Journal Sharia and Law

Volume 2011
Number 45 *Year 25, Issue No. 45 January 2011*

Article 7

January 2011

What Constitutes a "Unit" or "Package" in Bills of Lading?)*(A Study of American, English, Kuwaiti and Emirati Decisions

A Hassan M
College of Law, UAE University, a.hassan@uaeu.ac.ae

What Constitutes a “Unit” or “Package” in Bills of Lading?)*(A Study of American, English, Kuwaiti and Emirati Decisions

Cover Page Footnote

Dr. Abdulla Hassan Mohamed Associate Professor of Maritime Law and Commercial – Chairman of Department of Private Law - Faculty of Law University of United Arab Emirates

Dr. Abdulla Hassan Mohamed (*)

WHAT CONSTITUTES 'PACKAGE' OR 'UNIT' LIMITATION?

A STUDY OF AMERICAN, ENGLISH, KUWAITI AND EMIRATI DECISIONS *

Abstract

In 1924 the Hague Rules were adopted. The purpose of the Rules was to establish a standardized set of definitions and rules to govern the terms and conditions used in ocean bills of lading. One of its unique provisions limits a carrier's liability for lost or damaged cargo on a “per package or unit” basis; however, Hague Rules failed to define the term“ package” and "unit" and so the Maritime legislations which adopted the Rules. To resolve their differences of opinion, shippers and carriers heavily litigated the issue of what is a 'package' and 'unit' for purposes of limiting a carrier's liability

(*) Associate Professor - Head of Department of Private Law - Faculty of Law - UAĖ University.

* accepted 11.2.2010.

1. INTRODUCTION

The introduction in the Hague Rules(1) of the per package and unit limitation was said to be the consequence of a compromise(2) between cargo owner who required an application of the general principles of full liability of carriers for any contractual breach, and carriers who by means of exculpatory clauses inserted in the bill of lading had excluded their liability. The Rules established on the one hand the invalidity of most of the exculpatory clauses(3) and on the other hand, they established that the liability of the carrier is limited to a fixed amount per package or unit (unless the nature and value of the goods had been declared before the shipment and inserted in the bill of lading).(4)

(1) International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, adopted in Brussels, August 25,1924, and entered into force June 2,1931.

(2) ***Leather's Best* v. *S.S. Mormaclynx*** 1970 AMC 1310,1323 (E.D.N.Y. 1970): "COGSA represented a compromise between the interests of carriers and shippers. It was intended to increase the liability of carriers, and set a standard below which they could not go." See also ***Effort Shipping Co. Ltd.* v. *Linden Management S.A. (The Giannis NK)***, [1998] 1 Lloyd's Rep. 337, at 339 (H.L. *per* Lord Steyn): "This much we know about the broad objective of the Hague Rules: it was intended to reign in the unbridled freedom of contract of owners to impose terms which were 'so unreasonable and unjust in their terms as to exempt from almost every conceivable risk and responsibility'; *it aimed to achieve this by a pragmatic compromise between interests of owners and shippers; ...* ." (Emphasis added). See also ***The Jordan II*** [2005] 1 Lloyd's Rep. 57 at 63 (H.L. *per* Lord Steyn): "It has often been explained that the Hague Rules and Hague-Visby Rules represented a *pragmatic compromise* between the interests of owners, shippers and consignees."

(3) Article 3, rule 8 of the Hague Rules provides that:
"Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connexion with, goods arising from negligence, fault, or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in this Convention, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability".

(4) The aim of the package limitation and the non-responsibility clause provision of article 3(8) was explained in ***Pannell* v. *S.S. American Flyer*** 1958 AMC 1428,1433 (S.D. N.Y. 1957): "The purpose of the Act's limitation section is to prevent 'excessive claims in respect of small packages

The cargo limitation of liability clause of the Hague Rules reads, in pertinent part, as follows:(5)

"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 per package or unit,(6) 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."

U.S. Carriage of Goods by Sea Act 1936 (hereinafter referred to as COGSA) section 1304(5)(7) speaks about limitation per package or in the case of

---

of great value,' but not to permit carriers to escape liability for just claims ...". See also Wilson, *Carriage of Goods by Sea*, 6th Ed. 2008 at p. 194, stating that the purpose of the limitation is to set a minimum standard to avoid the carrier from limiting his liability to ridiculous amounts while protecting the carrier from the risks associated with cargoes of undisclosed high value, thus enabling cheaper freight rates.

(5) Article 4, rule 5. See also article 4(5)(a) of the Hague/Visby Rules (adopted in Brussels, February 23, 1968, and in force as of June 23,1977):
"Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, 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 goods in an amount exceeding the equivalent of 666.67 units of account per package or unit or units of account per kilo of gross weight of the goods lost or damaged, whichever is the higher."
And article 6(1)(a) of the Hamburg Rules (adopted in Hamburg, March 31, 1978, and in force as of November 1, 1992):
"The liability of the carrier for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher".
And article 59(1) of the Rotterdam Rules (adopted in Rotterdam, 11 December, 2008, and not yet in force):
"Subject to articles 60 and 61, paragraph I, the carrier's liability for breaches of its obligations under this Convention is limited to 875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is the higher…"

(6) During the formulation of the Hague Rules, consideration was given to limiting carrier liability to "package", "cubic foot" or "weight", whichever resulted in the least liability. See Int'l Law Ass'n, Mar. Law Comm., Draft of a Suggested International Code, art. IV, § 4 (1921), reprinted in 1 The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules 104 (Michael Sturley ed. 1990)**.** Determination by weight caused controversy because cargo may be "very valuable, but very light" or vice versa. See International Law Association, Report of the Thirtieth Conference (1921) (statement of French attorney Leopold Dor), reprinted in 1 Legislative History, supra note 16, at 266. Seemingly unmindful of the controversy, the Hague Rules were ratified containing a package unit limitation.

(7) Section 1304(5*)* of U.S. COGSA provides that:
"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 and other currency, unless the nature and value of such goods have been declared by the shipper before shipment and asserted in the bill of lading**".**
In 1996, the Maritime Law Association of the United States ("MLA") completed a four year effort to draft a modernized COGSA. The draft was passed by an overwhelming majority of the MLA's

goods not shipped in package per customary freight unit.(8) The words 'freight unit' are also found in U.A.E. Maritime Code 1981, article 276(1).(9) Whereas U.K. Carriage of goods by Sea Act 1971(hereinafter referred to COGSA) and Kuwait Maritime Code 1980 adopted the per package or unit terminology.(10)

membership which represents interests from all the various maritime industry sectors. (see Minutes, Doc. No. 723 (Mar. L. Ass'n, New York, N.Y.), May 3, 1996, at 10887 (278 votes in favor, 33 votes against). With the passage of the draft, the MLA is resolved to urge Congress to enact the proposed revisions.

The proposed revisions to section 4(5) of COGSA, relating to limitation of liability for cargo loss or damage, eliminate all reference to "customary freight units." The revision reads, in pertinent part, as follows:

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

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

(b)(1)The limits mentioned in subsection 4(5)(a) shall not apply if the nature and value of the goods have been declared by the shipper before shipment and inserted in the contract of carriage. This declaration, if embodied in the contract of carriage, shall be prima facie evidence, but shall not be conclusive on a carrier.

If enacted, the MLA's proposed revisions would make COGSA section 4(5) essentially the same as the Hague Rules amended by the Visby and SDR Protocols, commonly known as the Hague-Visby Rules.

(8) "The language of the Hague Rules was incorporated almost without change into COGSA, but Congress made one revision with respect to the section dealing with a carrier's limitation of liability. Whereas the Hague Rules limit a carrier's liability "per package or unit," COGSA more explicitly provides that the $500 limit shall apply per package, or in the case of goods not shipped in packages, per customary freight unit. This change delineates more clearly than do the Hague Rules that the limitation on the carrier's liability depends on whether the goods are shipped in a "package," as distinguished from "goods not shipped in packages", see ***Hartford Fire Ins. Co.*** **v.** ***Pacific Far East Line, Inc.*** 491 F.2d 960,963 (9th Cir 1974).

One of the main reasons for changing the wording of COGSA from the Hague Rules was to coordinate it with other American legislation (see The U.S. Department of State memorandum of June 5, 1937, stated: "The foregoing differences from the Convention, made in the Carriage of Goods by Sea Act, are intended primarily ... to coordinate the Carriage of Goods by Sea Act with other legislation of the United States.").

(9) Article 276 (1) of U.A.E. Maritime Code provides that:

""(Free translation) The liability of the carrier for loss or damage suffered by the goods shall be limited, in all cases, to a sum not exceeding AED10,000 per package or unit taken as a basis in computing the freight, or a sum not exceeding AED30 per kilogram of gross weight of the goods, whichever of the limit is the higher".

(10) Article 4 (5) (a) of U.K. COGSA provides that:

"Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither he carrier not the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in amount exceeding 666.67 units of account per package or unit or 2 units of account per kilogramme weight of the goods lost or damaged, whichever is the higher".

Article 193(2) of Kuwait Maritime Code provides in part that:

"(Free translation) The Carrier shall not in all cases be liable for any loss or damage to the goods or

However, neither the Hague Rules(11) nor the COGSAS or the Maritime Codes contain a definition of the words 'package', 'unit' or 'freight unit'. As a result, the courts have been left to grapple with the problem of fashioning an intelligible, understandable and rationally acceptable definition of these words. This judicial task has been further complicated by the container revolution which has taken place in the shipping industry.(12) By virtue of this occurrence, over-increasing demands have been made upon the courts to resolve the question of whether a container is a package or a unit within the meaning of article 4, rule 5.

---

the delay in the delivery thereof in an amount exceeding two hundred and fifty (250) Dinars per package or unit, or seven hundred and fifty (750) Fils per kilo of gross weight of the goods, whichever of the two limits is the higher….".

(11) Nor the Hague/Visby Rules, the Hamburg Rules or the Rotterdam Rules define the words 'package', 'unit' or 'freight unit'. Diamond in his work on the Hague/Visby Rules suggests that 'package' refers to goods which have undergone a sufficient degree of packing (i.e. a crate of goods or a container stuffed with goods), and that 'unit' is to be construed as referring to an individual article or piece of goods which is not a 'package'; see A. Diamond, *"The Hague-Visby Rules"* (1978) 2 LMCLQ p. 225 at pp.240-241. The same view expressed by Tetley in his work on *"Maritime Cargo Claims"* (2nd ed. 1978), at 444.
The majority of the Federal Court of Australia has concluded that "units" in article 4(5)(c) of the Hague/Visby Rules "... means shipping units, which can include unboxed and unpackaged articles if packed in the container as such, and if that is made clear in the bill ....", (see ***El Greco (Australia) Pty. Ltd.* v. *Mediterranean Shipping Co.*** [2004] 2 Lloyd's Rep. 537 at 586-587, 2004 AMC 2886 at 2977-2978 (Fed. C. Aust., Full Court). Referring to article 4(5)(a) and (c) of the Hague/Visby Rules, Allsop J. of the Federal Court of Australia, in ***El Greco***,id., held (Lloyd's Rep. at p. 586, AMC at p. 2978): The addition of the words 'or unit' can be seen to have been intended to clarify the rule [art. 4(5) of the Hague Rules] by making unnecessary any debate on individual cases about the extent and nature of wrapping and the like, *so that individual articles capable of being carried without packaging - boilers, cars and the like - would be covered. This approach involves a rejection of the notion that 'or unit' was inserted to cover bulk cargo by reference to freight unit, as in US COGSA.* The weight of judicial and other views that I have earlier referred to makes this a safe conclusion." (Emphasis added).
The Hamburg Rules and the Rotterdam Rules make it clear that the "unit" is a "shipping unit", i.e. a physical entity such as a car, and not the more abstract "freight unit".

(12) A clear explanation of the impact of containerization on the U.S. COGSA package limitation is to be found in ***Groupe Chegaray / V De Chalus v. P. & O. Containers*** 2001 AMC 1858 (11 Cir. 2001)at 1861-62 where the Court of Appeals for the Eleventh Circuit ponted out out:
"In addition to the lack of statutory guidance, unforeseeable technological strides in the shipping industry since 1936 have contributed to the frustration of many courts attempting to define a COGSA package. Traditionally, shipments were made by "breakbulk," whereby goods were packaged into parcels which could be hand-loaded into a vessel's cargo-hold. The advent of the container in the 1960s revolutionized the shipping industry by enabling the shipment of massive metal boxes filled with goods that were often concealed and/or not divided into breakbulk size. Modern containers are able to hold hundreds of "packages" as the term was probably understood in 1936. The very concept of a cargo-hold was transformed when vessels were retrofitted to hold containers, which functionally became part of the ship itself. Thus, if ever the meaning of a "package" was self-evident, the container turned it into a puzzle".

The term of 'package', to some extent, can be regarded as unambiguous;[13] it indicates something packed. However, to determine whether the cargo involved is a package may not be easy.[14] Certain cases are clear, conventional package, bale, barrel, carton, etc., pose no problem. On the other hand, goods shipped unpackaged, unboxed and uncrated also pose no problem. But, when a relatively large self-contained object or cargo partially covered is being shipped the problem of construction becomes more difficult. In ***Studebaker Distributors*** *Ltd. v. Charlton Steam Shipping Co. Ltd.*,[15] an unenclosed automobile was held not to be a 'package'. Similarly, in *Gulf Italia Co.* v. *S.S. Exiria*,[16] a tractor, the superstructure of which was partially boxed and covered with waterproofing paper but the base of which was left exposed, was not considered a package. Conversely, in *Companhia Hidro Electrica* v. *S.S. Honduras*,[17]unwrapped gas circuit breakers which were fully visible except for wooden crating the instrument panel were held to be packages. Further, containerisation and palletisation changed the simple concept of 'package'. Industry began to ship goods, either banded together on pallets or packed in trailer-like containers to be loaded, stowed and unloaded as a 'unit'. Often the goods being banded or packed were themselves 'packages' in the traditional sense of the word.

The evolution of shipping technology led to conflicting claims as to what constituted a package for the purpose of limiting total carrier's liability. The decisions reached and tests applied are far from harmonious in approach and result.[18]

The term 'unit' has been called "flagrantly ambiguous."[19] It might refer to the physical shipping unit (i.e. unit of cargo - for example, an unboxed car or item of machinery, sack, etc.). Or it may mean the freight unit (i.e. the unit on the basis of which the freight is calculated). The freight unit is usually based on the weight or volume of the cargo (for instance - tons, cubic feet, hundredweights, etc.).

(13) Selving, "Unite Limitation of Carriers' Liability" (London 1961), at p.42.
(14) Robert Force, Admiralty and Maritime Law 2004, at p.75.
(15) (1938) 1 K.B. 459.
(16) 263 F.2d 135.
(17) 368 F. Supp. 289.
(18) "Where, however, the meaning and application of the rules is unclear, as it is in the present case due to the development of new modes of international transport, the English Courts confronted with competing constructions neither of which is inconsistent with the wording of the conventions, should, in the interests of the harmonization of international jurisprudence on the subject, regard as a paramount consideration the fact that the Courts of other jurisdictions ... have given the Convention one particular meaning and rejected the other." *The River Gurara* [1996] 2 Lloyd's Rep. 53 at 62.
(19) Selving, above note 13, at p.42.

The distinction between 'package' and 'unit' is of little difference if 'unit' is read to mean shipping unit. What may conceivably be called a package equally constitutes a shipping unit and the total amount of liability will be computed on the same basis in either case. If, however, 'unit' is interpreted to mean freight unit, then the maximum liability will be greater than that based upon shipping unit,(20) and here the distinction between 'unit' and 'package' is of great importance.

This article will review the American, English, Kuwaiti and Emirati decisions that established the present definition of 'package' and 'unit'. It will analyse the key elements that define existence of package and unit and rules that have been developed by the courts to help shippers and carriers determine the extent of their liability

2. THE MEANING OF PACKAGE

1.2. AMERICAN DECISIONS

The determination of the term 'package' is of considerable importance under American law. In a particular case the amount to which the liability of the carrier is limited may, to a large extent, vary according to whether the amount is computed on the basis of a certain number of packages or freight units.(21) However, COGSA does not define 'package'(22) and the decisions under section 1304(5) have offered no consistently reliable guide to the meaning of the term 'package.' Some courts, for example, have declared that the COGSA supplies no specialized or technical meaning, and thus the term must be construed according to its plain, ordinary meaning.((23))Other courts, however, have noted that 'package' has become a term of art in the shipping industry and

(20) Van Wageningen, "Interpreting COGSA: The meaning of 'package'" Univ. of Miami L.R. Vol. 30 (1975), p.169 at p.171.

(21) Van Wageningen, above, note 20, at p.117.

(22) "Although the difference in limitation of liability clearly turns on whether the goods are in a "package," Congress did not define this term, and left no interpretive clues in either the statute itself or in any of the legislative hearings", see ***Hartford Fire Ins. Co.*** **v.** ***Pacific Far East Line, Inc.,*** 491 F.2d 960, at 962 (9th Cir 1974); ***Monica Textile Corp.*** **v.** ***S.S. Tana*** 1992 AMC 609 at 612 (2 Cir. 1991). In U.S., a petition was even made to the Federal Maritime Commission (FMC) for a definition of package but the request was refused: Definition of COGS A package 1986 AMC 403 (FMC 1985).

(23) See, e.g., ***Travelers Indem. Co. v. Vessel Sam Houston***, 26 F.3d 895, 900, 1994 AMC 2162, 2168 (9th Cir. [Cal.] 1994); ***Van Der Salm Bulb Farms, Inc. v. Hapag Lloyd, AG***, 818 F.2d 699, 701(9th Cir. [Ore.] 1987) (per curiam); ***Hartford Fire Ins. Co. v. Pacific Far E. Line***, 491 F.2d 960, 963 (9th Cir. [Cal.] 1974); ***Tokio Marine & Fire Ins. Co. v. Nippon Express U.S.A. (Illinois), Inc.***, 155 F. Supp.2d 1167, 1172, 2001 AMC 1239, 1243-44 (C.D. Cal. 2000), aff'd, 45 Fed. Appx. 710 (9th Cir. 2002) ; ***Omark Indus. v. Associated Container Transp. (Australia), Ltd.,*** 420 F. Supp. 139, 141, 1977 AMC 230, 232 (D. Ore. 1976).

should be interpreted accordingly.(24) The difference between the courts stem from conflicting views as to the legislative intent of COGSA. In this context, Wageningen said:(25)

"A determination that COGSA was intended to benefit cargo interests has persuaded some courts to apply a restrictive construction of the word 'package' since the 'customary freight unit' method of computing liability usually favours cargo interests. Conversely, a view of COGSA as intending to benefit carriers has encouraged a more expansive interpretation of the word 'package' since the 'customary freight unit' method of computing liability usually works to the benefit of cargo interests."

It is undisputed that, regardless of size, shape, or weight, cargo fully boxed or crated is a "package" within the meaning of COGSA.(26) Conversely, where goods are shipped without any packaging preparation, such items are not "packages" within the meaning of COGSA.(27) The most difficult determination

(24) See, e.g., ***Monica Textile Corp. v. S.S. Tana***, 1992 AMC 609, 616 (2d Cir. [N.Y.] 1991); ***Seguros "Illimani" S.A. v. M/V Popi P***, 929 F.2d 89, 94 (2d Cir. [N.Y.] 1991); ***Aluminios Pozuelo Ltd. v. S.S. Navigator,*** 407 F.2d 152, 156 (2d Cir. [N.Y.] 1968); ***Rainly Equipos de Riego, S.R.L. v. Pentagon Freight Servs., Inc.,*** 979 F. Supp. 1079, 1084 (S.D. Tex. 1997); ***Bando Silk Co. v. Hyundai Commander,*** 1995 AMC 516, 520 (S.D.N.Y. 1994) ; ***Companhia Hidro Electrica v. S/S "Loide Honduras,"*** 368 F. Supp. 289, 291(S.D.N.Y. 1974).

(25) Van Wageningen, above, note 20, at p.173.

(26) See, e.g., ***Hartford Fire Ins. Co. v. Pacific Far E. Line***, 491 F.2d 960, 964 & n.6, (9th Cir. [Cal.] 1974); ***Aluminios Pozuelo Ltd. v. S.S. Navigator***, 407 F.2d 152, 155, 1968 AMC 2532, 2535 (2d Cir. [N.Y.] 1968); ***Nippon Fire & Marine Ins. Co. v. M.V. Tourcoing,*** 979 F. Supp. 206, 208, 1998 AMC 89, 90 (S.D.N.Y. 1997); .Y.] 1999) (per curiam); ***Jagenberg, Inc. v. Georgia Ports Auth.,*** 882 F. Supp. 1065, 1069, 1995 AMC 2333, 2336 (S.D. Ga. 1995) ; ***Pyropower Corp. v. M/V Alps Maru***, 1993 AMC 1562, 1572 (E.D. Pa. 1993). In ***Robert C. Herd & Co. v. Krawill Machinery Corp.*** 1959 AMC 879 (1959), the Supreme Court recognized that a fully crated 19 tons press was a package. Similarly, in ***Mitsubishi Int'l Corp. v. S.S. Palmetto State***, 1963 AMC 958 (2d Cir. (N.Y.), the Second Circuit held that a 32 tons steel roll fully boxed in 480-cubic-foot wooden case constituted a single package. The shipper argued that the limitation of liability provision of COGSA was intended to prevent excessive claims in respect to small packages of great value, but not to permit carriers to escape liability for just claims, and that where the carrier is in fact aware of the greater value of an article fully packaged, the Act would be perverted to limit liability to $500. Such a position, the court said, is inconsistent with a policy obviously incorporated into the limitation of liability provision as applied to goods not shipped in packages.
From the discussion that took place during the drafting of Hague Rules, it is clear that the average package was considered to be 20 cubic feet, representing 10 cwt in weight. The original intention of the drafters was to limit the carrier's liability to objects of a certain size, but after some discussion it was felt that objects of greater value could be found in smaller-sized packages. There was also a concern that carriers would use the wording as it was to limit their liability to ridiculously low amounts for packages that were not the size of the standard package. See ILA, *Report of the Thirtieth Conference,* reproduced in Sturley, *Legislative History*, 1990, vol. 1, 89 at pp. 267,291.

(27) ***Henley Drilling Co. v. McGee,*** 36 F.3d 143, 148, 1995 AMC 173, 181, 1995 AMC 1047, 1055 (1st Cir. [P.R.] 1994); ***Hartford Fire Ins. Co. v. Pacific Far E. Line***, 491 F.2d 960, 964 & n.7 (9th Cir. 1974); ***Aluminios Pozuelo Ltd. v. S.S. Navigator***, 407 F.2d 152, 155, 1968 AMC 2532, 2534-35 (2d Cir. [N.Y.] 1968); ***Orient Overseas Container Line, (UK) Ltd. v. Sea-Land Serv., Inc.***, 122

which the courts have had to make with respect to the question of what constitutes a "package" within the meaning of COGSA has been the status of goods which have been partially packaged.[28]The decisions in this situation are inconsistent. The cases which have dealt with this issue generally fall within three groups.[29] The cases arising from the shores of the Ninth Circuit present a narrower view (i.e. cargo is a 'package' within the meaning of the status only where the mode of packaging conceals the identity of the goods being shipped).[30] Opposed to the Ninth Circuit standard are those cases whose home port is the Second Circuit which present the broad view (i.e. 'package' means a

F. Supp.2d 481, 486-489, 2001 AMC 1005, 1012-16 (S.D.N.Y. 2000) (holding that 1,768 automobile engines, which were not covered by any wrapping and were not boxed or crated, do not qualify as COGSA packages); ***G.E. Power Sys., Inc. v. Industrial Maritime Carriers (Bahamas), Inc.***, 89 F. Supp.2d 782 (E.D. La. 2000) (holding that a gas turbine that was not enclosed in a container, crate, or box, and that was only partially covered with two poly cloth tarpaulins (which did not conceal the nature of the cargo being shipped), did not qualify as a COGSA package); ***Caterpillar Americas Co. v S.S. Sea Roads*** (1964, DC Fla) 231 F Supp 647, affd (CA5 Fla) 364 F2d 829, (holding that a tractor shipped in a "loose" condition (not boxed, crated, or put on skids) was not a "package"). ***Tamini v Salen Dry Cargo AB*** (1989, CA5 Tex) 866 F2d 741(holding drilling rig was not "package" within meaning of Carriage of Goods by Sea Act since it was not enclosed in container, it was for most part fully exposed, no appurtenances or packaging were attached to facilitate its handling during transportation, and since transportation charges had been calculated on weight, not per package, basis). ***Pt. Keraton Selaras v. M/V Cartagena de Indias***, 959 F. Supp. 270, 274-75, 1997 AMC 2218, 2223-25 (E.D. Pa. 1997) (holding that the rolling crane house portion of a mobile truck crane would not constitute a "package" if it was in no way prepared for shipment).

(28) Robert Force, above note 14, at p.75. The relevant time for determining whether there has been sufficient preparation for an item to constitute a "package" is the time of shipment, not the time when the damage occurs. Thus, in ***Caterpillar, Inc. v. S.S. Enterprise***, 725 F. Supp. 1255, 1990 AMC 991 (S.D. Ga. 1989), a track loader was attached to a metal platform in order to facilitate transportation and was therefore a "package" when the shipper delivered it to the carrier. It did not cease to be one simply because the platform fell off during discharge.

(29) See ***Crispin Co. v M/V Morning Park*** (1984, SD Tex) 578 F Supp 359, 360 where the court stated that:
"COGSA provides no definition of the term "package," and the legislative history is unhelpful. Decisions on this issue fall into two general groups. Those courts following the Second Circuit's approach adopt an expansive definition of the term "package" as "a class of cargo, irrespective of size, shape or weight, to which some packaging preparation for transportation has been made which facilitates handling, but which does not necessarily conceal or completely enclose the goods." Other courts have adopted the Ninth Circuit's narrower view that a cargo is a "package" under COGSA only when the preparation of the goods for shipment conceals their identity.."
In ***Royal Ins Co. of America v. Orient Overseas Container Line Ltd.,*** 408 F. Supp. 2d 415,423 (E.D. Mich. 2005) the court said:
"In order to determine what constitutes a "package" under COGSA, courts consider the following four factors: (1) the parties' contractual agreement in the bill lading; (2) whether the COGSA package is the result of some amount of preparation for purpose of transportation, which also facilitates handling; (3) a container can be considered a COGSA package only in light of a clear agreement to that effect between the parties; and (4) when goods are placed in containers without being described as separately packaged, they are classified as "goods not shipped in packages" for COGSA purposes, absent agreement otherwise."

(30) ***Hartford Fire Ins. Co. v. Pacific Far East Line, Inc.*** 491 F.2d 960 (9th Cir 1974)

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).[31] The third group of cases are those which look at the parties' intention as a first factor to be considered in determining what the package is.

1.1.2. *The Plain Meaning Test*

In their efforts to protect the shipper, some courts have applied a restrictive construction of the term 'package'. They said that since no specialised or technical meaning was ascribed to the word "package" in COGSA, the courts assumed that Congress had none in mind and intended that the word be given its plain, ordinary meaning. In an early decision of ***Gulf Italia Co. v. American Export Lines, Inc.***,[32] a judge within the Southern District of New York[33] held that a tractor which had been "prepared for shipment by putting waterproof paper about some of the more vital parts...[and partially covering its] superstructure with wooden planking"[34] was not a package within the meaning of COGSA. The judge rejected the carrier's contention that the tractor should be treated as a package because it was prepared for shipment and that any preparation of goods for ocean transportation converts the goods into a package.[35] He concluded that:

"a shipper who attempts to minimize possible harm to his property by putting protective covering on sensitive [machinery] parts [should not] be in a worse position than a shipper who cavalierly makes no effort to reduce the possibility of loss not only to himself but to the carrier…the item damaged should not be considered a 'package' under any ordinary construction of the term. A big tractor, weighing 43,319 pounds, is not within the purview of the layman's view of a 'package'."[36]

On appeal, the majority of the Second Circuit Court of Appeal[37] affirmed, concluding that the method of preparing cargo for shipment does not "[convert] the goods into a package."[38] The court stated that a contrary holding would place a shipper who attempts to protect his cargo in a far "worse position than a shipper who makes no effort to reduce the possibility of loss from inclement

(31) ***Aluminios Pozuelo Ltd.*** **v.** ***S.S. Navigator*** 407 F.2d 152 at p. 155; ***Nichimen Co. v. M. v. Farland (***1972, CA2 NY) 462 F2d 319. ***General Motors Corp. v. S.S. Mormacoak*** (1971, DC NY) 327 F Supp 666, affd (CA2 NY) 451 F2d 24.
(32) 263 F2d 135 (1959, CA2 NY).
(33) 160 F. Supp. 956.
(34) Id., at 958.
(35) Id.
(36) Id., at 959.
(37) 263 F2d 135 (1959, CA2 NY).
(38) Id., at 136.

weather or pilfering."[39] The court remarked, "Any test dependent upon extent of external covering would lead to uncertainty and increase litigation."[40]

But the dissenting member of the court (Judge Moore) refused to construe the word 'package' in accordance with the layman's view.[41] Emphasising that the tractor appeared carefully packaged and that it was described as a package in the bill of lading, he concluded that the tractor was either a package or a freight unit within the meaning of COGSA:

"A large tractor, weighing 43,319 pounds, is not within the purview of the layman's view of a 'package'. However, a layman's definition of a package should not be determinative here. The fact that the shipping industry does not so regard a package is well illustrated by appellee's concession on argument that a large automobile completely enclosed in a packing case would be a 'package'. A casual inspection of the average pier shows hundreds of 'packages' of great size and weight which would be in the same category. Obviously weight, size or value should not control. Had a few additional pieces of lumber been placed around the tractor treads a package would concededly have resulted, but this would have been a needless act because the treads themselves did not require protection. It would indeed be an anomalous situation if a shipper who had completely enclosed a tractor were limited to damages of $500 whereas another shipper could recover on a weight or size basis merely because he had allowed some indestructible part to protrude from the package."[42]

The same judge (Judge Moore), giving the opinion of the majority of the same court, the Court of Appeals for the Second Circuit, in ***Mitsubishi International Corp.* v. *S.S. Palmetto State***,[43]held that the $500 limitation was applicable to three rolls of steel each weighing 32.5 tons fully enclosed, noted that:

"the field of admiralty law is not an area in which the layman should venture to tread."[44]

He indicated that:

"any article completely enclosed in a wooden box prepared for shipment is a 'package' within COGSA regardless of the size or weight of the package...."[45]

(39) Id., at 137.
(40) Id.
(41) Id.
(42) Id., at 137-38
(43) 311 F.2d 382.
(44) Id., at 383.
(45) Id., at 384.

While the Second Circuit began to undercut and discredit the layman's definition of 'package',(46)we find that the Ninth Circuit, in contrast, advocating the layman's view and applying it in ***Hartford Fire Ins. Co. v. Pacific Far East Line, Inc***.(47)Here, the sole question presented for review was whether or not a large equipped electrical transformer, attached by bolts to a wooden skid, but not otherwise boxed or crated, constituted a 'package' within the meaning of section 1304(5) of COGSA. (48)The carriers contended that since no value for the cargo was expressed in the bill of lading, cargo owners should be limited to the $500 package limitation. The Ninth Circuit disagreed. Citing *Stirnimann v. The San Diego*(49) the Ninth Circuit noted:

"It was not the purpose of the Act...to relieve the carrier of its normal responsibility for damage to cargo or to unduly limit its liability for just claims when goods have not been shipped in packages."(50)

The court assumed that, since no specialized or technical meaning was ascribed to the word "package" in COGSA, Congress had none in mind and intended that the word be given its plain, ordinary meaning.(51) The court also said that advancements in the shipping industry do not justify an overextension of the statutory term "package".(52) The court stated that Congress surely was aware of technological advances such as pallets and forklifts, which, by the time of the statute's enactment, were being utilized by the industry.(53)Yet, the court rejected the subjective purpose of the shipping configuration as a criterion, but indicated instead that cargo is shipped in a 'package' when 'the mode of packaging conceals the identity of the goods being shipped."(54) The court held that the electrical transformer was not shipped in [a] package.

The Ninth Circuit applied the plain meaning test once again in ***Omark Industries Inc. v. Associated Container Transp. (Australia), Ltd***.,(55) where Judge Beeks explained that

"Congress, from all that can be gathered from the statue and its legislative history, never intended the word 'package' to be treated as a sophisticated or esoteric term of art. Giving due recognition to this fact, the analytical framework within which the instant case must be decided becomes clear and

(46) See also **Aluminios Pozuelo Ltd. v. S.S. Navigator**, 407 F.2d 152; **Standard Electric, S.A. v. Hamburg S.** 375 F.2d 943.
(47) 491 F.2d 960 (9th Cir 1974).
(48) Id., at 961.
(49) 148 F2d 141 (1945, CA 2 NY).
(50) 491 F.2d 960, at 963.
(51) Id.
(52) Id.
(53) Id., at 964.
(54) Id., at 965.
(55) 420 F. Supp. 139 (D. Or. 1976).

uncomplicated. The Court's task, simply stated, is to determine whether the palletised unit or the cartons contained therein best comports with the 'plain ordinary meaning' of the word 'package'."(56)

Nevertheless, the *Omark* court held that a palletised unit rather than its component cartons was a 'package'. The court relied on the following factors:(57)

(1) The shipper prepared the palletised units, and

(2) Each unit was enclosed by heavy double-wall corrugated cardboard concealing the cartons within.

The court applied to the case before it the general principle that a COGSA package is the largest individual unit of packaged cargo made up by the shipper and entrusted to the carrier.(58) It treated the outer packaging material as an integral part of the shipment; if the shipper opts for such large packages to achieve greater protection, the court reasoned, it must settle for less protection under COGSA.(59)

In the Ninth Circuit, then, the 'customary freight unit' is a far more prevalent method of computing the carrier's limitation of liability than is the 'package' basis. So restrictive is the Ninth Circuit in its use of the 'package' concept that it may be expected to require that a 'package' not easily lend itself to inspection of its contents notwithstanding its size.(60)

In a further case, ***American & Far Eastern Trading Co. v. Sea-Land Serv., Inc.***,(61)the Ninth Circuit expanded the definition of the plain meaning test. The primary determining factor was the presence or absence of the carrier's practical ability to visually ascertain the character, condition or quantity of goods. In the case in question, cartons constituting a pallet load were put in a shrink pack polythene bag which substituted for steel strapping. Both shipper and carrier benefited. Further, the carrier had notice of the character and composition of each pallet load:

"The carrier had notice of the character and composition of each pallet load, first, because the polyethylene covering was transparent, and, second, because the shipping documents, although ambiguous, disclosed that each pallet

(56) Id., at 142.
(57) Id. In Omark 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-walled corrugated cardboard.
(58) Id., at 143.
(59) Id.
(60) Van Wageningen, above, note 20, at p.178.
(61) 493 F Supp 125 (1980, ND Cal).

contained 300 cases. The decision to use the Shrink Pack was the shipper's, but the parties have stipulated that it benefitted the carrier and consignee as well".(62)

Relying upon the plain meaning test of *Hartford Fire Ins. Co. v. Pacific Far East Line Inc*,(63) the Ninth Circuit held that each carton making up the palletised load was a COGSA package.

2.1.2. *The Facilitation for Transportation Test*

According to this test, a distinction should be made between a preparation of cargo which facilitates transport by allowing for easier lifting, loading, storing and which constitutes a package and a preparation which is solely for protection of the cargo, which does not. This test was firstly advanced by Judge Moore in ***Aluminios***(64) case where he defined a COGSA package as:

"a class of cargo, irrespective of size, shape or weight, to which some packaging preparation for transportation has been made which does not necessarily conceal or completely enclose the goods."(65)

It is advocated that the facilitation for transport test has the advantage of predictability because the shipper knows that, if the item of goods is prepared in a way that facilitates handling, the item will be considered a 'package' for limitation purposes. If the item is worth more than $500, the shipper could protect itself either by declaring the higher value and paying the increased tariff or by insuring for the higher value. However, as the following discussion indicates, the test is a vague one which allows courts to arrive at divergent results upon the slightest factual nuances.(66)

In *Aluminios*(67)a skidded toggle press(68) was damaged during the voyage. The press weighed over 3 tons and was 11 feet in height, 55 by 46 inches at its base, and 98 by 67 inches at its top. It was bolted to a skid consisting of two parallel pieces of lumber 130 inches in length with three cross pieces 96 inches in length. The bill of lading described the press under the headings "No. of Pkgs" and "Shipper's Description of Packages and Goods" as "One (1) Skid Machinery—2812 (gross weight in kilos)—6200 (gross weight in pounds)." The

(62) 493 F Supp 125 (1980, ND Cal) at 128.
(63) 491 F.2d 960 (9th Cir 1974).
(64) ***Aluminios Pozuelo Ltd. v. S.S. Navigator*** 407 F.2d 152 (2d Cir. 1968).
(65) *Id*., at 155.
(66) Van Wageningen, above note 20, at p. 180.
(67) ***Aluminios Pozuelo Ltd. v. S.S. Navigator*** 407 F.2d 152 (2d Cir. 1968).
(68) A toggle press is "a toggle-joint press." A toggle joint is "a device consisting of two bars jointed together end to end but not in line, so that when a force is applied to the knee tending to straighten the arrangement, the parts abutting or jointed to the ends of the bars will experience an endwise pressure which increases indefinitely as the bars approach a straight-line position." WEBSTER'S NEW INT'L DICTIONARY 2660 (2nd ed. 1957).

carriers admitted responsibility for the damage but maintained that their liability was limited to $500. The cargo owner argued that the freight charge was based on a measurement of 40 cubic feet. In making its determination, the court looked at the common definition of a package, such 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. A parcel is a small package; “parcel” being diminutive of “package.” Each of the words denotes a thing in form suitable for transportation or handling, or sale from hand to hand. As ordinarily understood in the commercial world, it means a shipping package".(69) The court decided that the toggle press on a skid was a COGSA package because the skid facilitated the transportation and handling of the machine.(70) Judge Moore found that while the skid provided protection, it was attached essentially to facilitate delivery so as to make the press an article put up in a form suitable for transportation or handling. In dicta, however, Judge Moore stated that, had the skid been used to protect the machine during shipment, a COGSA package may have not existed.(71) He, further, pointed out that the shipper could have obtained full coverage by declaring the nature and value of the goods in the bill of lading and paying a higher fee if the carrier so required.(72)

According to Judge Moore’s definition of ‘package’, pallets, skids, coils, crates, bundles, all could fall within this definition. And this is what was held in ***Nichimen Co. v. M.V. Farland,***(73) where the Second Circuit decided that unwrapped rolled steel coils strapped and tied with steel bands were not packages.(74) In this case, an action brought by the consignee against the vessel, her owner, and her time charterer for damage to 142 coils of steel, 87 of which had been wrapped in burlap and 55 of which were tied with steel bands. The court held that the 55 unwrapped coils, as well as the coils wrapped in burlap, constituted "packages" within the meaning of COGSA, thus entitling the various respondents to have their liability limited to $500 for each of the 142 damaged

(69) BLACK'S LAW DICTIONARY 1108 (6th ed. 1990).

(70) See ***Caterpillar, Inc. v. S.S. Enterprise***, 725 F.Supp. 1255 (S.D.Ga.1989) (a tractor and track loader on metal platforms (bolsters) are packages); ***Forwarding v. C.A. Naviera de Transporte Y Tourismo***, 486 F.Supp. 636 (S.D.Fla.1980) (air conditioning equipment bolted to wooden skid is a package); ***Mediterranean Marine Lines, Inc. v. John T. Clark & Son of Maryland, Inc.***, 485 F.Supp. 1330 (D.Md.1980) (a metal working shear on a wooden skid, covered with polyethylene and tarpaulin is a package); ***Hartford Fire Ins. Co. v. Pacific Far East Line, Inc***., 320 F.Supp. 324 (N.D.Cal.1970), rev'd, 491 F.2d 960 (9th Cir.1974), cert. denied, 419 U.S. 873 (1974) (electrical transformer mounted on skid is a COGSA package).

(71) ***Aluminios Pozuelo Ltd. v. S.S. Navigator*** 407 F.2d 152, at 155-56 (2d Cir. 1968).

(72) *Id.*

(73) (1972, CA2 NY) 462 F2d 319.

(74) *Id.*, at 334.

coils.(75) Referring to the 55 coils which were rolled, strapped, and tied with steel bands. The court said that there had been some packaging preparation for transportation which facilitated handling. Responding to the consignee's argument that putting steel bands around the coils was useful for warehousing as well as for transportation, the court said that "the fact that the act of rolling and banding facilitates storage does not necessarily negate the possibility that it is also packaging preparation made to facilitate handling in transportation". (76)

The Second Circuit once again applied the facilitation for transportation test in ***Shinko Boeki Co. v S.S. Pioneer Moon***,(77) where the Second Circuit held that a 2000 gallon tank for a bulk shipment of liquid latex was not a package. Here, a consignee, a Japanese corporation, ordered a large quantity of liquid latex from an American company. The latex was to be carried in 34 lift-on, lift-off tanks (each tank was 7 feet 11 inches long, 7 feet 9 inches wide, and 6 feet 4 inches high, and capable of carrying about 2,000 gallons, and weighed about 7 tons when loaded. The tanks were the carrier's property and were filled under its supervision. The bill of lading indicated that 24 tanks were shipped containing a total of 359,170 pounds of liquid latex.(78)On arrival in Japan, 11 of the tanks were found to be either completely empty of their contents or contaminated to an extent that the latex was unfit for its intended use. The carrier argued that the individual tanks were the container for purposes of limiting its liability.(79) The court did not agree.(80) The court pointed out that although large size and heavy weight, with probable consequent high value, do not mandate the conclusion that a particular shipment is not a "package" in a case where a shipper has done something to prepare the goods for carriage, they at least suggest a need for careful scrutiny of the entire transaction to ascertain whether the complaining shipper in fact did any "packaging." The term "package," the court continued, implies that some packaging preparation for transportation has been made which facilitates handling. Shipment in the 2,000-gallon tanks furnished by the ship, the court said, was more closely analogous to shipment in its deep tanks than to transportation in the shipper's drums. In practical effect, the court continued, the 2,000-gallon tanks were a smaller and movable version of the deep tanks and were functionally part of the ship. The court held that the tanks were not "packages" within the meaning of COGSA, and, accordingly, the consignee's recovery was not limited to $500 per tank.(81)

(75) *Id.*
(76) *Id., at 323*
(77) 507 F.2d 342 (2nd Cir.1974).
(78) Id., at 344.
(79) Id.
(80) Id.
(81) Id. at 345.

However, in ***Companhia Hidro Electrica v. S.S. Loide Honduras***,(82) a District Court in the Second Circuit apparently had rejected the "facilitation for transportation" test when it stated that any distinction between packaging preparation which facilitates handling and that which is protective, as a ground for deciding if an item is a "package" within the terms of COGSA, "does not commend itself to this court."(83) In this case, circuit breakers allegedly damaged during a voyage from New York to Brazil were unwrapped and fully visible except for wooden crating covering an instrument panel at one end, but the circuit breakers were mounted on a form of steel base. The shipper contended that the base was a permanent part of the circuit breaker while the carrier took the position either that the base was a temporary skid for the purpose of facilitating handling and delivery, or that, even if a permanent base of the circuit breaker, it did in fact facilitate handling and delivery.(84) The court said that packaging, to the extent that it protects the cargo, also facilitates its handling. Packaging for protection, the court continued, whether complete or partial, should be considered as constituting a "package" within the meaning of the statute.(85) The court additionally pointed out that the Court of Appeals has recognized that packaging may serve a dual purpose so that the existence of another purpose does not necessarily negate the possibility that it is also packaging preparation made to facilitate handling and transportation.(86)

So, while one District Court in the Second Circuit apparently has rejected the "facilitation of handling" test, such a view does not seem to be the prevailing one because the test was applied by other circuits. It was relied on by the Fourth Circuit in ***Mediterranean Marine Lines v John T. Clark & Son*** (87) where a 45,000 pounds metal working mounted on a skid and completely covered by polyethylene and tarpaulin was held to be a single package. More recently, in ***Maersk Line, Ltd. v. U.S.***(88) the Fourth Circuit Court of Appeal pointed out that:

"In determining whether particular goods constitute packages within meaning of Carriage of Goods by Sea Act's (COGSA) $500 per package limitation of liability, a court should consider whether particular goods fall within the term, as defined as a class of cargo, irrespective of size, shape or weight to which some packaging preparation for transportation has been made which facilitates handling, but which does not necessarily conceal or completely

(82) 368 F. Supp. 289 (1974, DC NY).
(83) *Id*., at 290
(84) *Id.*
(85) *Id.*, at 292.
(86) *Id*.
(87) 485 F. Supp. 1330.
(88) 513 F.3d 418 (4th Cir. [Va.] 2008).

enclose the goods, and then consider the parties' contract for carriage to determine whether the parties intended the goods to constitute a package".(89)

The facilitation for transport test was also applied by the Fifth Circuit in ***Insurance Company of N. America v. Delta Brazil*** (90) where the court held that a chiller unit, which was prepared for transportation by encasing it in a slatted wooden crate, constituted a package. By the Eleventh Circuit in ***Marante Forwarding v. C.A. Naviera De Transport*** (91) where it was held that air conditioning equipment attached by bolts to a wooden skid but not otherwise boxed or crated constituted a package. By the Seventh Circuit in ***Island Yachts, Inc. v Federal Pacific Lakes Line*** (92)where it was held that a 42-foot cruiser, allegedly damaged during its shipment from Hong Kong to Detroit, Michigan, under a bill of lading incorporating the provisions of COGSA, was a "package" within the meaning of the Act. The cargo was described in the bill of lading, under the heads "NUMBER OF PACKAGES" and "DESCRIPTION OF PACKAGES AND GOODS", as "1 SHIPPING CRADLE containing: ONE (1) 41 foot—10 inch cruiser TOTAL: ONE (1) UNIT ONLY."(93) The court said that there was some packaging preparation for transportation which facilitated handling (the shipping cradle).(94) Moreover, the court said that there was a description in the bill of lading describing the cargo as a single unit.(95) Accordingly, the carrier's liability, if any, would be limited to the statutory amount of $500.

It may be argued that the facilitation for transport test, if it was adopted as a test for classifying the goods as packages, would penalise those shippers who protect their shipments against damage.(96) Because in practice any shipping preparation, to the extent that it protects cargo, facilitates handling. Efforts to minimise risk through the use of outside covering or reinforcement could be characterised as preparation to facilitate transport. In this instance the shipper could be penalised for his precaution in preparing the cargo for shipment.

(89) *Id.* at 422.

(90) 1983, A.M.C. 1597. While the Fifth Circuit apparently has not conclusively defined "package" in this context, it has stated clearly that cargo does not have to be fully enclosed to qualify as a package, ***Calmaquip Engineering West Hemisphere Corporation v. West Coast Carriers, Ltd.,*** 650 F.2d 633, 639 (5th Cir.1981), and has identified itself more closely with the Second Circuit's approach. ***Allstate Insurance Company v. Inversiones Navieras Imparca, C.A.,*** 646 F.2d 169, 172 (5th Cir.1981); ***Croft & Scully Co. v. M/V Skulptor Vuchetich,*** 664 F.2d 1277, 1281 (5th Cir.1982)**.**

(91) 486 F. Supp. 636.

(92) 345 F Supp 889(1971, DC Ill); see also ***Primary Industries Corp. v Barber Lines A/S*** (1974) 78 Misc 2d 603, 357 NYS2d 375, where the Fifth Circuit adopted facilitation for transport test to hold that that each bundle containing 22 ingots constituted a single "package" under COGSA.

(93) 345 F Supp 889(1971, DC Ill), at 890.

(94) *Id.*

(95) *Id.*

(96) Van Wageningen, above note 20, at p.184.

The Ninth Circuit has realised the harsh result created by the facilitation for transport test, therefore it rejected it in ***Hartford Fire Ins. Co. v. Pacific Far East Line, In***.(97)In this case the Ninth Circuit was confronted with the task of determining whether an electrical transformer bolted to a wooden skid was shipped in a "package." The shipper and the carrier both urged that the "facilitation of handling" test be adopted in the instant case,(98) one party contending that the skid was not intended to facilitate the handling of the transformer, and the other party contending that the purpose for which the skid was attached to the transformer should not be a controlling factor.(99) The court said that:

"Any distinction based upon the subjective purpose for which the skid was attached should not be the test for resolving the issue. The skid certainly protected the transformer to some extent, though obviously unsuccess- fully, by preventing it from shifting and sliding, and from contact with other cargo during transit.[a]nd, the skid could have been utilised to facilitate the transportation of the transformer. Nevertheless, we are unpersuaded that by simply attaching the transformer to a wooden skid, the shipper created a 'package'...[t]o hold that somehow a 'package' evolved from the mere attachment of the machine to a wooden skid seems a highly unreasonable result."(100)

3.1.2. *The Parties' Description Test*

Absence of a clear and predictable answer to the question what constitutes a package led the parties to a contract of carriage to find another solution and that is by describing the cargo in the contract as 'package'. For instance, Clause 17 of the Uniform North Atlantic Bill of Lading, 1937, provides that the phrase 'per package or customary freight unit' used in U.S. COGSA means 'per package or per unit, on which basis the freight is adjusted'.

Another clause read: "It is understood that the meaning of the word 'package' includes pieces and all articles of any description except goods shipped in bulk."

The description of the goods in the contract of carriage has been of secondary importance in some cases(101) but quite significant to the outcome of others.(102)

(97) 491 F.2d 960 (9th Cir.1974).
(98) *Id*., at 965.
(99) *Id.*
(100) *Id*.
(101) See, e.g. ***Island Yachts, Inc. v Federal Pacific Lakes Line***, 345 F Supp 889 (1971, DC Ill) .
(102) See, e.g., ***Fireman's Fund Ins. Co. v. Tropical Shipping & Constr. Co***., 254 F.3d 987, 997, 2001 AMC 2474 (11th Cir. 2001) ; ***Groupe Chegaray/V. De Chalus v. P&O Containers***, 251 F.3d 1359, 1367-70, 2001 AMC 1858, 1867-70 (11th Cir. 2001) ; ***Travelers Indem. Co. v. Vessel Sam***

[WHAT CONSTITUTES 'PACKAGE' OR 'UNIT' LIMITATION?]

In ***Standard Electric, S.A. v. Hamburg S. D-G.***[(103)] while holding that pallets containing cartons constituted a "package," the court pointed out that the dock receipt, the bill of lading, and the consignee's claim letter all indicated that the parties regarded each pallet as a package.[(104)] Moreover, the invoice from the shipper to the consignee described the pallets as "packages," and after the loss of some of the pallets was discovered, the consignee sent a letter to the carrier's agent complaining that "only 2 packages were discharged" out of "a shipment of 9 packages."[(105)] The court additionally pointed out that the parties'

Houston, 26 F.3d 895, 901-02, 1994 AMC 2162, *2170-72* (9th Cir. [Cal.] 1994); ***Pt. Keraton Selaras v. M/V Cartagena de Indias,*** *959 F.* Supp. 270, 272-73, 1997 AMC 2218, 2221 (E.D. Pa. 1997); ***Pyropower Corp. v. M/V Alps Maru***, 1993 AMC 1562, 1572 (E.D. Pa. 1993). See also ***F.A. Mach. Logistics, Inc. v. M/V Jebel Ali,*** 1998 AMC 2963, 2965 (S.D. Ga. 1998) (giving some weight to the "package" definition in the bill of lading); ***Chapman Marine Pty. Ltd. v. Wilhelmsen Lines A/S***, 1999 AMC 1221, 1233-34 (Austl. Fed. Ct. 1999) ("Ultimately, however, the question must be determined by reference to the intention of the parties as evidenced by their contract") (applying U.S. COGSA). ***The Margaret Lykes*** 57 F Supp 466 (1944, DC La), where the dock receipt and the bill of lading clearly referred to the truck as a "package." It was immaterial, the court said, whether or not the uncrated truck was such an article as came within the commonplace definition of "package," inasmuch as the parties elected to so denominate it. No recovery, the court said, in excess of $500, could be had of ship or carrier with reference to said damaged articles or freight not concealed by packages and yet referred to by the parties as a "package.

Of course, when the court believes that an item is clearly not a package, describing it as a "package" in the bill of lading will not be enough to make it so. See, e.g., ***Orient Overseas Container Line, (UK) Ltd. v. Sea-Land Serv., Inc.,*** 122 F. Supp.2d 481, 486-489, 2001 AMC 1005, 1012-16 (S.D.N.Y. 2000) (holding that 1,768 automobile engines, which were not covered by any wrapping and were not boxed or crated, do not qualify as COGSA packages even though they were described on the bill of lading as the "packages"); ***G.E. Power Sys., Inc. v. Industrial Maritime Carriers (Bahamas), Inc.,*** 89 F. Supp.2d 782 (E.D. La. 2000) (holding that a gas turbine that was not enclosed in a container, crate, or box, and that was only partially covered with two poly cloth tarpaulins (which did not conceal the nature of the cargo being shipped), did not qualify as a COGSA package even though the number "1" appeared in the column for "No. of Pkgs."); ***Middle E. Agency, Inc. v. The John B. Waterman,*** 86 F. Supp. 487, 491, 1949 AMC 1403, 1408-09 (S.D.N.Y. 1949) (holding that eleven "uncased and uncrated" tractors, "shipped without any covering whatsoever," do not qualify as COGSA packages even though they were described on the bill of lading as "packages"). These were not treated as cases in the "twilight zone."

In ***Insurance Co. of North America v. M/V Frio Brazil***, 729 F. Supp. 826, 836, 1990 AMC 2506, 2514 (M.D. Fla. 1990), the court looked to the parties' description of the goods on the bill of lading, but with the added wrinkle that all ambiguities must be resolved in favor of the shipper or consignee. Such a rule of construction may make sense for resolving ambiguities in boilerplate bill of lading clauses (which are drafted by the carrier. But see ***Pt. Keraton Selaras v. M/V Cartagena de Indias***, 951 F. Supp. 1196, 1208 & n.12, 1997 AMC 967, 984 & n.12 (E.D. Pa. 1996) (accepting the argument that an ambiguity in the bill of lading's description of the goods should be construed against the shipper, whose agent prepared the description), vacated on other grounds, 959 F. Supp. 270, 1997 AMC 2218 (E.D. Pa. 1997). Cf. ***Royal Ins. Co. of Am. v. M/V MSC Dymphna,*** 2004 AMC 785, 792-93 (S.D.N.Y. 2004) (considering carrier's argument that ambiguous description of the goods should be construed against the shipper that initially prepared it and the cargo's argument that it should be construed against the carrier that include it in the bill of lading).

(103) 375 F2d 943 (1967, CA2 NY).

(104) *Id.*, at 944.

(105) *Id.*, at 946.

characterizations of the pallets further reflected the meaning given the term "package" by the custom and usage of the trade, and that each pallet had the physical characteristics of a "package."(106)

In ***Aluminios Pozuelo, Ltd. v S.S. Navigator***(107), the court, while holding that machinery attached to a skid constituted a "package" within the meaning of COGSA, considered the fact that both the carrier and the shipper specified that the machinery attached to the skid was a "package."(108) Their contract, the court noted, specified that the machinery attached to the skid was "ONE (1) package." Therefore, the court said, the parties must abide by its meaning as a word of liability limitation:

"....Where the term 'package' for maritime shipping purposes has become a word of art and where by statute liability limitation consequences attach thereto, the parties must be presumed to have understood these consequences when they applied it to this Brobdingnagian package, the three-ton press. Their contract states their agreement. Having specified that the press was 'ONE (1)' package, they must abide by its meaning as a word of liability limitation."(109)

In ***Nichimen Co. v M.V. Far Land***(110) an a action was brought by cargo owner for damage to 142 coils of steel, some wrapped in burlap and some coiled and wrapped with steel bands, part of a shipment from Japan to Connecticut. The bill of lading described the cargo under the heading 'No. of Packages' as '280 coils'. The court, while determining whether the unwrapped coils constituted "packages" within the meaning of COGSA, stated that the bill of lading, while not controlling, was important evidence of the parties' understanding regarding the question of what constitutes "packages."(111)

(106) *Id.*

(107) 407 F2d 152 (1968, CA2 NY).

(108) The bill of lading, under the headings "NO. OF PKGS" and "SHIPPER'S DESCRIPTION OF PACKAGES AND GOODS," described the 3 tons toggle press bolted to a skid as "ONE (1) SKID MACHINERY

(109) *Id.*, 156.

(110) 1972 AMC 1573, (2d Cir. [N.Y.].

(111) *Id.*, at 1593-95. See ***J.A. Johnston Company Limited v. The Tendefjell and Sea Lion Navigation Co.* SA *and Concordia Line A/S*** [1973] F.C. 1003 at 1009 (Fed. C. Can. *per* Collier J.): "I hasten to add that the intention must be ascertained from consideration of all the facts and not merely the words used in the bill of lading: the type of container, who supplied it, who sealed it if it was sealed on delivery to the carrier, the opportunity for count by the carrier, previous course of dealings - all these matters, and many others, which I have not enumerated, may be relevant in arriving at what the parties, by the particular contract, intended." See also ***In* re *Complaint of Belize Trading, Ltd.*** 1994 AMC 1210 (11 Cir. 1993), cert. denied, 510 U.S. 1046 (1994), where the Court held that the invoices and packing lists detailing the number of cartons in each container would govern the applicability of the COGSA limitation even though the information was not contained in the bills of lading.

In ***Seguros ''Illimani'' S.A. v. M/V Popi P.***,(112) the Second Circuit went even further and established what has since been described as a "bright line test"(113) giving almost conclusive weight to the number in the bill of lading's "NO. OF PKGS." column,(114) at least in non-container cases.(115) The court explained its approach as follows:

"The number appearing under the heading "NO. OF PKGS." is our starting point for determining the number of packages for purposes of the COGSA per-package limitation, and unless the significance of that number is plainly contradicted by contrary evidence of the parties' intent, or unless the number refers to items that cannot qualify as "packages," it is also the ending point of our inquiry. "Package" is a term of art in the ocean shipping business, and parties to bills of lading should expect to be held to the number that appears under a column whose heading so unmistakably refers to the number of packages".(116)

The Fourth Circuit has also considered the description of the goods in the shipping documents as an important factor in determining the nature of the goods shipped. Thus in ***Commonwealth Petrochemical Inc., v. S.S. Puerto Rico***,(117) a bill of lading defined package as including animals, pieces, and all articles of any description except goods shipped in bulk. The court held that an

(112) 929 F.2d 89, 94-95, 1991 AMC 1521, 1527-30 (2d Cir. (N.Y.) 1991).

(113) See, e.g**.,** ***In re Maritima Aragua, S.A. (The M.V. Mar Dorada)***, 1992 AMC 1603, 1608 (S.D.N.Y. 1992).

(114) See also, e.g., ***Travelers Indem. Co. v. Vessel Sam Houston***, 26 F.3d 895, 902, 1994 AMC 2162, 2171 (9th Cir. 1994) (following ***Seguros ''Illimani''***); ***Tokio Marine & Fire Ins. Co. v. Nippon Express U.S.A. (Illinois), Inc.,*** 155 F. Supp.2d 1167, 1170-71, 2001 AMC 1239, 1242 (C.D. Cal. 2000) (following ***Travelers Indem***.), aff'd, 45 Fed. Appx. 710 (9th Cir. 2002); ***Pyropower Corp. v. M/V Alps Maru,*** 1993 AMC 1562, 1572 (E.D. Pa. 1993) (following ***Seguros ''Illimani''***). But see ***Bando Silk Co. v. Hyundai Commander,*** 1995 AMC 516, 520-22 (S.D.N.Y. 1994) (rejecting the number given in the bill of lading's "NO OF CONT OR OTHER PKGS" column (and "MARKS AND NUMBERS" column) in favor of number in "DESCRIPTION OF GOODS" column). When the items referred to in the "number of packages" column cannot qualify as a COGSA "package," however, the number becomes irrelevant. See, e.g., ***Pt. Keraton Selaras v. M/V Cartagena de Indias,*** 959 F. Supp. 270, 275 & n.2, 1997 AMC 2218, 2225 & n.2 (E.D. Pa. 1997).

(115) In ***Monica Textile Corp. v. S.S. Tana,*** 952 F.2d 636, 640-41, 1992 AMC 609, 616-17 (2d Cir. [N.Y.] 1991), the Second Circuit declared that the test in ***Seguros ''Illimani''*** is limited to non-container cases. In container cases, the courts have often given no weight to boilerplate provisions in the bill of lading defining the container as a package. See, e.g., ***Universal Leaf Tobacco Co. v. Companhia de Navegacao Maritima Netumar***, 993 F.2d 414, 417, 1993 AMC 2439, 2444-45 (4th Cir. [Va.] 1993); ***Monica Textile Corp. v. S.S. Tana,*** 952 F.2d 636, 641-43, 1992 AMC 609, 617-21 (2d Cir. [N.Y.] 1991); ***Rossetti v. Charleston Freight Station, Inc.,*** 354 F. Supp. 2d 612, 615 (D.S.C. 2005) ; ***Alternative Glass Supplies v. M/V Nomzi,*** 1999 AMC 1080, 1085 n.4 (S.D.N.Y. 1999) (following ***Monica Textile***); ***Judy-Philippine Inc. v. S/S Verazano Bridge***, 805 F. Supp. 185, 188 (S.D.N.Y. 1992).

(116) 929 F.2d at 94, 1991 AMC at 1528.

(117) 607 F.2d 322.

electrical transformer that exceeded ten feet in each dimension, weighed 47,700 pounds, and was bolted to iron skid was a package. The court pointed out that:

"[T]he key to determining what is a package or unit for the purposes of limitation is the intention of the parties, particularly as declared on the bill of lading."(118)

It has been argued that an item of goods should not become a 'package' or 'unit' merely because the parties have chosen to call it one. Allowing a clause in the bill of lading such as the following:

"An article or piece of merchandise which is not crated, boxed or packaged shall nevertheless be considered a separate package or the customary freight unit for the purpose of determining the extent of the liability of the carrier under this clause and under S.4(5) of COGSA."(119)

will certainly reduce the carrier's liability below what is statutorily permissible on the basis of the carrier's own contract where by use of a more proper test the unit of cargo would not really be a package. This argument was clearly put forward by Judge Cashin in ***Gulf Italia Co. v. American Export Lines***:(120)

" To allow the parties themselves to define what a 'package' is would allow a lessening of liability other than by the terms of the Act since a carrier could always limit its liability to $500 by merely extracting a stipulation from the shipper that everything shipped, is no matter what form, would be deemed for the purposes of limitation of liability a 'package'".(121)

To reiterate, the main fault in giving weight to the description on a bill of lading is that, the bills of lading are generally drafted by the carrier,(122) who is in a better position of knowing the consequences of the use of the word

(118) *Id.*, at 327. See also ***Seguros Illumani* S.A. *v. M/V Popi P*** 1991 AMC 1521 at 1528 (2 Cir. 1991): "The number appearing under the heading "NO. OF PKGS." is our starting point for determining the number of packages for purposes of the COGSA per-package limitation, and unless the significance of that number is *plainly contradicted* by contrary evidence of the parties' intent, or unless the number refers to items that cannot qualify as 'packages', it is also the ending point of our inquiry." (Emphasis added); see also ***Fireman's Fund Insurance Co. v. Tropical Shipping and Construction Co. Ltd***, 2001 AMC 2474 (11th Cir. 2001).

(119) See ***St.Paul F. & M. Ins. Co. v. Alcoa S.S. Co***. 1957 A.M.C. 574.

(120) 1958 A.M.C. 439 at 442.

(121) *Ibid.*, at p. 442. See also ***Matsushita Elec. Corp.* v. *S.S. Aegis Spirit*** 1976 AMC 779 at p. 793 (W.D. Wash. 1976), where the Court held that: "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 COGS A 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."* (Emphasis added).

(122) ***Matsushito Electric Corp. v. S.S. Aegis Spirit*** 1976 A.M.C. 779, at p. 93.

'package' in shipping business - and completed as a matter of course by the shipper who is not in the business of shipping. Therefore, the carrier is in a position subtly to influence the way in which the cargo is described in the bill of lading merely through the wording of column headings. When the courts give weight to typed-in figures under the column headed 'No. of packages' as ostensibly evidencing the intent of both parties, they may in fact be enforcing only the intent of the carrier.

A further undesirable side-effect of a test based upon the parties' intentions is its obvious potential for impairing the value and negotiability of ocean bills of lading, due to uncertainty in the allocation of risks with respect to the cargo. The holder of the bill can never be sure what the shipper and carrier 'intended' to treat as a package except to the extent that said intent can be deduced from the four corners of the bill itself.

Although courts place emphasis on the terms of the bill of lading, the definitions set forth in the bill of lading will not be enforced if they contravene COGSA where COGSA applies by its own force.(123) In ***Omark Industries Inc., v. Associated Container***(124) Judge Beeks, sitting by designation, concluded that:(125)

"...no legal effect can be given, consistent with COGSA and the shipping Act, to the parties' private intention or characterisation regarding the COGSA package."

However, where COGSA does not apply of its own force and effect, and is merely incorporated as term of the bill of lading and does not apply as a matter of law, the courts will generally rely on the bill of lading description within the limitation of liability provision in the statute.(126)

(123) In ***Omark Industries Inc., v. Associated Container*** 420 F.Supp.139,143**,** Judge Beeks, sitting by designation, concluded that:
"...no legal effect can be given, consistent with COGSA and the shipping Act, to the parties' private intention or characterisation regarding the COGSA package."
See also ***Monica Textile Corp. v. S.S. Tana***, 731 F. Supp. 124, 126 (S.D.N.Y. 1990) [bales deemed COGSA packages despite disclaimer on reverse of bill of lading]; ***Shinko Boeki Co. v. S.S. "Pioneer Moon,"*** 507 F.2d 342, 345, 1975 AMC 49, 52-53 (2d Cir. [N.Y.] 1974); ***St. Paul Fire & Marine Ins. Co. v. Sea-Land Serv., Inc.,*** 735 F. Supp. 129, 1990 AMC 2239 (S.D.N.Y. 1990); more sceptical of carriers' attempts to define "package" through a bill of lading clause. ***All Pac. Trading, Inc. v. Vessel M/V Hanjin Yosu,*** 7 F.3d 1427, 93 CDOS 7837, 1994 AMC 365 (9th Cir. [Cal.] 1993), shipper's listing on bills of lading of number of packages within each sealed container delivered to carrier determined number of packages for purposes of section 1304(5), and carrier's attempt to limit liability by contract declaring containers to be "packages" was void as violaton of section 1303(8).

(124) 420 F.Supp. 139.

(125) *Ibid.*, at p. 143.

(126) Thus in ***Pannell v United States Lines Co.*** 263 F.2d 497 (2nd Cir.1959), cert. denied, 359 U.S. 1013 (1959), it was held that a yacht, damaged during its shipment from London to New York on the deck of the carrier's vessel, was a "package"; accordingly the shipper's recovery for damages

inflicted upon the yacht was limited to $500. The court said that inasmuch as COGSA does not apply ex proprio vigour (its owner force) to cargo carried on deck (46 U.S.C.A. § 1301(c), the statute was incorporated into the bill of lading, which also defined "package" as including pieces and articles of any description except goods shipped in bulk. Because the statute did not apply automatically to the shipment in question, the court continued, the parties were free to define "package" in a manner which would include the yacht in question. In ***Island Yachts, Inc. v Federal Pacific Lakes Line*** 345 F Supp 889(1971, DC Ill), it was held that, a 42-foot cruiser, allegedly damaged during its shipment from Hong Kong to Detroit, Michigan, under a bill of lading incorporating the provisions of COGSA was a "package" within the meaning of the Act. On the bill of lading, under the heads "NUMBER OF PACKAGES" and "DESCRIPTION OF PACKAGES AND GOODS," the cargo was described as "1 SHIPPING CRADLE containing: ONE (1) 41 foot—10 inch cruiser TOTAL: ONE (1) UNIT ONLY." The court said that there was some packaging preparation for transportation which facilitated handling (the shipping cradle). Moreover, the court said that there was a description in the bill of lading describing the cargo as a single unit. Accordingly, the carrier's motion for partial summary judgment on the issue of potential liability was granted; the carrier's liability, if any, would be limited to the statutory amount of $500. In ***Companhia Hidro Electrica v S/S "Loide Honduras"*** (1974, DC NY) 368 F Supp 289, five gas circuit breakers of a shipment of six such items were damaged during a voyage from New York to Brazil. The bill of lading described the shipment as six packages. Each circuit breaker, unwrapped and fully visible except for wooden crating covering an instrument panel at one end, was mounted on a form of steel base. The court held that each of the five damaged circuit breakers constituted a "package" within the terms of COGSA. The court said that the parties had to abide by the description of the items in the bill of lading, which clearly specified the circuit breakers as six "packages," and, moreover, the court concluded that some packaging preparation for transportation had been made which facilitated handling. In ***Institute of London Underwriters v. Sea-Land Serv., Inc.,*** 881 F.2d 761, 765-66, 1989 AMC 2516 (9th Cir. [Wash.] 1989) where the court held that Yacht, which was shipped in on–deck cradle, constituted "package" within meaning of Carriage of Goods by Sea Act (COGSA), and liability, therefore ,was limited to $500 per package. The bill of lading provided in part that, in event of damage to goods exceeding in actual value equivalent of $500 per package, value of goods shall be deemed to be $500 per package, and that word "package" include cargo shipped on cradle; incorporation of COGSA into contract of carriage did not prevent term "goods" from including cargo shipped on deck, whether or not in cradle, and parties to contract for foreign carriage are free in incorporate COGSA and to include, at same time, otherwise valid contract terms not in harmony with COGSA. In ***Sail America Foundation v. M/V T.S. Prosperity***, 778 F. Supp. 1282, 1992 AMC 1617 (S.D.N.Y. 1991), the carrier had presumably attempted to expand the "package definition with a bill of lading clause that defined a package as "all pieces of cargo shipped individually and not prepared in any manner for transport, and all containers". The clause, however, did not cover cargo that *had* been prepared for shipment. The district court, applying the bill of lading's definition, held that a piece of cargo wrapped in burlap and plastic was not a package unless it was a "container" as defined in the bill of lading. Thus the carrier increased its liability through a bill of lading package definition. See also ***Commonwealth Petrochemicals, Inc. v. S/S Puerto Rico,*** 607 F.2d 322, 1979 AMC 2772 (4th Cir. [Md.] 1979); ***Pannell v. United States Lines,*** 263 F.2d 497, 1959 AMC 935 (2d Cir. [N.Y.] 1959), cert. denied, 359 U.S. 1013, 79 S. Ct. 1151, 3 L. Ed. 2d 1037 (1959); ***Enterprise, Inc. v. M/V Sam Houston***, 706 F. Supp. 451, 453, 1988 AMC 2745, 2747 (E.D. La. 1988); ***Continental Ins. Co. v. CLX Services,*** 2003 AMC 2251 (Cal. Super. Ct. 2002) . See also ***Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd.,*** 230 F.3d 549, 2001 AMC 25 (2d Cir. [N.Y.] 2000) (permitting the application of a liability regime yielding a lower limitation amount than COGSA when COGSA applied, if at all, only as a matter of contract. ***United Overseas Corp. v. Barber S.S. Lines, No. 83***-402 (S.D.N.Y. 1989), *aff'd*, 880 F.2d 1319 (2d Cir. 1989) [individually marked goods described as “PCS” or “pieces” on bill of lading are each COGSA packages]; ***International Adjusters, Inc. v. Korean Wonis-Son***, 682 F. Supp. 383, 385 (N.D. Ill. 1988) [containerized cartons are COGSA packages where specified in the bill of lading].

2.2. ENGLISH DECISIONS

The package limitation has never been judicially interpreted in England. This led Scrutton[127] to say:

"These words [package and unit] give rise to a number of difficulties...but surprisingly there is no direct English authority as to their meaning. Reference has therefore been made to American, Canadian and Continental decisions where appropriate. These decisions should, however, be regarded with caution when considering how far they are applicable to the English Rules, since they may turn in part on different consideration as to the policy of the Rules."

There is, however, an old and indirect case of ***Whaite* v. *Lancashire & Yorkshire Ry. Co***,[128] which commentators generally refer to, where the term "package" was construed in the context of the Carrier's Act, a statute which limited the carrier's liability for articles "contained in any parcel or package." In *Whaite,* a group of oil paintings placed into a four-wheeled wagon which had wooden sides but no top, such that the identity of the paintings themselves was hidden. The train met a collision and the contents of the wagon were injured. The British Carrier's Act 1830 which was involved contained a limitation of £100 per parcel or package. The court held that the whole wagon was one package despite its size. In reaching this conclusion emphasis has been laid on the object and purpose of the Act:

"I think this wagon with its contents was a 'package' within the meaning of the Act. Although one would not commonly describe it in that way, yet, looking at the object and purpose of the Act, I think we are not only entitled, but compelled to say that it was a 'package or parcel' within the section".[129]

The court further emphasised the purpose of per package limitation in holding that the wagon so packed was a "package":

"….though the defendants (the carriers) could see that there were pictures in the wagon, they could not see what was the exact character of the pictures".[130]

(127) Scrutton on Charter Parties (18th ed.) pp.441-442. See also Wilson, above note 4 at p. 195: "Problems have also arisen in many countries in interpreting the terms 'package' and 'unit' ... What constitutes a 'package'? Is size relevant and is it essential that the article carries some form of wrapping? Again, is the term 'unit' intended to refer to a shipping unit, such as a crate, package, or container, or would it equally apply to freight unit, i.e. the unit of measurement used to calculate the freight?... There is little authority on these points in English law, where the issue has attracted little litigation…"

(128) (1874) L.R. 9 Exp. 67.

(129) *Id* , per Bramwell, B., at 70.

(130) *Id.*

The examination of the above passages obviously leads to the inescapable conclusion that the Court took the view that since the contents of the wagon could not easily be inspected by the carrier, the whole wagon was then a package. The Court discussed also at some length the question of size of the package and held that the size could not be a test in determining whether the goods constitute packages or not:

" It would be absurd to say that the wagon was too large to be a package; plainly, size cannot be a criterion".(131)

Wahite decision has been cited with approval in ***Falconbridge*** case(132) and ***Hartford Fire Ins. Co.* v. *Pacific Far East Line, Inc.***(133) In the former case the Supreme Court of Canada pointed out that the *Wahite* decision interpreted the word 'package' to mean articles which are packed or crated. Therefore, it is questionable whether goods partially covered or packed are to be considered 'packages' under English law.

Whaite case is all that English jurisprudence has to offer on the question of what constitutes a package(134)and one can only surmise that carriers and cargo interests alike have found it advantageous in terms of negotiating a favourable settlement of cargo claims to leave the matter unlitigated and consequently uncertain.

3.2. KUWAITI AND EMIRATI DECISIONS

Kuwaiti and Emirati Courts have applied a restrictive interpretation on the word 'package' similar to that applied by the Court of Appeal for the Ninth Circuit in the ***Hartford Fire Ins. Co.* v. *Pacific Far East Line, Inc.***.(135) Package, in their view, must indicate something completely or fully enclosed. Thus where two uncrated giant cranes were damaged during the voyage, the Supreme Court of Kuwait(136)held that the uncrate cranes were not packages. The term 'package'," said the Court, "(Free translation) refers to the packing

(131) (1874) L.R. 9 Ex. 67, at 70 per Cleasby, B.

(132) ***Falconbridge Nickel Mine Ltd* v. *Chimo Shipping Co*** [1973] 2 L1oyd's Rep. 469. See the comment of Colman J in ***The River Gurara*** [1996] 2 Lloyd's Rep. 53.

(133) 491 F.2d 960 (9th Cir.1974).

(134) "It has been said that since the date of that English decision, the decisions have presented no reliable guide as to what constitutes a "package"", see ***Aluminios Pozuelo Ltd. v. S.S. Navigator***, 407 F.2d 152 (2d Cir. [N.Y.] 1968.

(135) 491 F.2d 960 (9th Cir.1974).

(136) ***No. 92 (1984)*** Supreme Court case (unreported); Court of Appeal of Abu Dhabi***, Case No. 116 (1978)*** and Court of Appeal of Dubai***, Case No. 1390 (1979)*** (unreported). In Egyptian courts adopted the same view as Kuwaiti and Emirati courts and held that the car is neither a package nor a unit. A package, said Alexandria court, refers to goods packed in such a way as to prevent the carrier from knowing the identity of the goods placed in the package (1954) D.M.F. 691, Alexandria 21.2.1954)***., Case No. 1390 (1979)***.

whose contents cannot be seen, thus making it impossible for the carrier to appreciate its nature and value."

As a matter of fact, the question of the extent of the required packaging or covering has never been tested by Kuwaiti and Emirati courts.(137)Further, shape, size or weight seems to have little, if any, bearing on the determination of whether an article of cargo is a package. Thus in a case(138) where 20 large and heavy boxes contained electrical transformers carried from Antwerp to Abu Dhabi. On arrival, 13 transformers were found in damaged condition. The carrier admitted responsibility but sought to limit liability to £100 per package (box). The trial judge refused to consider the boxes as packages because of their weight and size, holding that the carrier was not entitled to per package limitation. On appeal, the Abu Dhabi Court of Appeal reversed the lower court's decision, holding that since the nature and value of the goods had not been declared to the carrier, then the carrier was entitled to limit his liability to £100 per package. It emphasised that size and weight are not to be considered as a criterion in determining whether or not an item of cargo is a package.

U.A.E. courts, in determining what constitutes a package have given a considerable effect also to the intention of the parties stated in the bill of lading. In a case before the Dubai Court of Appeal,(139) seven pallets containing cartons of foodstuff shipped from New Zealand to Dubai. Upon discharge at Dubai it was discovered that two pallets had been lost in transit. The cargo-owner sought to receive £850 in damages. The bill of lading incorporated the Hague Rules. It described the cargo as follows:

No. of Packages	Gross Weight	Measurement
150 cartons of Mayonnaise	1987 kg	325 cubic metre
125 cartons of Pickle	1204 kg	215 cubic metre
100 cartons of Corn	1406 kg	231 cubic metre
50 cartons of Sweet	322 kg	51 cubic metre

(137) In a case before an Omani court, the court has adopted a test similar to the one applied by the U.S. Court of Appeal for the Second Circuit in ***Aluminios*** case (407 F. 2d 152), namely the facilitation for transport test, to determine whether a generator, which was 156 feet long, 28 feet wide and 63 feet high and which was attached by bolts to a wooden skid and, as it appeared, completely covered, constituted a package within the meaning of article 363 of the Omani Maritime Code. The court said in order to say whether an item of cargo is or is not a 'package', a distinction should be made between a covering which facilitates the handling and transportation of goods, which constitutes a 'package', and a covering which is solely for protection, which does not. Referring to the case in issue the court found that the generator was covered merely for its protection and nothing else, therefore it was not a package ***(Case No. 292 (1985)*** 9.3.1986 (unreported).

(138) ***Appeal Case No. 72 (1982)*** (unreported).

(139) ***Case No. 39 (1983)*** (unreported).

25 cartons of Backing Powder125 kg19 cubic metre

The carrier contended that its liability was limited to £200 for the missing pallets. The court rejected the carrier's contention, holding that each carton within the pallets should be taken as a basis in calculating the amount of liability. The court asserted that in determining what constitutes a package reference should be made to what has been stated in the bill of lading. Since the bill of lading described the numbers, weight and measurement of the cartons within the pallets, then this clearly indicated that the parties had considered the cartons and not the pallets as packages**.**

3. THE MEANING OF 'UNIT'

Before starting the discussion on the meaning of the word 'unit', it should be noted first that this word was not subject to any discussion in the Hague Conference 1921. It did not appear in the original draft of the provisions of article 4, rule 5, but was added by the Drafting Committee and was pointed out by the Chairman at the closing session of the Conference before the approval was given:

"Now," said the Chairman, "there is a slight alteration made to which I call your attention- '£100 per package or unit'- As you know, there are goods as to which the Code will apply which are not described as per package, and the matter was raised yesterday, and upon consideration the committee thought that by adding the words 'or unit' the intent would be clear."(140)

1.3.AMERICAN DECISIONS

It has already been mentioned that the COGSA uses language substantially different from that of the Hague Rules. The word 'unit' in article 4, rule 5 of the latter is there replaced by the expression 'customary freight unit'.(141) COGSA,

(140) The comments was made by Sir Henry Duke, Chairman of the Maritime Law Committee of the International Law Association (ILA), on September 2, 1921 (the fourth day of the deliberations of the Committee), as published by the (ILA) in its *Report of the Thirtieth Conference held at the Peace Palace, The Hague, Holland, 30th August-3rd September*, 1921, *vol. II, Proceedings of the Maritime Law Committee*, Sweet & Maxwell, London, 1922, and as reproduced in Sturley, *Legislative History*, 1990, vol. 1,89 at p. 322. Selving, above note 13, at p.38.

(141) The COGSA at section 1304(5) reads in part:
"per package lawful money of the United States, or in case of goods not shipped in packages per customary freight unit ....".
The "First Understanding" to the Ratification of the Convention by the United States refers to $500 "per package or unit" and there is no mention of customary freight unit and thus it might be concluded that there is no difference intended between the terms "unit" and "customary freight unit", and that the latter is merely meant to clarify the former. The U.S. Department of State memorandum of June 5, 1937, described the various differences in wording between COGSA and the Brussels Convention of 1924 (The Hague Rules). Then it stated: "The foregoing differences from the Convention, made in the Carriage of Goods by Sea Act, are intended primarily (1) to clarify provisions in the Convention which may be of uncertain meaning

however, does not define "customary freight unit" and Judge Tenney of the Southern District of New York found that the meaning of "customary freight unit" is sphinx-like and that the reported decisions are inconsistent and cannot be satisfactorily rationalised."(142)

1.1.3. *The Bill Decision*

The first case to interpret and apply the phrase "customary freight unit" was ***Brazil Oiticica Ltd. v. The Bill***.(143) *The Bill* involved a short delivery of Oiticica oil from Brazil which never arrived at its final destination in New York. In determining the amount of the carrier's liability, the court's first task was to define " freight" as it appeared in the COGSA phrase "customary freight unit."(144) The court found that COGSA's legislative history shed little light on interpreting the word.(145) According to the parties, "freight" either meant the money or consideration paid to the carrier for the transportation of the commodity, or it referred to the commodity being shipped.(146) The court held that "freight" was the money paid as opposed to the goods, according the same meaning generally given the term in marine contracts.(147) Taking the next step, the court then defined " freight unit" as the measurement used to determine the freight charge and not the physical shipping unit.(148) Finally, the court held that the phrase "per customary freight unit," in light of its legislative history, refers

thereby avoiding expensive litigation in the United States for purposes of interpretation and (2) to coordinate the Carriage of Goods by Sea Act with other legislation of the United States." (See Tetley, *Marine Cargo Claims*, 2 Ed., Toronto, 1978, at pp. 543-550 for the complete texts.) See also ***The Bill*** 1944 AMC 883 at p. 886 (D. Md. 1944): "There appear to be no committee reports which clearly explain the quoted phrase 'per customary freight unit'; but it seems reasonably clear that the phraseology finally adopted was intended to be more definite than the shorter phrase 'per unit' contained in the Hague Rules".

(142) ***Eaton Corp. v. S.S. Galeona***, 474 F. Supp. 819, 823. The term " customary freight unit" has also undergone judicial scrutiny, and recent cases have given contrary interpretations. In mid-1988, the Second Circuit in ***FMC Corp. v. S.S. Marjorie Lykes*** 851 F.2d 78 (2d Cir. [N.Y.] 1988), ruled that a customary freight unit is not a standard unit of measure used in the trade, but the actual freight unit used by the parties to calculate the freight for shipment at issue. A few months later, the Fourth Circuit in ***Aetna Ins. Co. v. M/V LASH ITALIA*** 858 F.2d 190 (4th Cir. (Md.) 1988) countered with a decision that the customary freight unit is the rate customarily used in the trade as the basis for calculating the freight.

(143) ***Brazil Oiticica Ltd. v. The Bill***, 47 F. Supp. 969, 971-72 (D. Md. 1942) (the 1942 trial established liability, but there was insufficient evidence to determine damages, which was the sole issue at the 1944 trial).

(144) ***The Bill***, 55 F. Supp. 780, 782-83.

(145) *Id.* at 782.

(146) *Id.*

(147) *Id.* at 783.

(148) *Id.* The court supported this conclusion based on deposition evidence of an expert witness who used "freight unit" and "freight rate" synonymously. Id. In addition, the court noted that the Uniform North Atlantic Bill of Lading Clause: which provides that "the value of the goods shall be deemed to be $500 per package or per unit, on which basis the freight is adjusted," supported the same conclusion. *Id*. at 783 n.2.

to the unit of quantity, weight, or measurement of the cargo customarily used as the basis for the calculation of the freight rate to be charged:

"Upon consideration of this hitherto unadjudicated point, I conclude that the phrase 'per customary freight unit' in this context in the light of its legislative history, refers to the unit of quantity, weight or measurement of the cargo customarily used as the basis for the calculation of the freight rate to be charged. Generally in marine contracts the word 'freight' is used to denote remuneration or reward for carriage of goods by ship, rather than the goods themselves....."[(149)]

As a result, since the bill of lading in *The Bill* specified the freight charges to be $22 per 1000 kilograms, the customary freight unit was 1000 kilograms.[(150)]

The passage from the judgement in *The Bill* set out above was cited with approval by the Fifth Circuit in ***Waterman S.S. Corp. v. U.S. Smelting, Refining & Mining Co.***,[(151)]where 698 pieces of structural steel - the weight somewhat exceeding a ton per piece - were shipped in bulk, the freight being adjusted per 100 lb. Thirteen pieces were lost on the voyage. The Court of Appeal for the Fifth Circuit, did not regard each of them as a customary freight unit. Since the freight was charged at 65 cents per 100 lb, that unit of measure was held to be the customary freight unit.[(152)]

Although the cargo involved in the above cases was bulk cargo, the courts' interpretation of 'customary freight unit' has subsequently been approved and applied to non bulk cargo.[(153)] However, in the cases which followed, the courts

(149) *Id*., at 782.

(150) *Id.* The court was satisfied with the uncontradicted testimony of one expert witness that 1000 kilograms of oil constituted a "customary freight unit." *Id*.

(151) 155 F.2d 687, 693, 1946 AMC 997 (5th Cir. 1946).

(152) See ***Cia. Panamena de Seguros, S.A. v. Prudential Lines***, 416 F. Supp. 641, 643 (D. Canal Zone 1976) where the court held that when the carrier charged freight on the basis of the measurement ton, the measurement ton is the customary freight unit). In this case, an action for cargo loss arising out of loss overboard of two containers, neither containers themselves nor each of packages stuffed into containers were "packages" within purview of 46 U.S.C.A. § 1304(5), but court would look to "customary freight unit" used by carrier as basis for its freight charge for purpose of limitation of 46 U.S.C.A. § 1304(5); where carrier computed freight charges on basis of "measurement ton," i.e. 40 cubic feet of measurement, limit of carrier's liability would be $500 per each of freight units on which freight rate was charged. See also ***B. Terfloth & Cie (Canada), Inc. v M/V Tropic Lure*** (1987, SD Fla) 682 F Supp 514, where plaintiff failed to offer proof supporting different customary freight units and where freight was computed on "weight" basis of $130 per ton for 22 tons, customary freight unit was equal to number of tons.

(153) The Canadian Supreme Court followed this approach in ***Anticosti Shipping Co. v. St. Amand,*** 19 D.L.R.2d 472, 1959 S.C.R. 372, 1959 AMC 1526 (Can. 1959*)* for example, the court held that an uncrated locomotive with its tender was not a "package" but that it was a "customary freight unit." Similarly, in ***General Motors Corp. v. Moore-McCormack Lines,*** 451 F.2d 24, 1971 AMC 2408

have read the phrase more narrowly, 'customary' or 'customarily' has essentially been deleted. The phrase 'customary freight unit' has been read by most courts to mean the freight unit by which the freight was calculated in that particular case.(154)In so reading the phrase they have relied on the bills of lading and tariffs.(155)

(2d Cir. 1971) (per curiam) the court held that a single generator unit was not a "package" but that the entire power plant, of which the generator unit formed a part, was a "customary freight unit."

(154) See ***Henley Drilling Co. v. McGee,*** 36 F.3d 143, 148 n.10, 1995 AMC 173, 181 n.10, 1995 AMC 1047, 1055 n.10 (1st Cir. [P.R.] 1994); ***Granite State Ins. Co. v. M/V Caraibe, 825 F. Supp.*** 1113, 1126-27, 1994 AMC 680, 700-02 (D. P.R. 1993). For a rare example to the contrary, see ***Eaton Corp. v. S.S. Galeona***, 474 F. Supp. 819, 1979 AMC 2253 (S.D.N.Y. 1979) (a lump-sum rate for the first 2400 cubic feet of cargo is not "customary"). Since this district court's decision, its circuit court has held that "the 'customary freight unit' is not the standard unit of measure used in the industry, but the actual freight unit used by the parties to calculate freight for the shipment at issue." ***FMC Corp. v. S.S. Marjorie Lykes, Inc.,*** 851 F.2d 78, 80, 1988 AMC 2113, 2116 (2d Cir. [N.Y.] 1988).

(155) **See** ***FMC Corp. v. S.S. Marjorie Lykes***, 20. 851 F.2d 78, 1988 AMC 2113 (2d Cir. (N.Y.) 1988) the parties negotiated the rate for a shipment of engines. The carrier initially offered a rate of $ 165 per measurement ton, which it later reduced to $ 125 per measurement ton. Eventually the parties agreed on a rate of $ 4,250 for each engine, which was equivalent to slightly more than $ 110 per measurement ton, and the carrier filed a tariff based on this *ad hoc* agreement. The bill of lading described the goods as "30 UNBOXED –FIRE ENGINES," and reflected a lump sum charge of "$4,250.00/ea X 30". The Second Circuit held that each engine was a "customary freight unit," despite the heavy reliance on the measurement ton during the negotiating process. For other examples of the courts' unwillingness to look behind the shipping documents to discover the actual basis for the freight rate, see ***Aetna Ins. Co. v. M/V Lash Italia,*** 858 F.2d 190, 193, 1989 AMC 135, 139 (4th Cir. (Md.) 1988); ***General Motors Corp. v. Moore-McCormack Lines***, 451 F.2d 24, 1971 AMC 2408 (2d Cir. (N.Y.) 1971) (per curiam); ***Barth v. Atlantic Container Line***, 597 F. Supp. 1254, 1985 AMC 1196 (D. Md. 1984); ***India Supply Mission v. S.S. Overseas Joyce***, 246 F. Supp. 536, 1966 AMC 66 (S.D.N.Y. 1965); ***Freedman & Slater, Inc. v. M/V Tofevo***, 222 F. Supp. 964, 971, 1963 AMC 1525, 1536 (S.D.N.Y. 1963). A recent decision of the Fourth Circuit significantly extends this trend of permitting the parties to determine the customary freight unit through the bill of lading. In ***Caterpillar Overseas, S.A. v. Marine Transport, Inc.,*** 900 F.2d 714, 1991 AMC 75 (4th Cir. (Va.) 1990), the court upheld a boilerplate bill of lading clause that defined "customary freight unit" to cover a Caterpillar tractor. Some district courts have suggested in dicta that the plaintiff could overcome the presumption created by the shipping documents if it could show that the ostensible freight unit was a "mere sham." ***Morand Bros. Beverage Co. v. M/V Banija,*** 1985 AMC 1077 (N.D. Ill. 1984); ***Caterpillar Americas Co. v. S.S. Sea Roads***, 231 F. Supp. 647, 649, 1964 AMC 2646, 2648 (S.D. Fla. 1964).

Even when courts look behind the shipping documents to consider the actual basis for the freight rate, it is still difficult to overcome the documentary evidence. In ***Henley Drilling Co. v. McGee***(36 F.3d 143, 1995 AMC 173, 1995 AMC 1047 (1st Cir. (P.R.) 1994). for example, the documentary evidence showed a lump-sum freight rate for a return voyage when freight charges on the outbound voyage had been calculated on a short-ton basis, wharfage and terminal usage charges were calculated on a short-ton basis (36 F.3d at 148 n.12, 1995 AMC at 182 n.12, 1995 AMC at 1056 n.12.) and deposition testimony suggested that the freight charges for the return voyage were based on the vessel's expenses. (36 F.3d at 150, 1995 AMC at 184, 1995 AMC at 1058). The court concluded that there was "no competent evidence that the freight charge was based on anything other than a lump sum," (26. 36 F.3d at 150, 1995 AMC at 184, 1995 AMC at 1058) and the carrier was entitled to summary judgment. The best judicial summary of the federal courts' current practice is found in ***Granite State Insurance Co. v. M/V Caraibe***, 825 F. Supp. 1113, 1994 AMC 680 (D. P.R. 1993) where Judge Fuste explained:

2.1.3. Second Circuit Decisions

The Second Circuit, perhaps the leading circuit on COGSA issues, confronted with the task of determining the meaning of the phrase 'customary freight unit' in several occasions. In ***Freedman & Slater, Inc. v M. V. Tofevo,***(156) an action for damage to a shipment of 107 Goggomobile automobiles transported from Hamburg, Germany, to New York, aboard the vessel M.V. Tofevo. It is undisputed that the automobiles were damaged during the voyage while in the possession, custody and control of the carriers and that the automobiles were not 'packages' within the meaning of the Act. The parties were in agreement that the phrase 'per customary freight unit' is applicable; however, they differed as to the definition of 'customary freight unit.'(157)The carrier contends that each vehicle constituted the freight unit since the freight was assertedly charged at a specific cost for each vehicle. In support of its position, the carrier relies upon the bill of lading which shows that the freight charge was computed by multiplying the number of cars of each model by the rate per vehicle for that particular model.(158)The cargo owners urged that although the charges for freight might have been for each vehicle, the controlling factor in the case should be the measurement unit used in arriving at the rate per automobile shown on the freight tariff of the carrier.(159) On cross-examination, a witness stated that the freight rate per vehicle quoted on the tariff for each type of Gogomobile was calculated by multiplying the number of cubic meters shown for each model of Gogomobile by a certain rate per cubic meter.(160)

The District Court of New York held that each of 107 Goggomobile automobiles, constituted the "customary freight unit" within the meaning of COGSA inasmuch as the bill of lading indicated that the freight charge was computed by multiplying the number of cars of each model by the rate per vehicle for that particular model.(161) The applicable tariff also indicated that a

---

[T]he agreement between the parties, the bill of lading, ought to be the starting point for determining the customary freight unit. 'Absent any ambiguity there, the inquiry is ended, and both parties are bound to the freight unit therein adopted.'... . If, however, the bill of lading and the published tariff do not allow the court to decipher the customary freight unit used to determine the freight cost, the court should only then go beyond the bill of lading to general industry custom to seek an answer". 825 F. Supp. at 1127, 1994 AMC at 701-02 (quoting ***FMC Corp. v. S.S. Marjorie Lykes***, 851 F.2d 78, 81, 1988 AMC 2113, 2116 (2d Cir. [N.Y.] 1988).

(156). This case illustrates an extreme example of permitting the parties to determine the customary freight unit through the bill of lading; see Michael F. Sturley, 2A-XVI. Benedict on Admiralty § 167.

(157) 222 F Supp 964 (1963, DC NY), at 967.

(158) *Id.* at 971.

(159) *Id.*

(160) *Id.* at 972.

(161) *Id.*

per vehicle rate was used. The court refused to accept the cargo owner's theory, remarking that if the theory were adopted, shippers would be bound by the internal workings of carriers and their associations; while it is true that acceptance of this theory would be to the advantage of the shipper in the instant case, the court noted, the opposite might be true in other cases.(162) The use of the word "customary," the court said, in the phrase "customary freight unit" which appears in the limitation of liability statute, suggests that the freight unit should be one that is well known in the shipping industry or at least one known to the immediate parties.(163)

Again, in ***India Supply Mission v S.S. Overseas Joyce***,(164) six locomotives were carried from United States to India. The cargo owner alleged that when the shipment arrived in India, a number of the locomotives were damaged, thereby requiring a total recovery in the amount of $55,000. The carrier only admitted that one locomotive was damaged and admitted its liability for that locomotive. It was undisputed that the locomotive concededly damaged was not a "package" within the meaning of the COCSA. The parties agreed that "customary freight unit" was applicable, but disagreed as to what "customary freight unit" meant. The vessel upon which the locomotives had been shipped had been chartered to two corporations other than the carrier in the instant case; thus the carrier was not a participant in the negotiations between the cargo owner and the charterers respecting freight charges for the locomotives. The bill of lading was broken down into six separate cargo or freight units—one for each locomotive—and thus the carrier contended, its maximum liability per unit would be $500 in accordance with the limitation provision.(165) The cargo owner, however, urged the court to look to extrinsic circumstances, namely, an affidavit of a person who, at the time the freight charges were negotiated, was a director of one of the two other corporations.(166) The affidavit indicated that the freight to be charged was negotiated between the parties and was determined by utilizing a tariff rate and multiplying it by approximately 200 revenue units (a revenue unit consists of 40 cubic feet by volume or 2,240 pounds).(167) There were then added heavy lift charges and there was allowed a trade discount of 30 percent given the Government of India by most carriers in the trade. The resultant figure was then rounded out to a lump sum of $7,000 per locomotive, which was listed as the freight rate on the bill of lading.(168) The court rejected the cargo owner's contention and refused to look beyond the bill of lading to

(162) *Id*., at 973.
(163) *Id.*
(164) 246 F Supp 536(1965, DC NY).
(165) *Id.*, at 537
(166) *Id*
(167) *Id.*, at 538
(168) *Id.*

extrinsic circumstances, particularly since the carrier was not and could not have been a party to negotiations concerning freight charges, including the subject of limitation of liability. Further support for the carrier's position, the court said, could be found by looking to well-known policy considerations underpinning the limitation of liability provisions. That language, the court said, was intended to limit the liability of common carriers if inserted in a bill of lading unless the shipper declared a higher value on the goods and paid a higher rate; the cargo owner's position, the court said, would tend to negate that purpose, inasmuch as if all six locomotives were significantly damaged and if the cargo owner's theory of "customary freight unit" as one revenue unit were accepted, the carrier's maximum exposure would be $600,000. In the light of the freight charges actually agreed upon and paid, the court concluded, it would be hard to believe that such a possible result was intended by the immediate parties to the transaction. It is even more difficult to hold that the carrier should be bound by such an arrangement. Finally, the court held that a customary freight unit was one locomotive.

Further, in ***General Motors Corp. v S.S. Mormacook*** (169) an electric generator, one component of a power plant being shipped from New York to Brazil, was dropped into the sea during discharge from the ship. The freight paid was $24,750 per the power plant, plus surcharges of $8.00 per weight measurement for use of the Brazilian ports. The cargo owner argued that the freight charge was based on a measurement to (40 cubic feet). The carrier contended that the charge was based on a flat rate for the power plant.

Noting the absence of the original bill of lading to resolve the dispute, the Southern District of New York found for the carrier. It reasoned that under the applicable tariff the freight was determined on the basis of the entire power plant and that the measurement cited by the cargo owner was not mentioned.(170) Accordingly, the cargo owner was limited to a recovery of $500 for the loss of the generator. In affirming the decision, the court of appeals(171)addressed the cargo owner’s contention that a measurement ton is a more customary freight unit and that it was used in computing surcharges on the shipment. The court of appeals rejected that contention, concluding that the surcharge, levied on all those using Brazilian ports, was only incidental to the much larger principal charge, which was determined on a flat rate.(172)

(169) 327 F. Supp. 666, 1971 AMC 1647, (S.D.N.Y. 1971), aff'd sub nom., ***General Motors Corp. v. Moore-McCormack Lines***, 451 F.2d 24, 1971 AMC 2408 (2d Cir. 1971) (per curiam)

(170) ***General Motors Corp. v. S.S. Mormacoak***, 327 F. Supp. 666, 668-70, 1971 AMC 1647, 1650-53 (S.D.N.Y. 1971), (per curiam).

(171) 451 F. 2d 24.

(172) *Id.*, at 26.

It is worth noting that in ***Pannell v U.S. Line Co.,***(173)Judge Moore expressed a view which seems inconsistent with the general view of the cases previously discussed. In that case a yacht carried on deck was lost. Judge Moore considered that the words 'customary freight unit' should be applied to the yacht as a whole, rather than to the units of measure used in calculating the freight charged. There seems considerable force in his argument that:

"Had Congress intended to extend this limitation only to the unit used in calculating freight charges it would have been very simple to have so phrased the statute".(174)

3.1.3. *Fourth Circuit Decisions*

The District of Maryland, the same court that ruled in *The Bill* again confronted the 'customary freight unit' issue in ***Bumble Bee Seafoods v. S.S. Kiku Maru***(175) In this case the court had to answer several questions, among them: Was a shipment of fish to be deemed as a shipment of individual COGSA 'packages' and, if not, what was the customary freight unit for limitation purposes? The cargo-owners contended that since the bill of lading described the shipment under the heading 'Packages' as 67,222 which was the number of fish shipped then each fish should be treated as a 'package'. The court rejected this contention on the ground that the description on the bill of lading is not controlling on the issue of what constitutes a 'package'. The court relied on the definition of 'package' which was set forth by Judge Moore in *Aluminios* to hold that a fish is not a COGSA 'package'.(176) The court asserted that in the absence of shipment by package the COGSA limitation would be controlled by the 'customary freight unit'.(177) The decision in *The Bill* (178) was noted as holding that the 'customary freight unit' refers to the unit of quantity, weight or measurement of the cargo customarily used as the basis for the calculation of the freight rate to be charged. The *Kiku Maru* court, however, found the 'more widely accepted viewpoint' was that the 'customary freight

(173) 263 F.2d 497 (2d Cir. 1959).
(174) *Id.*, at 499.
(175) 1978 A.M.C. 1586.
(176) *Id.* at 1587.
(177) By the terms of the statute, where goods are packaged the customary freight unit is irrelevant. As the Second Circuit explained, COGSA's "treatment of packaged and nonpackaged goods was intended to be mutually exclusive." ***Mitsubishi Int'l Corp. v. S.S. Palmetto State***, 311 F.2d 382, 384, 1963 AMC 958, 961 (2d Cir. (N.Y.) 1962). See also ***Fireman's Fund Ins. Co. v. Tropical Shipping & Constr. Co.***, 254 F.3d 987, 999, 2001 AMC 2474 (11th Cir. 2001) ; ***Omark Indus., Inc. v. Associated Container Transp. (Australia), Ltd.,*** 420 F. Supp. 139, 141, 1977 AMC 230, 231 (D. Or. 1976). For a similar conclusion under the Hague Rules (on which COGSA is based, but which do not include the statutory phrase, "in case of goods not shipped in packages"), see ***Fiat Co. v. American Export Lines,*** 1965 AMC 384, 387-88 (Italian Ct. App. 1964)
(178) 1944 55 F.Supp. 780.

unit' refers to the unit upon which the charge for freight is computed.(179) *The Bill*'s definition may be read to require some unit traditionally used by the industry as the freight rate.(180) The court avoided choosing between the Fourth Circuit precedent and the 'more widely accepted viewpoint' by holding that the 'customary freight unit' and the 'actual' freight unit were the same: the short ton.(181)

4.1.3. *Fifth Circuit Decisions*

The task of interpreting the phrase 'customary freight unit' has also arisen in the Fifth Circuit. In ***Waterman S.S. Corp. v. U.S. Smelting, Refining & Mining Co.***,(182) 698 pieces of structural steel - the weight somewhat exceeding a ton per piece - were shipped in bulk. The freight was adjusted per 100 lb. Thirteen pieces were lost on the voyage. The Court of Appeal, approving the judgment in *The Bill*, did not regard each of them as a customary freight unit. Since the freight was charged at 65 cents per 100 lb, that unit of measure was held to be the customary freight unit.(183)

5.1.3. *Seventh Circuit Decisions*

The Seventh Circuit confronted the 'customary freight unit' issue in ***Island Yachts, Inc. v Federal Pacific Lakes Line*** .(184)In this case, a 42-foot cruiser, allegedly damaged during its shipment on the deck of the carrier's vessel from Hong Kong to Detroit, Michigan, under a bill of lading incorporating the provisions of COGSA. The court held, that the yacht itself was the "customary freight unit" inasmuch as the freight charge was a lump-sum charge of $2,460. On the bill of lading under a column entitled "MEASUREMENT CUBIC FEET," the only information that was given was the length of the cruiser, and in the section "FREIGHT AND CHARGES," no freight assessment was made in the areas allotted rates per cubic foot and per pound. Thus the court said, the bill

(179) 1978 A.M.C. 1586 at 1588.
(180) *Id.*
(181) *Id.*
(182) 155 F.2d 687, 693, 1946 AMC 997 (5th Cir. 1946).
(183) See ***Cia. Panamena de Seguros, S.A. v. Prudential Lines***, 416 F. Supp. 641, 643 (D. Canal Zone 1976) where the court held that when the carrier charged freight on the basis of the measurement ton, the measurement ton is the customary freight unit). In this case, an action for cargo loss arising out of loss overboard of two containers, neither containers themselves nor each of packages stuffed into containers were "packages" within purview of 46 U.S.C.A. § 1304(5), but court would look to "customary freight unit" used by carrier as basis for its freight charge for purpose of limitation of 46 U.S.C.A. § 1304(5); where carrier computed freight charges on basis of "measurement ton," i.e. 40 cubic feet of measurement, limit of carrier's liability would be $500 per each of freight units on which freight rate was charged. See also ***B. Terfloth & Cie (Canada), Inc. v M/V Tropic Lure*** (1987, SD Fla) 682 F Supp 514, where plaintiff failed to offer proof supporting different customary freight units and where freight was computed on "weight" basis of $130 per ton for 22 tons, customary freight unit was equal to number of tons.
(184) 345 F Supp 889 (1971, DC Ill).

of lading itself indicated that a per vehicle rate, not a unit of poundage or cubic feet, was used to calculate the freight charge.(185) Such conclusion, the court said, was buttressed by an affidavit in support of the carrier's motion for partial summary judgment on the issue of potential liability which indicated that the freight rates used by the carrier in the carriage of yachts from Hong Kong to Great Lakes ports in 1969 were the same as the contract rates established by the Hong Kong/East Canada Freight Conference.(186) For yachts, sailing boats, and pleasure craft between 41 and 42 feet in length and under 35,000 pounds, the contract rate, the court noted, was $2,460.(187) In short, the court said, the "customary freight unit" for a cruiser of the size shipped in the instant case was the cruiser itself.(188) Accordingly the carrier's liability, if any, was limited to the statutory amount of $500.

6.1. 3. *Eleventh Circuit Decisions*

In ***Caterpillar Americas Co. v. S.S. Sea Road*** (189) the Eleventh Circuit interpreted the 'customary freight unit' to refer to the unit upon which the charge for freight is computed, i.e. actual freight unit. In this case, a tractor was dropped into the water while being unloaded from the carrier's vessel. The tractor was delivered to and shipped by the carrier in a "loose" condition, that is, not boxed, crated, or put on skids. The bill of lading was blank with respect to the freight rate, but there were entered at the bottom of the face of the bill of lading the words "total steamship freight" in the amount of $875.The managing agent for the carrier testified that the $875 dollar charge was computed on a "lump-sum" basis for the entire shipment, based on past experience with similar shipments. The tractor owner contended, however, that hundredweight units constituted the freight unit. He cited for support of his contention a clause on the back of the bill of lading which contained the following language: "It is hereby mutually agreed that the shipper of the goods has been given a choice of freight rates as per tariff published, for the transportation of the goods covered by this bill of lading and that the freight on the goods is based on the declared value of said goods. The shipper declares and agrees that, unless a different valuation is stated in this bill of lading and freight paid thereon as per tariff, the value of said goods is not more than 10 cents per hundredweight". With respect to the tractor owner's reliance on such clause, the court said that it has been shown that this type of clause has been construed to be simply a formalistic recitation to achieve a limitation of liability while masquerading as a valuation clause.(190) Second,

(185) *Id.* at 891.
(186) *Id.*
(187) *Id.*
(188) *Id.*
(189) 231 F. Supp. 647 (S.D. Fla. 1964).
(190) *Id.*, at 560.

the court said, the tariffs referred to in the clause do not give any hundredweight rate which could have been used to compute the $875 charge on the shipment in question.(191) Accordingly, the court ruled that a final decree would be entered for the tractor owner in the amount of $500 plus costs.

7.1.3. *Lump Sum Freight*

Reading 'customary freight unit' as to mean the freight unit by which the freight is adjusted may create difficulties in cases where the freight is stipulated in lump sum,(192) and such difficulties can be illustrated by comparing two decisions of the Second Circuit: ***Stirnimann v. The San Diego***(193) and ***Petition of Isbrandtsen Co. v. United States (The Edmund Fanning)***.(194)

In ***The San Diego*** a giant crane was shipped under a single bill of lading in 126 parts, of which 20 were boxed and 106 unboxed. The freight was stipulated in lump sum. The carriers claimed to limit their liability to $500 on the ground that the words 'freight unit' contemplated the crane as a whole, but this contention was rejected by the District Court:

"The parts of the crane damaged were not in packages. It is contended that the words 'freight unit' contemplate the crane as a whole and that, therefore, no damages in excess of $500 can be recovered. There does not seem to be any previous decision defining the meaning of these words. In the absence of any testimony as to the rate applied to this shipment, or the manner in which the amount of the freight was arrived at, the words 'freight unit', in my opinion, refer not to the entire shipment which was in 126 units or parts, but to tons or separate pieces... The [shipper] may recover [his] damage, reasonably to be ascertained but not in excess of $500 as to any separate part scheduled in the bill of lading."(195)

(191) *Id.*

(192) Selving, *above*, note 8 at p.59. **See *Ulrich Ammann Building Equip. Ltd. v. M/V Monsun***, 1985 AMC 1965 (S.D.N.Y. 1985). Pursuant to an agreement with the shipper, the carrier filed a temporary tariff charging freight on a lump-sum basis for the entire shipment. The court therefore held that the entire shipment, rather than a single tractor, constituted the customary freight unit for COGSA purposes, although there was clearly no suggestion that freight rates are customarily calculated on a thirty-tractor basis. For an even more striking example of an entire shipment being treated as a customary freight unit, see ***Craddock Int'l Inc. v. W.K.P. Wilson & Son***, *116 F.3d 1095, 1108-10, 1998 AMC 1107, 1126-29* (5th Cir. (Miss.) 1997), which upheld the district court's finding that a $ 1.7 million fish meal processing plant shipped on a lump-sum basis was a customary freight unit to which the $ 500 limitation applied. *See also, e.g.,* ***Vision Air Flight Serv., Inc. v. M/V Nat'l Pride***, *155 F.3d 1165, 1170 n.5, 1999 AMC 1168, 1174 n.5* (9th Cir. [Cal.] 1998).

(193) 1945 A.M.C. 436.

(194) (1953. CA2 NY)201 F.2d 281..

(195) 1944 A.M.C. 676, at 680.

This decision may therefore contradict the principal rule as laid down in *The Bill* case, as it in fact limited the liability of the carrier according to shipping units.

When the case went to appeal,(196) counsel for the shipowners contended that, as the freight was a lump sum, the shipper was only entitled to $500 on the authority of *The Bill* which was cited to the court. The Second Circuit Court of Appeals rejected this argument on the ground that there was no indication as to how the figure on the bill of lading had been arrived at. The record showed that each piece of the crane was carefully weighed and measured and described in a schedule. It seemed reasonable to suppose that the weight and size of each piece were carefully and separately considered in arriving at the freight.(197) The court below had held that each of the 126 pieces was a separate package or freight unit, each being subject separately to the $500 limitation.

In ***The Edmund Fanning,*** the United States Army sought to recover for the destruction of ten uncrated locomotives and their tenders while in transit to Korea. The court found that the locomotives not to be packages. Nevertheless the Government was limited to a recovery of $500 for each set of locomotive and tender even though the freight alone for each set was $10,000.(198) The court reasoned that the evidence clearly showed that the freight rate was calculated on the basis of each set of locomotive and tender.(199) The court referred to *The Bill*(200) and *Waterman*(201)saying that these cases had defined the words 'customary freight unit' to mean the unit upon which the charge for freight is computed and not to the shipping unit.(202) The court conceded that its interpretation of 'customary freight unit' may lead to a strange result because smaller locomotives would impose greater liability on the carrier than larger more expensive locomotives because freight on small locomotives under twenty-five tons would be calculated per ton rather than per set of locomotive and tender.(203)

It is obvious that the Second Circuit's interpretation of 'customary freight unit' in *The Edmund Fanning* was also a strange result in the light of that court's prior opinion in *The San Diego* which had held that a lump sum freight charge did not establish one 'customary freight unit'. Moreover, in *The Edmund Fanning*, the carrier charged a lump sum because its published tariff on

(196) 1945 A.M.C. 436.
(197) Id., at 438.
(198) 201 F.2d 281,at 286.
(199) *Id.*
(200) 1944 55 F.Supp. 780.
(201) 1949 86 F.Supp. 487.
(202) ***The Bill*** and ***Waterman's*** cases had defined the phrase not in terms of the unit upon which the charge for freight is computed but in terms of the unit of freight 'customarily' charged.
(203) 201 F.2d at 286.

locomotives only went up to twenty-five tons; the freight on smaller locomotives was calculated per ton. The court in *The Edmund Fanning* held that a lump sum can be a 'customary freight unit' where a flat rate was charged per shipping unit or per complete shipment.(204)

In 1988, the Second Circuit once again confronted the "lump sum freight" issue in ***FMC Corp. v. S.S. Marjorie Lykes***.(205) In this case, thirty small fire engines were shipped from Erie, Pennsylvania to Alexandria, Egypt.(206) Three of the engines were destroyed during discharge from the vessel.(207) The District Court for the Southern District of New York found that the parties negotiated for freight based on a forty cubic feet measurement, and accordingly, the limitation should have been fixed at $500 per forty cubic feet, which totalled $63,750.(208) In overruling the district court, the Second Circuit held that the correct calculation of the limitation would be $500 per vehicle because the freight was charged on a "lump sum" basis, making each vehicle a customary freight unit.(209) In so holding, the Second Circuit adopted the principle underlying the rule articulated in "per package" limitation cases:

"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".(210)

The Second Circuit made clear that the terms of the documents should guide all customary freight unit determination. The bill of lading and tariff clearly indicated that the fire engines were to be shipped based on a "lump sum" charge of $4,250 for each of the thirty unboxed fire engines.(211) However, at trial the district court looked beyond these tell-tale figures to the underlying negotiations between the parties.(212) FMC contended that in the negotiations, a forty cubic feet unit was used to determine the rate, and in fact, the lump sum figure was nearly identical to that calculated using the forty cubic feet unit.(213) However, no evidence was introduced to prove that a forty cubic feet calculation was used, and only the lump sum rate appeared on all the documentation.(214) In dicta, the Second Circuit reasoned that even if there was

(204) *Id.*
(205) 851 F.2d 78, 1988 AMC 2113 (2d Cir. 1988)
(206) *Id.* at 79.
(207) *Id.*
(208) ***FMC Corp. v. S.S. S.S. Marjorie Lykes***, 1988 AMC 960 (S.D.N.Y. 1987)
(209) *S.S. Marjorie Lykes*, 851 F.2d at 80-81.
(210) *Id.* (quoting ***Allied Int'l v. S.S. Yang Ming***, 672 F.2d 1055, 1061, 1982 AMC 820 (2d Cir. 1982)).
(211) *Id.* at 80.
(212) *Id.*
(213) *Id.*
(214) *Id.* at 81

evidence of another basis for determining customary freight unit, that evidence would not be used if it disagreed with the bill of lading or tariff and neither document was ambiguous.(215) Thus the Second Circuit held that the intent of the parties as to the customary freight unit is the "overarching standard," and in determining that intent one must look to the bill of lading and the filed tariff.(216) Absent any ambiguity, the inquiry ends there and both parties are bound to the customary freight unit adopted within those documents.(217) The Second Circuit predicted that this clear-cut rule would provide certainty for those in the shipping industry.(218)

In ***Malloy v. Oregon Rainbow***,(219) the Ninth Circuit confronted the limp sum issue. Here a yacht was damaged during the voyage. It was placed in a cradle for shipment. The carrier argued that the yacht should be treated either as a single package or one customary freight unit. The court held that the yacht was not a package according to the Ninth Circuit definition of package that "cargo is a 'package' within the meaning of the statute only where the mode of packaging conceals the identity of the goods being shipped."(220) Nor was a single 'freight unit'. The shipping charge for the carriage of a yacht was usually based on the tariff rate which would have been $69.50 per cubic metre. However, the shipper applied for and received a special lump sum rate of $10,000 which saved the shipper nearly $4,000 from the applicable tariff rate. The carrier thus argued that the yacht, with the freight charge modified, became the 'customary freight unit' for limitation purposes. The court, however, stated that its task was to determine "what unit was actually used by the carrier for computing the freight charge on the shipment in question.(221) If a truly customary freight unit cannot be determined, the court must attempt to ascertain - in light of the purpose behind the statute - a reasonable understanding of the basis for a freight charge in a particular case."(222)

The court concluded:

"In this case, though there was a standard and customary freight unit which normally was used to calculate the freight charge for the shipment of yachts, the shipper of the Mandrake applied for a lower lump sum rate. The process through which this rate was approved included a review by the defendant carrier, Uiterwyk Shipping Lines. In approving the lower rate the

(215) *Id.*
(216) *Id.*
(217) *Id.* at 80.
(218) *Id.* at 81.
(219) 1980 A.M.C. 2183.
(220) *Id.*, at p. 2184 (quoting *The Pacific Bear* [1974] 1 L1.L.Rep.359).
(221) *Id.*, at p. 2185.
(222) *Id.*

carrier took into account the standard rate for this type of shipment..... The carrier also considered other factors such as economies of scale which result from the larger load with less handling necessary. However, the relationship between the special rate and the customary rate was the primary factor considered.

The court must conclude that the basis for the freight charge in this case, despite the fact that the charge was a lump sum, was cost per cubic metre. This is the 'customary freight unit' in this case and was taken into account in computing the lump sum actually charged. To ignore the reality of the situation would produce a harsh result which is not mandated by the statute."(223)

The Oregon Rainbow court looked behind the 'lump sum' freight to discover the 'customary freight unit' and limited the carrier's liability to $500 per cubic metre of the yacht, which amount to $99,225.

2.3. ENGLISH DECISIONS

The word "unit", in the English law, has come to mean shipping units - generally large, unboxed and unpackaged objects, such as cars, generators and tractors - rather than freight units as in the United States.(224) In ***Studebaker Distributors Ltd. v. Charlton Steam Shipping Co. Ltd.,***(225) an unenclosed automobile was held not to be a 'package'. In ***Anticosti Shipping Co. v. Viateur St. Amand,***(226) the suggestion that the word 'unit' is to mean 'freight unit' was rejected in favour of 'shipping unit'. In ***Anticosti***, the Supreme Court of Canada examined whether a truck which was uncrated or packaged could be considered a 'package' or a 'unit'. In the course of his reason for judgement, Mr. Justice Rand, as he then was, indicated that in applying article 4, rule 5 to the circumstances, he was concerned exclusively with the meaning of the term 'unit' as it occurs in that Rule. Giving the judgement of the Supreme Court, Rand, J., said of the word 'unit':

"The word 'unit' would, I think, normally apply only to a shipping unit, that is, a unit of goods; the word 'package' and the context generally seem so to limit it, but there has been suggested and in some cases the rule specified the

(223) *Id.*

(224) See Carver on Bills of Lading , 2nd ed. (2005), para. 9-254: "... the unit referred to in Art. IV(5)(a), for those jurisdictions [England and Canada] is an identifiable article or piece of goods that cannot be called a package (usually because it is not packed) ... for example trucks or cars, or even perhaps logs if reasonably large." See also F.M.B. Reynolds, "The Package or Unit Limitation and the Visby Rules" [2005] LMCLQ 1 at p. 2: "The word 'unit' in Art. IV, r. 5(a) has, however, caused little problem in England since 1924 because 1924 because small unpackaged items are unlikely to be presented for loading into a ship's hold. So the few cases under the Hague Rules have concerned fairly obvious examples: large but unpackaged items such as trucks, generators and cars."

(225) (1938) 1 K.B. 459.

(226) [1959] 1 Lloyd's Rep. 352.

unit of the charge for freight. Neither the bill of lading nor the evidence here throws any light on the freight rate unit. There seems to have been only a flat charge of $48 plus $3 wharfage fee; there is no indication, for example, of a rate based on tonnage or any other weight quantity. The weight of the truck is shown, but to assume that the charge is calculated on a rate for 100 pounds would bring a fractional figure which is most unlikely to represent the actual basis. The sum of $500 would scarcely be taken as a fair limitation of the value of the average 100 pounds weight of freight; in this case the amount would be the product of 102.16 units at $500 each or $51,000 which seems disproportionate to any policy estimate to be attributed to the rule. And the absence itself of any reasonable ground for extending the word to that type of measure, with the other considerations, excludes its application here."(227)

The Anticosti case has been treated as an authority in favour of the shipping unit in ***Falconbridge Nickel Mines v. Chimo Shipping Ltd.***,(228) where the Supreme Court of Canada refused the principle of a freight unit for unpackaged tractor and generator.

"[T]his natural interpretation of the word 'unit' in the phrase 'package or unit' appears to be that it has been added in order to cover parts of a cargo similar in a general way to a package, but not strictly included in that term, which properly implies something packed up or made up for portability and would therefore not include such a thing as a log of wood or a bar of metal. The word 'unit' has, it is suggested been added in order to embrace such things and not to extend the scope of the Rule to bulk cargo or parts thereof."(229)

The same approach has been adopted in the ***N.S. Tractors v. M / V Tarros Gage***(230) where a Crawler Backhoe weighing 84,400 lbs and valued at $163,000 was treated as a single shipping unit. In this case the plaintiff sought to recover the full value of the machinery arguing that the transportation costs were based on $2.60 per 100 lbs of gross weight, and that there wee accordingly 8440 'customary freight units'. The bill of lading incorporated the Hague Rules and also provided:

"...the liability (if any) of the carrier shall not exceed $500 per package or customary freight unit of goods lost, damaged...where such goods are not carried in containers or pallets..."

The defendant carrier contended that his liability was limited to $500 in accordance with Article 4, rule5, Teitelbaum, J., held that since the plaintiff

(227) *Id.*, at p.358.
(228) [1973] 2 Lloyd's Rep. 257.
(229) *Id*., at 260
(230) 1986 AMC 2050 (Fed. C. of Can.)

failed to insert the true value of the goods in the bill of lading, the carrier would not be liable for more than $500.(231)

3.3. KUWAITI AND EMIRATI DECISONS

The unit limitation has not been judicially interpreted in Kuwait. However, Sarkho expressed the view that the 'unit' is to mean the unit of weight, measurement, quantity and size upon which the freight of carriage is calculated, i.e. the freight unit.(232)

Emirati Courts adopted the same view. In a case before the Abu Dhabi Court of Appeal,(233) a shipment of unboxed cars carried from London to Abu-Dhabi. Five cars were damaged during the voyage. The bill of lading incorporated the U.K. COGSA 1924. The carrier argued that his liability should be limited to £100 per package (per car) but the Appeal Court of Abu-Dhabi rejected its argument holding that a car was not to be considered as a package or unit. On the meaning of 'unit', the court said that it refers to "unit of weight, size or measurement" and it issued where there is a bulk cargo. The court noted that 'unite' in the Hague Rules applied only to goods which are usually transported in bulk and which are unsusceptible to be numerated.

(231) *Id*., at 2056.

(232) See Sarkho Y., *Commentary on the Kuwait Maritime Law 1980*,4th ed., (2001) ,at p. 413. In determining what a 'unit' is, an Egyptian court said that the expression 'unit' in the Hague Rules applied only to goods which are usually transported in bulk and which are unsusceptible to be numerated. Therefore, the court refused to consider an unboxed car as a unit (see ***1954 D.M.F. 691*** Alexandria 21.2.1954).
While the courts in Egypt refused to apply the word 'unit' except in cases where the cargo is in bulk, we find the Appeal Court of Qatar has applied it in a case involving cars. In that case two cars, measured 1060 cubic feet, carried from U.S. to Qatar, were delivered in damaged condition. The bill of lading which was issued in respect of the cars incorporated U.S.COGSA. It also provided:
"In case of any loss or damage to or in connection with goods exceeding in actual value $500 lawful money of the United States, for package, or,. in case of goods not shipped in packages per customary freight unit, the value of the goods shall be deemed to be $500 per package or per unit, on which basis the freight is adjusted and the carrier's liability, if any, in any capacity shall be determined on the basis of a value of $500 per package or per customary freight unit, unless the nature of the goods and evaluation higher than $500 shall have been declared in writing by the shipper upon delivery to the carrier, etc."
The carrier, relying on the above provision and on article 4, rule 5 of the said Act, sought to limit his liability to $500 per car, treating each car as one unit. The court held that because U.S.COGSA governed the present question, then the meaning of 'per customary freight unit' should be determined with reference to American law. Citing at some length the American cases of ***The Bill,*** 47 F.Supp. 969 (D. Md. 1942), ***Stirnimann v. San Diego***, 1945 A.M.C. 436 and ***The Edmund Fanning*** 201 F.2d 281, the court concluded that 'per customary freight unit' means the unit on which the freight is customarily adjusted. Because in the case in issue the freight was adjusted, as it was found, per 40 cubic feet and as there were accordingly 26.5 'customary freight units' the damages should be 26.5 units x $500 = $13,220.

(233) *Case No.110 (1978*) (unreported).

It should be pointed out that Article 276 of the U.A.E. Maritime Code interprets 'unit' to mean a unit adopted as a basis for the calculation of freight, i.e. actual freight unit, and in this respect it seems that the legislation has followed American practice.

4. CONCLUSION

The goals of the shipper and carrier involved in moving shipments in international trade can be stated as follows: "[t]he shipper will wish to minimize his freight costs while maximizing his chance of full recovery in the event of an accident. A carrier, on the other hand, will desire to maximize the shipper's freight cost and thus his own revenues while at the same time minimizing his exposure to liability."(234) A key element in limiting liability is the definition of a package. Under Hague Rules and the Maritime Acts and Codes which adopted the Rules, the carrier's liability is limited to a certain amount per package, per unit or per customary freight unit. However, no definition of these terms is provided in the Rules, the Acts or the Codes. After much litigation, the courts constructed a complex set of rules that help shippers and carriers to determine what is a package for purposes of limiting liability. The factor most relied upon by the courts is the intent of the parties as exhibited by the ocean bill of lading. The description of the cargo plays a significant role in determining intent. In describing the goods, a key element is how the goods are physically packaged. To determine intent, the courts have also examined the construction of the freight rate and any clauses that appeared in the bill of lading.

It has been eighty-five years since the Hague Rules were passed, and the conflict over what is a package or unit may not be ended. Technology continues to advance. Along with it comes the opportunity for shippers and carriers to disagree on whether a new development impacts the definition of a package.(235)

(234) D.C. Toedt III, *Comment, Defining "Package" in the Carriage of Goods by Sea Act,* 60 Tex.L.Rew. 961,981(1982).

(235) **N**ancy A. Sharp**,** *Comment , What is a COGSA "package?",* 5 Pace Int'l L. Rev. 115 (1993)

REFERENCES:

- Diamond, *"The Hague/Visby Rules"* (1978) 2 LMCLQ p. 225.
- Carver on Bills of Lading, 2nd ed. (2005).
- D.C. Toedt, "*Comment, Defining 'Package' in the Carriage of Goods by Sea Act",* 60 Tex.L.Rew. 961(1982)
- F.M.B. Reynolds, "*The Package or Unit Limitation and the Visby Rules*" [2005] LMCLQ 1.
- **N**ancy A. Sharp**, "***Comment , What is a COGSA 'package?'"*, 5 Pace Int'l L. Rev. 115 (1993)
- Robert Force, Admiralty and Maritime Law, 2004.
- Sarkho Y., *Commentary on the Kuwait Maritime Law 1980,* 4th ed. (2001)
- Scrutton on Charter Parties, 18th ed, (1974).
- Selving, "*Unite Limitation of Carriers' Liability*" (London 1961)
- Tetley W, *Marine Cargo Claims,* 2nd ed. (1978).
- Van Wageningen, "*Interpreting COGSA: The meaning of 'package'*" Univ. of Miami L.R. Vol. 30 (1975).
- Wilson, *Carriage of Goods by Sea,* 6th Ed. 2008.

مسؤولية الناقل البحري عن ضياع أو تلف البضاعة عن كل طرد أو وحدة

إعداد

د. عبد الله حسن محمد

ملخص البحث

في ١٩٢٤ تبنت الأمم المتحدة قواعد لاهاي الخاصة بسندات الشحن البحرية. وكان الهدف من تبني هذه القواعد هو وضع معايير موحدة تحكم البنود والشروط التي يوردها الناقلون البحريون في سندات الشحن البحرية. وكان من بين مواد قواعد لاهاي المهمة تلك المواد التي تحدد مسئولية الناقل البحري عن ضياع أو تلف البضاعة بمبلغ معين عن كل طرد أو وحدة. إلا أن قواعد لاهاي والتشريعات البحرية التي تبنت تلك القواعد أغفلت تعريف مصطلحي "الطرد" و "الوحدة"، الأمر الذي اضطر معه الشاحنون والناقلون إلى الالتجاء إلى المحاكم والطلب منها بيان المقصود بالطرد والوحدة الواردين في القواعد. ولكن المحاكم اختلفت المحاكم في تعريف مصطلحي الطرد والوحدة وزاد من حدة الخلاف دخول الحاويات مجال النقل البحري.

وهذا البحث يلقي الضوء على أحكام كل من المحاكم الأمريكية والانجليزية والكويتية والإماراتية والتعريف الذي تبنته لمصطلحي "طرد" و "وحدة".