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Admiralty Litigation In Perpetuum: The Continuing Saga of Package Litigation and Third World Delivery Problems

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Abstract

Certain admiralty cargo issues are litigated frequently, often in search of a magical test which will preclude all further litigation. Three such issues are package limitations, the burden of proving the condition and quantity of cargo stowed within containers, and the point at which the ocean carrier delivers cargo at discharge and thus completes its duties under the contract of carriage. Despite the frequency with which these issues have been litigated, significant disagreement remains among the circuit courts as to their proper resolution. This article will examine the current state of judicial uncertainty in these areas and the indications given by the courts as the positions most likely to be adopted in the future.

ADMIRALTY LITIGATION *IN PERPETUUM*: THE CONTINUING SAGA OF PACKAGE LIMITATION AND THIRD WORLD DELIVERY PROBLEMS

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INTRODUCTION

Certain admiralty cargo issues are litigated frequently, often in search of a magical test which will preclude all further litigation. Three such issues are package limitations, the burden of proving the condition and quantity of cargo stowed within containers, and the point at which the ocean carrier delivers cargo at discharge and thus completes its duties under the contract of carriage. Despite the frequency with which these issues have been litigated, significant disagreement remains among the circuit courts as to their proper resolution. This Article will examine the current state of judicial uncertainty in these areas and the indications given by the courts as to the positions most likely to be adopted in the future.

I. PACKAGE LIMITATION

The United States Carriage of Goods by Sea Act¹ (COGSA) limits an ocean carrier's liability for cargo loss or damage to \$500 per package or customary freight unit unless the shipper has declared the value of the cargo and inserted it in the bill of lading.²

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1. 46 U.S.C. §§ 1300-1315 (1976). For a discussion of the statute's legislative history, see *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 1959 A.M.C. 879 (1959). See also *Encyclopedia Britannica, Inc. v. S.S. Hong Kong Producer*, 422 F.2d 7, 11-13, 1969 A.M.C. 1741, 1746-47 (2d Cir. 1969), *cert. denied*, 397 U.S. 964 (1970).

2. 46 U.S.C. § 1304(5) (1976) provides:

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding \$500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

Id.

This limitation presented little judicial controversy at a time when packages were small and easily identified as such. The introduction and widespread use of multi-modal containers for the transportation of cargo has, however, created much judicial controversy regarding the application of the \$500 package limitation.³ The courts have not been successful in their attempts to settle the question permanently, but they might be able to diminish the frequency with which they face the issue by defining the purpose of the COGSA package limitation. Once that purpose is determined, the outcome should follow logically and predictably.

A. Containers as COGSA Packages

Part of the difficulty facing the courts stems from the fact that the drafters of COGSA in 1936⁴ did not envision the large multi-modal container. The courts have aptly described their attempts to determine legislative intent on the issue as an exercise in ascertaining "what Congress would have thought about a subject about which it never thought or could have thought and one about which we have never thought."⁵ Nevertheless, recent case law has approached a definition of COGSA's purpose, and may have thus slowed the flow of container package litigation. Judge Friendly's opinion in *Mitsui & Co. v. American Export Lines*⁶ changed the Second Circuit law in this area. It brought the Second Circuit

3. See G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 14 (2d ed. 1975); Bissell, *The Operational Realities of Containerization and Their Effect on the "Package" Limitation and the "On-Deck" Prohibition: Review and Suggestions*, 45 TUL. L. REV. 902 (1971); Calamari, *The Container Revolution and the \$500 Package Limitation—Conflicting Approaches and Unrealistic Solutions: A Proposed Alternative*, 51 ST. JOHN'S L. REV. 687, 688 n.4 (1977); DeOrchis, *The Container and the Package Limitation—The Search for Predictability*, 5 J. MAR. L. & COM. 251 (1974); Simon, *Latest Developments in the Law of Shipping Containers*, 4 J. MAR. L. & COM. 441 (1973). The multi-modal container is a large metal, re-usable box whose dimensions are up to 40 feet by 8 feet by 8 feet, and which generally carries cargo valued far in excess of the \$500 limitation.

4. Carriage of Goods by Sea Act, Pub. L. No. 521, ch. 229, 49 Stat. 1207 (1936).

5. *Wirth Ltd. v. S/S Acadia Forest*, 537 F.2d 1272, 1276, 1976 A.M.C. 2178, 2183 (5th Cir. 1976) (footnote omitted).

6. 636 F.2d 807, 1981 A.M.C. 331 (2d Cir. 1981). The *Mitsui* panel consisted of an excellent combination of Second Circuit judges, Chief Judge Feinberg, Judge Friendly and Judge Oakes, to dispose of the container package issue. Judge Friendly had authored the landmark opinion of *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 1971 A.M.C. 2383 (2d Cir. 1971) and Judge Oakes had authored the landmark opinion of *Royal Type-writer Co. v. M/V Kulmerland*, 483 F.2d 645, 1973 A.M.C. 1784 (2d Cir. 1973).

approach closer to that of the Ninth Circuit,⁷ and the Fifth Circuit has followed suit.⁸

Mitsui concerned the loss of containers overboard. The Second Circuit directed its attention to two containerized cargoes, rolls of linoleum and piles of tin ingots, and found the COGSA packages inside the containers in both instances. Most of the discussion centered on the more interesting issues raised by the piles of tin ingots which were described in the bills of lading as "bundles." In an extremely thorough opinion, Judge Friendly reviewed many previous package decisions and the many criticisms of the *Kulmerland* "functional economics" test.⁹ He stated that one of the purposes of the COGSA package limitation was to establish an "irreducible minimum of immunity of the carrier from liability."¹⁰ For this purpose, he referred to Lord Diplock's theory that carriers must have meaningful liability to provide them with a commercial inducement to be cautious.¹¹

Although *Mitsui* expressed reluctance to consider a container a COGSA package, it was willing to treat a pallet as a COGSA package. It distinguished containers from pallets and other break-bulk cargo on the basis that shippers pay freight for the weight of pallets and other packaging used for break-bulk cargo,¹² but do not

7. *Hartford Fire Ins. Co. v. Pacific Far E. Lines*, 491 F.2d 960, 1974 A.M.C. 1475 (9th Cir.), cert. denied 419 U.S. 873 (1974); see also *Matsushita Elec. Corp. v. S.S. Aegis Spirit*, 414 F. Supp. 894 (W.D. Wash. 1976) (rejecting the parties' intent to regard the container as the COGSA package and, rather, finding the cartons stowed by the shipper inside the container to be the COGSA package).

8. *Croft & Scully Co. v. M/V Skulptor Vuchetich*, 664 F.2d 1277, 1982 A.M.C. 1042 (5th Cir. 1982). See *infra* notes 27-29 and accompanying text.

9. The "functional economics" test creates a presumption for or against the container being deemed a COGSA package depending on whether the shipper has utilized packaging, generally its own cartons or crates, sufficient to withstand independently the rigors of break-bulk carriage. See *Royal Typewriter Co. v. M/V Kulmerland*, 483 F.2d 645, 648-49, 1973 A.M.C. 1784, 1789-90. (2d Cir. 1973). See generally Recent Development, 4 *FORDHAM INT'L L.J.* 409, 413-19 (1980-81) (discussing evolution and criticism of the "functional economics" test).

10. *Mitsui*, 636 F.2d at 815, 1981 A.M.C. at 341-42 (discussing the legislative history of COGSA and the broad purposes underlying the statute as enacted by Congress in 1936, quoting H.R. REP. NO. 2218, 74th CONG., 2d SESS. 1 (1936)). See also *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 815, 1971 A.M.C. 2383, 2403 (2d Cir. 1971) (noting that the purpose of § 4(5) of COGSA was to "set a reasonable figure below which the carrier should not be permitted to limit his liability").

11. *Mitsui*, 636 F.2d at 815, 1981 A.M.C. at 341. See Diplock, *Conventions and Morals—Limitation Clauses in International Maritime Conventions*, 1 *J. MAR. L. & COM.* 525 (1970). See also DeOrchis, *supra* note 3, at 276-77.

12. For a definition of break-bulk cargo, see *infra* note 32.

pay freight for the weight of containers.¹³ Therefore, Judge Friendly considered the container, as opposed to a package, a functional part of the ship.¹⁴ Judge Friendly also reasoned that reducing the coverage of a valuable container load of cargo to \$500 in effect nullified the COGSA package limitation.¹⁵ After an exhaustive review of these various factors, Judge Friendly concluded:

Clearly the goal of international uniformity is better served by the approach in *Leather's Best* that generally a container supplied by the carrier is not a COGSA package if its contents and the number of packages or units are disclosed, than by the functional economics test of *Kulmerland*. For all these reasons this panel respectfully declines to follow the functional economics test set forth in *Kulmerland*.¹⁶

Mitsui did not, however, hold that a container would never be considered a COGSA package. Judge Friendly stated that even a large container could be considered a COGSA package if the shipping documents gave the carrier no information as to its contents.¹⁷ The *Mitsui* decision also referred to *Rosenbruch v. American Export Isbrandtsen Lines*¹⁸ as an example of a clear situation in which a container should be treated as a package.¹⁹ In *Rosenbruch*, a carrier received a container filled with wholly unpackaged household goods. Its bill of lading gave the carrier no notice of the number of units or packages within the container and, in fact, there probably were no packages within the container.²⁰ Judge Friendly noted that "[i]n holding that the container was the package under the circumstances there presented, the [Rosenbruch] court thought it to be 'of particular importance' that in a column of the bill of lading prepared by the shipper's agent headed 'No. of Cont. Or Other Pkgs.' the agent had inserted the figure '1'."²¹ In other words, the *Mitsui* court relied heavily on the intent of the parties in resolving the container as a package issue.

13. *Mitsui*, 636 F.2d at 816, 1981 A.M.C. at 343.

14. *Id.*

15. *Id.*

16. *Id.* at 821, 1981 A.M.C. at 351 (footnotes omitted).

17. *Id.* at 817, 1981 A.M.C. at 344-45.

18. 543 F.2d 967, 1976 A.M.C. 487 (2d Cir.), *cert. denied*, 429 U.S. 939, 1976 A.M.C. 2684 (1976).

19. *Mitsui*, 636 F.2d at 817, 1981 A.M.C. at 345.

20. *See Rosenbruch*, 543 F.2d at 970, 1976 A.M.C. at 490.

21. 636 F.2d at 819 n.15, 1981 A.M.C. at 348-49 n.15 (citation omitted).

Similarly, the subsequent Second Circuit decision of *Smythgreyhound v. M/V Eurygenes*²² placed great reliance on the intent of the parties. *Eurygenes* concerned a shipment of stereo equipment packaged by the shipper into cartons which were then placed by the shipper into a carrier-furnished container.²³ The number of cartons was disclosed to the carrier in the bill of lading.²⁴ *Eurygenes* followed the *Mitsui* test and treated the cartons, not the container, as the COGSA packages. However, *Eurygenes* indicated that a carrier could limit its liability to \$500 per container if the bill of lading failed to disclose the number of cartons or units within the container, or if the parties indicated, in clear and unambiguous language, an agreement to treat the container as the package.²⁵

The recent Second Circuit decision of *Allied International American Eagle Trading Corp. v. S/S Yang Ming*²⁶ further emphasizes the parties' intent test²⁷ by broadening the parties' ability to limit the carrier's liability to \$500 per container.²⁸ Judge Tenney of the District Court for the Southern District of New York, sitting by designation, authored *Yang Ming*. He stated in dicta that containers could be considered COGSA packages if the bills of lading clearly defined the containers as packages.²⁹ Judge Tenney emphasized that the Second Circuit did not supplant contract analysis with notice analysis in resolving the container as a package issue.³⁰ He further noted that the mere fact that an ocean carrier is notified,

22. 666 F.2d 746, 1982 A.M.C. 320 (2d Cir. 1981).

23. *Id.* at 747, 1982 A.M.C. at 322.

24. *Id.*

25. *See id.* at 753, 1982 A.M.C. at 331. There, the court noted: "*Mitsui* and our decision today will put carrier interests on notice that the container will not be considered the COGSA 'package' where the bill of lading discloses the contents of the container." *Id.* The court proceeded to set forth its alternative test in a footnote, stating:

This does not mean that the parties cannot agree between themselves that the container will be the COGSA "package," especially in cases where COGSA does not apply *ex proprio vigore*. Rather, we hold today that in the absence of clear and unambiguous language indicating agreement on the definition of "package," then we will conclusively presume that the container is *not* the package where the bill of lading discloses the container's contents.

Id. at n.20, 1982 A.M.C. at 331-32 n.20 (emphasis included).

26. 672 F.2d 1055, 1982 A.M.C. 820 (2d Cir. 1982).

27. *See supra* note 22 and accompanying text.

28. 672 F.2d at 1061, 1982 A.M.C. at 828. Although the Second Circuit in *Yang Ming* discussed primarily whether pallets were COGSA packages, the court also mentioned containers extensively in dicta. *See id.* at 1058-60, 1982 A.M.C. at 823-25.

29. *Id.* at 1061, 1982 A.M.C. at 829.

30. *Id.*

in writing on the bill of lading, of the contents of a pallet or container, does not supplant the intent of the parties as expressed in the bill of lading.³¹

The courts have not yet dispositively decided what constitutes an express reference to a container as a package in a bill of lading, or what language constitutes an unambiguous expression of the parties' intent to treat the container as a COGSA package. Of course, no test or formula will be able to determine automatically the parties' intent. That will have to be decided on a case by case approach. The parties' intent does, however, seem to be the critical issue in resolving this commercial dispute. In most instances, determination of the package issue only assigns part of the loss to the cargo owner's underwriter or to the carrier's underwriter. If the parties express their intent clearly and can rely on the courts to uphold that intent, they can allocate their insurance to protect the party assigned to bear the risk.

If the parties can predict the outcome of the package issue at the time of contracting, and insurance is allocated accordingly, the size or appearance of the package should be irrelevant. An interesting comparison can be made to the alternate limitation unit, the customary freight unit. The courts have applied it routinely and more predictably, without regard to the size and nature of a particular customary freight unit.

B. Customary Freight Limitation

COGSA limits a carrier's liability to \$500 per customary freight unit if the goods are not shipped in packages. If the contents of a container or bulk-cargo³² are usually shipped without any

31. *Id.* The court ruled:

Because of their size and their function in the shipping industry, containers are ordinarily not considered "packages." But when the bill of lading expressly refers to the container as one package, or when the parties fail to specify an alternative measure of the "packages" shipped, the courts have no choice but to respect their express or implied understanding and to treat the container as a single package. In such a situation, the carrier's lack of notice of the container's contents indicates that the parties agreed upon no meaning for "package" other than the container as a whole. At base, however, the court must examine the parties' contractual arrangement.

In this circuit, *Mitsui* . . . did not replace contract analysis with notice analysis, and the opinion in *Standard Electrica* . . . is still the law with regard to pallets. *Id.* (citations omitted).

32. "Bulk" cargo, or "break-bulk," generally refers to the method of shipping whereby individual barrels, boxes, bales, bags, cartons, and drums are stored in the hold of the vessel, as opposed to being placed in containers. Calamari, *supra* note 3, at 692 n.24.

packaging whatsoever, the courts will not automatically treat the container as a COGSA package simply because the container was the only possible package. In such a situation, the courts will look to the "customary freight unit" limitation.³³ If, however, the cargo within the container is not packaged, but is usually shipped in a package, the courts will treat the container as a package.³⁴

In *Mitsui*, part of the cargo consisted of unpackaged tin ingots which had been stacked by the shipper inside the container. Although the stacks were described as "bundles" in the bills of lading, they were not strapped together as use of the word bundle implies.³⁵ Judge Friendly held that the container was not the package and that, because the piles were not strapped together, there was no package. In these circumstances, the customary freight unit limitation would ordinarily apply.³⁶ However, Judge Friendly construed a clause of the bill of lading to waive application of the customary freight unit limitation.³⁷ This reasoning would have left the carrier without any limitation, but the carrier was able to limit liability because the bill of lading had inaccurately described the ingot piles as "bundles." The court held that the consignee was estopped from denying that the piles were bundles (or packages) because its agent, the shipper, had described them as such.³⁸

Judge Sofaer of the Southern District of New York followed this line of reasoning in *Watermill Export v. M/V Ponce*.³⁹ There, potatoes were shipped loose in containers. The court held that the potatoes were not packaged, that potatoes could be shipped in bulk without packaging, and that the customary freight unit limitation, not the package limitation, applied.⁴⁰ The court's treatment of loose potatoes shipped within containers as bulk-cargo, rather than as cargo packaged in containers, was implicitly consistent with *Rosen-*

33. See *Mitsui*, 636 F.2d at 822-23, 1981 A.M.C. at 352-54; see also *supra* note 2 and accompanying text.

34. See *id.* In such a situation, the bill of lading could not possibly refer to any package other than the container because no other package could exist.

35. *Id.* at 821-22, 1981 A.M.C. at 352.

36. *Id.* at 822, 1981 A.M.C. at 352.

37. *Id.*

38. *Id.* at 823, 1981 A.M.C. at 354 ("If the action here were by the shipper, this would seem a classic case for the application of estoppel. Mitsui [the consignee] and its insurer can stand no better; the shipper must be regarded as their agent in preparing the shipping documents." (footnote omitted)).

39. 506 F. Supp. 612, 1981 A.M.C. 2457 (S.D.N.Y. 1981).

40. *Id.* at 617, 1981 A.M.C. at 2464.

bruch.⁴¹ *Rosenbruch* had treated loose household goods within a container as one package because the household goods required packaging and the container served that purpose.⁴²

To date, the general *Mitsui* and *Eurygenes* container as package rules have been followed by the Fifth Circuit cases of *Allstate Insurance v. Inversiones Navieras Imparca*⁴³ and *Croft & Scully Co. v. M/V Skulptor Vuchetich*.⁴⁴ *Skulptor Vuchetich* added an interesting element to the container package issue. Freight was charged per container, and the carrier argued that, if the court did not consider the container filled with cartons of soft drinks a COGSA package, the customary freight unit limitation should apply to the entire container.⁴⁵ The customary freight unit would have limited the carrier's liability to \$500 per container.⁴⁶ Judge Brown agreed with this theory and, after reversing the district court's holding that the container was the package,⁴⁷ remanded the customary freight unit limitation question for factual determinations. He stated that the "customary freight unit" was a question of fact and would vary from contract to contract.⁴⁸ Since the customary freight unit would be deduced from the contract, the parties' intent as expressed in the bill of lading and applicable tariffs became important.⁴⁹ Judge Brown concluded that, if the container was actually used as the customary freight unit to compute the freight charge, the carrier's liability would be limited to \$500.⁵⁰ If, however, some other customary unit was actually used to compute the freight charge, and the listing of the container as the freight

41. 543 F.2d at 970, 1976 A.M.C. at 492.

42. *Id.* The *Rosenbruch* court had reasoned that the "household goods, absent a container, would not have been shipped in separate packages. They would have been shipped in a large wooden crate or container approximating the size of the metal container that was actually used." *Id.*

43. 646 F.2d 169, 1982 A.M.C. 945 (5th Cir. 1981).

44. 664 F.2d 1277, 1982 A.M.C. 1042 (5th Cir. 1982).

45. *Id.* at 1281, 1982 A.M.C. at 1047.

46. *Id.* at 1282, 1982 A.M.C. at 1048. See *Croft & Scully Co. v. M/V Skulptor Vuchetich*, 508 F. Supp. 670 (S.D. Tex. 1981), *aff'd*, 664 F.2d 1277, 1982 A.M.C. 1042 (5th Cir. 1982).

47. 664 F.2d at 1282, 1982 A.M.C. at 1048.

48. *Id.*

49. *Id.*

50. *Id.*

unit was a mere sham, the carrier could not limit its liability to \$500.⁵¹

Parties to contracts for carriage may find the customary freight unit a more predictable means than the package unit to express their intentions concerning limitation. The courts have generally upheld the customary freight unit limitation without regard to the unit itself. Perhaps the general notion of a package as a small cardboard box makes the courts reluctant to hold that it is anything else. No such notion accompanies the customary freight unit, however, and the courts seem to have little difficulty holding that the customary freight unit is whatever the parties determine it to be.

C. Pallets as COGSA Packages

With the same fervency that ocean carriers have attempted to persuade the courts that containers are COGSA packages, cargo owners and underwriters have attempted to persuade the courts that pallets of cargo are not COGSA packages. The Second Circuit decision in *Allied International American Eagle Trading Corp. v. S/S Yang Ming*⁵² indicates that carriers are prevailing in this aspect of the package argument. In *Yang Ming*, the Second Circuit held that a pallet can appropriately be considered a package and that the courts will generally enforce a bill of lading description of a pallet as a package.⁵³ Generally, the courts have allowed parties to express their intent less clearly when referring to a pallet as a package, than when referring to a container as a package.

51. *Id.* In support of this ruling, Judge Brown looked to *Caterpillar Ams. Co. v. S.S. Sea Roads*, 231 F. Supp. 647, 1964 A.M.C. 2646 (S.D. Fla. 1964), *aff'd*, 364 F.2d 829, 1967 A.M.C. 290 (5th Cir. 1966), and quoted the following relevant language from that opinion:

With respect to the words 'customary freight unit,' the authorities are conclusive that this phrase refers to the *unit upon which the charge for freight is computed* and not to the physical shipping unit. As thus construed, the statute gives the court the task of determining what unit was actually used by the carrier for computing the freight charge on the shipment in question. Under the statute the freight unit, if one exists, will control the question of limitation of liability, unless the freight unit employed was a mere sham, and, therefore, not a 'customary' unit within the meaning of the statute.

Skulptor Vuchetich, 664 F.2d at 1282, 1982 A.M.C. at 1048 (quoting *S.S. Sea Roads*, 231 F. Supp. at 649-50, 1964 A.M.C. at 2648, and citing in accord *General Motors Corp. v. S.S. Mormacoak*, 327 F. Supp. 666, 668-69 (S.D.N.Y.), *aff'd*, 451 F.2d 24 (2d Cir. 1971) (entire power plant deemed to be the customary freight unit)).

52. 672 F.2d 1055, 1982 A.M.C. 820 (2d Cir. 1982).

53. *Id.* at 1062, 1982 A.M.C. at 831.

The *Yang Ming* cargo consisted of pallets of cases and drums as well as loose cases and drums. The court referred to the bill of lading description as follows:

In this case, under the heading "No. of Containers or P'kgs.," the bill of lading listed eighteen pallets, two cases, and ten drums, with a total listed as "30 Packages." Under the heading "Description of Packages and Goods," there is a parenthetical listing of the number of cartons, cases and drums on each pallet, as well as the point of origin and a general legend reading "Screws, Bolts, Nuts, Studs." Below all of this information, a printed line requires the parties to fill in the "Total Number of Packages or Units (in words)," after which is typed "Thirty (30) Packages Only."⁵⁴

The court held that the pallets as well as the loose cases and drums were COGSA packages.⁵⁵ Judge Tenney compared the intent necessary for the court to find that a container is a package with that required to find that a pallet is a package. He stated that a clearer expression is necessary for containers because treating containers as packages can be "ludicrous."⁵⁶ The exhaustive *Yang Ming* opinion warrants repeated reading in order to ascertain its various messages, although its basic holding was stated succinctly: "We now rule that written notice of the number of containers on a pallet, even in the bill of lading, is not binding on the carrier if, elsewhere in the bill of lading, the parties express agreement upon a number of 'packages' which counts only the pallets."⁵⁷

54. *Id.* at 1056, 1982 A.M.C. at 821.

55. *Id.*

56. *Id.* at 1062, 1982 A.M.C. at 831.

57. *Id.* at 1061, 1982 A.M.C. at 829 (footnote omitted). The *Yang Ming* court specifically disagreed with the language contained in *Allied Int'l Am. Eagle Trading Corp. v. S.S. "Export Bay,"* 468 F. Supp. 1233, 1979 A.M.C. 1578 (S.D.N.Y. 1979). *Export Bay* concerned a cargo identical to the *Yang Ming* cargo and held that the pallets were not packages. *Export Bay* relied on the bill of lading description of both loose drums and cases as well as those contained in pallets, as packages. *Id.* at 1234, 1979 A.M.C. at 1579. The court assumed that both categories of cargo, pallets and loose cases and drums, could not be considered packages. Based upon this assumption, the court concluded that the bill of lading description was ambiguous and construed the ambiguity against the ocean carrier which had drafted the bill of lading. Thus, the court concluded that the individual cases and drums were the packages, not the pallets. *Id.* at 1235, 1979 A.M.C. at 1580-81. The *Yang Ming* decision disagreed with *Export Bay* insofar as the latter case may have relied on the notice to the carrier of the contents of the pallet. The court noted: "We disagree with [*Export Bay*], however, at least insofar as it placed primary importance on mere notice to the carrier in determining the package limitation." *Yang Ming*, 672 F.2d at 1061 n.4, 1982 A.M.C. at 829-30 n.4.

The January, 1982 decision by Judge Mary Johnson Lowe, *In re Universal Enterprises*,⁵⁸ provides a summary of the application of the above stated theories. The parties had asked Judge Lowe to find, via a motion for partial summary judgment, COGSA packages in eight different cargoes. Judge Lowe held that various packaged cargoes, shipped in containers and described as packages in the bills of lading, were COGSA packages.⁵⁹ Furthermore, some containers were held to be COGSA packages. In those containers, used computer printout paper was placed into cardboard cartons, which were then strapped onto pallets. The pallets were then placed into containers by the shipper. The bill of lading, however, referred to the containers as the packages.⁶⁰ Judge Lowe held that the shipper was charged with knowledge of the \$500 package limitation and concluded that the containers were the COGSA packages.⁶¹ In brief, the courts generally treat the pallet as the historic package and do not hesitate to limit a carrier's liability to \$500 per pallet.

D. *Affording Shippers an Opportunity to Declare a Higher Value*

The COGSA package limitation entitles the carrier to limit its liability for cargo loss or damage "unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier."⁶²

All recent decisions appear to agree that the carrier cannot rely upon the package limitation unless he affords the shipper an opportunity to declare a value higher than the \$500 limitation. While there is agreement on this general principle, there is sharp disagreement as to what constitutes affording shippers an opportunity to declare a higher value. The Ninth Circuit seems to require a carrier to invite the shipper to declare a higher value,⁶³ while the Fifth

58. No. 76 Civ. 1143 (S.D.N.Y. Feb. 11, 1982).

59. *Id.* at 25, 34, 39, 42, 47.

60. *Id.* at 48.

61. *Id.* at 50.

62. 46 U.S.C. § 1304(5) (1976).

63. See *Komatsu Ltd. v. States S.S. Co.*, 674 F.2d 806 (9th Cir. 1982); *Pan Am. World Airways v. California Stevedore & Ballast Co.*, 559 F.2d 1173, 1978 A.M.C. 1834 (9th Cir. 1977). The Ninth Circuit rule approaches a Miranda-type warning by requiring that the carrier invite the shipper to declare a higher value. *Id.* at 1177, 1978 A.M.C. at 1838.

Circuit only requires that the carrier agree to a declaration of a higher value if the shipper so requests.⁶⁴

The history of the carrier's notice obligation should be examined briefly to place it in context. Its origins can be found in the Supreme Court decisions of *The Kensington*,⁶⁵ *Union Pacific Railroad v. Burke*,⁶⁶ and *New York, New Haven & Hartford Railroad v. Nothnagle*.⁶⁷ In essence, these early decisions voided carriers' limitation of liability provisions when adequate notice of the provisions was not provided.

This concept next appeared, and probably became confused, in *Tessler Brothers Ltd. v. Itaipacific Line*.⁶⁸ There, the court mixed the Carmack Amendment package limitation with the COGSA package limitation and stated in dicta that: "A significant restriction on a carrier's right to limit liability to an amount less than the actual loss sustained is that the carrier must give the shipper 'a fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge'"⁶⁹ The *Tessler* court, however, stated that the bill of lading language

64. See *Brown & Root, Inc. v. M/V Peisander*, 648 F.2d 415, 425, 1982 A.M.C. 929, 944 (5th Cir. 1981).

65. 183 U.S. 263 (1902). *The Kensington* posed the question of whether a passenger carrier could limit its liability to passengers for injury or luggage lost, through language contained in the tickets, without first notifying the passengers of such waivers. The Supreme Court ruled that such limitations were void as against public policy. *Id.* at 268-71.

66. 255 U.S. 317 (1921). *Union Pacific* involved an agreement between an interstate railroad company and a shipper which included a condition limiting the shipper's right to recovery to \$100 per package. The Court ruled that the limitation provision found in the bill of lading was inoperative since the shipper was not given the opportunity to pay a higher carriage rate in order to avoid the limited recovery clause. *Id.* at 323.

67. 346 U.S. 128, 1953 A.M.C. 1228 (1953). *Nothnagle* did not concern ocean transportation; it concerned a suitcase lost on the New York, New Haven and Hartford Railway. An unfortunate Mrs. Nothnagle turned her suitcase over to a redcap employed by the railroad, and never saw the suitcase again. The railroad attempted to limit its liability to \$25 per suitcase according to the provisions of its tariff. The Supreme Court looked to the provisions of the Carmack Amendment, Act of Mar. 4, 1915, ch. 176, § 1, 38 Stat. 1196, (codified at 94 U.S.C. § 20(11) (1976)), which required a value declared in writing by the shipper, or agreed upon in writing, before a carrier could limit its liability. The Court held that Mrs. Nothnagle had "no reasonable opportunity to discover" the limitation and the railroad could not limit its liability. 346 U.S. at 135-36, 1953 A.M.C. at 1233. See also *Gordon H. Mooney, Ltd. v. Farrell Lines*, 616 F.2d 619, 1980 A.M.C. 505 (2d Cir. 1980) (discussing the Carmack Amendment package limitation).

68. 494 F.2d 438, 1974 A.M.C. 937 (9th Cir. 1974). See *supra* note 67.

69. *Id.* at 443, 1974 A.M.C. at 942 (quoting *Nothnagle*, 346 U.S. at 135, 1953 A.M.C. at 1233 and *Sommer Corp. v. Panama Canal Co.*, 475 F.2d 292, 298, 1973 A.M.C. 2053, 2060 (5th Cir. 1973)).

indicated that the carrier's liability would be limited unless the shipper declared a higher value.⁷⁰ The court in effect concluded that the bill of lading language established evidence of the opportunity.⁷¹ Thus, the carrier could avail itself of the limitation.

The Ninth Circuit case of *Pan American World Airways, Inc. v. California Stevedore & Ballast Co.*⁷² did not involve mere absence of opportunity language in the bill of lading. Rather, it concerned a statement in the bill of lading which specifically denied an opportunity to declare a higher value.⁷³ The Ninth Circuit disregarded the carrier's argument that Pan American World Airways was a sophisticated shipper and thus must have known that it could have declared full value despite the disclaimer in the bill of lading. It interpreted the phrase "in no case" as nullifying the effect of such knowledge.⁷⁴ The court did not, however, indicate what the result would have been had the carrier proved that the shipper actually knew that it had the right to declare full value.

The Ninth Circuit adopted a similar rationale in *Komatsu, Ltd. v. State Steamship Co.*⁷⁵ The court relied on the following language from the *Pan Am* decision: "*Pan Am* requires that the 'opportunity' to declare a higher value must 'present itself on the face of the bill of lading' to constitute prima facie evidence."⁷⁶ *Komatsu* included a Clause Paramount⁷⁷ in the bill of lading, but no specific invitation to declare a higher value. The bill of lading also contained the following clause:

18. Reference is hereby made specifically to value limitations (46 U.S. Code 1304(5)) and time limitations for filing claim and bringing suit (46 U.S. Code 1303(6)) which shall apply and are incorporated herein by reference.⁷⁸

70. 494 F.2d at 445, 1974 A.M.C. at 945.

71. *Id.*

72. 559 F.2d 1173, 1978 A.M.C. 1834 (9th Cir. 1977).

73. The bill of lading language read as follows:

18. AMOUNT OF LIMITATION

The responsibility of the carrier shall *in no case*, whether governed by the U.S. Carriage of Goods by Sea Act, the Hague Rules or not, exceed the amount of \$500.00 per package or customary freight unit.

Id. at 1175, 1978 A.M.C. at 1835 (emphasis added).

74. *Id.* at 1176, 1978 A.M.C. at 1836.

75. 674 F.2d 806 (9th Cir. 1982).

76. *Id.* at 810 (emphasis added).

77. A Clause Paramount is often included in bills of lading in order to indicate that the provisions of COGSA should govern the parties' contractual relations.

78. 674 F.2d at 810.

Even though this clause made reference to COGSA value limitations, it did not specifically invite the shipper to declare a higher value and was not deemed sufficient evidence that the shipper received the requisite opportunity.⁷⁹

Conversely, the Fifth Circuit allowed the same carrier involved in the *Pan Am* case, using the same bill of lading, to limit its liability. In *Brown & Root, Inc. v. M/V Peisander*,⁸⁰ Judge Brown stated that COGSA was adopted in the bill of lading, and made the following succinct observation: "With COGSA so expressly adopted, what does COGSA provide? The answer is simple and direct: \$500 per package unless the nature and value of the goods have been declared by the shipper and inserted in the bill of lading."⁸¹ Judge Brown also discussed the *Pan Am* and *Tessler Brothers* cases at length, and concluded that the shipper bore the burden of proving that it was not afforded the opportunity to declare a higher value. He explained that *Tessler* did not assign the burden to the carrier as the *Pan Am* and *Komatsu* decisions had inferred. The *Tessler* court had observed:

Tessler contends there is no evidence that the shipper was offered a choice of rates, one with the limitation and another without it. The provisions in the bill of lading and COGSA are prima facie evidence of the opportunity to avoid the limitation, however, and it is Tessler's burden to prove that such an opportunity did not in fact exist⁸²

The Fifth Circuit in *Peisander* thus interpreted *Tessler* as assigning the burden of proof to the shipper, and held that the absence of an invitation in the bill of lading did not shift this burden to the carrier.⁸³

79. *Id.*

80. 648 F.2d 415, 1982 A.M.C. 929 (5th Cir. 1981).

81. *Id.* at 420, 1982 A.M.C. at 936 (footnote omitted).

82. *Tessler*, 494 F.2d at 443, 1974 A.M.C. at 942 (citation omitted). See *supra* text accompanying notes 68-71.

83. The court reasoned:

Even accepting the Ninth Circuit's treatment of the "in no case" language of clause 18, the circumstances of the case before us do not overcome the prima facie evidence of the opportunity for a choice of rates and valuations *nor do they sustain Shipper's burden "to prove that such an opportunity did not in fact exist. . . ."* First, COGSA was expressly incorporated in the bill of lading to thereby bring into play § 4(5). . . . Next, and more significantly, the published tariff which has the effect of law very carefully gave Shipper a choice of valuations by a choice of precisely definable freight rates. . . .

The Eastern District of Pennsylvania, in *Nathan Trotter & Co. v. Delta Steamship Lines*,⁸⁴ has agreed with the Fifth Circuit. Additionally, the District Court for the Southern District of New York, in *General Electric Co. v. M/V Lady Sophie*⁸⁵ agreed with the Ninth Circuit, while an older case in the Southern District of New York, *Export Project Services v. S.S. Steinfels*,⁸⁶ sided with the Fifth Circuit. In *Export Project Services*, Judge Tyler of the Southern District of New York simply referred to the shipper's COGSA right to declare full value, and held that this right mooted the "opportunity" argument.⁸⁷

Judge Werker, however, by granting the motion for partial summary judgment in the *Lady Sophie* decision,⁸⁸ precluded the

This gave Shipper the opportunity to choose between valuations by paying more or less freight. COGSA § 4(5) does not prescribe that the face of the bill of lading contain a specific space or blank in which the increased valuation is to be inserted nor does it provide that the carrier rather than the shipper must actually make the notation. *The phrase "unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading" clearly puts the burden on the Shipper to make the determination as between value limitations and the making of the declaration. . . .* Indeed, the stipulated bill of lading leaves ample space in the middle of the front page for "Description of Packages and Goods" under the heading of "Particulars Furnished by Shipper."

Peisander, 648 F.2d at 424, 1982 A.M.C. at 942-43 (emphasis added) (citations omitted).

84. No. 81 Civ. 3417 (E.D. Pa. Apr. 19, 1982).

85. 458 F. Supp. 620, 1979 A.M.C. 724 (S.D.N.Y. 1978), *aff'd mem.*, 620 F.2d 285, 1980 A.M.C. 2399 (2d Cir. 1980).

86. 1975 A.M.C. 765 (S.D.N.Y. 1975).

87. Judge Tyler reasoned:

Plaintiffs' second and third contentions, that the shipper must have an option on freight charges related to limitation of liability and that no option was provided in this case, are likewise lacking in merit. This court's subject matter jurisdiction over this case is provided for in Article III, Section 2 of the Constitution. When exercising this type of federal question jurisdiction, the federal courts follow federal common law and look to otherwise applicable state common law only for guidance. Hence, state law authority cited by plaintiffs (to support the contention that optional freight rates must exist and must be related to limitation of liability) may be persuasive but is not binding. *Even if federal law were as plaintiffs would have it, the fact that optional rates did exist here would moot the issue.* The shipper could have paid the *ad valorem* rate; hired another carrier, if the *ad valorem* rate was considered too dear; or tried to negotiate another deal with the carrier. If shipper considered the *ad valorem* rates exorbitant, it could buy its own insurance for the cargo.

Id. at 767 (emphasis added).

88. 458 F. Supp. 620, 1979 A.M.C. 724 (S.D.N.Y. 1978). Developments in the *Lady Sophie* after the decision granting the motion for partial summary judgment are interesting. After it was held that plaintiff could attempt to recover its total damages of \$517,000, the liability issue was tried and decided in favor of defendant. The court held that the damage was caused by an error of navigation.

carrier from relying on the package limitation because it had not afforded cargo owners an opportunity to declare full value.⁸⁹ The bill of lading form used not only failed to inform the shipper that it could declare a higher value, but also failed to mention the package limitation. The bill of lading only referred to the Hague Rules.⁹⁰ Judge Werker did not think cargo owners were given a sufficient opportunity to declare full value because they would have had to understand the connection between the bill of lading, the Hague Rules and COGSA in order to discover the package limit and the right to declare a higher value.⁹¹

The courts generally agree that the shipper must be given an opportunity to declare a higher value. If the shipper knew it had the opportunity, then the shipper would be limited unless it had asked to declare a higher value and the carrier had refused. Litigation arises when the shipper's knowledge is disputed, and the courts differ on whether the carrier must inform the shipper or whether the shipper must independently learn of the COGSA limitation provisions. The issue can be narrowed to the burden of proving whether an opportunity was in fact given. The confusion seems to have started in *Tessler*, which mixed both COGSA and Carmack Amendment limitation law. The Ninth Circuit has followed the Carmack Amendment approach and has, in effect, applied the Carmack Amendment to ocean carriage when it should have applied COGSA. The Fifth Circuit has, instead, applied COGSA to the appropriate cases.

In addition to its sound legal reasoning, the Fifth Circuit has used a sound practical approach. The Ninth Circuit's approach wrongly ignores the fact that experienced shippers generally know of their right to declare higher values. In fact, most cargo interests use an insurance broker from whom they regularly purchase all-risk cargo insurance. The cargo insurance will reimburse the cargo interest for its insured value, regardless of the carrier's ability to limit its liability.

Plaintiff appealed the dismissal of its complaint, and the Court of Appeals for the Second Circuit affirmed the dismissal on the opinion below. Because the complaint was dismissed, the court of appeals did not address the opportunity issue.

89. *Id.* at 622, 1979 A.M.C. at 727.

90. *Id.* (citing International Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155).

91. *Id.* The court noted: "These steps are necessitated by the absence of a simple statement in the bill of lading that the value of the cargo must be declared and inserted therein to avoid the \$500 limitation." *Id.*

E. Package Limitations—Summary and Analysis

The container, pallet, and the opportunity to declare a higher value issues may all be clarified by examining the original purpose of the COGSA package limitation. *Mitsui* set forth the two principal objectives of Congress as: (1) “uniformity in the basic rights and responsibilities arising out of bills of lading” and (2) “an irreducible minimum of immunity of the carrier from liability.”⁹² The first purpose is relevant to the issues of containers and pallets as packages, while the second purpose is relevant to the issue of opportunity to declare a higher value.

Although *Mitsui* speaks of uniformity as a purpose, uniformity can be viewed not as a goal in and of itself, but as a means by which the goal of predictability can be reached. Two parties to a commercial transaction will be more interested in their ability to predict a court’s interpretation of their bill of lading contract than in assuring that their bill of lading is similar to other bills of lading. The similarity of their bill of lading contracts should be of little or no concern. If the parties wish to treat a container as a package, they should be able to agree to do so in the bill of lading, confident that the courts will uphold their intent.

The second purpose, to set an “irreducible minimum” of the carrier’s immunity, is accomplished by the opportunity to declare a value greater than \$500. If a small shipper asks to declare a higher value and is refused an opportunity to do so by an overreaching carrier, the carrier will be denied the package or customary freight unit limitation. Such an event, however, is at best rare and may, in fact, never occur. Large shippers have traffic departments that handle bills of lading and are probably in a stronger bargaining position than ocean carriers. Most smaller shippers use freight forwarders⁹³ to handle bills of lading and shipping details. The freight

92. *Mitsui*, 636 F.2d 807, 815 (2d Cir. 1981) (citing H.R. REP. No. 2218, 74th Cong., 2d Sess. 1 (1936)).

93. The Carmack Amendment defines a “freight forwarder” as:
a person holding itself out to the general public (other than as an express, pipeline, rail, sleeping car, motor, or water carrier) to provide transportation of property for compensation and in the ordinary course of its business—

(A) assembles and consolidates, or provides for assembling and consolidating, shipments and performs or provides for break-bulk and distribution operations of the shipments;

(B) assumes responsibility for the transportation from the place of receipt to the place of destination; and

forwarders are licensed by the Federal Maritime Commission⁹⁴ and are keenly aware of the \$500 package or customary freight unit limitation.

Finally, the existence of insurance is a significant factor which must be considered. Shipments are generally insured for all risks and insurance will reimburse the cargo owner regardless of whether the carrier can limit its liability. Therefore, if a shipper declares a higher value and pays a higher freight, it is, in effect, insuring its cargo twice.

II. JUDICIAL CONFLICTS ON BURDEN OF PROOF

A. Burden of Proof in Cargo Damage Cases

The package issue is not the only one affected by the container revolution. The issue of allocating the burden of proving the quantity or condition of the containers' contents has also been in sharp dispute. The courts have usually held that cargo owners and underwriters bear the burden of proving the condition of cargo hidden from the carrier's view by packaging, and that the carrier bears the burden of proving the quantity of cargo received.⁹⁵ The courts do not expect carriers to open packaging in order to check the condition of the contents, but do expect carriers to count or weigh the packaging. These same rules have been applied to cargo received by the carriers in locked and sealed containers.⁹⁶ The courts have reasoned that carriers can weigh containers to verify the quantity specified in the bill of lading if there is no means of checking the quantity.⁹⁷

(C) uses for any part of the transportation a carrier subject to the jurisdiction of the Interstate Commerce Commission

49 U.S.C. § 10102(8) (Supp. III 1979).

94. See 46 U.S.C. § 841b(a) (1976) ("No person shall engage in carrying on the business of forwarding . . . unless such person holds a license issued by the Federal Maritime Commission to engage in such business").

95. See *Caemint Food, Inc. v. Brasileiro*, 647 F.2d 347, 1981 A.M.C. 1801 (2d Cir. 1981); *United States v. Central Gulf S.S. Corp.*, 517 F.2d 687, 1975 A.M.C. 2254 (5th Cir. 1975).

96. See, e.g., *Tatlow & Pledger (Pty.) Ltd. v. Hermann Forwarding Co.*, 456 F. Supp. 351 (S.D.N.Y. 1978); *E.T. Barwick Mills, Inc. v. Hellenic Lines*, 331 F. Supp. 161, 1972 A.M.C. 1802 (S.D. Ga. 1971), *aff'd mem.*, 472 F.2d 1406 (5th Cir. 1973); *Samincorp. S. Am. Minerals & Merchandise Corp. v. S.S. Cornwall*, 240 F. Supp. 327, 1964 A.M.C. 2411 (D. Md. 1963).

97. In this light, 46 U.S.C. § 1303(3)(c) (1976) states:

no carrier, master, or agent of the carrier, shall be bound to state or show in the bill

The courts have held that any affirmative description, such as a statement of quantity—either in volume or weight—will be binding on the carrier.⁹⁸ If the carrier suspects that the quantity of the cargo is not as described by the bill of lading, it should not issue the bill of lading with that quantity description. If the carrier has no means of checking the quantity description and it issues the bill of lading, including the description, it may be estopped from later denying the description.⁹⁹

The description of condition has been treated differently by the courts. If the carrier simply issues a clean bill of lading without any exception for damaged cargo, and has no reasonable means of checking the condition of the cargo, the carrier will not be estopped from impeaching the clean bill of lading. The courts have, of course, considered the clean bill of lading applicable only to receipt for the condition of the external packaging. The carrier cannot state that the contents are damaged unless it knows the internal condition.¹⁰⁰ When receipting for quantity, the carrier can state that it has no knowledge of what is actually inside cardboard cartons said to contain certain items, but it cannot state that it does not know how many cartons are actually inside the containers.¹⁰¹ To avoid liability for the quantity, the carrier must refuse to issue a bill of lading that includes a representation that a certain number of cartons are inside a locked and sealed container.

The Ninth Circuit in *Portland Fish Co. v. States Steamship Co.*¹⁰² reversed a trial court which had allowed a carrier to impeach a bill of lading that described the weight of a cargo of fish. The Ninth Circuit reasoned that if the carrier had no reasonable means of checking the weight of the cargo, it should not have issued the bill of lading with the weight description.¹⁰³ Once the weight was described, purchasers of the bill of lading would rely on that

of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

Id.

98. *Spanish-American Skin Co. v. M.S. Ferngulf*, 143 F. Supp. 345, 349 (S.D.N.Y. 1956), *aff'd*, 242 F.2d 551 (2d Cir. 1957).

99. *Id.* at 350.

100. *S.M. Sartori, Inc. v. S.S. Kastav*, 412 F. Supp. 1181, 1977 A.M.C. 126 (S.D.N.Y. 1976).

101. *See infra* note 108.

102. 510 F.2d 628, 1975 A.M.C. 395 (9th Cir. 1974).

103. *Id.* at 630-31, 1975 A.M.C. at 396-97.

weight. To preserve the instrument's negotiability, the Ninth Circuit estopped the carrier from denying that it had received the goods described in the bill of lading.¹⁰⁴ After this decision was issued, several ocean carriers moved for rehearing and the opportunity to file amicus curiae briefs. The carriers were apparently concerned about the possible effects of the decision on containerized cargoes. The Ninth Circuit denied rehearing because it did not intend the decision to apply to containers.¹⁰⁵

The courts were quick to address the issues left open in *Portland Fish*. In both *Baby Togs, Inc. v. S.S. American Ming*,¹⁰⁶ and *Westway Coffee Corp. v. M.V. Netuno*,¹⁰⁷ the District Court for the Southern District of New York reasoned that the carrier did not have to include a description of the weight or volume of the cargo in the bill of lading, and questioned whether the carrier should be estopped from denying such a description. *Baby Togs* may not have gone as far as the *Westway* decision appeared to go. The court in *Baby Togs* gave the bill of lading quantity description prima facie weight and held that the carrier had failed to rebut it.¹⁰⁸ Because

104. *Id.* at 631-33, 1975 A.M.C. at 399-401.

105. *Id.* at 634, 1975 A.M.C. at 2373-74.

On rehearing, several ocean carriers have moved for leave to file briefs *amicus curiae*. However, it appears that the issues sought to be raised in such briefs concern the possible effect of our decision on the ocean transportation of containerized cargoes—those in sealed “packages” not normally opened and inspected by the carrier at the time he issues a bill of lading. The motions are denied. Since the case before us involves solely a bulk shipment subject to piece count, the questions thus raised will have to wait another day for decision. We intimate no opinion on them.

Id.

106. 1975 A.M.C. 2012 (S.D.N.Y. 1975).

107. 528 F. Supp. 113, 1982 A.M.C. 505 (S.D.N.Y. 1981), *aff'd*, 675 F.2d 30 (2d Cir. 1982).

108. 1975 A.M.C. at 2018-19. The court reasoned:

Defendant carrier contends that plaintiff has failed to prove the contents of the container and their condition at the time of delivery to defendant. In so doing, it relies upon the statements “Shipper's Load & Count” and “Said to Contain” appearing on the dock receipt and on the clean bills of lading which defendant issued. However, the bills of lading herein also list the number of cartons of infants' wear, their cubic measurement, and their weight, although under 46 U.S. Code, sec. 1303(3)(c), the carrier may omit such information from the bill of lading if it has reasonable grounds for suspecting, or no reasonable means of checking, the accuracy of any marks, number, quantity or weight. . . . Accordingly, the recitation of the number, weight and measurement in the bills of lading established *prima facie* receipt by the carrier of the number, weight and measurement recited, regardless of the above quoted statements appearing on those documents.

This prima facie proof has not been effectively rebutted by competent evidence.

Id. at 2018 (footnotes omitted) (citation omitted) (emphasis added).

the carrier failed to rebut the prima facie case, the court noted that it did not have to address the estoppel theory.¹⁰⁹

The district court in *Westway* seemingly went one step further. The court estopped a carrier from impeaching the bill of lading description of the number of cartons of instant coffee stowed within a container.¹¹⁰ However, the carrier in that situation had the opportunity to check the contents by weighing the container and did not do so. In his opinion, Judge Sand commented:

“[COGSA] specifically provides a method for avoiding carrier liability for false information . . . by not stating it in the bill. . . . The carrier must utilize that method, rather than the quite general reservation attempted here.” . . . Since plaintiff relied on the weights specified in the bills in purchasing the consignment, defendant is estopped from denying the accuracy of the description contained therein.¹¹¹

109. *Id.* at 2020 n.9. “In light of the foregoing, it is not necessary to find that, where defendant’s clean bill of lading is relied upon in purchasing and paying for the merchandise covered, it is estopped from adducing evidence to prove that the shortage was of preshipment origin.” *Id.* (citation omitted).

110. In summarizing the parties’ arguments, the court explained:

Plaintiff contends that the weights stated in the June 7, 1979 bill of lading constitute “prima facie evidence of the receipt by the carrier of the goods as therein described,” 46 U.S.C. § 1303(4); . . . that it was entitled to rely on the weights stated in the bill of lading which was duly negotiated to it; and that [carrier] . . . is estopped from claiming that the missing cartons of coffee were not in the containers when [carrier] . . . took possession of them.

Defendant contends that plaintiff has failed to prove delivery of the full quantity to the carrier, and thereby has failed to establish a prima facie case; and alternatively, that defendant has established that it exercised proper care; and that plaintiff’s estoppel theory does not apply to cases involving sealed containers.

528 F. Supp. at 116, 1982 A.M.C. at 508 (citation omitted) (footnotes omitted). In upholding plaintiff’s estoppel theory, the *Westway* court continued:

Defendant inexplicably bases this last contention on *Portland Fish Co. v. States Steamship Co.*, 510 F.2d 628, 634, 1975 A.M.C. 2373 [DRO] (9th Cir. 1974), in which the court denied a rehearing and stated that it “intimated no opinion” with respect to the impact of its decision on containerized cargoes which may not be opened and inspected by the carrier when the bill of lading is issued. *Id.* In any event, defendant’s inability to open the containers and inspect their contents is irrelevant to this case, *because this case involves the presence of the missing cargo, not its condition, and because defendant had the alternative of weighing the containers to verify that they contained the consigned cargo.*

Id. at 116 n.5, 1982 A.M.C. at 508 n.5 (emphasis added).

111. *Id.* at 116-17, 1982 A.M.C. at 509 (footnotes omitted) (quoting *Spanish Am. Skin Co. v. The Ferngulf*, 242 F.2d 551, 553 (2d Cir. 1957)).

Judge Sand then noted that if the carrier had weighed the containers when it received them, the carrier would not have been estopped from denying the bill of lading quantity.¹¹² In that event, the carrier would have demonstrated delivery of everything it had received. The court also noted that, even though the carrier was estopped from denying the contents, such estoppel would not necessarily preclude it from escaping liability.¹¹³ If the carrier had proven itself free of the negligence which might have allowed the theft, it would not have been liable. The Second Circuit affirmation did not rely on the estoppel issue.

These cases should be compared to the non-containerized cargo case of *Caemint Food, Inc. v. Lloyd Brasileiro Companhia de Navegação*.¹¹⁴ That case concerned a shipment of canned corned beef packed in cardboard cartons and shipped break-bulk. In holding the carrier liable, Judge Motley of the Southern District of New York held that mold damage had started before the cartons were delivered to the vessel and that improper ventilation of the vessel's holds had aggravated the damage.¹¹⁵

Judge Friendly, writing for the Second Circuit, reversed the district court's decision and held that the shipper had the burden of proving good order and condition of the contents of the cardboard cartons when they were delivered to the carrier.¹¹⁶ Because the carrier had no reasonable means of checking the inside of the cardboard cartons, the carrier was not estopped from denying the good order and condition of the cargo at the time the carrier received the cargo.¹¹⁷ Judge Friendly noted that the cargo owners and underwriters had failed to prove that the cargo was free from damage at delivery to the carrier, and that the district court had specifically held that some damage existed at the time of delivery to the carrier.¹¹⁸ The court followed *The Niel Maersk*,¹¹⁹ and assigned to cargo claimants the burden of separating the damage caused by

112. 528 F. Supp. at 116, 1982 A.M.C. at 508.

113. *Id.* at 116-17, 1982 A.M.C. at 509.

114. 501 F. Supp. 791, 1981 A.M.C. 1815 (S.D.N.Y. 1980), *rev'd*, 647 F.2d 347, 1981 A.M.C. 1801 (2d Cir. 1981).

115. 501 F. Supp. at 794, 1981 A.M.C. at 1818.

116. 647 F.2d at 351-52, 1981 A.M.C. at 1807.

117. *Id.* at 352, 1981 A.M.C. at 1807-08.

118. *Id.* at 354-55, 1981 A.M.C. at 1809.

119. 91 F.2d 932, 1937 A.M.C. 975 (2d Cir.), *cert. denied*, 302 U.S. 753, 1937 A.M.C. 1646 (1937).

the pre-shipment condition from the aggravation of that damage due to the improperly ventilated holds. Since cargo claimants had failed to satisfy this burden, the carrier prevailed.

In this thorough opinion, Judge Friendly described the burdens of proof. He explained that the shipper presents a *prima facie* case by proving delivery to the carrier in good order and condition and receipt from the carrier in damaged or short condition.¹²⁰ Judge Friendly explained further that the plaintiff would have prevailed had the carrier not controverted the clean bill of lading as evidence of good condition at delivery to the carrier.¹²¹ The carrier had successfully controverted the bill of lading evidence by showing high humidity and damp conditions in the pre-loading storage area.¹²² The court inferred from this evidence that mold had started to form on the labels of the corned beef cans before the cans were loaded on board the vessel. Judge Friendly concluded that plaintiff had produced no evidence that the presence of the mold on the cans, when they were delivered to the carrier, would have caused a change in the external appearance of the cartons and thus made the damage protest to the carrier.¹²³ The court stated that if the external appearance of the cartons had disclosed to the carrier the internal damage, the carrier should have so noted in the bills of lading. Had the carrier not included such a clause in the bills of lading, it would have been estopped from denying the defective loading condition.¹²⁴

These decisions, holding a carrier liable for the quantity of cargo in a sealed container despite the bill of lading clause "shippers load and count," can cause harsh results. The courts presume that

120. 647 F.2d at 352, 1981 A.M.C. at 1807.

121. In *Caemint Food*, 647 F.2d at 352, 1981 A.M.C. at 1807-08, the court reasoned:

A clean bill of lading is ordinarily *prima facie* evidence of delivery in good condition. . . . If plaintiff here were suing for damage to the cartons, the recitals of apparent good order and condition in the bills of lading issued by defendant would constitute *prima facie* evidence that the cartons were delivered in good condition. If defendant introduced no evidence to controvert the bills of lading, plaintiff would have carried its burden of proving delivery in good condition and, since damage to the cartons at outturn is conceded, would have established a *prima facie* case for recovery.

Id. (citation omitted).

122. *Id.* at 354-55, 1981 A.M.C. at 1812.

123. *Id.* at 353, 1981 A.M.C. at 1810.

124. See also *Arista Indus. v. S.S. Export Agent*, 1978 A.M.C. 2128 (S.D.N.Y. 1978), where Judge Weinfeld found the ocean carrier not to be estopped from contesting the condition of cargo within cartons despite its issuance of a clean bill of lading. *Id.* at 2129.

the amount of cargo in packages or containers can be checked by counting or weighing. If the carrier has no reasonable means of checking the quantity, and it allows the quantity description to remain on the bill of lading, it does so at its peril.¹²⁵ The carrier may derive a sense of security by inserting a clause in the bill of lading stating "shipper's load and count," or "said to contain," but the courts have paid little attention to these clauses.¹²⁶ If carriers abided by the procedure suggested by the courts and deleted quantity descriptions from bills of lading, the carriers' financial interests would be adversely affected. Shippers would not be able to negotiate the bills of lading through banks and obtain payment of their letters of credit. In addition, if carriers insisted on opening sealed containers to count cargo, shippers would object because the cargo would be delayed and possibly damaged or pilfered.

It is anomalous that a carrier can issue a clean bill of lading which acts as a receipt only for the external good order and condition of the container, regardless of the cargo's condition, but cannot issue a similar receipt for the quantity of the cargo in the same container.

B. *Burden of Proof in Fire Damage Cases*

Judicial disagreements as to the allocation of the burden of proof and the consequences arising therefrom are most clearly reflected in the Ninth and Second Circuit decisions concerning the burden of proof assignments in fire cases.¹²⁷ The Ninth Circuit, in

125. Problems may arise if the carrier has no reasonable means of checking the contents. See *supra* notes 102-04 and accompanying text. If the carrier checks the contents, it should also, if necessary, change the quantity description.

126. See *supra* note 108.

127. The liability of carriers for damage to or loss of cargo arising out of fire on board the vessel is governed generally by the Fire Statute, 46 U.S.C. § 182 (1976), and the COGSA Fire Defense, 46 U.S.C. § 1304(2)(b) (1976). The Fire Statute provides that:

No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.

46 U.S.C. § 182.

The COGSA Fire Defense states that:

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . .

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

46 U.S.C. § 1304(2)(b).

Sunkist Growers, Inc. v. Adelaide Shipping Lines,¹²⁸ required a shipowner to bear the burden of proving the exercise of due diligence in making a vessel seaworthy as a condition precedent to relying on the COGSA fire defense or on the fire statute.¹²⁹ The Second Circuit, in *In re Ta Chi Navigation (Panama) Corp.*,¹³⁰ specifically and almost vehemently disagreed with *Sunkist*, holding that the vessel owner does not bear this burden.¹³¹ According to the Second Circuit, the vessel owner need only prove that the damage in question was caused by fire.¹³² The shipper then bears the burden of proving that the fire damage was caused by the fault or was within the privity of the vessel owner.¹³³

Both *Sunkist* and *Ta Chi* referred to *Asbestos Corp. v. Compagnie de Navigation*, the Second Circuit opinion authored by Judge Timbers.¹³⁴ That case held that the vessel owner had not exercised due diligence to make the vessel seaworthy due to its deficient fire-fighting equipment and excluded the shipowner from the benefits of the COGSA fire defense and the fire statute.¹³⁵

In *Sunkist*, the Northern District of California held that the shipper failed to carry its burden of proving that the fire was the result of the design, neglect or fault, or was within the privity of, the owner or of the charterer of the ship, and exonerated the carrier.¹³⁶ The Ninth Circuit reversed the district court, and stated that the district court had misread *Asbestos*. The Ninth Circuit noted that the *Asbestos* case held the vessel liable for the "inexcus-

128. 603 F.2d 1327, 1979 A.M.C. 2787 (9th Cir. 1979), *cert. denied*, 444 U.S. 1012, 1980 A.M.C. 2102 (1980).

129. *Id.* at 1336, 1979 A.M.C. at 2798-99.

130. 677 F.2d 225, 1982 A.M.C. 1710 (2d Cir. 1982).

131. *Id.* at 229, 1982 A.M.C. at 1715.

132. *Id.*

133. *Id.*

134. 480 F.2d 669, 1973 A.M.C. 1683 (2d Cir. 1973).

135. *Id.* at 672, 1973 A.M.C. at 1687. In dicta, the court stated the following regarding the burden of proof scheme:

Generally . . . [t]he burden of proof is on the carrier to show that he exercised due diligence. The fire exemption provisions merely shift this burden of proof to the shipper. If the carrier shows that the damage was caused by fire, the shipper must prove that the carrier's negligence caused the damage.

Id. at 672-73, 1973 A.M.C. at 1687 (footnote omitted).

136. 1976 A.M.C. 2597, 2604-05 (N.D. Cal. 1976), *rev'd*, 603 F.2d 1327, 1979 A.M.C. 2787 (9th Cir. 1979), *cert. denied*, 444 U.S. 1012, 1980 A.M.C. 2102 (1980).

able condition of unseaworthiness"¹³⁷ and that the Second Circuit's comments concerning the burden of proof were dicta.¹³⁸

The Second Circuit in *Ta Chi* responded to the Ninth Circuit's interpretation of *Asbestos* with the following comment:

We disagree not only with *Sunkist's* unflattering characterization of Judge Timbers' opinion in *Asbestos*, an opinion that was concurred in by Judges Smith and Hayes, but also with the Ninth Circuit's interpretation of the interrelation between the fire statute and COGSA, an interpretation that is concurred in by no other Circuit.¹³⁹

Ta Chi concerned fire which began when acetylene gas escaped from a welding hose in the ship's engine room. The district court followed the *Sunkist* rule¹⁴⁰ and required the vessel owner to prove an exercise of due diligence in making the vessel seaworthy at or before the commencement of the voyage.¹⁴¹ It stated that, if the shipowner failed in this task, any loss which occurred by reason of fault or neglect in this area was within the shipowner's privity, and it could not avail itself of the fire exemption statutes.¹⁴² The Second

137. 603 F.2d at 1335, 1979 A.M.C. at 2798.

138. In its discussion of the district court's misinterpretation of the *Asbestos* opinion, the Ninth Circuit made the following comments:

True enough, the Second Circuit in speaking to both the Fire Statute and COGSA made the statement: "The burden of proof is on the carrier to show that he exercised due diligence. The fire exemption provisions merely shift this burden of proof to the shipper. If the carrier shows that the damage was caused by fire, the shipper must prove that the carrier's negligence caused the damage." . . . The use of this language was entirely unnecessary to the decision for the reason that the court had already affirmed the trial court's conclusion that the *Marquette* was unseaworthy because of her owners' failure to exercise due diligence.

. . . .

Our overlengthy analysis of the language in *Abestos Corp.* is prompted by the casual treatment of the burden of proof by the author of the appellate court opinion. Although relying on COGSA, he completely overlooks the language of §§ 1303(1) and 1304(1) which places the burden of showing due diligence to provide a seaworthy ship squarely on the shoulders of the carrier. It is this burden that appellees must overcome in order to invoke the exemptions of either § 1304(2)(b) or the Fire Statute.

Id. at 1335-36, 1979 A.M.C. at 2798-99 (citations omitted).

139. *In re Ta Chi Nav.*, 677 F.2d at 229, 1982 A.M.C. at 1715.

140. See *supra* note 129 and accompanying text.

141. 504 F. Supp. 209, 229 (S.D.N.Y. 1980).

142. *Id.* at 230.

Circuit reversed and specifically held that cargo claimants had the burden of proving fault and privity of the vessel owner.¹⁴³

The Second Circuit then cited various authorities for its holding.¹⁴⁴ It noted that when Congress intended to place the burden of proof on the shipowner, the statute was specific.¹⁴⁵ To the extent Congress did not specifically place the burden of proof on the shipowner, it placed the burden on the cargo owners.

The Ninth Circuit seems to overlook the original intent Congress expressed when it enacted COGSA. If Congress had intended to make proof of the exercise of due diligence to make a vessel seaworthy a condition precedent to the fire defense, it would have expressed such an intent. To make proof of due diligence a condition precedent is to interpret COGSA without looking to the origins of COGSA and the fire statute. Similar interpretations of the Harter Act's delivery requirements¹⁴⁶ have led some courts to base their decisions not on the original purpose of the requirements, but on

143. 677 F.2d at 228-29, 1982 A.M.C. at 1714-15. The Second Circuit reasoned:

The district court's approach to the burden of proof is not as straightforward as we have presented it. It is clear, however, that the entire approach reflects a misunderstanding of the terms of the Fire Statute as they have been applied by the Supreme Court and the courts of this Circuit. The Fire Statute . . . exonerates the shipowner from liability for fire damage to cargo unless the fire was caused by the "design or neglect" of the owner. "Neglect", as thus used, means negligence, not the breach of a non-delegable duty. . . . "If the carrier shows that the damage was caused by fire, the shipper must prove that the carrier's negligence caused the damage."

Id. at 228, 1982 A.M.C. at 1713 (citations omitted) (quoting *Asbestos*, 480 F.2d at 673).

144. 677 F.2d at 228, 1982 A.M.C. at 1713. *See, e.g.*, *J. Gerber & Co. v. S.S. Sabine Howaldt*, 437 F.2d 580, 588 (2d Cir. 1971); *Lekas & Drivas, Inc. v. Goulandris*, 306 F.2d 426, 432 (2d Cir. 1962); *Automobile Ins. Co. v. United Fruit Co.*, 224 F.2d 72, 75 (2d Cir.), *cert. denied*, 350 U.S. 885 (1955); *American Tobacco Co. v. The Katingo Hadjipatera*, 194 F.2d 449, 450 (2d Cir. 1951), *cert. denied*, 343 U.S. 978 (1952).

145. 677 F.2d at 229, 1982 A.M.C. at 1715-16. The court noted:

When Congress wanted to put the burden of proving freedom from fault on a shipowner claiming the benefit of an exemption, it specifically said so. The *Sunkist* court would read the language of subsection (q) into subsection (b), "although Congress did not put it there." . . . This Court has not put it there either. We adhere to our prior holdings that, if the carrier shows that the damage was caused by fire, the shipper must prove that the carrier's negligence caused the fire or prevented its extinguishment.

Id. (citations omitted). *Ta Chi* was remanded and is being retried. It is not possible at this time to determine whether either party will file a petition for certiorari. If a petition is filed, it will be interesting to learn whether the Supreme Court will grant certiorari to settle the dispute between the circuits.

146. *See* 46 U.S.C. §§ 190-191 (1976).

regulations of some port authorities which were probably drafted to defeat the Harter Act's delivery requirements.

III. DELIVERY DISPUTES IN SHIPMENTS TO THIRD WORLD NATIONS

The Harter Act requires carriers to deliver cargo properly.¹⁴⁷ Once the carrier properly delivers cargo, its contract of carriage is complete, and it is no longer liable for any damage to that cargo. The courts have defined delivery as delivery to a fit and proper wharf with the consignee being given a reasonable opportunity to pick up the cargo. Alternatively, the carrier can properly deliver the cargo by delivering according to the custom and regulations of the port.

Many port authorities, particularly in Third World countries, have attempted to avoid liability for cargo loss and damage by defining "delivery" from the vessel as occurring long after physical custody and control of the cargo has passed to the local authority. Judge Weinfeld may have rendered such attempts ineffective in the Second Circuit by his decision in *Farrell Lines v. Highlands Insurance Co.*¹⁴⁸ There, the vessel carried shoes from New York to Monrovia, Liberia. The vessel arrived in Monrovia on March 28, 1980. The cargo was unloaded from the ship to the stringpiece by stevedores employed by the carrier between March 28 and March 30, 1980. Thereafter, the cargo was handled by stevedores employed by the National Port Authority. Approximately \$5,000 worth of cargo was missing when transferred from the stevedores employed by the carrier to those employed by the Port Authority. The cargo was placed into the Port Authority warehouse, and a warehouse receipt was issued on May 6, 1980. By then, cargo worth approximately \$60,000 was missing. The Liberian Port Regulations defined delivery as follows: "Cargo shall only be regarded as landed when placed and safely deposited in the Transit Warehouse or at a place designated by the Port Manager, and until then delivery of the cargo shall not be considered to have been made to the Authority."¹⁴⁹

147. *Id.* § 190.

148. 532 F. Supp. 77, 1982 A.M.C. 1430 (S.D.N.Y. 1982).

149. *Id.* at 79, 1982 A.M.C. at 1432.

Judge Weinfeld held that delivery occurred when the physical transfer occurred on the stringpiece.¹⁵⁰ He did not decide the case based on Liberian law, but applied the United States Harter Act and the case law which has interpreted that act. Judge Weinfeld explained that, as a general rule, American law requires delivery of the cargo to the consignee at a fit and proper wharf, with reasonable notice to the consignee that the cargo has arrived, and a reasonable opportunity for the consignee to take possession of the cargo.¹⁵¹ Judge Weinfeld then explained the exceptions which governed *Farrell Lines*:

[T]his general rule of proper delivery is subject to a well-recognized exception where custom, regulation or law of the port otherwise provide. As stated by the Supreme Court,
“No rule is better settled than that delivery must be according to the custom and usage of the port, and such delivery will discharge the carrier of his responsibility.”¹⁵²

Judge Weinfeld interpreted this rule to mean that delivery occurred when the cargo was physically transferred.¹⁵³ If the transfer was in accordance with the port regulations or customs, it was proper. The cargo owner argued that delivery did not occur simultaneously with the physical transfer, but occurred when the port regulations so provided.¹⁵⁴ Judge Weinfeld suggested that the application of the Liberian Port Regulations¹⁵⁵ would “emasculate the well-established rule . . . that where delivery is compelled according to custom and usage of the port, the carrier is discharged of its responsibility.”¹⁵⁶

The holding in *Farrell Lines* differed from those in *Black Sea & Baltic v. S.S. Hellenic Destiny*¹⁵⁷ and *Early California Industries v. M/V Hellenic Pioneer*.¹⁵⁸ In *Black Sea*, defendant made a motion

150. *Id.* at 80, 1982 A.M.C. at 1433.

151. *Id.* at 79, 1982 A.M.C. at 1432. *See also* F.J. Walker Ltd. v. M/V Lemoncore, 561 F.2d 1138, 1142 (5th Cir. 1977); Calcot, Ltd. v. Isbrandtsen Co., 318 F.2d 669, 673 (1st Cir. 1963); Tan Hi v. United States, 94 F. Supp. 432, 434-35 (N.D. Cal. 1950).

152. 532 F. Supp. at 79, 1982 A.M.C. at 1433 (footnote omitted) (quoting Constable v. National S.S. Co., 154 U.S. 51, 63 (1894)).

153. 532 F. Supp. at 80, 1982 A.M.C. at 1433.

154. *Id.*

155. *Id.* at 79, 1982 A.M.C. at 1432 (citing Port Regulations of the National Port Authority, Liberia (1974)).

156. *Id.* at 79-80, 1982 A.M.C. at 1433.

157. 500 F. Supp. 677, 1981 A.M.C. 926 (S.D.N.Y. 1980).

158. No. 75 Civ. 2255 (S.D.N.Y. Jan. 19, 1982).

for partial summary judgment to decide whether the shipper had proved a prima facie case by introducing a clean bill of lading and certificates issued by the Saudi Arabian customs officers.¹⁵⁹ The certificates reported a shortage of cargo at the customs authority's warehouse. The relevant Saudi Arabian port regulation read as follows:

Actual receipt of the goods by Customs takes place only when the goods arrive at the gates of [Customs] warehouses or at the places assigned for storage, and when a careful inspection of the external condition of the package has been made. Consequently, goods that have been unloaded remain under the control and responsibility of the shipping companies until they are actually received by the Customs warehouseman.¹⁶⁰

Although *Black Sea* can be distinguished from *Farrell Lines* because the regulations in *Black Sea* specified that cargo remain under the control and responsibility of the carrier until received by the customs warehousemen, the two cases seem to conflict. The *Black Sea* decision spoke of two deliveries, a physical delivery and a legal delivery,¹⁶¹ while the *Farrell Lines* decision concentrated solely on the physical delivery of the goods.¹⁶²

159. 500 F. Supp at 677, 1981 A.M.C. at 926. See *supra* notes 95-126 and accompanying text for a discussion of the burden of proof scheme in this area.

160. *Black Sea*, 500 F. Supp. at 678, 1981 A.M.C. at 927 (quoting Saudi Arabian Customs Regulations and Rules for Implementation, Article 124).

161. In *Black Sea*, the court summarized:

[W]e find that proper delivery according to the law governing Saudi Arabian ports occurs when a "careful inspection of the external condition of the packages" is made. That inspection includes both an inventory of the total delivery and a segregation and weighing of the damaged cargo. The Certificate of Imported Goods reflects this inspection.

It is unnecessary, for the purpose of disposing of this motion, to determine when this inspection actually takes place. While a reading of the applicable regulations leaves the impression that the segregation and weighing of damaged cargo and the inventory of all the cargo occur simultaneously and soon after physical delivery, the evidence of both parties in this case indicates that the inventory, at least, is not generally conducted until clearance procedures begin. To be sure, when such delay occurs it renders Article 131 meaningless, for the goods would be cleared out of Customs just as they are officially received in Customs. Nevertheless, the determination of the factual question of when the inspection actually occurs cannot change the fact that it is this inspection which ends the carrier's liability and which is reflected in the Certificates.

Id. at 681 (footnote omitted).

162. In *Farrell Lines*, Judge Weinfeld stated: "[Defendant's] argument that the regulation governs the determination of when delivery occurred disregards the actual fact that

The more recent case, *Early California Industries*,¹⁶³ involved the same parties as *Black Sea* and simply followed that opinion. Thus, the *Black Sea* court's apparent reliance on Saudi Arabian law to define proper delivery was directly counter to the reasoning applied by the Southern District in *Farrell Lines*. In *Farrell Lines*, Judge Weinfeld specifically held that the law of the United States, and not the law of Liberia, applied.¹⁶⁴ This approach has been followed subsequently by several courts.¹⁶⁵

All the above decisions in the delivery area leave substantial room for argument, both from cargo and shipowning interests. Once the courts agree that delivery occurs simultaneously with physical transfer, only the propriety of the physical transfer need be litigated. The tests which now exist will allow the parties to a bill of lading to predict accurately when and how the delivery will be accomplished and, thus, the point at which their contract will be completed. Only factual disputes concerning delivery should be left to be litigated.

CONCLUSION

Litigation in the areas of package limitation, burden of proof and delivery can probably never be eliminated by any judicially

Farrell . . . lost physical custody and control of the cargo upon its delivery to the stringpiece and that, thereupon, it was received by [the National Port Authority] for delivery to the consignee." 532 F. Supp. at 80, 1982 A.M.C. at 1433.

163. No. 75 Civ. 2255 (S.D.N.Y. Jan. 19, 1982).

164. 532 F. Supp. at 79-80, 1982 A.M.C. at 1433. It should be noted that the *Farrell Lines* decision is on appeal and oral argument was heard by the Second Circuit (Judge Oakes, Judge Winter and Southern District Judge Metzner) on October 20, 1982. Moreover, *Black Sea* will be appealed shortly. The opinions rendered in these two cases should put the issue to rest in the Second Circuit.

165. See, e.g., *Allstate Ins. Co. v. Imparca Lines*, 646 F.2d 166 (5th Cir. 1981); *All Commodities Supplies, Ltd. v. M/V Acritas*, 1982 A.M.C. 166 (E.D. La. 1981). In *Acritas*, the stevedores operated the vessel's winches and gears in Apapos/Lagos, Nigeria and discharged the cargo directly into trucks alongside the vessel. The court noted that:

Because the stevedores were appointed and paid by an agency of the Nigerian Government, the vessel interests had no control over the stevedores or over discharge of the cargo. Once the stevedore personnel commenced handling the bags of rice in the vessel's holds, the cargo was surrendered into the exclusive custody and control of the NPA and its appointees, and was beyond the custody and control of the vessel interests.

Id. at 168.

The court explained that the vessel was required by the Nigerian regulations to surrender control of the cargo to the stevedores who discharged the vessel. Therefore, a proper delivery occurred at that time. *Id.* at 170.

created rule or legislative change of law. Litigation problems in these areas may be solved, however, by the contracting parties' ability to predict the judicial interpretation of their contract, and to place insurance to cover the predictable risks.

The package limitation will be predictable if the courts abide by the parties' intent as expressed in the bill of lading. The ocean carrier should not have to prove that it advised the shipper of its rights to declare a higher value; the shipper should bear the burden of proving that the carrier would not agree to the higher declaration.

Likewise, the parties to a bill of lading should be able to prepare bills of lading in a manner which indicates an absence of knowledge of the quantity as well as the condition of a container's contents. The practicalities of the ocean shipping industry do not allow the carrier time to open and count the contents of every container. Nor do the practicalities of the shipping industry permit a shipper to transfer a bill of lading without a representation of the quantity of cargo within a container even if the bill of lading has a clause indicating the carrier's lack of knowledge of the contents. In this era of sophisticated, worldwide transportation, a consignee almost certainly relies upon the shipper, not the ocean carrier, for shipment of the quantity of cargo it ordered. If containers are loaded and sealed by the shipper, the consignee should be able to rely on the shipper to place the agreed upon number of cartons in the container. The consignee will rely on the carrier to ensure that the container remains sealed and intact during the carriage. If the seal is broken and the contents are pilfered, the carrier should be liable unless the pilferage was due to a cause for which the carrier has a defense. If the shipper does not place the agreed upon amount of cargo in the container, the shipper, not the carrier, should bear the liability. Judicial acceptance of this approach would enable the parties to a contract of carriage to predict more accurately the party bearing the risk and to place their insurance accordingly.

Similarly, holding that delivery occurs simultaneously with physical transfer of cargo simplifies the law in this area, and allows the parties to predict which party is at risk for loss or damage at the discharge port. That party may then insure accordingly for such risk.