The Unworkable Per-Package Limitation of the Carrier's Liability under the Hague (or Hamburg) Rules

I. Introduction

The purpose of the agreements reached at the Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading in 1924 (the Hague Rules)[1] was to establish international uniformity taking into consideration the interests of ocean carriers, cargo owners, insurers and bankers. The Hague Rules modified the existing law, allegedly to protect shippers from the overreaching of carriers who were presumed to be in superior bargaining positions, to prevent carriers from contracting out of liability for cargo loss or damage through adhesion contracts, and to provide an incentive for careful transport and delivery.[2]

The language of the Hague Rules was incorporated almost *verbatim* into the United States *Carriage of Goods by Sea Act*[3] of 1936 more than a decade after the principles embodied in the Act were agreed upon and ratified by the United States at the Convention in Brussels. Under Article 4(5) of the Hague Rules[4] the shipper's recovery for any loss or damage in connection with

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[1] 120 L.N.T.S. 155.

[2] See, *e.g.*, *Yeramex International* v. *S.S. Tendo* [1977] A.M.C. 1807, 1829 (E.D. Va 1977); *Matsushita Electric Corp.* v. *S.S. Aegis Spirit* [1976] A.M.C. 779, 796, 414 F.Supp. 894 (W.D. Wash. 1976); *Shinko Boeki Co.* v. *S.S. Pioneer Moon* [1975] A.M.C. 49, 51, 507 F. 2d 342 (2 Cir. 1974); *Hartford Fire Insurance Co.* v. *Pacific Far East Line, Inc.* [1974] A.M.C. 1475, 1477, 491 F.2d 960 (9 Cir. 1974); *Cameco, Inc.* v. *S.S. American Legion* [1974] A.M.C. 2568, 514 F.2d 1291, [1975] 1 Lloyd's Rep. 295, 304 (2 Cir. 1974); *Rosenbruch* v. *American Export Isbrandtsen Lines, Inc.* [1973] A.M.C. 1160, 357 F.Supp. 982, 983 (S.D. N.Y. 1973); *Standard Electrica, S.A.* v. *Hamburg Südamerikanische Dampfschiffahrtsgesellschaft* [1967] A.M.C. 881, 883, 375 F.2d 943 (2 Cir. 1967); *Leather's Best, Inc.* v. *S.S. Mormaclynx* [1971] A.M.C. 2383, 451 F.2d 800, [1971] 2 Lloyd's Rep. 476, 486 (2 Cir. 1971); *Caterpillar Overseas, S.A.* v. *S.S. Expeditor* [1963] A.M.C. 1662, 318 F.2d 720, 722 (2 Cir. 1963); *Jones* v. *Flying Clipper* [1954] A.M.C. 259, 116 F.Supp. 386, 388 (S.D. N.Y. 1953). See also Gilmore & Black, *The Law of Admiralty* 2d ed. (1975), 143.

[3] 46 U.S.C. § 1300 (1970) (hereinafter referred to as COGSA).

[4] Art.4(5) states: "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pounds sterling per package or 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... ."

transportation of goods is limited to a fixed amount per "package". The same concept is embodied in Section 4(5) of COGSA but emphasis is laid, in the American statute, on the distinction between "package" and "customary freight unit".[5] In *Stirnimann* v. *The San Diego,* Clark J. explained that the purpose of Section 4(5) of COGSA was to prevent excessive claims in respect of small packages of great value but not to permit carriers to escape liability for just cause.[6] Several subsequent cases have adopted this view.[7]

The $500 per-package limitation was enacted long before the advent of modern container shipping. At that time the minimum per-package amount imposed accurately reflected the worth of an average parcel shipped. Today, as a result of the widespread use of containers and other methods of carrying single parcels, the "pack-

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The same or equivalent wording is employed in the statutes and laws of England (*The Carriage of Goods by Sea Act, 1924,* 14 & 15 Geo.V, c.22), Canada (*Carriage of Goods by Water Act,* R.S.C. 1970, c.S-9), France (*Loi du 18 juin* 1966, art.28), and The Netherlands (W.v.K., art.469(5)). The Italian Nav. Code (C.N., art.423) uses the expression "ciascuna unità di carico", *i.e.,* each freight unit" (author's translation). The Merchant Shipping Code of the U.S.S.R. (1968) in art.165 provides for limitation of the carrier's liability according to "parcel or customary freight unit". (Trans. & ed., Butler & Quigley, *The Merchant Shipping Code of the U.S.S.R. (1968)* (1970), 86-87. See further examples and references in Selvig, *Unit Limitation of Carrier's Liability* (1961), 35 *et seq.*

[5] 46 U.S.C. § 1304(5) (1970) 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. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier." On the legislative history see Selvig, *supra,* note 4, 35 *et seq.* See also *Hearings on S.1152 before the Senate Committee on Commerce,* 74th Cong., 1st Sess. § 15(1935) on a bill relating to the carriage of goods by sea; Knauth, *The American Law of Ocean Bills of Lading* 4th ed. (1953) 115 *et seq.*

[6] *Stirnimann* v. *The San Diego* [1945] A.M.C. 436, 148 F.2d 141, 143 (2 Cir. 1945).

[7] *Mitsubishi International Corp.* v. *S.S. Palmetto State* [1963] A.M.C. 958, 311 F.2d 382 (2 Cir. 1962); *Pannell* v. *S.S. American Flyer* [1958] A.M.C. 1428, 1433-34, 157 F.Supp. 422 (S.D. N.Y. 1957); *Brazil Oiticica, Ltd* v. *The Bill* [1944] A.M.C. 883, 55 F.Supp. 780, 782 (D. Md 1944); *Gerling-Konzern Allgemeine Vers. AG* v. *Hapag-Lloyd AG* [1976] A.M.C. 629, 632 (Hans. OLG Bremen 1975). See also De Orchis, *The Container and the Package Limitation — The Search for Predictability* (1974) 5 J.Mar.L. & Comm. 251.

age" concept of 1924 is outdated and "utterly meaningless".[8] Thus, courts have frequently had to pass judgment on the question of what constitutes a package for purposes of the amount limitation. Furthermore, they had to adapt this limitation to today's policy considerations with respect to the practice of shipping in large containers.[9] The decisions reached and tests applied, however, are far from harmonious in approach and result.[10]

II. What is a package?

No definition of "package" is included in the statute. *The Oxford English Dictionary* defines the word as "[t]he whole or mass of things packed together; a cargo. . . . A bundle of things packed up, whether in a box or other receptacle, or merely compactly tied up".[11] *Webster's New Twentieth Century Dictionary* includes within the meaning of "package" both "a wrapped or boxed thing or group of things; a parcel; a bundle" and "a box, case, etc. in which things are packed".[12] *Black's Law Dictionary* defines *"package"* as "[a] bundle put up for transportation or commercial handling; a thing in form to become, as such, an article of merchandise or delivery from hand to hand. . . . As ordinarily understood in the commercial world, it means a shipping package".[13]

As early as 1874 the term "package" was considered in the context of a statute limiting a carrier's liability. In *Whaite* v. *Lancashire & Yorkshire Railway Co.* a large open top wagon was held to be a package: "It would be absurd to say that the waggon was too large to be a package; plainly, size cannot be a criterion."[14] Since that date no standards which might provide a reliable guide as to what constitutes a package have been forthcoming. A review of the recent cases illustrates the following:

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[8] *Aluminios Pozuelo, Ltd* v. *S.S. Navigator* [1968] A.M.C. 2532, 2534, 407 F.2d 152 (2 Cir. 1968) *per* Moore J.

[9] See *Yeramex International* v. *S.S. Tendo, supra,* note 2; *Shinko Boeki Co.* v. *S.S. Pioneer Moon, supra,* note 2; *Cameco, Inc.* v. *S.S. American Legion, supra,* note 2; *Leather's Best, Inc.* v. *S.S. Mormaclynx, supra,* note 2; *Royal Typewriter Co.* v. *M.V. Kulmerland* [1973] A.M.C. 1784, 483 F.2d 645 (2 Cir. 1973); *Nichimen Co.* v. *M.V. Farland* [1972] A.M.C. 1573, 462 F.2d 319 (2 Cir. 1972).

[10] *Matsushita Electric Corp.* v. *S.S. Aegis Spirit, supra,* note 2, 788. See also, the cases reviewed in Benedict, *On Admiralty* 7th ed. (1977), vol.2A, para.167-70.

[11] *The Oxford English Dictionary* (1961), vol.VII, 363.

[12] *Webster's New Twentieth Century Dictionary* 2d ed. (1975), 1283.

[13] *Black's Law Dictionary* rev. 4th ed. (1968), 1262.

[14] (1874) 9 L.R. 67, 70 (Ex.), *per* Cleasby B.

a) Goods shipped without any packaging preparation are not packages within the meaning of Section 4(5).[15]

b) Fully crated or boxed cargo satisfies the COGSA package meaning, regardless of size.[16]

c) Little consistency is shown in cases of items partially packaged.[17]

d) Whether an item is a package may depend on the intention of the parties, their dealings with each other and the nature of their contractual relationship.[18]

e) The question "when is a 'package' not a package?" has proven to be extremely difficult in container and pallet cases.[19]

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[15] *India Supply Mission* v. *S.S. Overseas Joyce* [1966] A.M.C. 66, 246 F.Supp. 536 (S.D. N.Y. 1965); *Caterpillar Americas Co.* v. *Sea Roads* [1964] A.M.C. 2646, 231 F.Supp. 647 (S.D. Fla 1964); *Freedman & Slater, Inc.* v. *Tofevo* [1963] A.M.C. 1525, 222 F.Supp. 964 (S.D. N.Y. 1963); *The Edmund Fanning* [1953] A.M.C. 86, 201 F.2d 281 (2 Cir. 1953); *Middle East Agency* v. *The John B. Waterman* [1949] A.M.C. 1403, 86 F.Supp. 487 (S.D. N.Y. 1949); *Waterman S S. Corp.* v. *U.S. Smelting, Refining & Mining Co.* [1946] A.M.C. 997, 155 F.2d 687 (5 Cir. 1946); *Brazil Oiticica, Ltd* v. *The Bill* [1945] A.M.C. 108, 145 F.2d 470 (4 Cir. 1945); *Stirnimann* v. *The San Diego, supra,* note 6.

[16] *Mitsubishi International Corp.* v. *S.S. Palmetto State, supra,* note 7; *Herd & Co.* v. *Krawill Machinery Corp.* 359 U.S. 297 (1959), [1959] A.M.C. 879; *John Deere & Co.* v. *Mississippi Shipping Co.* [1959] A.M.C. 480, 170 F.Supp. 479 (E.D. La 1959); *Middle East Agency* v. *The John B. Waterman, supra,* note 15; *Stirnimann* v. *The San Diego, supra,* note 6.

[17] *Gulf Italia Co.* v. *S.S. Exiria* [1958] A.M.C. 439, 160 F.Supp. 956 (S.D. N.Y. 1958), aff'd [1959] A.M.C. 930, 263 F.2d 135 (2 Cir. 1959); *Pannell* v. *U.S. Lines Co.* [1959] A.M.C. 935, 263 F.2d 497 (2 Cir. 1959); *Middle East Agency* v. *The John B. Waterman, supra,* note 15.

[18] *Acushnet Sales Co.* v. *S.S. American Legacy* (unreported) (S.D. N.Y. 1974) cited in *International Factory Sales* v. *The Ship Alexandr Serafimovich* [1975] A.M.C. 1453, 1462; *Nichimen Co.* v. *M.V. Farland, supra,* note 9; *Standard Electrica, S.A.* v. *Hamburg Südamerikanische Dampfschiffahrtsgesellschaft, supra,* note 2, 885.

[19] Containers and pallets *have been held* to be packages within the meaning of Sec.4(5) COGSA in: *Sperry Rand Corp.* v. *Norddeutscher Lloyd* [1973] A.M.C. 1392 (S.D. N.Y. 1973); *Rosenbruch* v. *American Export Isbrandtsen Lines, Inc., supra,* note 2 (household goods); *Royal Typewriter Co.* v. *M.V. Kulmerland, supra,* note 9; *Encyclopaedia Britannia, Inc.* v. *Hong Kong Producer* [1969] A.M.C. 1741, 422 F.2d 7 (2 Cir. 1969); *Maison Perrigault* v. *Capitaine du Breitenstein,* Trib.Comm. du Havre 19 oct. 1973 (1974) D.M.F. 304; *Sarkis* v. *Compagnie général transatlantique,* Rouen 16 mars 1973, D.1973.1.591 [containers]; *Menley & James* v. *M.V. Hellenic Splendor* [1977] A.M.C. 1782, F.Supp. 252 (S.D. N.Y. 1977); *Omark Industries, Inc.* v. *Associated Container Transportation (Australia), Ltd* [1977] A.M.C. 230, 420 F.Supp. 139 (D. Ore. 1976); *Primacy Industries Corp.* v. *Barber Lines* [1974] A.M.C. 1444 (Civ.Ct N.Y. 1974); *Nichimen Co.* v.

> Moore J. remarked in *Aluminios Pozuelo, Ltd* v. *S.S. Navigator*:
> The meaning of "package" which has evolved from the cases can therefore be said to define 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.[20]

In *Omark Industries, Inc.* v. *Associated Container Transportation (Australia)*[21] Berks J. observed that the COGSA package will generally be the *largest* individuated unit of package made up by the shipper, not the *smallest* packaged unit incorporated into a shipment.

No specialized or technical meaning is ascribed to the word "package". Therefore this word must be given its plain ordinary meaning.[22] It is not a term of art.[23] The parties' characterization of the word is immaterial: an article will not become a package merely because the parties have chosen to call it one.[24] If the parties to a carriage contract were permitted to define the COGSA package then the carrier's minimum liability under Section 4(5) would become "illusory and negotiable".[25] Thus no legal effect can be given to the

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M.V. Farland, supra, note 9; *Standard Electrica, S.A.* v. *Hamburg Südamerikanische Dampfschiffahrtsgesellschaft, supra,* note 2 [pallets].

Containers and pallets *have not been held* to be packages within the meaning of Sec.4(5) COGSA in: *Yeramex International* v. *S.S. Tendo, supra,* note 2; *Cia. Panamena de Seguros, S.A.* v. *Prudential Lines, Inc.* 416 F.Supp. 641 (D.C.Z. 1976); *Matsushita Electric Corp.* v. *S.S. Aegis Spirit, supra,* note 2; *Shinko Boeki Co.* v. *S.S. Pioneer Moon, supra,* note 2; *Cameco, Inc.* v. *S.S. American Legion, supra,* note 2; *Leather's Best, Inc.* v. *S.S. Mormaclynx, supra,* note 2 [containers]; *Acushnet Sales Co.* v. *S.S. American Legacy, supra,* note 18; *International Factory Sales* v. *The Ship Alexandr Serafimovich, supra,* note 18 [pallets].

[20] *Supra,* note 8, 2535. See also *Yeramex International* v. *S.S. Tendo, supra,* note 2, 1831; *Primary Industries Corp.* v. *Barber Lines, supra,* note 19, 1447; *Shinko Boeki Co.* v. *S.S. Pioneer Moon, supra,* note 2, 51; *Sperry Rand Corp.* v. *Norddeutscher Lloyd, supra,* note 19, 1397; *Leather's Best, Inc.* v. *S.S. Mormaclynx, supra,* note 2, 485; *Standard Electrica, S.A.* v. *Hamburg Südamerikanische Dampfschiffahrtsgesellschaft, supra,* note 2, 883; *Gerling-Konzern Allgemeine Vers. AG* v. *Hapag-Lloyd AG, supra,* note 7, 631-32; *Cie générale transatlantique* v. *The Marine Insurance Co.* Paris 24 oct. 1966, (1967) D.M.F. 23, 28.

[21] *Supra,* note 19, 234.

[22] *Matsushita Electric Corp.* v. *S.S. Aegis Spirit, supra,* note 2, 791; *Hartford Fire Insurance Co.* v. *Pacific Far East Line, Inc., supra,* note 2, 1478.

[23] *Omark Industries, Inc.* v. *Associated Container Transportation (Australia), Ltd, supra,* note 19, 233; *contra*: *Aluminios Pozuelo, Ltd* v. *S.S. Navigator, supra,* note 8, 2537 (not followed).

[24] *Standard Electrica, S.A.* v. *Hamburg Südamerikanische Dampfschiffahrtsgesellschaft, supra,* note 2, 893; *Pannell* v. *S.S. American Flyer, supra,* note 7, 1436.

[25] *Matsushita Electric Corp.* v. *S.S. Aegis Spirit, supra,* note 2, 793.

parties' private intentions or characterizations regarding the COGSA package.[26] The use of the word "package" in the bill of lading is not conclusive; indeed, the nature of the shipment is in no way dependent on the parties' description.[27] In some recent decisions it has been held that clauses in bills of lading stating that a container is a package for the purpose of limiting the carrier's liability under Section 4(5) of COGSA is null and void since it constitutes a lessening of the carrier's liability which is contrary to Section 3(8) of COGSA.[28] In *Tessler Brothers, Ltd* v. *Italpacific Line,* the Court explained:

> 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".[29]

It has frequently been said that selection by the shipper of a particular mode of packaging, such as a container, establishes a presumption of what the COGSA package will be, thus transferring to the shipper the burden to show by other evidence that the container should not constitute a package within the meaning of Section 4(5).[30] Another approach is the "functional economics test" as

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[26] *Omark Industries, Inc.* v. *Associated Container Transportation (Australia), Ltd, supra,* note 19, 236. A certain relevance is nevertheless attributed to the parties' characterization in order to ascertain their contractual relation: *Yeramex International* v. *S.S. Tendo, supra,* note 2, 1832; *Royal Typewriter Co.* v. *M.V. Kulmerland, supra,* note 9, 1790. See also *Pannell* v. *U.S. Lines Co., supra,* note 17, 937; *Tidewater Venice, Inc.* v. *M.V. Schwarzenfels* [1972] A.M.C. 1775 (E.D. La 1972).

[27] *Standard Electrica, S.A.* v. *Hamburg Südamerikanische Dampfschiffahrts-gesellschaft, supra,* note 2, 888; *Caterpillar Overseas, S.A.* v. *S.S. Expeditor, supra,* note 2, 722; *Gerlong-Kinzern Allgemeine Vers. AG,* v. *Hapag-Lloyd AG, supra,* note 7.

[28] *Yeramex International* v. *S.S. Tendo, supra,* note 2, 1834; *Cia. Panamena de Seguros, S.A.* v. *Prudential Lines, Inc., supra,* note 19, 643; *Siderurgica del Orinoco C.A.* v. *M.V. North Empress* [1977] A.M.C. 1140, 1146 (E.D. La 1976); *Matsushita Electric Corp.* v. *S.S. Aegis Spirit, supra,* note 2, 794-95; *Tessler Brothers, Ltd* v. *Italpacific Line* [1974] A.M.C. 937, 494 F.2d 438 (9 Cir. 1974) distinguished; *Leather's Best, Inc.* v. *S.S. Mormaclynx, supra,* note 2, 486. See also *Shinko Boeki Co.* v. *S.S. Pioneer Moon, supra,* note 2, 52.

[29] *Supra,* note 28, 942. See also: *Siderurgica del Orinoco* v. *M.V. North Empress, supra,* note 28, 1145; *Sommer Corp.* v. *Panama Canal Co.* [1973] A.M.C. 2053, 475 F.2d 292, 298 (5 Cir. 1973); *New York, New Haven & Hartford Railroad Co.* v. *Nothnagle* 346 U.S. 128 (1953), [1953] A.M.C. 1228, 1233.

[30] *Menley & James* v. *M.V. Hellenic Splendor, supra,* note 19, 1783; *Yeramex International* v. *S.S. Tendo, supra,* note 2, 1833; *Omark Industries, Inc.* v. *Associated Container Transportation (Australia), Ltd, supra,* note 19, 233-35; *Insurance Co. of North America* v. *S.S. Brooklyn Maru* [1974] A.M.C. 2443, [1975] 2 Lloyd's Rep. 512, 515 (S.D. N.Y. 1974); *Sperry Rand Corp.* v. *Norddeutscher Lloyd, supra,* note 19, 1398; *Rosenbruch* v. *American Export Isbrandtsen*

envisaged in *Royal Typewriter Co.* v. *M.V. Kulmerland.*[31] According to this doctrine the shipper's own carton or crate, rather than the container, is deemed to be the COGSA package if "the contents of the container could have feasibly been shipped overseas in the individual packages or cartons in which they were packed by the shipper".[32] Oakes J. explained in *Cameco, Inc.* v. *S.S. American Legion*[33] that the test was not to be conclusive for the purpose of defining a COGSA package, but was simply set forth to establish the burden of proof. Where the shipment is not a functional packing unit the burden shifts to the shipper (or consignee) to show that the units are by themselves packages.[34]

III. Containers and pallets — review of cases

A. *A container is a "package"*

1. Royal Typewriter Co. v. M.V. Kulmerland[35]

In that case the bill of lading described the parcel as "1 Container said to contain Machinery".[36] This was fatal to the shipper in the lower Court and the Court of Appeals of the Second Circuit affirmed the decision applying the "functional economics test". The Court stated that in the days before containers, adding machines were shipped in wooden crates or cases. The metal containers in which the cartons of adding machines were shipped in lots of 350 per container should essentially be likened to the wooden cases of days past. The individual cartons containing one adding machine each were not packing units suitable for overseas shipment. Thus, the

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Lines, Inc., supra, note 2, 984; *Royal Typewriter Co.* v. *M.V. Kumberland, supra,* note 9, 1790; *Truck Insurance Exchange* v. *American Export Freight* [1972] A.M.C. 2509, 2510, 357 F.Supp. 982, [1974] 1 Lloyd's Rep. 119 (N.D. I 11. 1972); *Standard Electrica, S.A.* v. *Hamburg Südamerikanische Dampfschiffahrts-gesellschaft, supra,* note 2, 885.

[31] *Supra,* note 9, 1789.

[32] *Ibid.*

[33] *Supra,* note 2, 303.

[34] See the discussion in *Omark Industries, Inc.* v. *Associate Container Transportation (Australia), Ltd, supra,* note 19, 235, and in *Insurance Co. of North America* v. *S.S. Brooklyn Maru, supra,* note 30, 514-15. See also *Maison Perrigault* v. *Capitaine du Breitenstein, supra,* note 19, 308-9.

The "functional economics test" has been repudiated in *Yeramex International* v. *S.S. Tendo, supra,* note 2, 1834 and in *Matsushita Electric Corp.* v. *S.S. Aegis Spirit, supra,* note 2, 795.

[35] *Supra,* note 9.

[36] *Ibid.*, 1786.

burden was on the shipper to show that his units were themselves packages — something he was unable to do.[37]

B. *A container is not a "package"*

1. **Cameco, Inc. v. S.S. American Legion**[38]

Tins of ham packed in corrugated cartons and pallets were shipped in a refrigerated container which disappeared in New York. The bill of lading specified the number of cartons with tins and weight per tin. The Court of Appeals of the Second Circuit applied the "functional economics test" and decided that cases and pallets of tinned ham met the functional package unit test. Accordingly, the burden of proof was on the carrier to show that the parties intended to treat the container as a "package". Oakes J. pointed out that a container is as much for the benefit of the carrier as for the shipper and to hold in all cases that a container is a package would defeat the purpose of COGSA, that is, to protect shippers from the use of adhesion contracts by carriers and to provide an incentive for careful transport and delivery of cargo. Feinberg J. wisely observed: "There are many problems arising out of the 'package' test announced in *Royal Typewriter Co.* v. *M.V. Kulmerland*".[39]

2. **Leather's Best, Inc. v. S.S. Mormaclynx**[40]

The shipper loaded 99 leather bales (cartons with steel straps around them) in a container obtained from the carrier, and procured a receipt from the carrier's truck driver who was present during the loading. Under the heading "[n]umber and kind of packages; description of goods", the bill of lading recorded "1 container [said to contain] 99 bales of leather".[41] In the left-hand corner of the bill of lading a clause stated that the shipper agreed to limit the carrier's liability to $500 with respect to the entire contents of each container. The container was unloaded at the New York terminal and placed in a storage area from which it disappeared. The Court of Appeals of the Second Circuit held that the container was not a package, that the limitation of liability should be calculated on the basis of 99 packages and that the stamped clause purporting to limit liability to $500 for the whole container was void.

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[37] *Simon, Latest Developments in the Law of Shipping Container* (1973) 4 J.Mar.L. & Comm. 441; note in (1974) 5 J.Mar.L. & Comm. 507. See also De Orchis, *supra*, note 7.

[38] *Supra*, note 2.

[39] *Ibid.*, 2582.

[40] *Supra*, note 2.

[41] *Ibid.*, 2386.

3. Matsushita Electric Corp. v. S.S. Aegis Spirit[42]

Two containers holding 601 cartons of color television sets were shipped from Japan to the United States on the S.S. Aegis Spirit. The shipment arrived at Tacoma, Washington, with the contents of the containers deteriorated, apparently due to concussive forces and the entry of sea water into the containers during the voyage. The containers themselves had sustained material damage *en route*. The bill of lading clearly specified the quantity of cartons and their weight.[43] The merchandise was wrapped in plastic bags, fitted with styrofoam padding and finally packed into heavy, double-walled cardboard cartons. The evidence showed that packaging materials of a strength and quality comparable to the above were currently used by the shipper in its "break bulk" transoceanic shipments. Beeks J. commented that the utility of container transport lies in its efficiency in handling, loading, stowing and discharging of cargo. He also noted that containers offer greater protection from pilferage and rough handling and that they permit the use of lighter, more economical packaging materials without increased risk to the cargo. The shipper can thus insure a tight stowage and the carrier enjoys tremendous savings in labor and in claim payments by reason of reduced cargo loss and damage. The learned Judge pointed out that the "functional economics test" was unsatisfactory,[44] since it did not conform either to the sense of Section 4(5) of COGSA or to the practical economics of container shipping. The language of the statute distinguished only between goods shipped in packages and goods not shipped in packages. There was no indication either in the Hague Rules or in COGSA, or its legislative history, that goods shipped in some sort of receptacle should be disqualified from being treated as packaged goods whenever the packaging provided by the shipper was below some "later to be established standards of strength and durability".[45] Mr Justice Beeks said further:

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[42] *Supra*, note 2.

[43] Clause 26 of the bill of lading contained the following terms: "In case the declared value is markedly higher than the actual value, the Carrier shall in no event be liable to pay any compensation, and (ii) where the cargo has been either packed into container(s) or unitized into similar article(s) of transport by or on behalf of the Merchant, it is expressly agreed that the number of such container(s) or similar article(s) of transport shown on the face hereof shall be considered as the number of the package(s) or unit(s) for the purpose of the application of the limitation of liability provided for herein." *Supra*, note 2, 783.

[44] See Simon, *The Law of Shipping Containers* (1974) 5 J.Mar.L. & Comm. 507, 521.

[45] *Supra*, note 2, 792.

> The undoubted objective of 46 U.S. Code sec.1304(5) was to establish a minimum floor below which carriers subject to the act could not reduce their liability for cargo damage. If carriers alone, or even carriers and shippers together, are allowed to christen something a "package" which distorts or belies the plain meaning of this word as used in the statute, then the liability floor becomes illusory and negotiable. The package limitation provision serves no purpose whatsoever if the courts' function in applying it is to merely identify and uphold the parties' private definition of COGSA package. Of course, the parties' characterization may often be wholly reasonable and consistent with the language and purpose of the statute, but the point to be made is that it is not the parties' characterization of the shipment, but the court's interpretation of the statute, that controls.[46]

He viewed the parties' attempt to define the package as likely to be a violation of the *Shipping Act, 1916*,[47] since it might constitute an illegal and invalid preference.[48]

4. Johnston Company v. The Ship Tindefjell[49]

Cargo was shipped in two standard metal containers. The bills of lading stated: "1 container which is said to contain shoes" — "143 cartons" and "1 container which is said to contain shoes" — "173 cartons".[50] The vessel encountered heavy weather and some of the shipment was damaged. According to Mr Justice Collier of the Federal Court of Canada, it seemed logical that the plaintiff intended to have the benefit of the minimum monetary responsibility, as laid down in the Hague Rules, by notifying the carrier as to the number of packages being carried, although, for reasons of convenience, they were grouped together in one large receptacle. The carrier could refuse to issue the bill of lading with that description, or insist on a count or increase the rate. The difference between this and the *Kulmerland*[51] and *Rosenbruch*[52] cases seems to be clear; indeed, in those cases there was no indieation of the number of cartons and the description was too vague. The learned Judge found in the case at bar that the containers were not packages for the purpose of the $500 limitation of liability. They were merely a modern method of carrying the packages.

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[46] *Ibid.*, 792-93.

[47] 46 U.S.C. § 801, 815 (1970).

[48] *Supra*, note 2, 794.

[49] [1973] F.C. 1003, [1973] A.M.C. 2119 (F.C.T.D. 1973).

[50] *Ibid.*, 2122.

[51] *Supra*, note 9.

[52] *Supra*, note 2.

C. *A pallet is a "package"*

1. Standard Electrica, S.A. v. Hamburg Südamerikanische Dampfschiffahrtsgesellschaft[53]

The Court of Appeals of the Second Circuit held that a shipment of six cardboard cartons, each containing forty television tuners, all strapped to one pallet constituted one package. The majority disregarded the plaintiff's contention that a pallet is merely a mechanical device to be used in conjunction with a forklift in order to facilitate loading. The bill of lading and other documents indicated that the parties regarded each pallet as a package, that it was the shipper who chose to make up the cartons into a pallet for his convenience, and that the shipper could have declared a higher value if he wanted to avoid the outdated per-package limitation. The Court felt that if the statutory limitation was inadequate, revision ought to come from Congress, not from the courts. With respect to the majority's opinion, Mr Justice Feinberg had the following to say:

> I do not understand why we should add to the inequity. The call for congressional revision may be sound, but in the meantime we should construe the existing statutory term as applied to the facts before us in consonance with its legislative purpose. That judicial function we ought not abdicate... . [C]ertainty at the expense of legislative policy and equity is undesirable... .[54]

His dissent expressed the view that it was within normal expectation to intend the word "package" to mean something which completely enclosed the packed goods. The strapping together of six cartons on a platform with a board on top to prevent other cargo and the four metal straps from cutting into the top two cartons did not make a "package" out of the six cartons. He pointed out that on the facts it was ambiguous whether the parties themselves considered the pallet a package since the carrier's agent himself referred to "the loss of 42 cartons" and not to "the loss of seven pallets of six cartons each". He also said that the shipper's subjective purpose in choosing a particular mode of packaging was irrelevant.

2. Omark Industries, Inc. v. Associated Container Transportation (Australia) Ltd[55]

The shipper prepared pallet bundles, each of which consisted of 20 to 26 cardboard cartons arranged in layers and tiers to form a large almost cubical mass, entirely enclosed by heavy double-

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[53] *Supra*, note 2.
[54] *Ibid.*, 889.
[55] *Supra*, note 19.

walled corrugated cardboard. Beeks J. complained that the case law presented itself as a confusing array of formulas and criteria for the determination of the COGSA package, which very often obscured the fact that Congress never intended to employ the word "package" as a sophisticated term of art. He further pointed out that pallet cargo can easily be distinguished from container cargo for package limitation purposes. On the facts, he found that the cardboard wrap did not extend across the bottom of the bundles but that the cartons within each bundle were effectively concealed. The judge said, after having emphasized the importance of the physical configuration of the bundles:

> I hold the palletized units, rather than the inner cartons, to be the "packages" to which the COGSA limitation applies. It is evident from the visual appearance of the units as well as from their physical construction that the heavy outer cardboard shell served to consolidate, protect and restrain the smaller, thinner cartons and their contents — thus creating a concededly compound but nonetheless bona fide "package". It matters not that in other circumstances of carriage the inner cartons might be deemed COGSA packages.[56]

D. *A pallet is not a "package"*

1. Acushnet Sales Co. v. S.S. American Legacy[57]

This case involved a shipment of 134 cartons of golf balls strapped to nine disposable pallets. The New York District Court held that the existence of a package depended not only on the physical description of the manner in which the goods were presented for shipment but also on the previous dealings and contractual relationship of the parties. On the facts, the Court held that the parties were dealing with a shipment consisting of 134 cartons, and that accordingly, the carrier was liable for the loss of part of them. The disposable pallets were held to be simply a device for trucking and handling convenience. The judgment placed some emphasis on the fact that the pallets were disposable and never intended for re-use. Each carton was separately strapped and numbered. Thus, it seemed to be clear to the Court that the individual visible cartons were self-contained shipping units irrespective of the pallets. Moreover, they were functional shipping units, as manifestly intended by the consistent conduct of the parties.

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[56] *Ibid.*, 142.

[57] *Supra*, note 18.

2. International Factory Sales v. The Ship Alexandr Serafimovich[58]

The bill of lading described the shipment as consisting of "3 Pallets (... 150 cartons)"[59] of sewing machine heads. Smith J. remarked that the pallets were not used for transportation when Canada enacted the *Carriage of Goods by Water Act*.[60] Furthermore, he felt that the subsequent monetary depreciation would make the $500 per-package limitation unfair today. The learned Judge stated that the palletizing of 50 cartons was simply a matter of shipping convenience which might have reduced the risks of damage and the cost of freight, and which allowed more rapid loading and unloading operations to the benefit of both cargo owner and carrier. On the question of whether a pallet was a package within the meaning of the Hague Rules, Mr Justice Smith said that it depended, in particular, "upon the intention of the parties as indicated by what is stated in the shipping documents, things said by the parties and the course of dealing between them".[61] On the facts, the numbering of the cartons and their visibility from outside the pallet permitted the Court to infer that the intention of the parties was to ship 150 sewing machine heads, each packed in a separate protective carton, rather than three wooden pallets, each containing 50 sewing machine heads stacked and strapped to a pallet.

IV. Third party rights

Stevedores and independent contractors were long considered complete strangers to the contract of carriage. It was said that they were bound contractually only to the carrier (or shipowner) and that there was no possibility for the carrier to extend the contractual benefits stipulated (for example, in a bill of lading) to these third parties.[62] In 1954, the case of *Adler* v. *Dickson* expressed a new doctrine:

> [I]n the carriage of passengers as well as of goods, the law permits a carrier to stipulate for exemption from liability not only for himself but also for those whom he engages to carry out the contract: and

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[58] *Ibid.*

[59] *Ibid.*, 1468.

[60] R.S.C. 1970, c.C-15.

[61] *Supra*, note 18, 1468.

[62] *A.M. Satterthwaite & Co.* v. *New Zealand Shipping Co.* (*The Eurymedon*) [1971] 2 Lloyd's Rep. 399 (N.Z.S.C.); *Scruttons, Ltd* v. *Midland Silicones, Ltd* [1962] A.C. 446, [1962] 2 W.L.R. 186, [1962] 1 All E.R. 1 (H.L.); *Wilson* v. *Darling Island Stevedoring and Lighterage Co.* [1956] 1 Lloyd's Rep. 346 (Austl. H.C.). But see *New Zealand Shipping Co.* v. *A.M. Satterthwaite & Co.* [1975] A.C. 154 (P.C.).

> this can be done by necessary implication as well as by express words. When such a stipulation is made, it is effective to protect those who render services under the contract, although they were not parties to it.[63]

The American view for a long time had been that if the damage was caused by the stevedores' negligence, the limitation-of-liability provisions in the bill of lading would not apply to the stevedores.[64] In *Herd & Co.* v. *Krawill Machinery Corp.* the United States Supreme Court held that:

> Under the common law as declared by this Court, petitioner [that is, the stevedore company] was liable for all damages caused by its negligence unless exonerated therefrom, in whole or in part, by a constitutional rule of law. No statute has limited its liability, and it was not a party to nor a beneficiary of the contract of carriage between the shipper and the carrier, and hence its liability was not limited by the contract. It follows that petitioner's common-law liability for damages caused by its negligence was in no way limited.[65]

This view has been explained and qualified in *Carle & Montanari, Inc.* v. *American Export Isbrandtsen Lines, Inc.*[66] where Bonsal J. said that the parties to a bill of lading may extend the contractual benefit to stevedores and other third parties, provided they use clear words to express their intention. The contract purporting to grant the immunity from liability must be strictly construed and must be limited to the unambiguously intended beneficiaries in order to insure that no broader effect than contemplated by the parties is given to the clause limiting liability.[67]

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[63] [1955] 1 Q.B. 158, [1954] 3 W.L.R. 696, [1954] 3 All E.R. 397, [1954] 2 Lloyd's Rep. 267, 272 *per* Lord Denning.

[64] *Krawill Machinery Corp.* v. *Herd & Co.* [1956] A.M.C. 2217, 145 F.Supp. 554 (D. Md 1956); aff'd [1958] A.M.C. 1265, 256 F.2d 946 (4 Cir. 1958). *Contra, Collins & Co.* v. *Panama R. Co.* 197 F.2d 893 (5 Cir. 1952). See also *Brady* v. *Roosevelt Steamship Co.* 317 U.S. 575 (1943), [1943] A.M.C. 1.

[65] *Supra,* note 16, 888 *per* Whittaker J.

[66] [1967] A.M.C. 1637, 275 F.Supp. 76, [1968] 1 Lloyd's Rep. 260, 262; aff'd [1967] A.M.C. 2529, 386 F.2d 839 (2 Cir. 1967); cert.denied 390 U.S. 1013 (1968).

[67] *Mitsubishi International Corp.* v. *S.S. Eurymedon* [1977] A.M.C. 2370, 2377; *Toyomenka Inc.* v. *S.S. Tosaharu Maru* [1975] A.M.C. 1820, 1823-24, 523 F.2d 518 (2 Cir. 1975); *Rupp* v. *International Terminal Operating Co.* [1973] A.M.C. 1093, 479 F.2d 674, 676-77 (2 Cir. 1973); *Bernard Screen Printing Corp.* v. *Meyer Line* [1972] A.M.C. 1919, 1922, 464 F.2d 934 (2 Cir. 1972); *Cabot Corp.* v. *S.S. Mormacscan* [1971] A.M.C. 1130, 441 F.2d 476, [1971] 2 Lloyd's Rep. 351, 353 (2 Cir. 1970); *Secrest Machine Corp.* v. *S.S. Tiber* [1971] A.M.C. 2332, 324 F.Supp. 671, [1972] 1 Lloyd's Rep. 352 (S.D.Ga 1971); *Cosa Export Co.* v. *Transamerican Freight Lines, Inc.* [1968] A.M.C. 1351, 1355; *Virgin Island Corp.* v. *Merwin Lighterage Co.* [1959] A.M.C. 2133, 2135, 177 F.Supp. 810 (D.VI, 1959); *Herd & Co.* v. *Krawill Machinery Corp. supra,* note 16, 885; *Boston Metals Co.* v. *S.S. Winding Gulf* 349 U.S. 122, 123-24, [1955] A.M.C. 927.

The doctrine of privity was still applied by the Supreme Court of Canada in *Canadian General Electric Co.* v. *The Lake Bosomtwe*[68] but the Quebec Court of Appeal in *Eisen und Metall AG* v. *Ceres Stevedoring Co.*[69] held that terminal operators, even if not privy to the contract, are in principle entitled to the benefit of exemption clauses in the bill of lading.[70]

V. Conclusion

The history of the relations between shipper and carrier has centered around a constant adjustment of two irreconcilable competing interests: the shipper asks for high security at the lowest freight rate, the carrier for exemption of liability if for any reason he becomes unable to fulfil his obligation to deliver the goods entrusted to him for carriage to their destination. As a matter of practical politics some limitation, not based on outdated notions of fault, must be placed upon the rights and duties of both. The task is to delineate the boundary beyond which the shipper must shoulder the loss himself and the carrier must assume liability. At this stage both will seek reparation and protection from another source: the insurer.

As pointed out by Lord Diplock,[71] the contest in cargo cases is actually between the cargo underwriters and the protection and indemnity underwriters. The task is how to allocate the loss between insurers. Shipper and carrier become the nominal parties through whom this process of distribution starts to flow.

The carrier's insurance cost, of course, will be incoporated into the freight rate. One of the functions of the per-package limitation is to permit a calculation of freight rates economically acceptable

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[68] [1971] S.C.R. 41, [1970] 2 Lloyd's Rep. 81, 84.

[69] [1977] 1 Lloyd's Rep. 665 *(The Cleveland)*, followed by *Miles International Corp.* v. *Federal Commerce & Navigation (The Federal Schelde)* [1978] 1 Lloyd's Rep. 285 and aff'd, in principle, in *Circle Sales & Import Ltd* v. *The Tarantel*, [1978] 1 F.C. 269. See the discussion of *The Cleveland* by Harrington, *Liability for pre-loading and after discharge losses in Quebec* (1977) 12 Eur. Transp. Law 483.

[70] But contracting out of liability resulting from gross negligence is illegal under Quebec law, see, *e.g.*, *The Cleveland, supra*, note 69, 672. See, for B.C., *The Suleyman Stalskiy* [1976] 2 Lloyd's Rep. 609 where the Court held that exemption clauses would not avail the stevedores since they were not privy to the contract.

[71] Lord Diplock, *Conventions and Morals — Limitation Clauses in International Maritime Conventions* (1970) 1 J.Mar.L. & Comm. 525, 530. See also Selvig, *supra*, note 4, 32, 202.

to both parties. Protection and indemnity is quite different in nature from cargo insurance. The latter spreads the cost among the cargo interests basing the risk upon *known* values, the former spreads the cost by passing it over the freight rate on an *estimate* maximum exposure.[72]

In container transport, the carriers have tried to limit their liability by applying the per-package amount to the whole container. This was, apparently, the only way to obtain a reliable estimate of maximum exposure. If the container is not a package, the carrier must approximate the value in order to insure. The rate-reducing factor becomes hypothetical: How much insurance should he take out, in these situations, for the *whole* container? Obviously, a system of full insurance cannot be the answer: the impact would render freight rates unaffordable (provided that coverage could be purchased, given the size of modern containerships).

What is needed is a compromise (other than the unworkable per-package limitation of liability) which respects the fundamental notion that equity should favour the innocent party in the residual non-insurance cases. A most dramatic illustration of this has been given in the *Kulmerland* case.[73] Fortunately, the recent American and Canadian cases have exhibited a greater respect for the spirit of the legislation. Indeed, the weighing of conflicting policy values could not go so far as to radically change the statutory provisions. To say that a container is a package within Article 4(5) of the Hague Rules is unacceptable.[74] It is interesting to note with what ingenuity carriers attempted to characterize the containers as packages in the clauses of bills of lading, clauses which are void by express provision of the statute (Section 3(8) of COGSA). Furthermore, the "functional economics test" is framed in language which is unmistakably arbitrary if read against the wording (and the spirit) of the 1924 Hague Rules. The convincing reason for the adoption of a per-package limitation of liability is that it was intended primarily to curb abuses by the carriers. The doctrine which equates a container with a package leads to the opposite result. It has been condemned by most writers and finds small favour with the courts. However, its complete elimination can only be accomplished by legislation.

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[72] De Orchis, *supra*, note 7, 277 *et seq.*

[73] *Supra*, note 9.

[74] A pallet may itself be a package if it is not made up of boxes, crates or other packages. See considerations on policy, *e.g.*, in *Gulf Italia Co.* v. *S.S. Exiria, supra*, note 17, 444.

The United Nations Convention on the Carriage of Goods by Sea, 1978[75] (the Hamburg Rules) adopted on March 30, 1978, has brought about important changes on the topic of the limitation of liability. Article 6(2)(a) states:

> Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading, if issued, or otherwise in any other document evidencing the contract of carriage by sea, as packed in such article of transport are deemed packages or shipping units. Except as aforesaid the goods in such article of transport are deemed one shipping unit.

Articles 7(1) and (2) provide:

> The defences and limits of liability provided for in this Convention apply in any action against the carrier in respect of loss or damages to the goods covered by the contract of carriage by sea, as well as of delay in delivery whether the action is founded in contract, in tort or otherwise.
>
> If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, is entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

The "container-package" issue, the alternative characterization in contract or tort of concurrent claims and the non-privity of stevedores, as well as the accompanying problems which have invited so much speculation and occasioned so much controversy, confusion and perplexity under the Hague Rules, will now be resolved by statutory force under the Hamburg Rules.[76]

Recent container cases[77] already provided the indication that courts were in the process of adopting a less ambiguous application of the law. Contractual terms clearly excluding or limiting liability had been given effect whether the claim was laid in contract or in tort.[78] *Carle & Montanari, Inc.*[79] and a series of following cases had shown that American courts were quite resourceful in their "assault upon the citadel" of privity.[80]

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[75] U.N.Doc.A/Conf. 89/13, Mar. 30, 1978, Annex I.

[76] Annex III.

[77] *Matsushita Electric Corp.* v. *Aegis Spirit, supra,* note 2; see also, *e.g.,* the discussion of this case in *Yeramex International* v. *S.S. Tendo, supra,* note 2.

[78] See Fridman, *The Interaction of Tort and Contract* (1977) 93 L.Q.R. 422 for further references.

[79] *Supra,* note 66.

[80] *Ultramares Corp.* v. *Touche* 255 N.Y. 170, 174 N.E. 441, 445 (Ct App. 1931) *per* Cardozo J. The skilful manipulation of the concepts of offer and acceptance and of consideration announced by the Privy Council in *New Zealand Shipping Co.* v. *A.M. Satterthwaite & Co., supra,* note 62, is logically unacceptable. Lord Denning's suggestion (*Scruttons, Ltd* v. *Midland Silicones, Ltd, supra,* note 62,

The Hamburg Rules provide a useful palliative. There are, however, still areas of uncertainty and incoherence. The divergent theories of liability — one based on the immediate contractual relationship of the parties, the other representing the closing of the gap based on the standard of negligence — may cause further problems. The hybrid per-package limitation of liability has little appeal and will certainly be litigated further. A more satisfactory and predictable solution could be to require the shipper to declare the value of cargo and to limit the carrier's liability to a statutory percentage of the declared value.[81] It would be simple to apply and, allowing for certain possible anomalies, theoretically satisfactory.

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488-89) to examine the issue in terms of assumption of risk (instead of contract) has not been followed, perhaps because it would have confused the distinction between contract and tort. See also Fridman, *supra*, note 78, 441.

[81] The idea of proportionality of compensation had already been advanced by the time the Hague Rules were discussed. See, *e.g.*, Selvig, *supra*, note 4, 29 and Fraikin, *Traité de la responsabilité du transporteur maritime* (1957), 283.

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