Report (MLA doc. no. 716, page 10711), the Section-by-Section Analysis was updated to reflect this change. The Review Committee felt that the proposal to eliminate the nautical fault would be easier to understand if subsection 4(2)(a) were deleted completely, but also felt that revising the remaining provisions in subsection 4(2) (*i.e.,* changing the "Q" clause to the "P" clause) would cause confusion.

On page 15 of Appendix 1 to the Report (MLA doc. no. 716, page 10726), in the proviso to subsection 4(2), insert the following after *"Provided,"*:

> That if any person contends that the master, mariner, pilot, or servants of the ocean carrier were negligent in the navigation or management of the ship, the burden shall be on that person to prove negligence in the navigation or management of the ship; and *Provided further,*

A corresponding change was made on page 15 of Appendix 2 to the Report (MLA doc. no. 716, page 10741). Minor changes were made on page 15 of the Report (MLA doc. no. 716, page 10693) to conform to this new approach. On

page 49 of the Report (MLA doc. no. 716, page 10712), the Section-by-Section Analysis will also be updated. With the elimination of subsection 4(2)(a), the shifting of the burden of proof previously included in proposed subsection 4(2)(a) needed to be added elsewhere in subsection 4(2). The Review Committee decided to include this concept as the first proviso to subsection 4(2), with the current proviso becoming the second. The Review Committee believes that this drafting will be easier to understand; there is no change in substance from the original proposal in this regard.

On page 18 of Appendix 1 to the Report (MLA doc. no. 716, page 10728), in the proviso at the end of the first paragraph of section 6, delete the word "negotiable" from the phrase "negotiable bill of lading." A corresponding change was made on page 19 of Appendix 2 to the Report (MLA doc. no. 716, page 10743). This change restores the current COGSA language. The Review Committee felt that section 6 has worked well in its current form and there was no reason to change this aspect of it.

On page 19 of Appendix 1 to the Report (MLA doc. no. 716, page 10729), modify the first sentence of section 13 to conform to the modified enacting clause. This sentence would thus read:

> This Act shall apply to all contracts that include the carriage of goods by sea covering transportation to or from the United States.

A corresponding change was made on page 21 of Appendix 2 to the Report (MLA doc. no. 716, page 10745). On page 54 of the Report (MLA doc. no. 716, page 10714), the Section-by-Section Analysis was updated to reflect this change.

On page 19 of Appendix 1 to the Report (MLA doc. no. 716, page 10729), in sec. 3, change "1995" to read:

> 1996

A corresponding change was made on page 22 of Appendix 2 to the Report (MLA doc. no. 716, page 10746) in section 16.

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 2, 1996

For more than a century the concept of the shared adventure has distinguished carriage of goods by sea from other forms of transportation — rail, road and air. The Hamburg Rules remove the distinction by eliminating owners' defense for error in navigation and management of the vessel.

Like the International Group of P. and I. clubs and the International Chamber of Shipping [whose views are annexed to this report for ease of reference], we dissent from the current Proposal which introduces the liability regime of the Hamburg Rules as a revision of the Visby Amendments.

The Proposal is principally driven by the understandable desire of containership owners to avoid liability for shortages discovered when sealed containers are opened in discharge ports. Owners are entitled to the inference that cargo missing from a sealed container was never there in the first place, only if they weigh the container before loading and the weight is consistent with the cargo description inserted by the shippers in the bill of lading. These requirements are mandatory and owners cannot contract out of them under current law.

A change in the law could be worthwhile. But not exactly the one proposed.

The Proposal trades off relief from the burden of weighing containers at loading ports against elimination of the error in navigation and management defense. Fair enough, if the latter were limited just to containerships. The problem is that the Proposal deletes the error in navigation and management defense for all shipowners in every trade.

The willingness of the containership owners to give up the defense stems from competition amongst themselves for market share. Many of their large customers are self insured or, perhaps, would like to become so. They resist having to accept unrecoverable cargo losses, as well as to contribute in general average, for the mistakes of the Master and crew. The containership owners responded to these market forces with g.a. absorption clauses in their hull policies and, in some cases, by voluntarily accepting increased responsibility for damage to

cargo capped by higher levels of package limitation. Thus, the containership owners, by offering to waive the error in navigation and management defense, do not see themselves as giving up anything of very much value to them now.

But for the rest of the industry, eliminating the defense would be of no practical benefit. Few cargo interests in other trades are self insured. On the contrary, in bulk commodities which are often sold afloat (like oil, ores, chemicals and grains) as well as virtually all sales of goods which are financed under letters of credit, 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 can be 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 influence on crew behavior than when carelessness endangers the lives of the seafarers themselves.

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 law should be designed so that the total amount which a shipper has to pay for cargo insurance and freight is kept to a minimum. Lord Diplock, Conventions and Morals — Limitation Clauses in International Maritime Conventions, 1 J.Mar.L.Comm. 575 (1970).

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.

The effect of the Proposal, then, is to force insured cargo interests to pay twice for the same coverage. And to the extent that additional litigation is spawned, in shifting the cargo losses from cargo to p. and i. underwriters, the legal expenses (on both sides) would seriously inflate the cargo losses. In short, since cargo risks are covered by cargo insurance in most trades, the Proposal would simply saddle most ocean shipping with increased cost without any corresponding commercial benefit.

This is not to say that the containership owners should be denied what they want for themselves. They should get it, but only without sacrificing the interests of others.

The Visby Amendments were, for the most part, an attempt to meet the then discernible needs of the container trade by clarifying what constituted a package, raising package limitation, and strengthening owners' rights to limit. The rest of the industry was unaffected and did not object.

A similar result could be achieved here by leaving in place the defense of error in navigation and management, but adding in a new Section 17 to COGSA, that if owners voluntarily waived the defense, they would be entitled to contract out of their obligation to weigh containers before loading.

By restructuring the Proposal in this way, the entire industry could unite behind it and support its enactment. Such a restructured proposal would also offer a vehicle for restoring greater uniformity worldwide. It would adhere to the concept of the shared adventure under the Hague-Visby Rules and yet open up the liability regime of the Hamburg Rules for voluntary adoption in those trades for which they might be appropriate.

Michael Marks Cohen
Wade S. Hooker

**INTERNATIONAL GROUP OF P&I CLUB**
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Attention:
Mr. Chester D. Hooper, President

The Maritime Law Association of the United States
Haight, Gardner, Poor & Havens
195 Broadway
New York, NY 10007
U.S.A.

8th February 1996

Dear Sirs,

**COGSA**

We thank you for your letter of 22nd January and for the opportunity of commenting on the proposals to be considered by your Carriage of Goods Committee.

Regardless of the merits of the proposals to be put forward to your Committee we consider that the timing is most unfortunate. The international regimes are in disarray: the Hague/Visby Rules are in need of revision, the Hamburg Rules are unlikely ever to achieve wide-scale acceptance. The matter is under

active consideration by the CMI with the hope that a unified scheme can be made effective world-wide. Now is therefore not the time for one of the major trading nations to act independently. We would therefore be opposed to these proposals at this stage and, if asked to give testimony before a Congressional committee, would voice this opposition.

We would also be opposed to these proposals on their merits; we are not convinced that any small adjustments to the rules produces any long-term benefit. The search for equity is an illusion in this context since both parties are invariably insured and the point at issue concerns only the apportionment of the cost of insurance. From this perspective clarity is the watchword: the existing rules should not be abandoned until a globally unified scheme can be introduced. If new law is introduced in the USA alone we would predict no long-term benefit but considerable short-term confusion to the benefit of no-one but lawyers.

I hope these comments are helpful.

Yours faithfully,
D.J.L. Watkins
c.c. Mr. Vincent M. DeOrchis, New York

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29 March 1996

Mr. Chester D. Hooper
President
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Haight, Gardner, Poor & Havens
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New York, NY 10007
USA

Dear Mr. Hooper

**COGSA**

ICS members have followed the progress of your Association's Carriage of Goods Committee proposals to revise COGSA with growing concern.

When viewed in an international context, the proposals have the potential to seriously undermine international uniformity of the law relating to the carriage of goods by sea.

As you know it has been suggested that there is already an unacceptably high degree of non-uniformity of this law and the CMI has formed an International Sub-Committee to consider whether something can be done to remedy the situation. ICS is participating as an observer in the current CMI discussions which your Association and other national maritime law associations are actively engaged in. We would urge your Association to defer its decision in relation to the Carriage of Goods Committee's proposals until the outcome of the CMI discussions is know.

ICS believes that while the current international situation is not ideal, the level of non-uniformity has been overstated. In practice the increasing number of different legal regimes has not resulted in the level of non-uniformity suggested. The world's major maritime nations have adopted the Hague-Visby Rules and the majority of the world's carriers contractually incorporate the Hague-Visby Rules in their contracts of carriage.

All of the "hybrid" national/regional regimes which have emerged in the past few years are firmly Hague-Visby based. We understand that it was also the intention of your Association to produce a Hague-Visby based revised COGSA. In the main your proposals would achieve this but they depart from the current international trend in the fundamentally important area of carrier's liability.

The Nordic countries' Maritime Codes, while abandoning the traditional Hague Rules Article 4 rule 2 "catalogue" of defences, have expressly retained the carrier's defence of negligent navigation or management — the "nautical fault defence" — (see for example Section 26 of the Finnish Maritime Code, Chapter 13).

The Maritime Code of the People's Republic of China, while incorporating a number of Hamburg Rules provisions and shortening the catalogue of defences, has expressly retained the nautical fault defence (see Chapter IV, Article 51).

In a similar exercise to your own, the Australian Cargo Liability Working Group has recommended to the Australian Government that a number of changes be made to Australian COGSA. The Working Group has not recommended any tinkering with the catalogue of defence. The Working Group did recommend that in international discussions Australia should support the abolition or partial abolition of the nautical fault defence, but only if there was clear international support for such a move by Australia's major trading partners.

There was no recommendation to abolish the nautical fault defence in Australia's national law.

ICS is of the view that any amendment to the central liability provisions of the Hague-Visby regime is likely to cause severe disruption and increased litigation. Furthermore, proponents of the Hamburg Rules could argue that the US proposals represented a significant step away from the Hague-Visby regime and a move towards US acceptance of the Hamburg Rules.

ICS firmly believes that any national/regional initiatives in this area are misguided and in conflict with the quest for international uniformity of the regulation of shipping. While we appreciate that the Carriage of Goods Committee's proposals are the result of several years' concentrated effort, and many of the recommendations are sensible and well considered, the proposal to abolish the nautical fault defence is totally unacceptable to us and we must therefore register our firm opposition to the package as a whole. Even though it may be unrealistic to expect US ratification of the Visby Protocol, in our view new US legislation in this area should be shaped around the provisions of that Protocol to ensure that the US remains in the mainstream of trading nations.

We have conferred with the Baltic & International Maritime Council (BIMCO) which has requested that we convey to you its full support for the views expressed herein.

We would be grateful if you could arrange for this letter to be circulated to your membership in advance of your May meeting.

Yours faithfully
J.C.S. Horrocks
Secretary General

cc: Michael Marks Cohen, Burlingham Underwood LLP

## MARITIME LAW ASSOCIATION OF THE UNITED STATES
## DISSENTING REPORT
### Committee on Carriage of Goods
## PROPOSED REVISIONS TO THE CARRIAGE OF GOODS BY SEA ACT
**April 2, 1996**

*Michael J. Ryan*

This report is by way of "dissent" to allow the full membership of the Committee on the Carriage of Goods as well as the full membership of the Association to consider certain aspects of the draft proposed which I submit require clarification.

Initially, I applaud the efforts of the Committee, its Chairmen who guided this effort and those who gave their time and input to the project. In many ways, the draft corrects situations (aberrations?) in need of correction as well as includes provisions to bring COGSA into the 90's. I strongly believe that COGSA should be updated and my participation with the Study Group and as a member of the Committee had this in mind.

I believe one of the basic purposes of the effort was to modernize; not to dramatically change. The cornerstone of the Hague Rules and COGSA (along with the preceding Harter Act) was to establish a regime with respect to common carriage where the obligations and rights of the parties to the venture (common carriage) would have a standard regime where each would know where the other stood. The touch stone of who was a carrier was based on the issuance of a bill of lading (i.e., a contract).

At the same time, the Hague Rules and COGSA made it clear that they did not apply to charter parties. Simply stated, neither the Hague Rules nor COGSA were to interfere with private carriage or contract (with the caveat that a bill of lading issued in a charter situation would be governed by the Rules or the Act).

While the Rules and COGSA based responsibility and rights on the contract issued, the proposed amendments go beyond contract and would include responsibilities and rights based upon participation. It is this aspect which I submit requires further consideration and clarification lest its broadness be literally interpreted to include private carriage, making parties who never intended to undertake the responsibility of common carriers subject to the Act. As a practical matter, many charter parties today include COGSA by reference; however, not all do. It is a matter of choice which should remain a matter of choice in private carriage.

The proposed amendment in Section 1(a) (i) defines "carrier" as including a contracting carrier, performing carrier or ocean carrier. Contracting carriers are simple enough; however, "performing carriers" in its emphasis on participation is, to say the least, extremely broad and perhaps too broad.

The effort initially considered a broad base regime which would include everyone involved in an intermodal movement. The railroads and truckers opted out (Section 1(a) (v) and the explanatory commentary was changed from all to more (substantive changes to Final Report, page 3). [Query: the proposed draft makes no mention of air carriage although transportation by air can and has been part of an intermodal movement. Should not an air carrier also be excluded when acting as an air carrier?]

It is submitted that the definition of "performing carrier" by the following language, perhaps unwittingly, can be read to include a private contract party merely on the basis of what it does or is.

"***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 use of the term "incidental service to facilitate the carriage of goods" may be literally read to include almost anyone who comes close to the deal. For example, the proposed clause is not specific that participants to the transportation are limited to just those working for the contracting carrier or performing carrier. It could be read to cover those whose participation is incidental to the transportation of the goods.

Packers are specifically mentioned as included; however, no specification as to whether these are packers employed by the shipper or by the carrier. In either case, it would seem somewhat anomalous that a packer (whether acting for the shipper or the carrier) would be entitled to a complete defense of "insufficiency of packing" (Section 4(2)(n)). The proposed amendments would, literally, afford a packer working for the carrier side a defense for his own negligence. It is without question that this defense has always been intended to cover the fault of the shipper's packer over which a carrier had no control.

By the same token, if the clause can be broadly read and a shipper's packer may be included as performing work incidental to facilitate the carriage of the goods (a package has been defined as a bundle put up for transportation), could the clause be read for the benefit of a negligent shipper's packer? Obviously, this was not intended nor should this be the result.

Nevertheless, it is submitted that lawyers and judges read words of statutes as written and, if they are subject to interpretation one way or another, the lawyer will argue to his client's advantage and the judge may well be persuaded on the basis that statutes are supposed to mean what they say. Therefore, statutes should say what they mean.

The term "carrier" also include "ocean carrier" which is defined as a "performing carrier" who owns, operates or charters a vessel. Again, "performing carrier" includes those who procure 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 "charter" makes no distinction between bareboat charter, time charter, voyage charter, space charter or cross charter. Aside from the bareboat charter situation, a time charterer, voyage charterer, etc., does not control the vessel by way of maintenance, repair, crew manning, equipment, etc. Such is the responsibility of the owner and charters will usually contain a warranty by the owner that he will maintain the vessel in seaworthy condition and will be

responsible for crew, equipment, etc. Charterers rely on this warranty and the delineation of responsibility.

Section 3(1) provides that the contracting carrier and ocean carrier shall have the obligation to exercise due diligence to make the vessel seaworthy and properly man, equip and supply it. [Query: What can an NVOCC who issues a bill of lading do to comply with the obligation to use due diligence to furnish a seaworthy vessel, man, equip and supply?] While an NVOCC issues a bill of lading in the common carriage game and, thus, may not engender any degree of real sympathy, the area of private carriage and private contract gives more concern.

If one who procures performance incidental to carriage can be a carrier, what would be the result in the following situation:

A time charterer procures a vessel from its owner and sub-charters it down the line by way of either time charterer or voyage charter. The sub-charterer issues a bill of lading. To make it simple, the bill of lading is issued by the sub-charterer and not by or for the master. Under the definitions of the proposed amendments, the sub-charterer would be a "carrier" (contracting carrier). The vessel owner would also be a "carrier" because its vessel was performing the transportation and it owns or operates that vessel (performing carrier, ocean carrier).

However, the time charterer, although in the charter party chain (private contract), could be said to have procured performance incidental to carriage of the cargo. At the same time, that time charterer has no means or right to control, operate, maintain or repair that vessel, nor does it hire or maintain the crew or provide the vessel's equipment. Any time charterer in such a situation and under the prevailing law today would take the position that it was not a carrier and did not have a carrier's responsibility vis-a-vis cargo. Yet, if the definitions of proposed Section 1 can be read literally and broadly, such a time charterer could find himself pegged as a "carrier" by statutory definition.

It is submitted that this was not and is not an intent of the proposed amendments.

Section 3(3)(i) provides for the carrier to issue a bill of lading showing the number of packages or pieces, or the quantity or weight, as furnished in writing by the shipper. For non-containerized goods, the carrier may qualify the bill of lading by using the phrase "said to contain" or "shipper's weight, load, and count."

Sections 3(3)(iii)(a) and (b) make a distinction with respect to containerized goods.

Sub-section (a) essentially provides that if the carrier receives a sealed container and no carrier "verified the container's contents" a qualifying phrase would avoid the statements being prima facie evidence that the carrier received the goods as described in the contract of carriage.

Sub-section (b) provides that if the carrier demonstrates that no carrier weighed the container before the contract was issued, the statement of weight as provided by the shipper must be qualified by an express statement that the container has not been weighed.

By way of explanation, the initial report of the Ad Hoc Study Group acknowledged that "opening a sealed container for inspection is inevitably too great a burden to impose" (document #716 at 10701). Yet, a distinction is made with respect to weight if it is contained in the bill of lading.

Section 3(5) makes provision for a guarantee by the shipper of the information given to the carrier, including weight (see also the intermodal container rule of the Department of Transportation's Federal Highway Administration requiring any person presenting a container with a gross cargo weight of more than 10,000 lbs. for intermodal transport to provide a certificate as to such weight).

The explanation for substantive changes to the final report set forth some eleven illustrations in an effort to "clarify the narrow situations in which they would apply." In Sub-Section (b) and throughout the illustrations, the term "weighed the container" is used. It is submitted that this term is at odds with operational reality.

The Pomerene Act (much of which would be incorporated in the proposed amendments) in Section 101, set forth a distinction between package freight and bulk freight. With the former, if the carrier could not count, it could use a qualifying phrase. With respect to bulk freight, where the shipper installs or maintains adequate facilities for weighing the bulk freight, and makes the same available to the carrier, then the carrier, upon request and when given a reasonable opportunity, would be required to ascertain the kind and quantity. In such instance, the carrier could not insert qualifying phrase such as "shipper's weight."

It should be noted that the Pomerene Act did not require the carrier to furnish or provide weighing facilities. In the real world of transportation, a number of ports do not have weighing facilities. Other may have weighing facilities; however, they may not be under the control of the carrier.

In most cases where scales are available when a containerized shipment is received what is usually weighed is not just the container, but the tractor, chassis, container (including cargo), the fuel in the tractor's tank and possibly the driver himself. Without mathematical computation to get to the weight of the

cargo, the gross weight in such instance is meaningless. By the same token even given the mathematical exercise, without a comparison of the cargo weight with the weight declared by the shipper, such computation would also be meaningless. Bills of lading may be issued some distance away from the scale the containerized shipment is received and time is a factor.

Given the recognition that it would be burdensome and certainly time consuming and more expensive to require carriers to open sealed containers, it is submitted the same would be applicable to a requirement that the carrier ascertain the weight of the cargo claimed to be inside the container.

As a practical matter, containers are not weighed by themselves and the "weight of the container" is just that. What is important to determine, if it is a significant factor in the commercial transaction, is the weight of the cargo being shipped.

In such a case, i.e., where the weight of the cargo is an important part of the commercial transaction, a consignee may easily insist that the weight of the cargo be verified. A carrier in certain instances, might verify the weight of the contents himself. In either case, a carrier should be bound by the weight verified or stated if the carrier was requested to weigh and did not.

It seems somewhat anomalous that a carrier may use a qualifying statement as to count when receiving a sealed container, yet be held to the prima facie impact of the weight stated on the bill of lading as given to him by the shipper. If the carrier does indeed verify the cargo weight or is requested to do so and does not, let him be bound by statement of weight in the bill of lading.

At the same time, if weight is not a consideration of the commercial transaction, holding a carrier to the prima facie impact of weight on the bill of lading makes little sense when one considers the operational realities involved in getting to a comparison of the actual weight of the container contents with the declared weight given by the shipper.

One of the stated intentions of the project was clarification, and, hopefully, the reduction of litigated disputes. It is submitted that further clarification of the terms commented on above will help to achieve this end.

The writer also recognizes that any proposed legislation submitted to Congress will be subject to further comment and very likely further change. Be that as it may, I believe the Maritime Law Association, well recognized for drafting ability, should do its best to submit a product as clear as capable of being made clear.

Hopefully, by May 3, 1996, when the Association will be called to vote on the proposed revisions, clarifying amendments can be proposed. This "dissent"

suggests that we can do better and, as the "Pros from Dover" I believe we should.

Respectfully submitted,
Michael J. Ryan

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March 14, 1996

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BY FACSIMILE: (410) 539-5223

Re: New Proposal COGSA Bill

Dear Mr. Dorsey:

I respectfully disagree with the proposed subsection 3(8)(b) of the COGSA Bill which provides for the nullification of choice of foreign forum clauses. I agree with the rest of the New Proposal and voted in its favor. I informed Mr. Vince DeOrchis, the Chairman of the COGSA Committee, by a letter faxed February 7, 1996 of my disagreement with the subsection and suggested that a subcommittee should be appointed to examine the matter.

My disagreement is based on the following grounds:

(1) The nullification of the choice of foreign forum clause, postulates that the foreign court or arbitrator will apply a law conflicting with COGSA.

(2) The a priori nullification by statute of a clause submitting future disputes to arbitration in a Contracting State of the New York Convention on the Recognition and Enforcement of Arbitral Awards, violates Article II of the said Convention, which provides that each Contracting State shall recognize an agreement in writing submitting disputes to arbitration. Whether the agreement to arbitrate is

void, voidable or unenforceable is a matter to be determined by the arbitration or a court having jurisdiction. Is Congress willing to trump the above treaty provision?

(3) The purported "nullification" of the clause will not avert the commencement of proceedings abroad and the enforcement against a vessel or other property or person within the jurisdiction of the foreign court or arbitrator.

(4) Protectionism applied to clauses that submit disputes to litigation or arbitration abroad is contrary to the judicial trend represented by a number of well known United States Supreme Court decisions with last and not least the *Vimar Seguros* case. They all upheld foreign litigation or arbitration expected to result in the evasion of preemptory statutory or common law rules of the United States. There are, of course, situations in which a choice of foreign forum should not be upheld, however they are rare and depend on an evaluation of a number of factors to be left to the courts.

(5) Protectionism against foreign arbitration clauses destabilizes the increasing global respect for arbitration clauses and the worldwide enforcement of arbitration clauses and awards and is therefore injurious to United States trade and business interests.

In conclusion, I respectfully submit that the subsection should be deleted or alternatively the matter submitted to a subcommittee for further consideration.

Sincerely,
George A. Zaphiriou

cc: Chester D. Hooper, Esquire
Vincent M. DeOrchis, Esquire