Cargo Litigation: A Primer on Cargo Claims and Review of Recent Developments*

BY JAMES L. CHAPMAN, IV** &
SHAWN A. VOYLES***

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** Member, Crenshaw, Ware & Martin, P.L.C.; J.D. 1982, Washington and Lee University School of Law; B.A. 1979, Virginia Polytechnic Institute and State University. Mr. Chapman is also Adjunct Professor of Trial Practice, Regent University School of Law.

*** Associate, Crenshaw, Ware & Martin, P.L.C.; J.D., magna cum laude, 1998, Regent University School of Law; B.A., cum laude, 1995, DePauw University.

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I. INTRODUCTION

Most cargo disputes arise out of either damage to the goods during shipment, failure to deliver the goods (due to theft, sinking, etc.), or late delivery. The litigation of such claims is almost entirely insurance-driven:

the folks whose goods are lost or damaged are typically insured for the loss. It is the cargo insurer who, unable to settle the case on its own, turns to the cargo litigator to pursue a remedy under familiar principles of subrogation.

This paper is designed to provide helpful information to maritime attorneys who are new to cargo litigation, as well as to more experienced cargo practitioners. The paper is structured first as a primer on common carriage; it provides a level of basic information for the new or occasional cargo claims practitioner. However, the paper also includes a review of recent case law affecting cargo litigation, which will hopefully aid the accomplished cargo litigator in navigating the latest decisions affecting carriage of cargo.

It is important to note at the outset what this paper does not cover: private carriage under charter parties or other agreements, international conventions relating to the carriage of cargo, general average, and cargo insurance.

II. THE BASICS: WHAT IS CARRIAGE OF CARGO?

A. The Parties Involved in a Contract of Carriage

A contract of carriage exists when a shipper and a carrier enter into an agreement for the transportation of goods. Several other parties may also be involved in a contract of carriage. These parties are discussed below.

1. Shipper

"The party who supplies the goods to be transported is the shipper; the transporter is the carrier."[1] The contract of carriage may call for delivery to the shipper (also known as the consignor), but most often delivery is designated to be made to a consignee, who may be a merchant or agent who desires to resell the goods.[2]

The Ninth Circuit recently held that a shipper-consignor of goods in a bill of lading has standing to sue the carrier for mis-delivery of goods and breach of contract, despite the fact that evidence showed that the consignee, and not the consignor, entered into the shipment contract with the carrier.[3]

1. 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 10-5, at 42 (Practitioner Treatise Series, 3d ed. 2001).

2. *Id.*

3. Lite-On Peripherals, Inc. v. Burlington Aire Express, Inc., 255 F.3d 1189, 1191, 2001

The consideration paid by the shipper is termed "freight."[4] Freight is generally not earned until the cargo is delivered, but this can be altered by agreement.[5] Freight is still payable despite the delivery of damaged cargo and an attendant claim for damages.[6]

2. Carrier

"The carrier is usually the shipowner or a person such as a charterer with the right to operate a ship."[7] Under the Carriage of Goods by Sea Act ("COGSA"), discussed below in Section III(A), "[t]he term 'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper."[8] The term "charterer" also includes "slot charterers," which "reserve a certain number of container slots on a ship owned by another party."[9]

A "contract of carriage" is one that is "covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea . . . ."[10] Thus, courts will consider as a "carrier" any entity that performs the carriage.[11] A vessel may also be classified as a "carrier."[12] Moreover, more than one party may be a carrier.[13]

AMC 2113 (9th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002). "Bills of lading, after all, are designed to prevent sellers of goods from losing money when distant or unfamiliar buyers turn out to be insolvent." *Id.* at 1193. *See also* Polo Ralph Lauren, L.P. v. Tropical Shipping & Constr. Co., 215 F.3d 1217, 1223, 2000 AMC 2129 (11th Cir. 2000) (Reversing grant of summary judgment where question of fact existed as to whether party, unnamed on bill of lading, had standing to sue under "owner of the goods" language in bill).

4. 2 SCHOENBAUM, *supra* note 1, § 10-5, at 42.

5. OT Africa Line, Ltd. v. First Class Shipping Corp., 124 F. Supp. 2d. 817, 821, 2000 AMC 1109 (S.D.N.Y. 2000).

6. 2 SCHOENBAUM, *supra* note 1, § 10-6, at 44-45. *See also* Genetics Int'l v. Cormorant Bulk Carriers, Inc., 877 F.2d 806, 1989 AMC 1725 (9th Cir. 1989). "[I]n the absence of a contractual term to the contrary, freight is due and payable upon delivery regardless of any claims" for damages. *Id.* at 809.

7. 2 SCHOENBAUM, *supra* note 1, § 10-5, at 42.

8. 46 U.S.C. app. § 1301(a) (2000).

9. Mediterranean Shipping Co. S.A. Geneva v. Pol-Atlantic, 229 F.3d 397, 399 n.2, 2001 AMC 1 (2d Cir. 2000).

10. 46 U.S.C. app. § 1301(b).

11. *See* Sabah Shipyard SDN. BHD. v. M/V HARBEL TAPPER, 178 F.3d 400, 405, 2000 AMC 163 (5th Cir. 1999).

12. *See* Hale Container Line, Inc. v. Houston Sea Packing Co., 137 F.3d 1455, 1465, 1999 AMC 607 (11th Cir. 1998).

13. *See id.*

3. Consignee

The consignee is the party to whom the carrier delivers the goods.[14] His identity is typically noted on the bill of lading.[15] A "consignee is *prima facie* liable for the payment of the freight charges when he accepts the goods from the carrier."[16] The contract of carriage is between the carrier and shipper. However, a consignee (or insurer through the right of subrogation) may also be "the proper party to sue the carrier for loss or damage to the goods or breach of the contract of carriage."[17]

4. NVOCC

A non-vessel operating common carrier ("NVOCC") consolidates cargo from shippers for shipment by an ocean carrier.[18] The NVOCC issues a bill of lading to each shipper, and if the cargo is damaged during the voyage, the NVOCC is liable to the shipper under its own bill of lading.[19]

5. Freight Forwarder

A freight forwarder arranges the transportation of cargo by booking carriage, that is, by securing cargo space with an ocean carrier and arranging to have the cargo reach the port in time to meet the designated vessel.[20] Freight forwarders are categorically different from carriers (including vessels, truckers, stevedores, or warehousemen), which are directly involved in transporting the cargo. "Unlike a carrier, a freight forwarder does *not* issue a bill of lading, and is therefore not liable to a shipper for anything that occurs to the goods being shipped,"[21] so long as it "limits its role to arranging for transportation . . . ."[22] In other words, a

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14. 2 SCHOENBAUM, *supra* note 1, § 10-5, at 42.

15. *See id.*

16. Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Fink, 250 U.S. 577, 581 (1919).

17. 2 SCHOENBAUM, *supra* note 1, § 10-10, at 57.

18. *See* Fireman's Fund Am. Ins. Cos. v. Puerto Rican Forwarding Co., 492 F.2d 1294, 1295 (1st Cir. 1974).

19. *See id. See also* Yang Ming Marine Transp. Corp. v. Okamoto Freighters Ltd., 259 F.3d 1086, 1089, 2001 AMC 2529 (9th Cir. 2001) (holding that an NVOCC is a shipper and liable for its misdescription of goods despite the bill of lading listing NVOCC as an "exporter").

20. *See* N.Y. Foreign Freight Forwarders & Brokers Ass'n v. Fed. Mar. Comm'n, 337 F.2d 289, 292, 1965 AMC 703 (2d Cir. 1964).

21. Prima U.S. Inc. v. Panalpina, Inc., 223 F.3d 126, 129, 2000 AMC 2897 (2d Cir. 2000).

22. *Id.* at 129. "[M]ere puffing" did not transform freight forwarder into NVOCC where company did not issue a bill of lading and did not consolidate cargo, but rather arranged for transportation.

freight forwarder's duties are not governed by a bill of lading.

A freight forwarder's obligations end when it selects a company to perform transportation services, unless the selection itself was negligent.[23] However, if an agency relationship exists between a forwarder and a shipper, the forwarder may be liable for breach of fiduciary duty.[24]

6. Other parties who may be protected by the bill of lading: Terminal Operators, Stevedores, and the Himalaya Clause

"Bill of lading provisions which extend defenses and protections to the carrier's agents and contractors are known in admiralty law as Himalaya clauses."[25] Courts construe Himalaya clauses strictly and limit them to the intended beneficiaries.[26]

While the defenses and protections of COGSA, discussed below, may be extended to non-carriers (such as stevedores and terminal operators) by a Himalaya clause,[27] "the term 'stevedore' does not need to appear in the bill of lading, and courts have held using terms such as 'agents' and 'subcontractors' is sufficient to include anyone engaged by the carrier to perform the duties of the carrier under the carriage contract."[28]

7. Changes Instituted by the Ocean Shipping Reform Act

The Ocean Shipping Reform Act of 1998[29] ("OSRA") amended the Shipping Act of 1984. The OSRA permits private shipping agreements—service contracts—between ocean carriers and larger shippers and associations of shippers that are considered "private carriage" and thus not subject to COGSA.[30] Carriage of goods under these kinds of service contracts is today replacing a significant portion of common carriage for

23. *See id.* at 130.

24. *See* Johnson Products Co., v. M/V LA MOLINERA, 628 F. Supp. 1240, 1246, 1987 AMC 2511 (S.D.N.Y. 1986).

25. Certain Underwriters at Lloyds v. Barber Blue Sea Line, 675 F.2d 266, 269 (11th Cir. 1982).

26. Hale Container Line, Inc. v. Houston Sea Packing Co., 137 F.3d 1455, 1465, 1999 AMC 607 (11th Cir. 1998); *see also, e.g.*, Fireman's Fund Ins. Co. v. Tropical Shipping & Constr. Co., 254 F.3d 987, 996, 2001 AMC 2474 (11th Cir. 2001).

27. *Hale Container Line*, 137 F.3d at 1465.

28. Watkins v. M/V LONDON SENATOR, 112 F. Supp. 2d 511, 517, 2000 AMC 2740 (E.D. Va. 2000). *See also* Akiyama Corporation of America v. M.V. HANJIN MARSEILLES, 162 F.3d 571, 574, 1999 AMC 650 (9th Cir. 1998) (rejecting argument that privity of contract is necessary to benefit from a Himalaya Clause).

29. Pub. L. 105-258, 112 Stat. 1902 (1998).

30. *See* 46 U.S.C. app. § 1707(b) (2003).

larger shippers and shipper's associations that formerly shipped under bills of lading.[31] The OSRA also amended the Shipping Act of 1984 by substantially deregulating ocean shipping, including the allowance of discriminatory rates, rebates, and extension or denial of special privileges, so long as the discrimination does not constitute retaliation.[32]

"The parties to service contracts [under OSRA] are free to negotiate freight rates, limitations and exclusions of liability, and other terms of shipment under service agreements."[33] Moreover, as the service contracts constitute private carriage not subject to COGSA, ocean carriers may ignore COGSA's prohibitions against limiting liability for cargo loss or damage so long as the shipment is not covered under a bill of lading or negotiable receipt, which would bring the carriage under COGSA's jurisdiction.[34]

B. The Paper Trail

1. Bills of Lading

a. Purpose of bill of lading

In common carriage, a bill of lading serves two purposes. First, it is a document signed by the carrier or his agent that acknowledges that goods have been shipped onboard a specific vessel that is bound for a particular destination.[35] Second, the bill states the terms under which the goods are to be carried.[36]

A bill of lading constitutes a contract of common carriage between a shipper and a common carrier.[37] As contracts of adhesion, universally drafted by the carrier, "bills [of lading] are 'strictly construed against the carrier.'"[38] Both the shipper's and carrier's freedom to contract for the

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31. CHARLES M. DAVIS, MARITIME LAW DESKBOOK § VIII(DD), at 291 (2001).

32. *Id.*

33. *Id.* § VIII(DD)(1), at 291.

34. *See id.* at §VIII(DD)(2), at 291.

35. 2 SCHOENBAUM, *supra* note 1, § 10-11, at 59.

36. *Id.*

37. *See, e.g.*, S. Pac. Transp. Co. v. Commercial Metals Co., 456 U.S. 336, 342 (1982) ("[t]he bill of lading is the basic transportation contract between the shipper-consignor and the carrier . . . .").

38. Interocean S.S. Corp. v. New Orleans Cold Storage & Warehouse Co., 865 F.2d 699, 703, 1989 AMC 1250 (5th Cir. 1989) (quoting Allied Chemical v. Companhia de Navegacao, 775 F.2d 476, 482, 1986 AMC 826 (2d Cir. 1985)).

shipment of goods under a bill of lading is qualified by principles of statutory law, including COGSA, the Harter Act, and the Pomerene Act (discussed in greater detail in Sections III(A) and (B)).

To properly interpret a bill of lading, courts "must 'effectuat[e] the intents and understandings of the parties to the bill of lading.'"[39] "If the bill of lading fails to evince the clear intent of the parties," a court "may consider collateral evidence of the parties's intentions, including [miscellaneous] shipping documents."[40]

Where a bill of lading is not issued because the goods were damaged prior to loading, an issue often arises over whether the carrier can invoke the bill's terms and limitations.[41] Numerous courts have held that experienced shippers who have previously shipped cargo with the carrier and who are familiar with the terms and conditions of the carrier's bill of lading have constructive notice of the bill and are bound by its terms and conditions.[42]

Where the bill of lading was issued after the cargo was loaded or after the voyage began, courts have held shippers to the terms of the bill of lading where the shipper indicates its acceptance of the bill. In *Gamma-10 Plastics, Inc. v. American President Lines, Ltd.*,[43] the court held the shipper "to the terms of the bill of lading where the bill was issued within a few days of loading"[44] and the shipper subsequently negotiated the bill to receive the cargo.[45] The court ruled that the shipper's negotiation of the

39. Yang Ming Marine Transp. Corp. v. Okamoto Freighters Ltd., 259 F.3d 1086, 1096, 2001 AMC 2529 (9th Cir. 2001) (alteration in original) (holding that NVOCC was considered a shipper despite the fact that the bill of lading listed the NVOCC as an "Exporter").

40. *Id.*

41. *See* DAVIS, *supra* note 31, § VIII(Y), at 286.

42. *See id. See also, e.g.,* Ins. Co. of N. Am. v. NNR Aircargo Serv. (USA) Inc., 201 F.3d 1111, 1115, 2000 AMC 1559 (9th Cir. 2000) (constructive notice doctrine adopted in air cargo case based on a course of dealing in 47 prior shipments); Caterpillar Overseas, S.A. v. Marine Transp., Inc., 900 F.2d 714, 719, 1991 AMC 76 (4th Cir. 1990); Cincinnati Milacron, Ltd. v. M/V AMERICAN LEGEND, 784 F.2d 1161, 1166, 1986 AMC 2153 (4th Cir. 1986) (Phillips, C.J., dissenting); Wuerttembergische v. M/V STUTTGART EXPRESS, 711 F.2d 621, 622, 1984 AMC 2738 (5th Cir. 1983) (adhering to constructive notice doctrine); *contra* Komatsu, Ltd. v. States S.S. Co., 674 F.2d 806, 811, 1982 AMC 2152 (9th Cir. 1982) (rejecting constructive notice doctrine). *Cf.* N.H. Ins. Co. v. Seaboard Marine, Ltd., 1991 U.S. Dist. LEXIS 21640, at *9, 1992 AMC 279 (S.D. Fla. Jan. 2, 1991) (court held an experienced shipper to the "terms and conditions customarily imposed by the carrier in its standard bill of lading" despite the fact that the shipper had not previously shipped cargo with that particular carrier).

43. 32 F.3d 1244, 1995 AMC 909 (8th Cir. 1994).

44. DAVIS, *supra* note 31, § VIII(Y), at 286-87 (summarizing the *Gamma-10* holding).

45. *Id.* § VIII(Y), at 287.

bill indicated its acceptance of the bill's terms.[46] The *Gamma-10* court also stated, however, that when a bill of lading is only issued after delivery, and the shipper does not negotiate the bill of lading, the carrier cannot successfully prove that the shipper had a fair opportunity to review the bill of lading and choose more favorable terms.[47]

b. Types of bills of lading

There are several types of bills of lading, including:

- A straight bill of lading, which consigns the goods to a specified person, is not negotiable, and must contain the words "non-negotiable" or "not negotiable" on its face;
- An order bill of lading, which states that the goods are consigned to the order of any person named in the bill and is negotiable by endorsement of the order party and delivery of the bill;
- An international through bill, which is used for multi-modal transport, i.e., the ocean carrier agrees to transport goods to their final destination and another carrier (e.g., railroad, trucker, or air carrier) performs a portion of the contracted carriage. A through bill replaces the requisite separate bills of lading for each mode of carriage;
- A combined transport bill of lading, which is a variant of a through bill and allows one operator, termed the multimodal transport operator ("MTO") or combined transport operator ("CTO") to take legal responsibility for the carriage of goods by different modes of transport;
- A bill of lading issued by a NVOCC;
- A bill of lading issued under a charter party;
- A waybill, which is a non-negotiable receipt issued after receipt of the goods by the carrier;
- An express cargo bill, which is effectively a non-negotiable receipt

46. Gamma-10 Plastics, Inc. v. Am. President Lines, Ltd., 32 F.3d 1244, 1254, 1995 AMC 909 (8th Cir. 1994).

47. *See id. Cf.* Unimac Co. v. C.F. Ocean Serv., Inc., 43 F.3d 1434, 1438, 1995 AMC 1484 (11th Cir. 1995) (applying the constructive notice doctrine where the carrier did not issue the bill of lading until after the ship departed).

that incorporates the carrier's bill of lading terms.

- Where a shipper bargains for transportation of goods from place-to-place instead of from port-to-port and the transport involves another vessel or mode of carriage (e.g. truck or rail), the contract is for through transport.[48] When other forms of carriage, such as rail or truck, are used, the contract is for multi-modal transport.[49]

c. Terms and conditions on bills of lading

The terms and conditions are typically printed microscopically on one side of a "long form" bill of lading. These terms of a bill of lading are what make it a contract of adhesion, as they are not normally open to negotiation. It should be noted, though, that a court will void and deem unenforceable any term or condition that violates COGSA.[50]

Make sure that you obtain a legible copy of both sides of the bill of lading *prior* to filing suit or appearing in a case. The customary terms and conditions are too numerous to enumerate here. Key terms, however, include the Clause Paramount, which "specif[ies] the law to be applied to the contract of carriage" (COGSA for carriage to or from United States),[51] and the Jurisdiction Clause, which specifies the forum and applicable law for litigation arising out of claims from the contract of carriage (although, as shown below, Section V(A), below, courts may not allow this clause to have full effect).[52] Other important terms include the Himalaya clause, already discussed in Section II(A)(5), and the limitation of liability clause, discussed below in Section V(A).

2. Other commercial documents

Other documents utilized in carriage of cargo include the packing slip, commercial invoice, letter of credit, and dock receipt (if the goods are stored at the pier before loading or after discharge). You will want to make sure you obtain these documents pre-suit.

48. 2 SCHOENBAUM, *supra* note 1, § 10-5, at 44.

49. *Id.*

50. *See, e.g.*, Plywood Panels, Inc. v. M/V SUN VALLEY, 804 F. Supp. 804, 810, 1993 AMC 516 (E.D. Va. 1992).

51. 2 SCHOENBAUM, *supra* note 1, § 10-11, at 65.

52. *Id.* § 10-11, at 68.

3. Subrogation documents

Where a cargo insurer desires to bring suit pursuant to its right of subrogation, the cargo litigator should obtain a copy of the subrogation receipt or other proof of payment prior to bringing suit. Until the cargo insurer has paid or been held liable to pay its assured, it has no standing to sue an ocean carrier for damage to goods.[53]

C. Modes of Carriage

The following modes of carriage are encountered in ocean carriage:

Containerized. A container is typically a metal box used for the carriage of cargo. Usual dimensions are 20 x 8 x 8.5 ft or 40 x 8 x 8.5 ft and are commonly referred to in shorthand by their length. Taller containers are referred to as "high cubes." Container ships are specially designed to carry these containers. A modern container ship often has bays into which the containers are lowered and where they are held in place by upright steel sections called cell guides. Containers are frequently carried on deck where they need to be lashed and secured. Freight is invoiced on the basis of the size of the container.

Reefer. A reefer is an insulated container that is fitted with a refrigerator unit for the carriage of cargo that must be frozen or chilled. Virtually all reefers are 40' in length. Electricity (440 volt) is supplied by ship's power during water transport and by either ground power at the pier or diesel-powered generator sets when being transported overland.

Flat Rack. Oversize items such as machinery are often lashed or strapped to a flat metal rack or skid for transport. They are handled much like containers but often need extra protection from the elements.

Bulk (dry). Dry bulk shipments are normally accomplished in either a bulk tanker or an ore/bulk/oiler tanker ("OBO"), which carries bulk products in addition to liquid cargo. Freight is invoiced by weight.

Bulk (liquid). Liquid bulk shipments are normally accomplished in an oiler tanker or OBO. Freight is invoiced by weight or volume.

53. *See* Meredith v. The IONIAN TRADER, 279 F.2d 471, 474 (2d Cir. 1960). *See also* M.V.M., Inc. v. St. Paul Fire & Marine Ins. Co., 156 F. Supp. 879, 881, 1987 AMC 1044 (S.D.N.Y. 1957) (holding that an underwriter who sues but has not been paid lacks standing).

III. APPLICABLE LAW

Until 1924, carriage of cargo was subject to the varying statutes of maritime nations and the complex bills of lading/contracts of carriage between shippers and carriers. The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading ("Hague Rules") was signed at Brussels in 1924 and entered into force in the United States in 1937.[54] The Hague Rules established uniformity in the international arena relating to bills of lading and the carriage of goods. In April 1936, the United States Congress incorporated the Hague Rules into domestic law with the enactment of COGSA.[55] As explained below, COGSA, the Harter Act, and the Pomerene Act govern the carriage of cargo in the United States courts.

In 1968, amendments to the Hague Rules, called the Visby Rules, were signed at Brussels and entered into force in 1977.[56] The Hague/Visby Rules adjusted upward the per unit limitation of liability found in the Hague Rules. The United States did not ratify the Hague/Visby Rules.[57]

A. Coverage and application of COGSA and the Harter Act

1. COGSA

COGSA governs "all contracts for [common] carriage of goods by sea to or from ports of the United States in foreign trade."[58] A "contract for carriage" is defined as applying "only to contracts of carriage covered by a bill of lading or any similar document of title . . . ."[59] Thus, COGSA will govern a common carriage of cargo to or from the United States where a bill of lading is issued as the contract of carriage.[60] COGSA is a statutory remedy that "affords one cause of action for lost or damaged goods which, depending on the underlying circumstances, may sound louder in either contract or tort."[61]

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54. 2 SCHOENBAUM, *supra* note 1, § 10-13, at 75-76.

55. 46 U.S.C. app. §§ 1300-1315 (2003).

56. 2 SCHOENBAUM, *supra* note 1, § 10-13, at 76 n.3.

57. *Id.* at 77.

58. 46 U.S.C. app. § 1312 (2000).

59. 46 U.S.C. app. § 1301(b) (2000).

60. *See* Polo Ralph Lauren, L.P. v. Tropical Shipping & Constr. Co., 215 F.3d 1217, 1220, 2000 AMC 2129 (11th Cir. 2000) (Holding COGSA is exclusive remedy for all contracts for carriage of goods between the United States and foreign ports).

61. *Id.* at 1221.

Congress enacted COGSA, in part, to establish uniform duties and responsibilities for carriers that cannot be avoided, even by express contractual provisions.[62] Accordingly, if the bill of lading at issue in a cargo dispute contains provisions inconsistent with COGSA, those provisions are void.

It is important to note that COGSA does not apply to bills of lading issued under a charter party or other private contracts of carriage unless it is expressly incorporated as a contractual term.[63] COGSA will also not apply between the parties if the bill of lading is intended as a mere receipt.[64]

a. COGSA's statute of limitations is one year from delivery

The statute of limitations under COGSA is one year after delivery or the date when the goods should have been delivered.[65] Carriers will often agree to extensions of time to file suit in favor of the subrogated insurer during settlement discussions. Beware that such extensions are strictly construed.[66]

2. Harter Act

The Harter Act[67] ("Harter"), enacted into law in 1893, governs the carriage of cargo between ports of the United States and inland water carriage where a bill of lading is issued as the contract of carriage.[68] Harter applies "from the time of discharge to the time of delivery."[69] In other words, Harter "defines a carrier's duties with regard to proper loading,

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62. *See* 2 SCHOENBAUM, *supra* note 1, § 10-15, at 88.

63. *See* 46 U.S.C. app. § 1305 (2000); Associated Metals & Minerals Corp. v. S/S JASMINE, 983 F.2d 410, 413, 1993 AMC 957 (2nd Cir. 1993) ("contracts of private carriage must evidence a clear intent to incorporate COGSA into charter party itself, and not merely into bills of lading issued under the charter party").

64. *See* Nichimen Co. v. M.V. FARLAND, 462 F.2d 319, 328, 1972 AMC 1573 (2d Cir. 1972).

65. 46 U.S.C. app. § 1303(6) (2000). *See* Servicios-Expoarma, C.A. v. Indus. Mar. Carriers, Inc., 135 F.3d 984, 992, 1998 AMC 1453 (5th Cir. 1998) (for purposes of § 1303(6), "'[d]elivery' occurs when the carrier places the cargo into the custody of whomever is legally entitled to receive it from the carrier").

66. Cont'l Ins. Co. v. M/V OLYMPIC MELODY, 2002 U.S. Dist. LEXIS 4220, at *9 (S.D.N.Y. March 15, 2002) (if conditions of extension are not fulfilled, the extension is without effect and party is bound by the COGSA one-year statute of limitation).

67. 46 U.S.C. app. §§ 190 – 196 (2003).

68. *OLYMPIC MELODY*, 2002 U.S. Dist. LEXIS 4220, at *9.

69. Crowley Am. Transp., Inc. v. Richard Sewing Mach. Co., 172 F.3d 781, 785 n.6, 1999 AMC 1723 (11th Cir. 1999).

stowage, custody, care, and delivery of cargo."[70] Thus the import of Harter is that it imposes liability upon the carrier from receipt of the goods until delivery. Harter does permit the carrier to limit liability.

3. Interplay between COGSA and Harter Act

COGSA can apply to purely domestic United States carriage where the bill of lading expressly states that COGSA shall govern the contract.[71] In such instances, Harter will apply to the periods before loading and after discharge.[72]

Moreover, parties "may contractually incorporate COGSA'S provisions to the periods of a voyage ordinarily covered by the Harter Act."[73] However, where parties contractually extend the provisions of COGSA to periods prior to loading and subsequent to discharge, "any inconsistency with the Harter Act must yield to the Harter Act."[74]

Harter and COGSA are functionally similar, with three exceptions: (1) under Harter, the carrier is automatically liable for "any failure to exercise due diligence to provide a seaworthy vessel,"[75] regardless of whether the carrier's negligence caused the loss; (2) "Harter has no statute of limitations, and (3) Harter does not provide a limit if liability for loss or damage to cargo."[76] Harter and COGSA also differ in the time period of their application to carriage of cargo. COGSA only applies to "the period from the time when the goods are loaded on to the time when they are discharged from the ship,"[77] commonly known as "tackle to tackle."[78]

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70. Sabah Shipyard SDN. BHD. v. M/V HARBEL TAPPER, 178 F.3d 400, 406, 2000 AMC 163 (5th Cir. 1999); *see also* 46 U.S.C. app. § 1311 (2000) (COGSA expressly provides that it does not supersede Harter as to the duties of the carrier "prior to the time when the goods are loaded on or after the time they are discharged from the ship").

71. 46 U.S.C. app. § 1312 (Supp. 2003).

72. *See, e.g.*, Armco Int'l Corp. v. Rederi A/S Disa (The ASTRI), 52 F. Supp. 668 (E.D.N.Y. 1943).

73. *Sabah Shipyard*, 178 F.3d at 407.

74. *Id.* (quoting Uncle Ben's Int'l Div of Uncle Ben's, Inc., v. Hapag-Lloyd AG, 855 F.2d 215, 217, 1989 AMC 748 (5th Cir. 1988)). *See also* Colgate Palmolive Co. v. S/S DART CANADA, 724 F.2d 313, 315, 1984 AMC 305 (2d Cir. 1983) ("Parties may contractually extend COGSA's application beyond its normal parameters. When they do so, however, COGSA does not apply of its own force, but merely as a contractual term.").

75. 2 SCHOENBAUM, *supra* note 1, § 10-15, at 91.

76. *Id.* at 92. *But see* Thiti Lert Watana, Co. v. Minagratex Corp., 105 F. Supp. 2d 1077, 1083, 2001 AMC 80 (N.D. Cal. 2000) (court upheld as reasonable a nine-month time limit for filing suit created by the parties under the Harter Act).

77. 46 U.S.C. app. § 1301(e) (2000).

78. 2 SCHOENBAUM, *supra* note 1, § 10-16, at 93; *see also* Project Hope v. M/V IBN SINA,

Harter, on the other hand, applies (except when superseded by COGSA) from receipt to delivery, including where the carrier accepts custody of the goods before loading.[79]

It is clear then, that the parties may contract to extend COGSA's application.[80] A peculiar bill of lading tested this proposition, as well as the question of compulsory application of Harter, in *Mannesman Demag Corp. v. M/V CONCERT EXPRESS*.[81] In that case, a single through bill of lading covered the carriage of goods from Bremerhaven, Germany to Terre Haute, Indiana.[82] Following ocean carriage to the Port of Baltimore, a trucker completed carriage to Terre Haute.[83] During the road carriage of goods, $145,000 in damages occurred to two pieces of machinery.[84]

Notably, the through bill of lading extended the application of COGSA beyond the tackle to tackle period, stating that COGSA would apply until the time when "the Harter Act . . . would otherwise be compulsorily applicable to regulate the Carrier's responsibility for the goods. . . ."[85] The carrier sought to have COGSA apply as a matter of contract to obtain the benefit of the $500 per package limitation and limit its liability to $1000.[86] Because Harter is compulsorily applicable until "proper delivery," the carrier argued that proper delivery to Terre Haute had not yet occurred when the cargo was damaged on the road from Baltimore.[87] Conversely, if Harter did not apply on a compulsory basis to the road carriage of goods, then the inland carrier's tariff would impose a much higher limitation amount.[88]

The Fifth Circuit rejected the carrier's argument, holding that proper delivery under Harter occurred when the ocean carrier delivered the cargo

250 F.3d 67, 73, 2001 AMC 1910 (2d Cir. 2001) (COGSA did not apply where trucker's negligence in failing to insure that reefer was set at proper temperature occurred exclusively on land).

79. *See* 2 SCHOENBAUM, *supra* note 1, § 10-16, at 93; 46 U.S.C. app. § 190 (2000); 46 U.S.C. § 1311 (2000).

80. *See, e.g.*, 2A ERASTUS C. BENEDICT, BENEDICT ON ADMIRALTY, § 43 (7th rev. ed. 2001).

81. 225 F.3d 587, 2000 AMC 2935 (5th Cir. 2000).

82. *Id.* at 588.

83. *See id.*

84. *See id.* at 588 n.1.

85. *Id.* at 589 (alterations in original).

86. *See id.* at 591.

87. *See id.* at 591-92.

88. *Id.* at 591.

to the trucker.[89] The court remarked that Harter, "at its core [is] a maritime law . . . . [and,] is designed solely to regulate the liability of seagoing carriers."[90]

As a result, the parties's attempt to contractually tie COGSA's $500 per package limitation to the compulsory application of Harter failed because Harter did "not apply to inland transportation in through bills of lading."[91] The court's decision, however, did not affect the parties's general ability to contractually extend COGSA's coverage and therefore limit liability during the time in which a carrier has custody or control over cargo.[92]

The *Mannesman* court's opinion will likely be followed in other circuits because the reasoning simply and clearly effectuates Congress' intent that Harter apply solely to regulate the liability of seagoing carriers, not inland transporters.[93]

B. The Pomerene Act

The Pomerene Bills of Lading Act ("Pomerene Act"),[94] enacted into law in 1916, is the principal law governing bills of lading issued in the United States for the purpose of interstate or foreign commerce.[95] The Pomerene Act supersedes state law.[96] "Bills of lading issued outside the United States are governed by the general maritime law, considering relevant choice of law rules."[97] The Pomerene Act arguably invalidates a choice of foreign law clause in a bill of lading issued in the United States as such a clause would appear to contravene the express language of the Pomerene Act, which mandates that the act govern such bills of lading.[98]

The Pomerene Act also distinguishes between straight bills of lading (non-negotiable bills which consign the goods to a specified person) and

89. *Id.* at 594.

90. *Id.* at 593-94 (quoting Jagenberg, Inc. v. Georgia Ports Auth., 882 F. Supp. 1065, 1077-78, 1995 AMC 2333 (S.D. Ga. 1995)).

91. *Id.* at 595.

92. *See id.*

93. *See, e.g.*, Colgate Palmolive Co. v. M/V ATLANTIC CONVEYOR, 1996 U.S. Dist. LEXIS 19247, at *14, 1997 AMC. 1478 (S.D.N.Y. Dec. 30, 1996) ("Proper delivery [under Harter] occurs when the cargo is ready for inland transport").

94. 49 U.S.C. § 80101 (Supp. 2002).

95. 2 SCHOENBAUM, *supra* note 1, § 10-11, at 61.

96. *Id.*; *see also* 49 U.S.C. § 80102 (Supp. 2002).

97. 2 SCHOENBAUM, *supra* note 1, § 10-11, at 61.

98. 49 U.S.C. § 80102 (Supp. 2002).

order bills of lading (negotiable bills which state that the goods are consigned to the order of any person named in the bill).[99] Under the Pomerene Act, the carrier is bound to deliver goods to one in possession of an order bill of lading, if it is duly endorsed.[100]

COGSA does not repeal, supersede, or limit the application of the Pomerene Act,[101] yet one court has held that COGSA's one-year statute of limitations will apply to actions brought pursuant to the Pomerene Act. In a case of first impression, the Ninth Circuit in *Underwood Cotton Co. v. Hyundai Merchant Marine (America), Inc*.[102] held that, because COGSA's one-year statute of limitation applied to claims under Pomerene Act, a shipper's claim on a bill of lading was time-barred where the claim was filed more than one year after the goods were delivered.[103]

In *Underwood Cotton*, the Ninth Circuit sought to reconcile two seemingly irreconcilable provisions in COGSA, 46 U.S.C. § 1300 ("every bill of lading . . . for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter"), and 46 U.S.C. § 1303(4) ("nothing in this chapter shall be construed as repealing or limiting the application of any part of sections 81 to 124 of Title 49 [the Pomerene Act]").[104] Reasoning that Congress did not intend for COGSA to "have nothing substantial whatsoever to say about rights flowing from or connected to a bill of lading on outgoing shipments,"[105] the Ninth Circuit favored "a more harmonious reading that does apply COGSA § 1303(6) to the Pomerene Act in accordance with the declaration in 46 U.S.C. app. § 1300."[106] The court found that "Congress's real concern was to assure that COGSA would not, somehow, dilute a carrier's liability for what it placed on the bill of lading when issuing it."[107] Application of COGSA's one-year statute of limitation would thus not repeal or limit any provision of the Pomerene Act under 46 U.S.C. § 1300.[108]

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99. 49 U.S.C. § 80103(a)-(b) (Supp. 2002).

100. Dare v. N.Y. Cent. R. Co., 20 F.2d 379, 380 (2d Cir. 1927).

101. *See* 46 U.S.C. app. § 1303(4) (2000).

102. 288 F.3d 405 (2002).

103. *Id.* at 411.

104. *Id.* at 407.

105. *Id.*

106. *Id.* at 409.

107. *Id.*

108. *See id.*

A central feature of the Pomerene Act is that it "provides carriers with immunity against claims for misdescribed cargo when the carrier qualifies the description of the cargo in the bill of lading with the phrase 'said to contain' or similar language."[109] In *Yang Ming Marine*, the Ninth Circuit determined that the Pomerene Act would not immunize an American NVOCC because the NVOCC's bill of lading did not contain the phrase "said to contain" or similar language.[110]

C. Carmack Amendment

The Carmack Amendment ("Carmack") was enacted in 1906 as an amendment to the Interstate Commerce Act of 1887.[111] Carmack established a uniform regime of recovery by shippers against truck and rail carriers of cargo. The amendment permits the shipper a single method of recovery "directly from [the] interstate common carrier in whose care their goods are damaged,"[112] thus "preempt[ing] [the] shipper's state and common law claims against a carrier for loss or damage to goods during shipment."[113]

A claimant under Carmack must file a written claim against the carrier within nine months of delivery, and then must file an action against the carrier within two years of the carrier's denial of the written claim.[114]

"There is no specific upper limit to liability under the Carmack Amendment, but an inland carrier can limit its liability if the shipper is given a reasonable opportunity to declare a higher value and pay correspondingly higher freight rate."[115]

Carmack's reach is determined by reference to 49 U.S.C. § 13501, a provision of the Interstate Commerce Act. In relevant part, § 13501

109. Yang Ming Marine Transp. Corp. v. Okamoto Freighters Ltd., 259 F.3d 1086, 1097, 2001 AMC 2529 (2001); *see also* 49 U.S.C. § 80113(b) (Supp. 2000).

110. *See Yang Ming Marine*, 259 F.3d at 1097.

111. 49 U.S.C. § 14706 (2000).

112. Windows, Inc. v. Jordan Panel Sys. Corp., 177 F.3d 114, 118 (2d Cir. 1999).

113. Ward v. Allied Van Lines, Inc., 231 F.3d 135, 138 (4th Cir. 2000).

114. 49 U.S.C. § 14706(e) (2000); 49 C.F.R. §§ 370.1-370.11 (2002) (regulations interpreting Carmack Amendment). *See also* Delphax Sys., Inc. v. Mayflower Transit, Inc., 54 F. Supp. 2d 60, 66 (D. Mass. 1999) (defendant's motion for summary judgment granted where plaintiff failed to file a timely claim in writing within nine months of the date of delivery).

115. 2 SCHOENBAUM, *supra* note 1, § 10-4, at 32. *See generally* Hughes v. United Van Lines, Inc., 829 F.2d 1407 (7th Cir. 1987) (where shippers were given a fair opportunity to choose between alternative levels of coverage, the coverage rate listed in the bill of lading controlled).

extends the reach of Carmack to motor and rail transportation of property (1) between a place in a state and a place in another state; or (2) between a place in the United States and a place in a foreign country "to the extent the transportation is in the United States . . . ."[116] Where Carmack does not apply, common law rules govern.[117]

"Where multiple carriers are responsible for different legs of a generally continuous shipment,"[118] courts examine "the intended final destination of the shipment as that intent existed when the shipment commenced" to determine Carmack's applicability.[119] "This intent fixes the character of the shipment for all the legs of the transport within the United States."[120] Thus, if the final intended destination is another state or a foreign country, Carmack applies throughout the entire portion of the shipment taking place within the United States, including intrastate legs of the shipment.[121]

In *Project Hope*, the Second Circuit determined that Carmack applied to a trucker's intrastate transportation of a refrigerated cargo of humulin (a synthetic form of insulin) from Winchester, Virginia to Norfolk, Virginia.[122] Project Hope, the shipper, had received vials of humulin from Eli Lilly and contracted with Blue Ocean, a NVOCC, to transport the vials from its warehouse in Winchester to Cairo, Egypt.[123] Blue Ocean subcontracted with Mill Transportation Company ("Mill") to provide the overland motor carriage and subcontracted with United Arab to provide the ocean carriage.[124] Mill would utilize an empty United Arab reefer that it would pick up in Norfolk and deliver back to United Arab.[125]

Mill negligently failed to check the reefer's temperature at the prescribed temperature for the humulin, resulting in loss of the entire

116. 49 U.S.C. § 13501(1)(A), (E) (2000).

117. 2 SCHOENBAUM, *supra* note 1, § 10-4, at 32.

118. Project Hope v. M/V IBN SINA, 250 F.3d 67, 74, 2001 AMC 1910 (2d Cir. 2001).

119. *Id.*

120. *Id.* at 75.

121. *Id.* *See also* Capitol Converting Equip., Inc. v. Lep Transp., Inc., 965 F.2d 391, 394, 1993 AMC 1609 (7th Cir. 1992) (if the domestic leg of an intermodal shipment is covered by a separate bill or bills of lading, the domestic leg is subject to Carmack); Reider v. Thompson, 339 U.S. 113, 117 (1950) (when a separate bill of lading is issued by an inland carrier, Carmack may apply to export and import shipments).

122. *Project Hope*, 250 F.3d at 75.

123. *See id.* at 70-71.

124. *Id.* at 71.

125. *See id.*

shipment. As stated above, the court determined that Carmack applied to Mill and Blue Ocean jointly and severally, despite the fact that Mill's transport of the humulin occurred exclusively in Virginia, and despite the fact that Mill issued a straight bill of lading. The court reasoned that "Project Hope's intention that the humulin travel in foreign commerce was fixed before Mill transported the humulin from Project Hope's Winchester warehouse to the Norfolk Terminal."[126] Thus, the district court's imposition of liability in favor of Project Hope stood against Mill.

When considering the import of Carmack, maritime cargo lawyers should remember the amendment's limited scope, its strictly-construed statute of limitations, and its lack of a statutory limitation of liability.

D. Choice of Law, Forum, and Arbitration Clauses

The Supreme Court upset the cargo world applecart in 1995 with its decision in *Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER*.[127] With that decision, the Court reversed the longstanding rule, uniformly followed by every federal court to have considered it, that foreign arbitration clauses in bills of lading were invalid because they worked to lessen the carrier's liability in violation of COGSA § 1303(8).[128]

Because the Supreme Court described such arbitration clauses as "but a subset of foreign forum selection clauses in general,"[129] federal courts have since applied *SKY REEFER* not only to arbitration clauses but also to foreign forum selection clauses in bills of lading.[130]

As every seasoned cargo litigator knows, *SKY REEFER* has had a chilling effect on the number of cargo cases filed in the United States because so many of the foreign carriers include foreign forum and/or arbitration clauses in their bills of lading. Most subrogated cargo insurers since *SKY REEFER* have either been willing to settle for less of a recovery, so as to avoid the foreign forum or foreign arbitration altogether, or have simply pursued their recoveries in the foreign forum without bothering to involve United States counsel. Obviously, both the cargo plaintiffs and

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126. *Id.* at 75.

127. 515 U.S. 528, 1994 AMC 1817 (1995).

128. 46 U.S.C. app. § 1303(8) (2000) (prohibiting any clause in a contract of carriage from relieving the carrier from liability or lessening such liability).

129. *SKY REEFER*, 515 U.S. at 534.

130. *See, e.g.*, Itel Container Corp. v. M/V TITAN SCAN, 139 F.3d 1450, 1454-55, 1998 AMC 1965 (11th Cir. 1998); Fireman's Fund Ins. Co. v. M/V DSR ATLANTIC, 131 F.3d 1336, 1338, 1998 AMC 583 (9th Cir. 1998).

cargo defense bars lament this development. Nonetheless, cargo plaintiff's lawyers continue to seek new ways to undermine the impact of *SKY REEFER*, as discussed below.

1. A forum selection clause should be raised as a motion to dismiss for improper venue

Motions to dismiss upon the basis of choice-of-forum and choice of law clauses are properly brought under Federal Rule 12(b)(3) as motions to dismiss for improper venue.[131] A shipper may seek to challenge a carrier's enforcement of such clauses where the carrier attempts to dismiss the shipper's complaint by utilizing the wrong procedural mechanism, such as a motion to dismiss pursuant to Rule 12(b)(1).[132] The *Lipcon* court stated that a motion to dismiss based on forum selection clauses is not properly brought pursuant to Rule 12(b)(1)—which permits motions to dismiss for lack of subject matter jurisdiction—"because the basis upon which the defendants seek dismissal—namely, that the agreement of the parties prohibits the plaintiff from bringing suit in the particular forum—is unrelated to the actual basis of federal subject matter jurisdiction—namely, federal question jurisdiction or diversity of citizenship . . . ."[133]

The court in *Longwall-Associates, Inc. v. Wolfgang Preinfalk, GmbH* adopted the *Lipcon* approach.[134] The *Longwall-Associates* court determined that a Rule 12(b)(1) motion was an improper mechanism for enforcing a forum selection clause because the issue before the court was not whether the court had subject matter jurisdiction over the dispute, but whether the parties had contractually adopted a different forum to litigate the dispute. The court stated: "[i]n other words, the parties may not strip a federal court of subject matter jurisdiction by agreement. Therefore, the motion does not properly raise a Rule [12(b)(1)] defense."[135]

The use of Rule 12(b)(3) to assert forum selection clauses has been widely adopted by the various Courts of Appeals.[136] Accordingly, the

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131. *See* FED. R. CIV. P. 12(b)(3) (2000). *See also* Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285, 1290 (11th Cir. 1998).

132. *See* FED. R. CIV. P. 12(b)(1) (2000).

133. *Lipcon*, 148 F.3d at 1289.

134. 2001 U.S. Dist. LEXIS 8113 (W.D. Va. June 12, 2001).

135. *Id.* at *6.

136. *See, e.g.*, Richards v. Lloyd's of London, 135 F.3d 1289, 1292 (9th Cir. 1998); Frietsch v. Refco, Inc., 56 F.3d 825, 830 (7th Cir. 1995); Commerce Consultants Int'l, Inc. v. Vetrerie Riunite, S.p.A, 867 F.2d 697, 698 (D.C. Cir. 1989); United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd., 210 F.3d 1207, 1222 (10th Cir. 2000). *Contra* Watkins v. M/V LONDON

cargo plaintiff should attempt to preclude a carrier's enforcement of a foreign forum selection or arbitration clause where the carrier attempts enforcement through a Rule 12(b)(1) motion.

Moreover, litigating the foreign forum clause as an improper venue motion permits cargo plaintiffs to distinguish *SKY REEFER* as only applicable to foreign arbitration cases.[137] While the burden of showing that the foreign forum clause is unenforceable falls upon the party resisting its enforcement,[138] there are far more reasons to challenge forum selection than there are to challenge foreign arbitration.

Thus, a challenge to a foreign forum clause can be based upon a showing that: (1) "trial in the contractual forum will be so gravely difficult and inconvenient that [the plaintiff] will for all practical purposes be deprived of his day in court,"[139]; (2) the incorporation of the choice of forum and law provisions into the agreement was induced by fraud or overreaching; (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) the provisions contravene a strong public policy of the forum in which the plaintiff has brought suit.[140] In an unpublished opinion, the district judge in *Baxter Export Corp. v. Caliber Logistics Healthcare, Inc.* opined that, because the cargo was damaged in the United States before the express cargo bill was issued, public policy reasons might preclude enforcement of a foreign forum clause.[141] A copy of the order is included at the end of this article.

In a recent opinion from the Southern District of New York, the court denied a defendant carrier's motion to dismiss for improper venue where enforcement of a foreign forum selection clause would lessen the carrier's liability under COGSA.[142] In *M/V GERTRUDE*, the shipper brought suit in both United States District Court and London to recover damages sustained to a shipment of 1735 rolls of fluting paper.[143] The

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SENATOR*,* 112 F. Supp. 2d 511, 514, 2000 AMC 1407 (E.D. Va. 2000) (court analyzed Rule 12(b) motion as a motion challenging the subject matter jurisdiction of the court).

137. *See* Rationis Enters., Inc. v. M/V MSC CARLA, 1999 U.S. Dist. LEXIS 34, at *16-17, 1999 AMC 889 (S.D.N.Y. Jan. 6, 1999).

138. *See* THE BREMEN v. Zapata Off-Shore Co., 407 U.S. 1, 15, 1972 AMC 1407 (1972).

139. *Id.* at 18.

140. *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595-96, 1991 AMC 1697 (1991).

141. No. 2:99cv2137 (E.D. Va. June 23, 2000).

142. Cent. National-Gottesman, Inc. v. M/V GERTRUDE OLDENDORFF, 204 F. Supp. 2d 675, 684, 2002 AMC 1477 (S.D.N.Y. 2002).

143. *Id.* at 677.

carrier, relying on a forum selection clause that required any disputes under the bill of lading to be decided in London under English law, moved to dismiss the complaint for improper venue.[144] The shipper objected to enforcement of the forum selection clause, arguing that English courts, in accordance with the Hague-Visby rules and in violation of COGSA, would enforce an exculpatory clause in the bill of lading that insulates parties other than the shipowner from liability.[145] The shipper provided an affidavit from an English lawyer attesting that an English court would enforce the exculpatory clause.[146]

The court agreed with the shipper and denied the motion to dismiss. Under COGSA, which allows recovery against any "carrier," the exculpatory clause would not be enforceable. Noting the Southern District of New York's expansive interpretation of the term carrier under COGSA, the court held that, "unless the court in London were similarly prepared to adopt an expansive view of the term 'carrier,' plaintiff Gottesman would effectively be relinquishing rights that would be guaranteed to it in this forum under COGSA."[147] On this ground alone the court retained jurisdiction, but it chose to decline enforcement of the forum selection clause for a second reason: the lack of retained jurisdiction.

Reviewing *SKY REEFER*, the court took notice of the Supreme Court's reliance on the fact that the district court possessed a subsequent opportunity to review the foreign court's decision to insure that it comported with public policy.[148] Because *SKY REEFER* involved a foreign arbitration clause, the district court retained jurisdiction to consider the COGSA issues after the arbitration was conducted. *M/V GERTRUDE*, however, involved a foreign jurisdiction clause; "[t]he safeguard of retained jurisdiction is therefore not applicable here . . . ."[149] Because the court lacked the precaution of retained jurisdiction, "to which *SKY REEFER* accorded substantial weight . . . the court [was] reluctant to enforce the forum selection clause and dismiss this action for improper

144. *Id.*

145. *Id.* at 679-80.

146. *Id.* at 681.

147. *Id.*

148. *Id.* at 682. (quoting Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER, 515 U.S. 528, 540, 1995 AMC 1817 (1995) ("Were there no subsequent opportunity for review [and foreign law operated to waive COGSA protection] . . . , we would have little hesitation in condemning the agreement as against public policy.") (alterations in original)).

149. *GERTRUDE*, 204 F. Supp. 2d at 682.

venue."[150]

2. Enforcement of an arbitration clause should be raised as a motion to stay under 9 U.S.C. § 3

Although the Supreme Court described foreign arbitration clauses as "but a subset of foreign forum selection clauses in general,"[151] this is an overstatement. Application of a foreign forum selection clause results in a dismissal of the action.[152] Under the Arbitration Act,[153] however, courts are procedurally obligated to stay the litigation while the arbitration proceeds.[154] Justice O'Connor pointed out this distinction in her concurrence in *SKY REEFER*, noting that the district court specifically retained jurisdiction to later determine whether the arbitration had resulted in any lessening of the carrier's COGSA liability.[155]

To be sure, district courts have actually dismissed cases when ordering arbitration to proceed, in the apparent belief that a party will simply re-file after the arbitration is concluded if it believes that COGSA liability has been lessened.[156] No doubt the fact that these decisions are not generally appealed is an indication that the parties probably feel the same way.[157] However, it is the opinion of this writer that these decisions are simply wrong, and result only from the district court's desire to clean up its docket.

Although discussed in more detail below, the Supreme Court recently noted in a consumer arbitration case that it declined to address

150. *Id.*

151. *SKY REEFER*, 515 U.S. at 534.

152. *See* Indussa Corp. v. S.S. RANBORG, 377 F.2d 200, 202 (2nd Cir. 1967).

153. 9 U.S.C. §§ 1-16 (2000).

154. 9 U.S.C. § 3 (2000).

155. *SKY REEFER*, 515 U.S. at 542 (O'Connor, J., concurring).

156. *See, e.g.*, Adair Bus Sales, Inc. v. Blue Bird Corp., 25 F.3d 953, 955 (10th Cir. 1994) (district court should have granted motion for stay pending arbitration, rather than dismissing action and ordering parties to proceed to arbitration).

157. *Id. See also* Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698, 699 (11th Cir. 1992) (vacating district court's dismissal and remanded with instructions to stay proceedings pending arbitration, stating that "[u]pon finding that a claim is subject to an arbitration agreement, the court should order that the action be stayed pending arbitration."). *Cf.* Smith v. The EQUITABLE, 209 F.3d 268, 272 (3rd Cir. 2000) (Although staying the litigation "may be the better practice, it was not error to dismiss" because "when 'all the claims involved in an action are arbitrable, a court may dismiss the action instead of staying it."); Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc., 252 F.3d 707, 709-710, 712 (4th Cir. 2001) (court held that dismissal is proper where all issues in a lawsuit are arbitrable, but vacated district court's dismissal and remanded with instructions to stay proceedings where one non-arbitrable issue existed).

whether such a dismissal is proper because the issue was not raised on appeal.[158]

3. A carrier may waive its right to enforce a forum selection or arbitration clause

As noted above, motions to dismiss upon the basis of choice-of-forum and choice of law clauses are properly brought pursuant to Rule 12(b)(3) as motions to dismiss for improper venue.[159] An objection to venue may be waived by submission through conduct.[160]

In *Manchester*, the court denied a Motion to Dismiss for Improper Venue when the carrier had twice requested hearings to defend temporary restraining orders and also requested a hearing to permit foreign counsel to appear *pro hac vice* before raising the defense of improper venue. The carrier first noted its objection to venue in its Answer, filed nine weeks after the complaint was served and four weeks after submitting to the court's jurisdiction on other matters.[161]

A cargo plaintiff should therefore take note of a carrier's activities indicating a submission to the jurisdiction of the court. Depending on local rules of practice, this could include participation in the Initial Scheduling Conference without objection or mention of a venue motion, active participation in discovery on the merits, and delay in filing the venue motion.

A carrier may also waive its right to enforce an arbitration clause through submission by conduct. In *Southern Systems, Inc. v. Torrid Oven Ltd.*,[162] the court denied the defendant's motion for stay of current proceedings pending arbitration where the defendant had delayed its invocation of the arbitration clause in the construction agreement at issue for eighteen months.[163] In the interim, the defendant sought and received an extension to respond to the complaint, filed an answer (that did not assert that the

158. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 87 n.2 (2000).

159. *See* FED. R. CIV. P. 12(b)(3) (2000).

160. *See*, *e.g.*, Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 168 (1939); Manchester Knitted Fashions v. Amalgamated Cotton Garment & Allied Indus. Fund, 967 F.2d 688, 692 (1st Cir. 1992).

161. *Manchester*, 967 F.2d at 692. *See also* Rationis Enters., Inc. v. M/V MSC CARLA, 1999 U.S. Dist. LEXIS 34, at *13-15, 1999 AMC 889 (S.D.N.Y. Jan. 6, 1999) (filing claim in limitation action constituted consent to jurisdiction so as to defeat carrier's motion to dismiss on grounds of foreign forum selection clause).

162. 105 F. Supp. 2d 848 (W.D. Tenn. 2000).

163. *See id.* at 856.

dispute was governed by an arbitration clause) and counterclaim, engaged in extensive pretrial discovery, and filed and actively pursued a motion to dismiss and/or change of venue.[164] The defendant filed its motion for stay less than one month prior to the discovery deadline and less than two months before the trial date.[165] Upon review of the defendant's actions, the court held "defendant intended to relinquish its right to insist upon arbitration."[166]

4. Choice of forum and arbitration clauses must be exclusive to be enforceable

Although most carriers are sophisticated enough to make the foreign forum selection clauses and/or arbitration clauses exclusive of all other forums or enforcement mechanisms, this area still proves occasionally to provide a basis for the district court to refuse enforcement of either type.[167]

5. Effect of in rem action on foreign forum selection clauses

Courts have reached conflicting conclusions over whether a foreign forum selection clause is enforceable when there is an *in rem* claim which is not recognized in the foreign forum. In *Fireman's Fund Ins. Co. v. M/V DSR ATLANTIC*,[168] the Ninth Circuit enforced a choice of law and forum clause that mandated application of Korean law in courts in Seoul.[169] Fireman's Fund had filed suit in California against Cho Yang shipping, and *in rem* against the M/V DSR ATLANTIC, after a shipment of wine, cognac, and armagnac suffered freeze damage en route from France to California.[170]

The trial court in *Fireman's Fund* refused to enforce the foreign forum selection clause in the bill of lading because Korean law did not

164. *See id.* at 850.

165. *Id.*

166. *Id.* at 856. *See also* Kramer v. Hammond, 943 F.2d 176, 179 (2d Cir. 1991) (finding waiver of right to arbitration where party engages in protracted litigation and prejudice results to the opposing party); Miller Brewing Co. v. Fort Worth Distrib. Co., 781 F.2d 494, 497 (5th Cir. 1986) (finding waiver of arbitration right when "the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party.").

167. *See* Hartford Fire Ins. Co. v. Novocargo USA Inc., 156 F. Supp. 2d 372, 375 (S.D.N.Y. 2001) (ship owner's motion to dismiss denied where both the forum selection and arbitration clauses were permissive rather than mandatory).

168. 131 F.3d 1336, 1998 AMC 583 (9th Cir. 1997).

169. *Id.* at 1340.

170. *Id.* at 1337.

allow suit against a vessel *in rem*.[171] The district court reasoned that Fireman's Fund would be denied its statutory remedy and thus denied the defendant's motion to dismiss.[172] In reversing, the Ninth Circuit held that "the mere unavailability of in rem proceedings does not constitute a 'lessening of the *specific liability* imposed by [COGSA],' . . . ; rather it presents a 'question of the means . . . of enforcing that liability.'"[173] The court concluded that Korean law would not "reduce the carrier's obligations . . . below what COGSA guarantees."[174]

Other courts have come to the opposite conclusion. For example, in *International Marine Underwriters v. M/V KASIF KALKAVAN*,[175] the district court held a Korean law and forum clause unenforceable, explaining that the "plaintiff's inability under Korean law to bring an *in rem* action against the vessel, would appear to deprive plaintiff of one of the substantive rights expressly guaranteed" by COGSA[176] The court did, however, reject the plaintiff's argument that the forum selection clause should not be enforced because Korean substantive law would be more favorable to carrier than COGSA.[177]

The district court in *Allianz Insurance Co. of Canada v. Cho Yang Shipping Co.*,[178] also disagreed with the Ninth Circuit's view that the unavailability of an *in rem* proceeding does "not constitute a lessening of the liability imposed by COGSA."[179] Faced with a Korean forum selection clause, an *in personam* defendant and an *in rem* defendant, the district court refused to enforce the clause as to the *in rem* defendant since such an action was unavailable under Korean law.[180]

Notably, the district court in *Allianz* critiqued the Ninth Circuit, observing that it "seems to have ignored"[181] COGSA, which prohibits any clause in a contract of carriage from relieving the carrier from liability or

171. *See id.* at 1337-38.

172. *See id.* at 1339.

173. *Id.* at 1339-40 (quoting Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER, 515 U.S. 528, 537, 1995 AMC 1817(1995)) (alteration in original).

174. *Fireman's Fund*, at 1340 (quoting *SKY REEFER*, 515 U.S. at 538) (alteration in original).

175. 989 F. Supp. 498, 1998 AMC 765 (S.D.N.Y. 1998).

176. *Id.* at 499.

177. *See id.* at 500.

178. 131 F. Supp. 2d 787, 2000 AMC 2947 (E.D. Va. 2000).

179. *Id.* at 794.

180. *Id.*

181. *Id.*

lessening such liability.[182] Quoting from *International Marine Underwriters*, the court stated that COGSA § 1303(8) "would be rendered meaningless if an *in rem* action were viewed simply as a procedural device not protected under § 3(8) as interpreted by *SKY REEFER*."[183] The court explained that "[a]n *in rem* action is not just a means of enforcing COGSA liability as espoused in *Fireman's Fund,* it is a substantive right guaranteed by federal law."[184]

The plaintiff must be prepared to provide an affidavit or other evidence of foreign law to establish that its COGSA rights are diminished. The *Allianz* court required that the party challenging the forum selection clause "must provide an affidavit or other evidence that supports its non-enforcement."[185]

6. A recent decision by the United States Supreme Court supports an argument that arbitration clauses may be unenforceable due to prohibitive costs.

The United States Supreme Court may have recently opened the door to litigation regarding whether the "prohibitive costs" of arbitration are a basis for rendering an arbitration clause unenforceable.[186] In *Green Tree Financial*, the Court considered "whether an arbitration agreement that does not mention arbitration costs and fees is unenforceable because it fails to affirmatively protect a party from potentially steep arbitration costs."[187] The consumer finance contract at issue in *Green Tree Financial* provided that all disputes arising from the contract would be resolved by binding arbitration, yet omitted any details regarding filing fees and arbitrator's costs.[188]

In a 5-4 decision, the Court held the arbitration agreement enforceable, citing a lack of evidence that the plaintiff would have incurred substantial costs in the event her Truth In Lending Act claim went to arbitration.[189] However, the majority opinion by Chief Justice Rehnquist stated that, if a party seeking to vindicate its statutory rights can

182. *Id.*

183. *Id.* (quoting Int'l Marine Underwriters CU v. M/V KASIF KALKAVAN, 989 F. Supp. 498, 499, 1998 AMC 765 (S.D.N.Y. 1998)).

184. *Allianz*, 131 F. Supp. 2d at 794 (citation ommitted).

185. *Id.* at 792.

186. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000).

187. *Id.* at 82.

188. *Id.* at 84.

189. *Id.* at 90.

demonstrate that arbitration would be "prohibitively expensive," a court could invalidate the arbitration agreement.[190]

The majority in *Green Tree Financial* placed the burden of proof squarely on the party seeking to avoid arbitration and concluded that, because no evidence had been adduced on this issue below, that the plaintiff failed to meet it. The dissenters, in an opinion by Justice Ginsberg, would have remanded for the development of this evidence.[191] Notably, the majority declined to address "[h]ow detailed the showing of prohibitive expense must be . . . ."[192]

In *Green Tree Financial* the Court was faced with arbitration of a consumer dispute involving less than $10,000, in which there was some anecdotal evidence that the aggrieved plaintiff might be responsible for a $500 filing fee and payment of all or at least some portion of the arbitrator's fees, estimated at $700 per day. As anyone who has been involved in an arbitration overseas knows, these sums pale in comparison to the typical costs in foreign arbitral forums. Likewise, the effect of the loser-pays-all rule in many foreign jurisdictions may further increase the cargo plaintiff's costs.

It should be noted that the *SKY REEFER* Court stated that increased cost and inconvenience were not enough to "lessen liability" in violation of COGSA so as to defeat the operation of a forum selection clause.[193] The *SKY REEFER* Court even questioned whether case-by-case inquiries into the inconvenience of litigating in a foreign forum should be entertained.[194] However, the inquiry under *Green Tree Financial* is much broader, i.e., whether the prohibitive costs of arbitration prevent a litigant from "effectively vindicating [its] federal statutory rights in the arbitral forum."[195]

Not surprisingly, *Green Tree Financial* did not cite *SKY REEFER*.

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190. *Id.* at 92. *See also* McCaskill v. SCI Management Corp., 285 F.3d 623 (7th Cir. 2002) (arbitration agreement that required employee who claimed sexual harassment to pay her own attorney fees regardless of outcome was unenforceable); Murray v. United Food & Commercial Workers Int'l Union, 289 F.3d 297, 304 (4th Cir. 2002) (district court erred in dismissing case and compelling arbitration where arbitration agreement was unenforceable due to the agreement's one-sided nature that provided the employer with exclusive right to choose the list of potential arbitrators).

191. *Green Tree*, 531 U.S. at 97 (Ginsburg, J., dissenting).

192. *Id.* at 92.

193. Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER, 515 U.S. 528, 536, 1995 AMC 1817 (1995).

194. *Id.*

195. *Green Tree*, 531 U.S. at 90.

Nonetheless, it appears that the Supreme Court has at least left the door ajar to revisiting the enforceability of foreign arbitration clauses where the shipper can convincingly demonstrate that the prohibitive costs of arbitration would prevent it from vindicating it statutory rights under COGSA.

IV. SHIPPER'S AND CARRIER'S BURDEN OF PROOF

A. *Shipper's* **Prima Facie** *Case*

Under COGSA, a carrier has the duty to "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."[196] A carrier has a further duty to issue a bill of lading that contains a description of the goods.[197] A *prima facie* case is established by the shipper by proving that the cargo was delivered to the carrier in good condition, but discharged it in damaged condition, or failed to deliver it, at the destination.[198] The shipper need not prove fault on the part of the carrier to make its *prima facie* case, nor is it required to explain how the cargo was lost or damaged.[199] However, "a shipper, in order to recover, must be prepared to show the quantity and condition of the goods at the moment they were given to the carrier for shipment."[200]

A "clean" bill of lading is one that contains no description of some defect or problem with the goods. When issued by the carrier it is *prima facie* evidence that the carrier received the cargo in an undamaged condition.[201] Where a container is pre-sealed, however, a clean bill of lading issued by the carrier using the language "said to contain" is not *prima facie* evidence of the contents of the container because the contents are not discoverable from an external examination.[202]

When the carrier delivers the goods, the bill of lading constitutes *prima facie* evidence of the goods' delivery in good order and condition,

196. 46 U.S.C. app. § 1303(2) (2000).

197. 46 U.S.C. app. § 1303(3).

198. Hale Container Line, Inc. v. Houston Sea Packing Co., 137 F.3d 1455, 1468, 1999 AMC 607 (11th Cir. 1998).

199. 2 SCHOENBAUM, *supra* note 1, § 10-22, at 106.

200. *Id.*

201. United States v. Ocean Bulk Ships, Inc., 248 F.3d 331, 336, 2001 AMC 1487 (5th Cir. 2001).

202. Daewoo Int'l (Am.) Corp. v. Sea-Land Orient Ltd., 196 F.3d 481, 485, 2000 AMC 197 (3d Cir. 1999) (Shipper failed to establish *prima facie* case where carrier had no independent duty, absent sufficient notice, to break the seal of a container from which goods were stolen).

unless the consignee gives notice of damage or loss at that time, or within three days of delivery if the damage or loss is not apparent.[203] Thus, the shipper's "failure to give timely notice requires it to rebut the carrier's prima facie defense of good delivery."[204] The presumption of good delivery will stand where the shipper does not present any evidence demonstrating that the cargo was damaged prior to delivery by the carrier.[205] It should be noted, though, that this presumption disappears upon the shipper's production of evidence to suggest that the cargo incurred damage prior to the carrier's delivery.[206]

Therefore, in order to establish its *prima facie* case, the shipper must prove damage upon discharge. This can be demonstrated by the testimony of an independent cargo surveyor attending the discharge.[207] Further, an alternative method exists for the shipper to establish its *prima facie* case. Even if the shipper cannot prove delivery to the carrier in good condition, it may nevertheless establish its *prima facie* case by producing evidence that the nature of the damage indicates that it occurred while the goods were in the carrier's custody.[208] However, if it appears as likely as not that the damage occurred after discharge as before, the carrier will prevail.[209] The "shipper's *prima facie* case creates a presumption of liability."[210]

B. The Carrier's Rebuttal

Once the shipper presents a *prima facie* case, the burden shifts to the carrier to prove that it either exercised due diligence to prevent damage to the cargo by properly handling, stowing, and caring for the cargo in a

203. 46 U.S.C. app. § 1303(6) (2000).

204. 2 SCHOENBAUM, *supra* note 1, § 10-22, at 114. *See also* Sumitomo Corp. of Am. v. M/V SIE KIM, 632 F. Supp. 824, 834, 1987 A.M.C. 160 (S.D.N.Y. 1985) (holding that failure to give timely notice creates a presumption that carrier delivered cargo in condition specified in bill of lading).

205. *See* Crisis Transp. Co. v. M/V ERLANGEN EXPRESS, 794 F.2d 185, 188, 1987 AMC 1905 (5th Cir. 1986).

206. *See* Pac. Employers Ins. Co. v. M/V GLORIA, 767 F.2d 229, 238 (5th Cir. 1985).

207. United States v. Ocean Bulk Ships, Inc., 248 F.3d 331, 336, 2001 AMC 1487 (5th Cir. 2001).

208. *See*, *e.g.*, Caemint Food, Inc. v. Lloyd Brasileiro, 647 F.2d 347, 355 1981 AMC 1801 (2d Cir. 1981); Sanyo Elec., Inc. v. M/V HANJIN INCHEON, 578 F. Supp. 75, 78 (W.D. Wash. 1983) (court accepted water damage that was not present on other goods of this type as evidence of damage while in carrier's custody).

209. *See* Fox & Assocs., Inc. v. M/V HANJIN YOKOHAMA, 977 F. Supp 1022, 1030, 1998 AMC 1090 (C.D. Cal. 1997).

210. *Ocean Bulk Ships*, 248 F.3d at 336.

seaworthy ship, or that the damage resulted from an "uncontrollable" cause of loss as defined in COGSA.[211] The carrier must offer more than "mere speculation as to the cause of lost or damaged cargo."[212] This can often turn into a battle of experts.

C. Shipper's Burden to Demonstrate Concurrent Cause and Carrier's Burden to Establish Apportionment of Fault

If the carrier successfully rebuts the shipper's *prima facie* case, then the presumption disappears and the shipper assumes the burden to show that carrier negligence was at least a concurrent cause of the loss or damage to the cargo.[213] "If the shipper successfully establishes that the carrier's negligence is at least a concurrent cause of the loss or damage, then the burden shifts once again to the carrier, which must establish what portion of the loss was caused by other factors."[214] The carrier will be liable for the full loss if they are unable to prove the appropriate apportionment of fault.[215]

On the other hand, if the shipper fails to prove that the carrier at least concurrently caused the loss or damage, the carrier's successful rebuttal of the shipper's *prima facie* case stands.[216]

V. DEFENSES

A. Package Limitations

1. Limitation of liability and the package problem

COGSA provides that the carrier may limit its liability to $500 per package or, in the case of goods not shipped in packages, per customary freight unit.[217] The problem of what is a "package" under COGSA continues to generate a significant amount of litigation. In a widely-cited

211. Hale Container Line, Inc. v. Houston Sea Packing Co., 137 F.3d 1455, 1468, 1999 AMC 607 (5th Cir. 1998); 46 U.S.C. app. § 1304(2) (2000). *See also infra* Section V.

212. *Ocean Bulk Ships*, 248 F.3d at 340 (carrier relied solely on inadequate survey reports, court found no probative evidence to rebut shipper's *prima facie* case).

213. *Id.* at 336; *see also* Lekas & Drivas, Inc. v. Goulandris, 306 F.2d 426 (2d Cir. 1962).

214. *Ocean Bulk Ships*, 248 F.3d at 336.

215. *Id. See also* Schnell v. The VALLESCURA, 293 U.S. 296 (1934).

216. Sun Co. v. S.S. OVERSEAS ARCTIC, 27 F.3d 1104, 1109, 1995 AMC 57 (5th Cir. 1994).

217. 46 U.S.C. app. § 1304(5) (2000).

opinion, the Second Circuit has described a package as "a class of cargo, irrespective of size, shape or weight, to which some packaging preparation for transportation has been made which facilitates handling, but which does not necessarily conceal or completely enclose the goods."[218]

a. The touchstone of a court's package analysis is the bill of lading

Courts will look first to the bill of lading to resolve the package issue. The generally accepted legal standard is the test formulated in *Hayes-Leger Associates v. M/V ORIENTAL KNIGHT*:[219] "(1) when a bill of lading discloses the number of COGSA packages in a container, the liability limitation applies to those packages,"[220] however, "(2) when a bill of lading lists the number of containers as the number of packages, and fails to disclose the number of COGSA packages within each container, the liability limitation . . . applies to the containers themselves."[221]

b. Courts will generally enforce the "number of packages" column listed on the bill of lading absent ambiguity

Applying the above principles, the court in *Fishman* & *Tobin Inc. v. Tropical Shipping & Const. Co.*[222] found that a 4' x 4' "big pack" container constituted one package under COGSA, despite the fact that the big pack contained numerous bundles of clothing called "dozens," and that each bundle held a dozen items.[223] Regarding the big packs, the court found dispositive the fact that the bill of lading and customs declaration form for the thirty-nine big packs did not indicate the number of "dozens," stating that "it is clear that the number of packages should be fully and accurately disclosed and easily discernable by the carrier, otherwise carriers will suffer unforeseen liability."[224] Affirming its standard set forth in *Hayes-Leger*, the court remarked that "'the touchstone of our analysis' is the contractual agreement between the parties as set forth in the bill of lading."[225]

218. Aluminios Pozuelo, Ltd. v. S.S. NAVIGATOR, 407 F.2d 152, 155 (2d Cir. 1968) (holding three-ton press bolted to metal skid to be a package under COGSA).

219. 765 F.2d 1076, 1986 A.M.C. 1724 (11th Cir. 1985).

220. *Id.* at 1080.

221. *Id.*

222. 240 F.3d 956, 2001 AMC 1663 (11th Cir. 2001).

223. *See id.* at 962.

224. *Id.* at 961.

225. *Id.* (quoting *Hayes-Leger*, 765 F.2d at 1080).

The *Fishman & Tobin* court also held that a "garment on hanger" container constituted one package under COGSA, and therefore the shipper recovered only $500,[226] despite the fact that the container held approximately 5000 garments on hangers.[227] The court noted that the carrier's bill of lading listed only the container size "1 x 40" in the "Quantity" column, although the carrier did list "5,000 Units Men's Jackets" in the "Description of Goods" column.[228]

The court's inquiry, however, did not end at the bill of lading. "While the 'number of packages' column is plainly our starting point in determining these issues, the analysis does not end there."[229] The court made clear that, "when a bill of lading refers to both containers and other units susceptible of being COGSA packages, it is inherently ambiguous," and that such ambiguity is normally resolved against the carrier.[230]

Despite this ambiguity, the court's review of the relevant shipping documents indicated that the shippers "of their own will stipulated under the number of packages column only one."[231] Furthermore, the court's "precedent has clearly required that the number of packages that are declared must be indicated in the number/quantity of packages column on the bill of lading."[232] Therefore, because "neither the bill of lading nor the reembarque or customs form offer any clear indication that each garment-on-hanger was the relevant unit of packaging being shipped and our precedent holding that such information need be provided,"[233] the court affirmed that the carrier was only liable for $500 for the single container shipped.[234]

226. *Id.* at 959.

227. *Id.* at 965.

228. *Id.* at 963.

229. *Id.* at 964.

230. *Id.* (internal quotation marks and alteration omitted).

231. *Id.* at 964.

232. *Id.* at 965.

233. *Id.*

234. *Id.* *Compare* Haemopharm, Inc. v. M/V MSC INDONESIA, 2002 U.S. Dist. LEXIS 7323, 2002 AMC 1297 (S.D.N.Y. 2002) (Motion for partial summary judgment to limit liability on $1,000,000 blood plasma shipment to $9,000 denied where "1" appeared in "No. of Pkgs" column and "18 PALLETS (981 CASES) FROZEN HUMAN PLASMA" appeared in "Description of Packages and Goods" column).

c. Courts will deem one large item to be one "package" where declared as such on the bill of lading

In *Fireman's Fund Ins. Co. v. Tropical Shipping & Constr. Co.*,[235] the Eleventh Circuit held that an entire mobile stage trailer constituted a package under COGSA because the parties listed it as one unit on the bill of lading.[236] The shipper claimed that "the $500 COGSA limitation should be multiplied by each 'customary freight unit,' which it contend[ed] [was] cubic feet."[237] In contrast, the carrier argued that the bill of lading listed the stage as a single item and, accordingly, the stage constituted one package for purposes of COGSA.[238]

The court, citing *Fishman & Tobin*, reiterated its adherence to the definition of package set forth by the Second Circuit in *Navigator*, and then stated that, under that definition, it must determine "whether a 'fully mobile, preassembled, hydraulically operated staging unit constitutes a 'package' under COGSA."[239] The court noted first that the bill of lading listed the mobile stage as one unit. This evidence, the court stated, "shall be *prima facie* evidence, but shall not be *conclusive* on the carrier."[240] Importantly, the court held that unless the number of packages "is *plainly contradicted* by contrary evidence of the parties' intent, or unless the number refers to items that cannot qualify as 'packages,' it is . . . the ending point of our inquiry."[241]

The court found no contrary evidence of the shipper's intent, nor did it find any ambiguity in the description of the number of packages on the bill of lading.[242] Rather, the court found that the mobile stage "becomes one 'package' enclosed on all sides when it is folded up."[243] Thus, the court concluded that the mobile stage constituted one package for purposes of COGSA.[244] Other courts have held similarly large items to constitute a

235. 254 F.3d 987, 2001 AMC 2474 (11th Cir. 2001).

236. *Id.* at 999.

237. *Id.* at 995.

238. *Id.*

239. *Id.* at 997.

240. *Id.* (quoting Hiram Walker & Sons v. Kirk Line, 963 F.2d 327, 331 n.5, 1993 AMC 965 (11th Cir. 1992)).

241. *Id.* at 998 (alteration in original) (quoting Seguros Illimani S.A. v. M/V POPI P, 929 F.2d 89, 94, 1991 AMC 1521 (2d Cir. 1991)).

242. *See id.* at 998.

243. *Id.* at 999.

244. *See id. See also* Groupe Chegaray/V. De Chalus v. P&O Containers, 251 F.3d 1359, 2001 AMC 1858 (11th Cir. 2001) (reversing district court's decision deeming each of 2,270

single unit or package for purposes of COGSA.[245]

2. Fair opportunity to declare a higher value

COGSA entitles a carrier to limit its liability for loss or damage to cargo to $500 per package unless the shipper declares the value of the goods on the face of the bill of lading before shipment, or the parties agree to a higher limit.[246]

Thus, the shipper is presented with two options: (1) avoid the COGSA limitation by declaring the value of the goods on the face of the bill of lading and paying a higher freight rate, or (2) accept the COGSA limitation, profit from a lower freight rate, and procure its own insurance (or not at all).[247] The carrier need only provide the shipper adequate notice of the $500 limitation and, importantly, a fair opportunity to declare excess value for the cargo.

"Under the 'fair opportunity' doctrine . . . the COGSA limit is inapplicable if the shipper does not have a fair opportunity to declare higher value and pay" a higher charge for freight.[248] The doctrine has stimulated litigation because shippers typically do not declare the value of their cargo and instead buy full value cargo insurance coverage. This shifts the risk to their insurers and saves the shipper a great deal of money on freight. "Where this is the case, the courts are not sympathetic to the shipper's claim of lack of an opportunity to declare a higher value."[249]

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cartons "packages"; the cartons were wrapped onto a total of 42 pallets and the bill of lading listed "4" in the "NO. OF PKGS" column and described the 42 pallets as "packages"); Orient Overseas Container Line Ltd. v. Sea-Land Service, Inc., 122 F. Supp. 2d 481, 489, 2001 AMC 1005 (S.D.N.Y. 2000) (because 104 unwrapped engines did not constitute "packages" under COGSA, court had "no choice but to regard the container as the COGSA package").

245. *See generally*, FMC Corp. v. S.S. MAJARJORIE LYKES, 851 F.2d 78, 1988 AMC 2113 (2d Cir. 1988) (fire engine); Aluminios Pozuelo Ltd. v. S.S. NAVIGATOR, 407 F.2d 152, 1968 AMC 2532 (1968) (three-ton press); Z.K. Marine, Inc. v. M/V ARCHIGETIS, 776 F. Supp 1549, 1991 AMC 1434 (S.D. Fla. 1991) (yacht); Taiwan Power Co. v. M/V GEORGE WYTHE, 575 F. Supp. 422, 1984 AMC 213 (N.D. Fla. 1983) (pressurizer weighing 155,000 pounds).

246. *See* 46 U.S.C. app. § 1304(5); Nippon Fire & Marine Ins. Co. v. M.V. TOURCOING, 167 F.3d 99, 101, 1999 AMC 913 (2d Cir. 1999); Gen. Elec. Co. v. MV NEDLLOYD, 817 F.2d 1022, 1028 1987 AMC 1817 (2d Cir. 1987).

247. *See* Fireman's Fund Ins. Co. v. Tropical Shipping & Constr. Co., 254 F.3d 987, 999, 2001 AMC 2474 (11th Cir. 2001); Fishman & Tobin v. Tropical Shipping & Constr. Co., 240 F.3d 956, 962 n.7, 2001 AMC 1663 (11th Cir. 2001). *See also* MacSteel Int'l USA Corp. v. M/V IBN ABDOUN, 154 F. Supp. 2d 826, 833, 2001 AMC 2841 (S.D.N.Y. 2001) (not clear from the face of the bill of lading and the charter party, examined together, that the Carriage of Goods by Sea Act governed, shipper had no fair opportunity to opt out of its liability limitation).

248. *Nippon*, 167 F.3d at 101.

249. 2 SCHOENBAUM, *supra* note 1, § 10-35, at 7 (Supp.).

In *Nippon Fire & Marine Insurance Co. v. M.V. TOURCOING*, a disassembled printing press was shipped in thirteen containers from Japan to the United States.[250] Several parts of the press sustained damage during the course of unloading.[251] The cargo insurer, Nippon, paid the shipper pursuant to a marine cargo insurance policy and sought recovery for $1,186,467.87 in damages that it paid the shipper. The district court entered judgment in favor of Nippon for $3750 based on the COGSA package limitation.[252]

The Second Circuit Court of Appeals agreed that COGSA was compulsorily applicable and that the shipper received a fair opportunity to declare a higher value for the printing press and pay a higher freight rate.[253] The bill of lading provided a space for the shipper to insert a higher value, and no such higher value was declared.[254] Consequently, the Second Circuit affirmed the district court's decision that the $500 per package limitation applied under COGSA.

Furthermore, the *Nippon* Court took notice of "the very fact that the shipper insured its cargo through Nippon demonstrates that it appreciated the substantial likelihood of a relatively low limit on the carrier's liability."[255] The court cited to *Vision Air Flight Service v. M/V NATIONAL PRIDE*,[256] in which the Ninth Circuit stated that the "shipper cannot contend that it was not given a 'fair opportunity' to opt for higher coverage precisely because [the shipper] *did* opt for higher coverage when it insured the [cargo] through an independent entity."[257] The Second Circuit thus affirmed the district court's decision to give effect to the $500 per package limitation.[258]

Cases such as *Nippon Fire* and *Vision Air* suggest that shippers obtaining full value cargo insurance coverage will be precluded from

250. *Nippon*, 167 F.3d at 100.

251. *Id.*

252. *Id.* (Author's note: the opinion does not explain why the judgment amount was not a multiple of $500).

253. *Id.*

254. *Id.* at 101. *See also* Gen. Elec. Co. v. M/V NEDLLOYD, 817 F.2d 1022, 1029, 1987 AMC 1817 (2d Cir. 1987) (language on the back of the bill of lading incorporating COGSA's provisions "and the space for declaring excess value on the front are sufficient notice of the limitation of liability and the means of avoiding it").

255. *Nippon*, 167 F.3d at 102.

256. 155 F.3d 1165 (9th Cir. 1998).

257. *Id.* at 1169. *See also* 2 SCHOENBAUM, *supra* note 1 § 10-35, at 7.

258. *Nippon*, 167 F.3d at 102.

invoking the fair opportunity doctrine.

B. Perils of the Sea and Acts of God

The common law defenses of natural *force majeure*—that is, perils of the sea and acts of God—are codified in COGSA as exceptions to liability.[259] The defense of perils of the sea has been defined as "those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence."[260] Events such as fire, lightning, or explosion are not peculiar to the sea, and therefore do not qualify as a peril of the sea.[261] While case law does not clearly distinguish between act of God and peril of the sea, commentators have opined that act of God is broader than a peril of the sea in that it includes "any natural cause of damage or loss to cargo that occurs without human intervention . . . ."[262] Therefore, an act of God includes storms, lightning, and frost.[263]

The test for both peril of the sea and an act of God is one of foreseeability. The carrier must not have been able to foreseeably prevent the damage or loss, and any fault on the part of the carrier will defeat a claim of peril of the sea or act of God.[264] "The determination of whether given conditions constitute a peril of the sea is wholly dependent on the facts of each case and is not amenable to a general standard."[265] Courts should, however, be aware that their ultimate conclusion should turn on whether the proffered peril of the sea was foreseeable.[266]

For example, in *Skandia Insurance Co. v. Star Shipping AS*,[267] the shipper sought recovery for damage to 1770 rolls of paper that resulted from tidal surge flooding associated with Hurricane Georges.[268] The court, however, precluded the shipper from recovering because it found that an act of God—Hurricane Georges—caused the damage, and not any

259. 46 U.S.C. app. § 1304(2)(c), (d) (2000).

260. The GIULIA, 218 F. 744, 746 (2d Cir. 1914)).

261. 2 SCHOENBAUM, *supra* note 1, § 10-28, at 137.

262. *Id.* at 138.

263. *Id.* at 139 n.16.

264. *See id.*

265. Thyssen, Inc. v. S/S EUROUNITY, 21 F.3d 533, 539, 2001 AMC 1527 (2d Cir. 1994).

266. *Id.*

267. 173 F. Supp. 2d 1228 (S.D. Ala. 2001).

268. *Id.* at 1233, 1237.

negligence on the part of the carrier.[269] The court determined that the carrier "could not have prevented the loss caused by the hurricane with the application of reasonable foresight. . . ."[270]

C. Act of War and Other Overwhelming Human Forces

COGSA has also codified certain exceptions to liability based on interference by human forces not under the control of either the shipper or carrier, including act of war, act of public enemies, arrest or restraint of princes, quarantine restrictions, strikes, and riots.[271] "Together, these exceptions comprise a comprehensive exception of human *force majeure* benefiting the carrier."[272]

The loss or damage to cargo from these human forces must be unforeseeable,[273] and the carrier must properly care for the cargo to the extent possible.[274] For example, a carrier must avoid a strike-bound port if possible, and it must take all reasonable steps to care for the cargo if it arrives in a strike-bound port.[275]

D. Due Diligence to Provide a Seaworthy Vessel

Under both Harter and COGSA, the carrier has the duty to use due diligence to make the ship seaworthy "before and at the beginning of the voyage."[276] The carrier may rebut a shipper's *prima facie* case by proving that it utilized due diligence to make the ship seaworthy and to properly care for the cargo.[277]

"Before the voyage" includes the time during the loading of

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269. *Id.* at 1252.

270. *Id.*

271. *See* 46 U.S.C. app. §§ 1304(2)(e), (f), (g), (h), (j), (k) (2000).

272. 2 SCHOENBAUM, *supra* note 1, §10-29, at 141.

273. *See* Morrisey v. S.S. A. & J. FAITH, 252 F. Supp. 54, 58-59, 1966 AMC 71 (N.D. Ohio 1965) (seizure of ship foreseeable where caused by carrier's reckless financial mismanagement).

274. *See* Sedco, Inc. v. S.S. STRATHEWE, 800 F.2d 27, 33, 1986 AMC 2801 (2d Cir. 1986) (restraint of princes defense not applicable where carrier's negligent handling of cargo caused damage, not requisition of ship by British government for Falkland Islands War).

275. *See* United States v. Lykes Bros. S.S. Co., 511 F.2d 218, 224, 1975 AMC 2244 (5th Cir. 1975).

276. 46 U.S.C. app. § 1303(1) (2000). *See also* THE STEEL NAVIGATOR, 23 F.2d 590, (2nd Cir. 1928); 46 U.S.C. app. § 191 (2000).

277. 46 U.S.C. app. § 1304(1) (2000); *see supra* Section IV regarding burdens of proof; *see* Section V(E), *infra*, regarding duty to care for cargo.

cargo.[278] "The legal test for seaworthiness is 'whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport.'"[279] This test is, of course, fact-dependent and applied on a case by case basis.[280]

The duty to use due diligence to provide a seaworthy ship ends when the vessel "breaks ground" on the voyage. Thus, if the vessel is damaged by third parties after the voyage commences, the carrier is not in breach of its duty to provide a seaworthy ship if there is any resulting damage to the cargo.[281] The duty is also nondelegable; the carrier is responsible for the acts of any agents, such as, ship repair yards, that he uses to fulfill this duty.[282]

The duty of seaworthiness under Harter and COGSA is nearly identical with one significant difference. Under COGSA, the plaintiff must establish a causal connection between the breach of the duty and the loss in order to hold the carrier liable.[283] Under Harter, however, the carrier is automatically liable for any failure to exercise due diligence to provide a seaworthy vessel, regardless of whether the unseaworthiness caused the loss.[284]

E. Carrier's Duty to Properly Load, Handle, and Care for the Cargo

The carrier's obligation to properly load, handle, and care for the cargo is codified in both the Harter Act and COGSA.[285] As stated above, the carrier may rebut a shipper's *prima facie* case by proving that it utilized due diligence to make the ship seaworthy and to properly care for the

278. *See* Am. Mail Line Ltd. v. United States, 377 F. Supp. 657, 660, 1974 AMC 1536 (W.D. Wash. 1974).

279. 2 SCHOENBAUM, *supra* note 1, § 10-24, at 125 (quoting The SYLVIA, 171 U.S. 462, 464 (1898)).

280. 2 SCHOENBAUM, *supra* note 1, § 10-24, at 125; *see also* Hale Container Line, Inc. v. Houston Sea Packing Co., 137 F.3d 1455, 1469-70 (11th Cir. 1998) (carrier exercised due diligence to ensure seaworthiness of vessel where it relied on assurance of party that stanchion system was safe and properly deferred to engineer and surveyor).

281. *See* Miss. Shipping Co. v. Zander & Co., 270 F.2d 345 (5th Cir. 1959) (vessel's hull plating fractured when it collided with a concrete dock during undocking maneuvers, carrier not liable because voyage had commenced when vessel left the pier).

282. *See* Int'l Navigation Co. v. Farr & Bailey Mfg. Co., 181 U.S. 218, 226 (1901).

283. 46 U.S.C. app. § 1304(1) (2000).

284. *See* May v. Hamburg-Amerikanische Packetfahrt A.G., 290 U.S. 333, 350-51 (1933) [hereinafter The ISIS].

285. *See* 2 SCHOENBAUM, *supra* note 1, § 10-25, at 126.

cargo.[286]

This duty is conceptually separate from, yet intertwined with, the duty of due diligence to provide a seaworthy vessel, and is similarly applied on a case by case basis.[287] Unlike the duty of seaworthiness, the duty to properly care for cargo applies to the loading, unloading, and the entire time the goods are in the carrier's custody, despite the fact that COGSA is said to cover only the period from tackle to tackle.[288] "This point is usually not important, since the Harter Act, which applies on land, requires the identical duty of the carrier."[289]

The duty of care also applies while the vessel is underway; the carrier is thus responsible for the acts of the master and crew during the voyage.[290] Further, "[u]se of stevedores to load and discharge the cargo does not relieve the ship and her owner of responsibility for any consequent cargo damage."[291]

This does not mean, however, that the shipper and carrier cannot contract to place the duty and expense of loading the cargo on the shipper.[292] Where cargo is damaged by a stevedore hired by the shipper and over whom the carrier had no control, the carrier is not liable.[293]

F. Negligent Navigation and Management of the Ship

Under both COGSA and the Harter Act, the carrier is not liable for damage caused by the master or crew's negligent navigation or management of the ship.[294] This somewhat logically suspect defense (the

286. 46 U.S.C. app. § 1304(1) (2000).

287. 2 SCHOENBAUM, *supra* note 1, § 10-25, at 127.

288. *See* Solar Turbines, Inc. v. S.S. AL SHIDADIAH, 575 F. Supp. 939, 940-41, 1984 AMC 2002 (S.D.N.Y. 1983).

289. 2 SCHOENBAUM, *supra* note 1, § 10-25, at 127 n.4.

290. *See* Nichimen Co. v. M/V FARLAND, 462 F.2d 319, 332, 1972 AMC 1573 (2d Cir. 1972) (captain and crew responsible for improper stowage of metal coils); *see also* 2 SCHOENBAUM, *supra* note 1, § 10-25, at 127.

291. Hale Container Line, Inc. v. Houston Sea Packing Co., 137 F.3d 1455, 1468-69, 1999 AMC 607 (11th Cir. 1998) (carrier not liable for damaged goods where shipper controlled loading and stowage process).

292. *See id.*; Sumitomo Corp. of Am. v. M/V SIE KIM, 632 F. Supp. 824, 837, 1987 AMC 160 (S.D.N.Y. 1985).

293. Sigri Carbon Corp. v. Lykes Bros. S.S. Co., 655 F. Supp. 1435, 1440, 1988 AMC 1787 (W.D. Ky. 1987).

294. 46 U.S.C. app. § 1304(2(a) (2000) (COGSA exoneration is unconditional and absolute); 46 U.S.C. app. § 192 (Harter exoneration is conditional on due diligence to provide a seaworthy vessel). *See also* 2 SCHOENBAUM, *supra* note 1, § 10-26, at 129-30.

carrier is, after all, responsible for the manner in which the crew handles the cargo during transport) is successful even where the carrier's agents or servants, usually the master and crew, were at fault.[295]

The defense of error in navigation is normally effective, especially when the error resulted in a collision or stranding.[296] The defense of error in management of the vessel, however, is often difficult to distinguish from the carrier's negligent care for the cargo, and for which the carrier is liable. Courts distinguish between these two categories of fault by examining "whether the negligent act or omission relate[d] primarily to the vessel . . . or . . . to the cargo."[297]

In the famous case *Firestone Synthetic Fibers, Co.. v. M/S BLACK HERON*,[298] the chief engineer, intending to ballast the ship, negligently pumped seawater into the hold that held the plaintiff's cargo.[299] The court exonerated the carrier because the engineer's purpose was the management of the ship, not care of the cargo.[300]

G. Fire Statute

Under the "Fire Statute," the carrier is exonerated for damages to cargo that result from a fire onboard the ship, unless the fire was caused by the "design or neglect" of the carrier. [301] Harter does not address fire loss. Under COGSA, neither the carrier nor the ship will bear responsibility unless the fire was caused by the "actual fault or privity" of the carrier or ship.[302] Note that these defenses only apply for fire causing damage aboard the ship.[303]

The carrier, therefore, may rebut the shipper's *prima facie* case

295. 2 SCHOENBAUM, *supra* note 1, § 10-26, at 130.

296. *See* The ISIS, 290 U.S. 333, 343 (1933); Cia. Atlantica Pacifica, S.A. v. Humble Oil & Ref. Co., 274 F. Supp. 884 (Md. 1967).

297. 2 SCHOENBAUM, *supra* note 1, § 10-26, at 130.

298. 324 F.2d 835 (2d Cir. 1963).

299. *Id.* at 836.

300. *Id. See also* Hershey Chocolate Corp. v. The MARS, 172 F. Supp. 321, 322 (E.D. Pa. 1959) (carrier not liable for sweat damage to cargo of cocoa beans caused by master's failure to avoid severe weather).

301. 46 U.S.C. app. § 182 (2000).

302. 46 U.S.C. app. § 1304(2)(b) (2000).

303. *See* Remington Rand, Inc. v. Am. Export Lines, 132 F. Supp. 129, 138 (S.D.N.Y. 1955) (fire aboard a lighter or pier after goods have been discharged not covered under Fire Statute or COGSA).

simply by showing that the loss resulted from fire.[304] The shipper must then show that the fire was caused by the "design or neglect" or "actual fault or privity" of the shipowner or carrier.[305]

H. Faults of the Shipper: Inherent Vice, Insufficiency of Packing, and Latent Defects

COGSA absolves a carrier from liability for loss or damage arising from: (1) act or omission of shipper,[306] (2) inherent vice or defect,[307] (3) insufficiency of packing,[308] and (4) latent defects.[309] The rationale behind these defenses rests on the carrier's lack of knowledge of specific aspects of the carriage. "All of these causes of loss for which the carrier is not liable potentially clash with the duty of the carrier to properly care for cargo; they are thus rather narrowly construed."[310]

1. Act or Omission of the Shipper

Act or omission of the shipper is a valid defense where the shipper either knew the manner in which goods were carried would result in damage, or specified the manner of carriage that caused the damage, despite proper care taken by the carrier.[311] The carrier assumes the burden of proof in this defense; it will receive full exoneration only if it demonstrates proper care in carriage. If the damage or loss was caused by any carrier negligence, the burden of proof for concurrent causes applies.[312]

a. Insufficiency of Packing

This defense presents a factual issue and the burden is placed on the carrier to demonstrate: (1) that "the shipper knew the goods were at risk" of damage and could have provided for "a different method of packing and (2)

304. 2 SCHOENBAUM, *supra* note 1, § 10-27, at 134.

305. *See* Westinghouse Elec. Corp. v. M/V LESLIE LYKES, 734 F.2d 199, 206, 1985 AMC 247 (5th Cir. 1984).

306. 46 U.S.C. app. § 1304(2)(i) (2000).

307. 46 U.S.C. app. § 1304(2)(m) (2000).

308. 46 U.S.C. app. § 1304(2)(n) (2000).

309. 46 U.S.C. app. § 1304(2)(p) (2000).

310. 2 SCHOENBAUM, *supra* note 1, § 10-30, at 142.

311. *Id. See, e.g.*, Aunt Mid, Inc. v. Fjell-Oranje Lines, 458 F.2d 712, 718, 1972 AMC 677 (7th Cir. 1972) (carrier not liable for spoiling of cabbages where shipper used ventilated, as opposed to refrigerated, stowage).

312. 2 SCHOENBAUM, *supra* note 1, § 10-30, at 142; *see infra* Section IV(C); United States v. Ocean Bulk Ships, Inc., 248 F.3d 331, 336, 2001 AMC 1487 (5th Cir. 2001).

the carrier exercised reasonable care in stowage" of the cargo.[313] The carrier must show that the goods as they were wrapped were not fitted to endure the ordinary hazards of the voyage.[314]

The carrier must support its defense of insufficiency of packaging with expert testimony, industry custom, or past experience.[315] Mere speculation is insufficient.[316]

b. Inherent Vice/Hidden Defect

The courts have defined inherent vice as "any existing defects, diseases, decay, or the inherent nature of the commodity which will cause it to deteriorate with a lapse of time."[317] Inherent vices have ranged from insect eggs,[318] to the tendency of metal to rust.[319]

The rationale behind the doctrine of inherent vice is that the shipper has personal knowledge of the inherent characteristics of the goods shipped and should shoulder the burden of guarding against the vice.[320] A split within the circuits exists regarding the burden of proof. The Second Circuit treats "inherent vice as bound up with the initial responsibility of the shipper to state a prima facie case."[321] The carrier merely needs to show "that the damage was of internal origin;"[322] the burden of proof then shifts back to the shipper to prove the condition of the goods when they were shipped.[323]

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313. 2 SCHOENBAUM, *supra* note 1, § 10-30, at 143. *See also* O'Connell Mach. Co. v. M.V. AMERICANA, 797 F.2d 1130, 1134-35, 1986 AMC 2822 (2d Cir. 1986).

314. Bache v. Silver Line, Ltd., 110 F.2d 60, 61 (2d Cir. 1940) (carrier not liable for damage to rubber bales where shipper insufficiently covered the bales for transport).

315. *See* David R. Webb Co., Inc. v. M/V HENRIQUE LEAL, 733 F. Supp. 702, 707-08, 1990 AMC 1236, (S.D.N.Y. 1990).

316. *See Ocean Bulk Ships*, 248 F.3d at 341-42 (carrier's reliance on surveyor's report constituted speculation where the surveyor's remarks about the packaging covered less than one-third of the total loss claimed by the shipper).

317. Raphaely Int'l, Inc. v. Waterman S.S. Corp., 972 F.2d 498, 504, 1994 AMC 1441 (2d Cir. 1992) (quoting Vana Trading Co. 556 F.2d at 104).

318. NICHIYO MARU v. Wellman, 89 F.2d 539, 1972 AMC 1440 (4th Cir. 1937).

319. *See* Demsey & Assocs. v. S.S. SEA STAR, 461 F.2d 1009, 1015 (2d Cir. 1972).

320. 2 SCHOENBAUM, *supra* note 1, § 10-30 at 144.

321. *Id.*

322. *Id.*

323. *Id. See also* Am. Tobacco Co. v. Goulandris, 281 F.2d 179, 182 (2nd Cir. 1960) ("It seems reasonable to place the burden of proof on the shipper once the damage is shown to have been of internal origin for he is clearly the one who has access to the information on this question").

The Fifth Circuit, on the other hand, treats inherent vice much the same as the other excepted causes under COGSA. The carrier must prove "some defect, quality, or vice adhering to the individual cargo . . . in question."[324] The shipper must then show that the damage resulted from negligence or fault caused by the carrier.[325] Commentators view the Fifth Circuit's approach as more in accordance with COGSA, making inherent vice a defense for the carrier, not a part of the shipper's *prima facie* case.[326]

2. Latent Defects

A latent defect refers to a defect in a piece of machinery or other device on a vessel that could not have been discovered by reasonable diligence.[327] A latent defect does not refer to either the shipper's fault or to a flaw in the goods. The latent defect "must be a flaw in the metal and not due to wear and tear."[328] The carrier must prove that the defect was not discoverable on reasonable inspection,[329] and if reasonable doubt exists on this issue, the carrier will be liable.[330]

I. The "q" Clause Exception

COGSA contains a "catch-all" exception to liability.[331] This exception states that the carrier is not liable for damages resulting from "any other cause arising without the actual fault and privity of the carrier" or its agents.[332]

The statute also provides that "the burden of proof shall be on the

324. Quaker Oats Co. v. M/V TORVANGER, 734 F.2d 238, 241 n.3, 1984 AMC 2943 (5th Cir. 1984).

325. 2 SCHOENBAUM, *supra* note 1, § 10-30 at 145.

326. *See, e.g.*, 2 SCHOENBAUM, *supra* note 1, § 10-30, at 145.

327. *Id.* at 145-46; *see also* Waterman S.S. Corp. v. United States Smelting, Ref., & Mining, 155 F.2d 687, 691 (5th Cir. 1946); CONTAINERSCHIFFSREEDEI T.S. COLUMBUS NEW ZEALAND v. Corp. of Lloyd's, 1981 AMC 60, 69 (S.D.N.Y. 1980).

328. 2 SCHOENBAUM, *supra* note 1, § 10-30 at 145-46; *see also Waterman S.S. Corp.*, 155 F.2d at 691.

329. *See* Sony Magnetic Prods. Inc. v. MERIVIENTI O/Y, 863 F.2d 1537, 1540 n.3, 1989 AMC 1259 (11th Cir. 1989).

330. 2 SCHOENBAUM, *supra* note 1, § 10-30, at 146; *see also Waterman S.S. Corp.,* 155 F.2d at 693.

331. 46 U.S.C. app. § 1304(2)(q) (2000).

332. *Id. See e.g.*, U.N./F.A.O. World Food Programme v. M/V TAY, 138 F.3d 197, 200, 1998 AMC 2729 (5th Cir. 1998) (interpreting the "q" exception to permit a carrier to avoid liability when it can prove that the loss or damage was caused after the carrier relinquished control of the cargo to a third party that, likewise, was acting completely beyond the carrier's control).

person claiming the benefit of this exception" to show that the carrier's fault or negligence did not contribute to the loss of damage.[333] The "q" clause exception thus "expressly requires that the carrier prove the applicability of the exception, while the remaining statutory exceptions are silent on the point."[334]

Considerable conflict exists in the federal courts regarding whether the carrier's rebuttal burden with respect to this exception is one of production or persuasion.[335] Some courts require the carrier to bear the burden of persuasion with respect to any defense premised on the "q" exception, while permitting a mere burden of production on a carrier seeking to rebut the shipper's *prima facie case* under the remaining COGSA exceptions.[336] Conversely, other courts hold that the carrier bears the same burden of proof for all COGSA exceptions, although courts differ as to whether the burden is one of production or persuasion.[337]

J. Inherently Dangerous Goods

COGSA § 1304(6) permits a carrier to off-load or destroy inherently dangerous goods without liability where the carrier "has not consented with knowledge of their nature and character."[338] Even where the carrier has taken on such goods with full consent and knowledge, it may off-load or destroy inherently dangerous goods without liability where the goods become actively dangerous.[339] The carrier may also recover damages caused by inherently dangerous goods where the carrier did not possess knowledge of the dangerous nature of the goods.[340] In *Senator Linie GmbH v. Sunway Line, Inc*,[341] the Second Circuit held that, where neither the shipper nor carrier had actual or constructive pre-shipment knowledge of the inherently dangerous nature of a chemical cargo, the shipper was

333. 46 U.S.C. app. § 1304(2)(q) (2000); *see also U.N./F.A.O. World Food Programme,* 138 F.3d at 200.

334. United States v. Ocean Bulk Ships, Inc., 248 F.3d 331, 338, 2001 AMC 1487 (5th Cir. 2001).

335. *Id.* at 337-38.

336. *See e.g.*, Tubacex, Inc. v. M/V RISAN, 45 F.3d 951, 955, 1995 AMC 1305 (5th Cir. 1995).

337. *See e.g.*, Sony Magnetic Prods. Inc. v. MERIVIENTI O/Y, 863 F.2d 1537, 1540 n.3, 1989 AMC 1259 (11th Cir. 1989)(burden of persuasion applicable to all COGSA exceptions).

338. 46 U.S.C. app. § 1304(6) (2000).

339. *Id.*

340. *Id.*

341. 291 F.3d 145, 2002 AMC 1217 (2d Cir. 2002).

strictly liable for the fire damages caused to the ship.[342]

VI. UNREASONABLE DEVIATION: LOSING THE PACKAGE LIMITATION

The doctrine of unreasonable deviation applies where a carrier's performance in shipping goods deviates unreasonably from the terms agreed to in a bill of lading. In such a situation, the carrier is deprived of all limitations on liability, including the $500 per package limit defense under COGSA, "on the ground that such deviations ousted the contract of carriage and made the carrier fully responsible for the cargo as an insurer."[343] Note, however, that an unreasonable deviation does not nullify COGSA's one year statute of limitations.[344]

The deviation doctrine has been applied primarily in two situations: an unreasonable geographic deviation from the route of the voyage and unauthorized on-deck stowage. The Ninth Circuit, however, appears to be developing a new twist to the unreasonable deviation doctrine based upon intentional damage to the cargo by the carrier.

A. Geographic Deviation

Unreasonable geographic deviations have included actions such as the unscheduled picking up or discharging of cargo,[345] a stop for inexpensive bunkers,[346] and a return to home port to repair a pre-existing unseaworthy condition.[347] A deviation will not exist where the carrier adheres to a customary trade route, despite the fact that the bill of lading discloses only the location of terminal ports and no intermediate ports.[348]

The Second Circuit examined a geographic deviation in an unpublished opinion, *National Starch & Chemical Co. v. Project Asia Line, Inc.*[349] In this case, National Starch filed suit seeking money damages of

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342. *See id.* at 148.

343. *See* Gen. Elec. Co. v. S.S. NANCY LYKES, 706 F.2d 80, 87, 1983 AMC 1947 (2d Cir. 1983).

344. *See* Bunge Edible Oil Corp. v. M/V TORM RASK, 949 F.2d 786, 788, 1992 AMC 2227 (5th Cir. 1992); Mesocap Ind. Ltd. v. Torm Lines, 194 F.3d 1342, 1345, 2000 AMC 370 (11th Cir. 1999).

345. *See* The FREDERICK LUCKENBACH, 15 F.2d 241, 244 (S.D.N.Y. 1926).

346. *See NANCY LYKES*, 706 F.2d at 86.

347. *See* The LOUISE, 58 F. Supp. 445, 450 (D. Md. 1945). *See also* 2 SCHOENBAUM, *supra* note 1, § 10-32, at 152.

348. *See* Amdahl v. Profit Freight Sys., Inc., 1998 U.S. App. LEXIS 5915 (9th Cir. 1998) (unpublished opinion).

349. 2001 U.S. App. LEXIS 14460 (2d Cir. June 27, 2001).

$819,039.17 caused by damage to a shipment of starch carried from Thailand to Portland, Maine.[350] National Starch had entered into a charter agreement with the carrier that specified that the carrier would transport 6800 metric tons of bagged starch.[351] While loading the starch, numerous bags were soaked when the ship's crew failed to timely close the hatches to avoid a tropical downpour.[352] National Starch tested several samples after loading, which revealed unacceptable moisture content, an indicator that microbiological growth could be present.[353] National Starch requested off-loading of the cargo for further testing, but the ship's captain refused and departed for Portland.[354]

En route, the ship picked up a shipment of bulk chrome ore, which necessitated moving the starch to a different hold.[355] This procedure revealed significant water damage to the starch as well as the ship's dunnage.[356] Despite this obvious damage and the bill of lading's clear identification of Portland as the port of discharge, the ship made an unplanned detour to Montreal to discharge the ore.[357] The detour to Montreal entailed an additional 1500 miles and approximately nine days of travel time.[358] Upon arrival in Portland, National Starch detected high levels of mold in the starch and determined that it could not be sold to its customers.[359] Since National Starch could not guarantee to its customers that the starch met industry standards for microbiological content the company "sold the [starch] at a deep discount . . . and sued for the difference between its mitigated costs and the cargo's fair market value."[360]

The district court found, *inter alia*, that National Starch's clean bill of lading evidenced that it delivered the starch in good condition, that the carrier's deviation to Montreal was unreasonable, and that the unreasonable geographic deviation significantly enhanced the microbiological growth resulting from the initial water damage to the starch.[361] The Second Circuit

350. *Id.* at *1.
351. *Id.* at *2.
352. *Id.*
353. *Id.*
354. *Id.*
355. *Id.*
356. *Id.* at *2-3.
357. *Id.* at *3.
358. *Id.*
359. *Id.*
360. *Id.*
361. *Id.* at *3-4.

affirmed the trial court's findings that the deviation deprived the carrier of the $500 per package limitation.[362]

B. Unauthorized On-Deck Stowage

Unauthorized deck stowage occurs most often where a carrier unjustifiably stows cargo on deck despite a clean bill of lading that either states or clearly implies under-deck stowage.[363] A carrier's failure to stow two sensitive, computerized textile weaving machines under-deck constituted an unreasonable deviation in *American Dornier Machinery Corp. v. MSC Gina*.[364] In that case, the carrier had a special stowage agreement regarding the machines. The shipper delivered six machines in two containers with express instructions to "stow under deck, cargo sensitive to water."[365] The carrier, however, loaded the containers on deck. The containers, and hence the machines, were lost overboard during the voyage.[366]

The trial court found that the carrier's breach of the stowage agreement constituted an unreasonable deviation, noting that the "manifest need to protect the sensitive machinery by under-deck stowage is obvious."[367] "[D]elicate machinery stowed above deck in a thin walled container is far more vulnerable to boarding seas or rain or other moisture than that same machinery stowed under deck and protected by the thick, steel walls of the vessel's hold."[368] Holding that the stowage agreement "by its very nature goes to the essence of the contractual venture,"[369] the court ruled that the carrier's unreasonable deviation exposed the weaving machines to the "very risks" the shipper sought to avoid.[370] Accordingly, the court deprived the carrier of the $500 per package limit found in COGSA § 1304(5).[371]

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362. *Id.* at *4.

363. *See* St. Johns N.F. Shipping Corp. v. S.A. Companhia Geral Commercial do Rio de Janeiro, 263 U.S. 119, 124 (1923).

364. No. 96 Civ. 9391, 2001 U.S. Dist. LEXIS 16762, 2002 AMC 560 (S.D.N.Y. Oct. 18, 2001).

365. *Id.* at *6.

366. *See id.* at *7.

367. *Id.* at *5.

368. *Id.* at *5.

369. *Id.* at *9.

370. *Id.* at *12.

371. *Id.* at *12. *But cf.* Konica Bus. Machs., Inc. v. SEA-LAND CONSUMER, 153 F.3d 1076, 1078-79, 1998 AMC 2705 (9th Cir. 1998) (Unreasonable deviation did not occur where

C. Intentional Damage as Unreasonable Deviation

As stated above, courts have traditionally applied the unreasonable deviation doctrine to geographic deviation and unauthorized on-deck stowage. The Ninth Circuit, however, concluded in *Vision Air Flight Service v. M/V NATIONAL PRIDE*[372] that "a carrier's intentional destruction of the very goods it contracts to transport constitutes an unreasonable deviation which renders inapplicable COGSA's limitation of liability provision."[373] In *Vision Air*, the Ninth Circuit examined whether an unreasonable deviation occurred where stevedores destroyed two airport refueling trucks while off-loading them from the ship.[374] This case is instructive for purposes of both an extension of the unreasonable deviation doctrine and the applicability of the fair opportunity doctrine.

Vision Air, a Philippine corporation, purchased two refurbished refuelers in Kansas and contracted through an intermediary to have the trucks shipped from California to Manila. The carrier's bill of lading "purported to limit [its] liability to $500 on the entire shipment pursuant to [COGSA] and . . . advised Vision that it could opt for higher liability by paying an increased freight charge."[375] Vision declined to pay the increased charge, opting instead to insure the refuelers with a cargo insurer.[376]

Once the vessel arrived in Manila, stevedores attempted to off-load the trucks using the ship's own cranes. According to an uncontroverted declaration of a Vision Air employee, the stevedores negligently off-loaded the first truck by failing to use proper equipment. As a result, It was apparent after off-loading that the doors, fenders, and refueling tank were crushed the underside was damaged.[377] Despite this visible damage, the stevedores off-loaded the second refueler in the same manner, causing similar damage. Both trucks were deemed a total loss.[378]

Vision Air filed suit against the carrier seeking damages based on

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carrier established custom of on-deck stowage and shipper could establish only mere negligence on part of carrier); Du Pont de Nemours Int'l S.A. v. S.S. MORMACVEGA, 493 F.2d 97, 102, 1974 AMC 67 (2d Cir. 1974) (stowage of containerized cargo on deck of a specially-designed containership is not a deviation because the risk of damage or loss was significantly reduced).

372. 155 F.3d 1165, 1999 AMC 1168 (9th Cir. 1998).

373. *Id.* at 1175.

374. *See id.* at 1167-68.

375. *Id.* at 1167.

376. *Id.*

377. *Id.* at 1167-68.

378. *Id.* at 1168.

the destruction of the refuelers. The carrier filed a motion for partial summary judgment to limit its liability to $500 per refueler pursuant to the bill of lading and COGSA. (The carrier did not raise the issue of vicarious liability for the stevedores' conduct at trial nor in its appellate briefs.) The district court granted the motion and issued an order limiting the carrier's liability to $1000. On appeal, Vision Air contended that the district court erred in limiting the carrier's liability to $1000, and that the manner of off-loading of the refuelers constituted an unreasonable deviation, rendering COGSA's $500 per package limitation inapplicable.[379]

Regarding the unreasonable deviation argument, the court found that a reasonable trier of fact could conclude that the stevedores, once they possessed notice of the damage to the first truck, intentionally destroyed the second one by off-loading it in an identical manner.[380] The court justified its extension of the unreasonable deviation doctrine by referring to pre-COGSA jurisprudence, which was "concerned about imposing upon shippers unreasonable risks that they had not bargained to bear."[381] Based on this framework, the court reasoned that the "intentional destruction of cargo is not a risk any shipper bargains to undertake or should expect to bear."[382] Indeed, the court noted that the contract "is rendered pointless by the carrier's intentional destruction of the goods en route," and that "[i]t is hard to conceive of a more fundamental breach going more to the essence of the contract. . . ."[383] Accordingly, the Ninth Circuit affirmed the district court's grant of partial summary judgment as to the first refueler, but vacated the grant of partial summary judgment as to the second refueler.[384]

The Ninth Circuit recently revisited this issue in *Sea-Land Service, Inc. v. Lozen International*,[385] where the court held that a genuine issue of fact existed as to whether the carrier's railroad agent intentionally caused damage to a shipment of grapes and thereby committed an unreasonable deviation.[386] *Lozen's* reliance on *Vision Air* indicates that the Ninth Circuit continues to adhere to the requirement that the damage must be intentional

379. *Id.*
380. *Id.* at 1176.
381. *Id.* at 1172.
382. *Id.* at 1175.
383. *Id.*
384. *Id.* at 1176.
385. 285 F.3d 808, 2002 AMC 5967 (9th Cir. 2002).
386. *Id.* at 818.

to constitute an unreasonable deviation.[387]

VII. DAMAGES

A. The Shipper's Recovery is Generally Measured by Market Value

1. When goods are damaged

When cargo is damaged, the measure of the shipper's recovery is normally "the difference between the market value of the cargo in the condition in which it would have arrived had the carrier performed properly, and the cargo's market value in its damaged state on arrival at port of destination."[388] Market value "considers the diminished value of the cargo on the date of discharge. . . ."[389] The shipper must prove both valuation figures.[390]

2. When goods are lost or delayed

If the cargo is lost rather than damaged, the shipper's recovery is the market value of the goods at the port of destination.[391] If the cargo is delayed due to the carrier's negligence, "the measure of damages is the difference between the market value of the goods at the time and place they should have arrived," and the market value when they did arrive.[392]

COGSA applies to physical loss or damage to cargo; claims for detention and delay are outside COGSA's scope.[393]

387. *See id.*

388. BP N. Am. Petroleum v. SOLAR ST., 250 F.3d 307, 312, 2001 AMC 1844 (5th Cir. 2001) (quoting Cook Indus. Inc. v. Barge UM-308, 622 F.2d 851, 854 (5th Cir. 1980)).

389. *Id.* at 314.

390. 2 SCHOENBAUM, *supra* note 1, § 10-36, at 167. *But see* United States v. Ocean Bulk Ships, Inc., 248 F.3d 331, 343, 2001 AMC 1487 (5th Cir. 2001) (court allowed as damages the value of cargo specified in the bill of lading where the shipper elected to declare the actual value, finding that the bill of lading "evidences the carrier's acquiescence to this declaration." *Id.* at 343).

391. St. Johns N.F. Shipping Corp. v. S.A. Companhia Geral Commercial do Rio de Janeiro, 263 U.S. 119, 125 (1923).

392. 2 SCHOENBAUM, *supra* note 1, § 10-36, at 167. *See also* Atl. Mut. Ins. Co. v. Poseidon Schiffahrt, GmbH, 313 F.2d 872, 875 (7th Cir. 1963).

393. Hellenic Lines, Ltd. v. Embassy of Pak., 467 F.2d 1150, 1156, 1972 AMC 2216 (2d Cir. 1972) ("Detention is wholly unconnected with physical loss or damage to goods and is a matter which COGSA left to be dealt with by contract between the parties").

3. Proof of market value

The commercial invoice is a good starting point in proving value. In addition, "[p]roof of market value and damages may be accomplished by using published price quotations or comparable sales where available."[394] Where such items are not available, a party may use an expert witness knowledgeable regarding "the particular cargo involved and the nature of the damage or loss."[395]

4. Salvage value

The shipper has a duty to mitigate its damages by selling its damaged cargo at salvage for the best price reasonably obtainable.[396] The duty to show failure to mitigate, however, rests on the carrier.[397] The shipper may recover the reasonable costs of obtaining salvage.[398]

B. Consequential Damages

Damages in excess of those awarded under the market value rule may be awarded where the plaintiff can demonstrate that at the time of the carriage contract special circumstances were communicated to the carrier and that the carrier therefore should have foreseen the consequential damages. In the absence of communication of such facts and circumstances, consequential damages will be denied.[399] Indeed, recovery

394. 2 SCHOENBAUM, *supra* note 1, § 10-36, at 167. *See also* BP N. Am. Petroleum v. SOLAR ST., 250 F.3d 307, 313, 2001 AMC 1844 (5th Cir. 2001); R.T. Jones Lumber Co. v. Roen S.S. Co., 270 F.2d 456, 460 (2d Cir. 1959) ("comparable sales are best evidence of market value").

395. 2 SCHOENBAUM, *supra* note 1, § 10-36 at 167.

396. The NYLAND, 164 F. Supp. 741, 745 (D. Md. 1958) (court held that U.S. government's method of sale of wheat affected the price received, stating that "[a]n injured party has a duty to minimize its damages, and is barred from recovering damages which might have been avoided by reasonable effort"). *See also* David R. Webb Co. v. M/V HENRIQUE LEAL, 733 F. Supp. 702, 714, 1990 AMC 1236 (S.D.N.Y. 1990) (court denied plaintiff's motion for summary judgment on damages to cargo of Mocitaiba veneer because of failure to mitigate damages).

397. *See* Emmco Ins. Co. v. Wallenius Caribbean Line, S.A., 492 F.2d 508, 514, 1974 AMC 2052 (5th Cir. 1974).

398. *See, e.g.*, Plywood Panels, Inc. v. M/V SUN VALLEY, 804 F. Supp. 804, 814 1993 AMC 516 (E.D. Va. 1992) (consignee awarded its costs of sorting and handling damaged goods to effect salvage); Consol. Grain & Barge Co. v. Am. Barge & Towing Co., 766 F. Supp. 754, 760, 1993 AMC 1520 (E.D. Mo. 1991) (shipper awarded monies retained from salvage proceeds and costs incurred for marine surveying of damaged grain).

399. Tex. Instruments, Inc. v. Branch Motor Express Co., 432 F.2d 564, (1st Cir. 1970).

of consequential damages in a common carriage situation is rare.[400] The district court in *Hoogwegt U.S. Inc. v. Schenker Int'l, Inc.*,[401] however, noted that consequential damages may be recovered under COGSA unless excluded by the bill of lading.[402]

C. Punitive Damages and Attorneys Fees

COGSA does not mention punitive damages, but they may be excluded by § 1304(5), which states that "[i]n no event shall the carrier be liable for more than the amount of damage actually sustained."[403] Like consequential damages, an award of punitive damages is rare. A district court did, however, award punitive damages when the carrier's conduct amounted to an independent tort.[404]

A court has the power to award attorneys fees and costs to a successful litigant in a cargo case "based on the bad faith exception to the general rule which precludes an award of attorneys fees to the prevailing party."[405]

D. Collateral Source Rule

The collateral source rule will generally apply in COGSA cases.[406] In *Texport Oil Co. v. M/V AMOLYNTOS*,[407] the shipper obtained judgment against the carrier under COGSA after a shipment of gasoline was contaminated by residue in the cargo hull of the vessel.[408] The carrier was

400. 2 SCHOENBAUM, *supra* note 1, § 10-38, at 175; 46 U.S.C. app. § 1304(5) (2000).

401. 121 F. Supp. 2d 1228, 1233 (N.D. Ill. 2000).

402. *See id.* at 1233; *contra* Mojica v. Autoridad de las Navieras de Puerto Rico, 1994 AMC 1316 (D.P.R. 1993).

403. 2 SCHOENBAUM, *supra* note 1, §10-36, at 173; 46 U.S.C. app. § 1304(5) (2000).

404. *See* Armada Supply, Inc. v. S/T AGIOS NIKOLAS, 639 F. Supp. 1161, 1163 (S.D.N.Y. 1986) (carrier willfully converted shipper's fuel oil in order to avoid an arrest warrant and to extort payment from the cargo owner).

405. Dow Chemical Pac. Ltd. v. Rascator Mar. S.A., 594 F. Supp. 1490, 1500, 1985 AMC 523 (S.D.N.Y. 1984) *opinion amended* 609 F. Supp. 451 (attorneys fees and costs awarded where intentional and wanton acts of carrier owner caused shipper's financial losses); *see also* Weinberger v. Kendrick, 698 F.2d 61, 80 (2nd Cir. 1982) (there exists "an exceptional power to shift fees where an action has been commenced or conducted 'in bad faith, vexatiously, wantonly, or for oppressive reasons'"). *See also* 2 SCHOENBAUM, *supra* note 1, § 10-36, at 173.

406. Texport Oil Co. v. M/V AMOLYNTOS, 816 F. Supp. 825, 1994 AMC 908 (E.D.N.Y. 1993) [hereinafter *Texport I*].

407. Texport Oil Co. v. M/V AMOLYNTOS, 11 F.3d 361, 1994 AMC 815 (2d Cir. 1993) [hereinafter *Texport II*].

408. *Id.* at 363.

held liable for incidental costs incurred by the shipper to restore the gasoline to marketable condition.[409] Notably, the shipper received $650,000 from its cargo insurer for damages to the gasoline.[410]
The carrier contended at trial, that the collateral source rule should not apply to a COGSA claim for damages because such a claim is essentially a contract claim, to which the collateral source rule does not apply.[411] The district court disagreed, holding that the COGSA action "is a maritime action in the nature of a mixed tort, contract and bailment cause of action. Under these circumstances, it is appropriate to apply the collateral source rule and the defendant cannot benefit by the prior insurance payment to Texport."[412] The Second Circuit affirmed, holding that "the fact that Texport entered into an independent contract with a third-party insurer to indemnify any loss does not insulate the AMOLYNTOS from full liability."[413]

VIII. CONCLUSION

The purpose of this paper was to provide a level of basic information for maritime attorneys who are new to cargo litigation, in addition to supplying the experienced cargo litigator with a review of more recent case law affecting cargo litigation. A number of issues affecting cargo law, such as charter parties, international conventions relating to the carriage of cargo, and general average, were not addressed. The paper is, of course, not exhaustive and should be supplemented by reference to one of the many excellent treatises on cargo law.

409. *See id.* at 368.
410. *Id.* at 364.
411. *Texport I.*, 816 F. Supp. at 843.
412. *Id.* at 844.
413. *Texport II*, 11 F.3d at 367.