LIMITATION OF LIABILITY OF CARRIERS BY SEA AND BY LAND

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This article discusses the limitation of liability of carriers by sea and by land. As for ocean carriage, the article focuses primarily on the Carriage of Goods by Sea Act. As for the carriage of goods by land, the article deals exclusively with interstate carriage and focuses primarily on motor carriers and rail carriers. Topics dealing with domestic and international air carriage are excluded from this article.

I. LIMITATION OF LIABILITY OF CARRIERS OF GOODS BY WATER AND BY SEA

There are three Acts which may come into play in determining the limitation of liability applicable to the carriage of goods by water and by sea: (1) the Carriage of Goods by Sea Act (COGSA),[1] (2) the Harter Act,[2] and (3) the Limited Liability Act of 1851.[3]

A. THE CARRIAGE OF GOODS BY SEA ACT (COGSA)

By its terms, COGSA applies "to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade."[4] The true scope of the Act, however, is not quite so broad as this language suggests. The "contract of carriage" definition, for example, covers "only ... contracts of carriage covered by a bill of lading or any similar document of title."[5] Section 1305 specifically excludes charter parties, unless bills of lading are issued under the charter party. The definition of "goods" excludes live animals and certain deck cargo.[6] Further, the definition of "carriage of goods" covers only "the period from the time when the goods are loaded on the ship to the time when they are discharged from the ship."[7] Nevertheless, COGSA applies to most international ocean shipments to or from the United States during the tackle-to-tackle period.

Although COGSA is not compulsorily applicable in some important situations — domestic carriage, shipments under charter parties, most deck cargo, and damages outside the tackle-to-tackle period — carriers generally take steps to obtain COGSA's coverage even in these situations. One of the primary reasons for this is that COGSA has a $500.00 per package limitation of liability.

B. THE HARTER ACT

In cases where COGSA does not apply, the Harter Act is typically the governing statute. The Harter Act generally applies to domestic carriage (in the absence of a contrary agreement), shipments under charter parties, most deck cargo and damages outside the tackle-to-tackle period. The Harter Act does not contain any specific language regulating the extent to which a carrier may limit its liability. Although the Act has no package limitation, common practice made the $100.00 agreed valuation clause the effective equivalent and some carriers used even lower amounts.

Under the Harter Act, a carrier is never exempted from liability for cargo loss unless it exercised due diligence to make the ship seaworthy at the beginning of the voyage. If unseaworthiness and a lack of due diligence are found, the carrier cannot invoke the Harter Act exoneration clause even if there is no causal connection between the unseaworthiness and the loss or damage.[8] The Harter Act makes unlawful provisions in a bill of lading or shipping document which relieve the manager, agent, master or owner of any vessel transferring property between ports of the United States and foreign ports from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery.

C. LIMITED LIABILITY ACT OF 1851

The Limited Liability Act of 1851 provides that the liability of a vessel owner for loss or damage to goods, incurred without the privity or knowledge of the owner, shall not exceed the amount or value of the interest of such owner in the vessel and her freight then pending. The Limitation of Liability Act was enacted to protect the American maritime industry by severely limiting shipowners' personal liability. The Act is directed at maritime misfortunes where the losses claimed exceed the value of the vessel and freight. A proceeding under the Act is primarily brought by a shipowner for exoneration from liability of any kind and only secondarily to limit the owner's liability to the value of the vessel. The act protects only the vessel owner and does not preclude the claimant from recovering more than the limitation fund from a party not entitled to claim the Act's protection. A shipowner's insurer is a third party not entitled to the protection of the Limitation of Liability Act.[9]

D. LIMITATION OF LIABILITY UNDER COGSA

Most cargo damage cases tried in the United States are governed by COGSA, either because Congress has declared its applicability in the statute or because the parties have chosen to apply it. Unlike the Harter Act, COGSA explicitly permits a carrier to limit its liability in situations where it is responsible for loss or damage to the cargo. COGSA has a $500.00 per package limitation and the carrier is barred from using a lower amount. COGSA contains the following limitation of liability of the carrier and the ship:

> 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 $500.00 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be *prima facia* evidence, but shall not be conclusive on the carrier.
>
> By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, that such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.
>
> Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.[10]

The above-quoted limitation of liability provision has become a major focus of litigation in cargo damage cases. Particularly troubling questions include the definition of a "package," the definition of a "customary freight unit," and the extent to which the limitation protects third parties.

1. The Package Problem

The term "package" is not defined in COGSA, nor is there any meaningful legislative history to aid in the determination of its meaning. Because of this, some courts have held that the term must be construed according to its plain, ordinary meaning.[11] Other courts have noted that "package" has become a term of art in the shipping industry and should be interpreted accordingly.[12]

Not only are the various definitions inconclusive, but so is expert testimony. The Ninth Circuit has held that the determination of what constitutes a package is a question of statutory interpretation and thus is a question of law; and that the opinion of an expert cannot convert a question of law into a question of fact. Thus, an expert's opinion is not sufficient to make the determination of a "package" a disputed question of fact which would preclude summary judgment.[13]

Despite these problems, there are at least some general standards that most courts appear to apply in determining what is meant by the term "package." These standards vary according to whether or not the cargo is shipped in a container, and thus it makes sense to discuss non-containerized and containerized shipments separately.

a. Non-Containerized Shipments

To start with the simplest case, when non-containerized cargo is fully boxed or crated, each box or crate will generally constitute a package. This is true regardless of the size and weight of the cargo. In Robert C. Herd & Co. v. Krawill Machinery Corp.,[14] the United

States Supreme Court treated a fully crated 19-ton press as a package. Similarly, the Second Circuit has held that a 32-ton steel roll packed in a 48-cubic foot packing case constituted a single package.[15] Conversely, cargo that is shipped without any packaging whatsoever is generally treated as "not shipped in packages." Thus, a free-standing locomotive,[16] an uncrated generator unit,[17] and a loose tractor[18] are not packages.

The more difficult question arises when the cargo has had some preparation for shipment but is not fully boxed, crated or enclosed. The decisions dealing with this situation are inconsistent.[19] In Aluminios Pozuelo, Ltd. v. S.S. Navigator,[20] the Second Circuit held that a three-ton toggle press bolted to a skid was a package for limitation purposes. The court explained that packaged goods constitute "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."[21] In Hartford Fire Insurance Co. v. Pacific Far East Line,[22] however, the Ninth Circuit rejected this analysis[23] and held that an eighteen-ton electrical transformer bolted to a skid was not a package for limitation purposes.[24]

When deciding cases in this gray area, several courts have given great weight to the parties' description of the goods as contained in the bill of lading.[25] In Aluminios Pozuelo, Ltd. v. S.S. Navigator,[26] the bill of lading, under the headings "NO. OF PKGS." and "SHIPPER'S DESCRIPTION OF PACKAGES AND GOODS," described the three-ton toggle press bolted to a skid as "ONE (1) SKID MACHINERY." The court explained that the parties, "[h]aving specified that the press was `One (1)' package," were now bound by this characterization.[27] The parties' description of the goods also is significant in cases where smaller units of cargo are consolidated into larger units and the court must decide whether the smaller or the larger unit is the package.[28] In Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft,[29] the Second Circuit considered the fact that not only the bill of lading, but also the dock receipt, the commercial invoice, and the claim letter all described a pallet containing six cardboard cartons as a single package.

In Seguros "Illimani," S.A. v. M/V Popi P.,[30] the Second Circuit went even further and established what has since been described as a bright line test[31] giving almost conclusive weight to the number in the bill of lading's "NO. OF PKGS." column, at least in noncontainer cases.[32] The court explained its approach as follows: The number appearing under the heading "NO. OF PKGS." is the 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 the 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.[33] For other courts, however, the bill of lading description is only one factor to consider among many, and it is possible to have a legal conclusion that is inconsistent with the description in the bill of lading.[34]

When COGSA applies as a matter of law, the bill of lading may not define "package" in a way that reduces the carrier's liability to a level less than that sanctioned by the prevailing interpretation of §1304(5). For instance, in a circuit where an uncrated piece of machinery cannot be a package, the bill of lading may not define a package to include uncrated machinery. Such a definition would violate §1303(8) of COGSA.[35] But when the parties have incorporated COGSA by contract so that COGSA does not apply as a matter of law, several courts have held that the parties are free to define "package" in any manner they please, even if the effect is to reduce the carrier's liability below what COGSA would otherwise allow.[36] In such cases, therefore, the parties' description of the goods can have the greatest weight.

Decisions sanctioning such definitions, however, are of minimal value in determining what constitutes a package when COGSA applies as a matter of law.[37]

b. Containerized Shipments

Beginning in the late 1950s, an increasing number of shipments have been "containerized," i.e., carried in metal containers measuring 8' by 8' by up to 40'. Such containers are usually supplied by the carrier, to whom they must be returned by the consignee. Normally the shipper does not pay for the weight of the containers as part of the freight bill. The container revolution created new problems in defining the term "package" as contained in the COGSA limitation of liability provision. One problem issue is whether the carton inside the container or the container itself constitutes the package for COGSA purposes. A similar problem issue arises in connection with the shipment of multiple units on a pallet or other device for the shipment of multiple units. Carriers and their insurers have sought to limit their liability by having the courts treat the container/pallet with all its contents as a package rather than the individual cartons within the container/pallet as separate "packages" to which the $500.00 limitation is applicable.

In Leather's Best, Inc. v. S.S. Mormaclynx,[38] the first court of appeals case to tackle the question of whether a container is a package, the Second Circuit considered many factors before making its decision — the ownership of the container, the identity of the party loading the container, the method for calculating freight, the size of the container, the description of the goods in the bill of lading, and the relative economic power of the parties. The court concluded that the container itself was not a package but that each of the ninety-nine bales of leather packed into the container constituted a separate package.[39]

Two years later, in Royal Typewriter C. v. M/V Kulmerland,[40] the Second Circuit sought to simplify the decision-making process by introducing the "functional economics test." Under this new rule, a court would determine whether the individual units within a container were functionally capable of being shipped outside of the container or whether the container was necessary for their safe transportation. If "the contents of the container could have feasibly been shipped overseas in the individual packages or cartons in which they were packed by the shipper,"[41] then there was a presumption (which the carrier could rebut) that these individual packages or cartons were packages for limitation purposes. If, on the other hand, the container was necessary for the safe transportation of the cargo then there was a presumption (which the shipper could rebut) that the container itself was the package for limitation purposes.[42] In Kulmerland, the cargo inside the container consisted of adding machines packed in single corrugated cartons sealed with thin paper tape. Because these cartons could not have withstood a voyage outside of the container, the court held that the container was the package.[43]

Although some courts applied the functional economics test,[44] others were very critical of it.[45] In fact, eight years after Kulmerland, the Second Circuit decided to abandon the test it had devised in favor of a new approach. In Mitsui & Co. v. American Export Lines,[46] the court decided to return to the bill of lading to see how the parties had described the cargo. If the bill of lading reveals the number of individual packages within the container, then these are the packages for limitation purposes.[47] However, if the bill of lading does not reveal the number of packages in the container, then the container itself could be the package for limitation purposes.[48] Binladen BSB Landscaping v. M/V Nedlloyd Rotterdam,[49] clarified the latter possibility with the following rule: When a bill of lading "does not clearly indicate an alternative number of packages, the container must be treated as a COGSA package if it is listed as a package on the bill of lading and if the parties have not specified that the shipment is one of `goods not shipped in packages.'"[50]

When a bill of lading purports to show the number of packages, but the indicated packages do not qualify as such under COGSA, the Mitsui-Binladen analysis is more complicated. In Binladen, the bill of lading referred to the number of live plants in the container, but the court concluded that plants were not packages in the absence of some preparation for shipment.[51] Similarly, the bill of lading in Seguros "Illimani," S.A. v. M/V Popi P.[52] listed the number of tin ingots as the number of packages. Because individual tin ingots are not COGSA packages,[53] the Second Circuit turned instead to the number of steel-strapped bundles (which was also listed on the bill of lading). The court explained the appropriate approach as follows: "[W]hen the number reflected in the `NO. OF PKGS.' column ... refers to an item that is not a package, we will accept, as the next best indication of the parties' intent, the numbers reflected on the bill of lading that do refer to something that qualifies as a `package'. ..."[54]

In cases involving containers that have been packed and sealed by the shipper, a question arises as to whether the number of packages inserted in the bill of lading may be used to compute the per-package limitation. Section 1303(4) of COGSA provides that the bill of lading constitutes "*prima facia* evidence of the receipt by the carrier of the goods as therein described." Section 1303(3)(c), however, provides that the carrier, master or agent of a carrier shall not be bound to state or show in the bill of lading any marks, number, quantity or weight which he has no reasonable means of checking. In an effort to avoid the statutory effect of Section 1303(4), carriers often insert qualifying language in the bill of lading such as "shipper's load and count," "said to contain" or similar language. Nevertheless, the courts have held that under COGSA the bill of lading constitutes *prima facia* evidence of the carrier's receipt of the specified number of cartons notwithstanding such qualifying language.[55]

Thus, when a carrier receives a sealed container, the contents of which it has no reasonable means of checking, it has been held that the carrier is bound to the description inserted in the bill of lading concerning the number of cartons or packages shown on the bill of lading,[56] or the weight of the cargo shown on the bill.[57] The carrier, to protect itself, must leave these items blank and not list the number of packages or the weight on the bill of lading where it has no reasonable means of checking the number or weight.[58] The number or weight indicated on the bill of lading is controlling, even in sealed container cases.

Another problem arises in relation to shipments of bulk liquids in tanks or other metal objects which are "functionally a part of the ship." For example, in Shinki Boeki Co., Ltd. v. S.S. Pioneer Moon,[59] latex was carried in tanks, each of which could hold 2,000 gallons and weighed 60 tons when filled. The tanks were owned by the ship owners, filled under the carrier's supervision and could be lifted on and off the vessel. The tanks were not included in computing freight charges. Upon arrival at destination, eleven tanks were either empty or their contents contaminated. The district court had held that each tank was a package and liability was limited to $500.00 per tank. The court of appeals reversed, holding that the tanks furnished by the carrier were not packages and the bill of lading provision could not make them so. They were "more closely analogous to shipment in deep tanks than to transportation in shipper's drums," and therefore were "functionally part of the ship." Consequently, the court held that the $500.00 per package limitation did not apply and awarded the higher amount of damages based upon the customary freight unit.

Although there is still confusion in this area, the following judicially developed "basic principles" have been applied in determining whether a container or the units within the container constitute the COGSA "package:"

> 1. The bill of lading, as evidence of the intent of the parties, must be considered and often is controlling.
>
> 2. To constitute a "package" the cargo must have some preparation for shipment which facilitates handling, but does not necessarily have to be completely concealed or enclosed;
>
> 3. A container is functionally part of the ship and will not be considered the COGSA "package" absent a clear agreement to the contrary where the number of packages or units within the container are disclosed;

> 4. Unless there is a contrary agreement in the bill of lading, where cargo within a container is described in the bill of lading as not separately packaged, the $500.00 liability limit will be based upon the customary freight unit; and
>
> 5. Where it cannot be reasonably determined from the description in the bill of lading that the cargo is in packages and the parties have not specified that the shipment is one of "goods not shipped in packages" and the container is listed in the bill of lading as a package, maximum carrier liability will be $500.00 per container, irrespective of the contents.

Although there have been various rules established by the courts in the past, the current prevailing rule in the Second Circuit and other Circuits appears to be that when goods are packaged and the packages, cartons, etc. are put into a container or shipped on pallets, and the bill of lading discloses the number of packages within the container or on the pallet, the COGSA package is not the container or the pallet but each individual package within the container or on the pallet. The bill of lading indicates the intent of the parties and is controlling.

c. Customary Freight Unit

COGSA's limitation of liability divides the transportation of goods into "packages" and goods not shipped in packages. If goods are not shipped in packages, then the limitation of liability is limited to $500.00 "per customary freight unit." Before considering whether the customary freight unit test is to be applied, the court must first determine whether the shipment constitutes a "package." Once it is determined that the shipment is a package, there is no need to consider the "customary freight unit."

The term "customary freight unit" refers not to the physical shipping unit, but 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."[60] Thus, a customary freight unit relates to the way in which carriers collect money; it may have nothing to do with the physical attributes of the cargo.

For example, where the parties agreed to a flat rate for a shipment of thirty tractors on one or two vessels and the flat rate was set forth in the carrier's amended tariff, the court held that the flat rate was the customary freight unit and liability was limited to $500.00 for the entire shipment of thirty tractors.[61] Similarly, when the cargo consisted of a number of pieces of structural steel, and the freight was calculated at the rate of 64 cents per hundred pounds, the customary freight unit was not a steel plate (which weighed well over 100 pounds) but the 100 pounds on which the freight was calculated.[62]

Judicial interpretations of the meaning of the term "customary freight unit" are inconsistent. Some courts have emphasized the word "customary" and determined the applicable freight unit as the one "customarily" used.[63] The Second Circuit has taken a different approach by interpreting the words to mean the "actual freight unit used by the parties to calculate freight for the shipment in issue," rather than the standard unit of measurement in the industry. The customary freight unit of a particular shipment is determined by the bill of lading which is evidenced by the parties' intent and by the carrier's tariff which sets forth the freight rate.[64]

Perhaps the best judicial summary of the federal courts' current practice is found in Granite State Insurance Co. v. M/V Caraibe,[65] where the court explained: "[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 costs, the court should only then go beyond the bill of lading to general industry custom to seek an answer.[66]

A problem arises where the cargo is not in a package and the customary freight unit does not provide a logical basis for the $500.00 limitation. In Hanover Insurance Co. v. Shulman Transport Enterprises, Inc.,[67] a press weighing over 1,000 pounds, shipped in open view, unboxed, uncrated and without any type of shipping skids, was held not to be a package. The freight shipping unit was the cubic foot and freight charges were at the rate of 91 cents per cubic foot for 594 cubic feet, a total of $540.54. Application of the freight unit rule — 594 units multiplied by $500.00 — would have resulted in damages of $297,000.00, which the court found would be an absurd result. Consequently, the appellate court sustained the trial court's assessment of carrier liability for actual damage incurred in the amount of $8,346.62.

2. Fair Opportunity Doctrine

The courts have generally held that to enable a carrier to claim the benefit of the limitation of liability imposed by COGSA, the carrier must give the shipper a fair opportunity to choose between higher or lower liability by paying a greater or lesser freight charge.[68] All courts which have addressed the matter require the carrier to provide the shipper with some notice of the package or customary freight unit limitation of liability, differing only as to the type of notice required to be given. It has been said that the Second, Fourth, Fifth, and Eleventh Circuits require that a bill of lading include a "Clause Paramount" incorporating COGSA by reference.[69] Such a "Clause Paramount" may provide: "This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act, approved April 16, 1936."

The Second Circuit has held that a Clause Paramount on the back of a bill of lading and a space on the front for declaring excess value are enough to satisfy the requirement.[70] The Eastern District of New York has applied this reasoning in holding that a carrier satisfied the fair opportunity requirement on the basis of a Clause Paramount alone.[71] The Ninth Circuit has held that the required language need not appear on the front page of the bill of lading, that the doctrine does not require a space for declaring a higher value, and that the required language may appear in fine print.[72] The Eleventh Circuit has also made it clear that COGSA does not require a specific blank or space on the bill of lading in which to make a value declaration.[73]

One court has held that the burden of proof is on the carrier to show that a fair opportunity has been offered,[74] whereas another court has held that the burden is on the shipper to show that a fair opportunity did not exist.[75]

Some decisions raise serious questions about the future of the fair opportunity doctrine.[76] Outside of the judicial arena, the Maritime Law Association has proposed amendments to COGSA that would eliminate the doctrine statutorily.[77] The brief discussion here, therefore, may have little relevance in the future. In the meantime, the doctrine remains as a potentially serious limitation on the carrier's rights under COGSA's limitation of liability provision.

E. HIMALAYA CLAUSES

1. Generally

The $500.00-per-package limitation of liability contained in COGSA extends only to a "carrier" of goods by sea,[78] and not to third parties who are not carriers, such as stevedores, terminal operators, etc.[79] The federal courts have held, however, that non-carriers may be made third-party beneficiaries of the limitations and conditions of COGSA by inserting a provision in the bill of lading known as a "Himalaya clause." A simple example of such a clause provides: "All defenses of the Carrier shall inure also to the benefit of the Carrier's agents, servants and employees and any independent contractor performing any of the Carrier's obligations under the contract of carriage or acting as bailee of the goods, whether sued in contract or in tort."

Although a carrier is free to contract with the owner or consignee of cargo to extend the benefits of COGSA to the carrier's agents, servants and independent contractors pursuant to a Himalaya clause, such a clause is strictly construed against the carrier and its third-party beneficiaries. The contractual extension of COGSA's limitation of liability benefits third parties only if the intent to do so is clearly and unambiguously expressed in the bill of lading.[80]

One of the major controversies surrounding Himalaya clauses concerns the extent to which beneficiaries of such clauses must be described. In one of the early leading cases, the bill of lading extended "all limitations of and exonerations from liability" to "all agents and all stevedores and other independent contractors whatsoever." The Southern District of New York held that the intent to protect the defendant stevedore was sufficiently clear, and that the stevedore could therefore rely on the carrier's package limitation.[81] Indeed, the courts have had little difficulty finding Himalaya clauses that explicitly mention "stevedores" and "terminal operators" to be sufficiently clear to protect these third parties.[82] The courts also have generally held that phrases mentioning "agents" and "independent contractors" are sufficiently clear to include stevedores and terminal operators.[83] In one case, however, the Eleventh Circuit held that a stevedore was "an `independent contractor performing services' under the bill of lading" (and thus protected by the Himalaya Clause) only "as long as [the carrier] had not completely discharged its responsibility by the time of the [loss]."[84]

It has been held that the person claiming the benefit of a Himalaya clause covering agents and independent contractors must be more than just an agent or independent contractor involved in the shipment; the person must be an agent or contractor of the carrier.[85] For example, in Toyomenka, Inc. v. S.S. Tosaharu Maru,[86] the Second Circuit held that a security company who had been hired by the stevedore rather than the carrier could not claim the benefit of the Himalaya clause. In Mikinberg v. Baltic Steamship Co.,[87] the Second Circuit explained its rationale for this approach as follows:

> There must be a contractual relationship between [the `stevedore] and [the carrier] in order for the provisions in the `Himalaya Clause' to apply. It is not enough that the [stevedore] merely handled the cargo shipped by [the carrier]. Otherwise, any transporter in the flow of commerce would be automatically protected by a single bill of lading regardless of its contractual privity with the shipper or carrier. We decline to extend COGSA protections through the `Himalaya Clause'

> to indefinite and unforeseeable defendants who may have only an attenuated connection to the `carriage of goods by sea.'[88]

2. Himalaya Clauses In Relation to Overland Carriers and Multimodal Transportation

With the development of the so-called container revolution and the increased use of multimodal transport, Himalaya benefits have been claimed by overland carriers either on the basis of a specific provision in the ocean carrier's bill of lading or as agents, servants or independent contractors of the ocean carriers. For example, in Cataplliller Overseas, S.A. v. Marine Transport, Inc.,[89] the bill of lading contained a clause which extended the carrier's limitation of liability to the period of carriage "before the shipment is loaded and after it is discharged from the carrying vessel, and throughout the entire time the goods are *in the custody of the carrier* until made ready for delivery." The bill of lading also included a Himalaya clause extending the limitation of liability to the carrier's agents and independent contractors. The court held that the Himalaya clause did not benefit a motor carrier which transported the cargo from one port in Portsmouth, Virginia to another port in Norfolk, Virginia. Although the motor carrier had been employed by the ocean carrier, the motor carrier was an independent contractor which selected the route for transporting the cargo over a heavily traveled highway, and which employed and exclusively controlled the driver. The damage to the cargo occurred while it was being transported by the motor carrier on the highway. Hence, the court held that at the time of the accident, the goods were in the custody of the motor carrier and not in the custody of the ocean carrier, as stated in the extension clause in the bill of lading. Therefore, the Himalaya clause was not applicable. The court held that the motor carrier was performing the sort of non-maritime service that the parties to the contract presumably did not intend to protect.

A shipment pursuant to a multimodal through bill of lading should be reviewed differently. A multimodal through bill of lading is one which obligates the carrier to transport the cargo from origin to destination where transportation by more than one mode is required on a single (joint rate) freight charge by use of a single contractual document (bill of lading) or set of documents. Most carriers issuing international multimodal through bills of lading which involve, in part, the carriage of goods by sea use a network system in which the through bill of lading provides that the liability of the carrier will vary as the cargo moves from mode to mode; that is, the liability of the carrier will be determined under COGSA if the loss occurs at sea, or under the Interstate Commerce Act if the loss occurs while in the hands of a carrier subject thereto. Many network type bills of lading provide that if loss or damage occurs after receipt of the goods by the carrier, and if it cannot be determined whether such damage or loss occurred during the ocean carriage or any other prior or subsequent carriage, it shall be conclusively presumed that the loss or damage occurred on board the vessel while the goods were in the custody of the ocean carrier. Such a presumption arises only where the place of loss or damage cannot be determined.

Where a network type bill of lading is used as well as a Himalaya clause extending the benefits of COGSA to the inland carrier, and the damage occurs while in the possession of the inland carrier, it would seem that the use of such a Himalaya clause creates an inconsistency which may make the bill of lading ambiguous. Where, on the other hand, the place of damage cannot be determined and the presumption that the damage occurred while in the possession of the ocean carrier prevails, the Himalaya clause, to the extent it provides benefits to the participating inland carrier, would appear to be unnecessary.

A multimodal shipment was made from Tennessee to New Orleans by rail via CSX and on a CSX bill of lading; and from New Orleans to California by rail via Southern Pacific Lines, but on the multimodal bill of lading of American President Lines (APL) who was to transport the cargo from California to the Philippines by sea. The cargo was damaged and never delivered. The APL bill of lading was the network type which provided that if it could not be determined where the damage occurred, it would be presumed that the damage occurred in the custody of the ocean carrier. The multimodal bill of lading also contained a Himalaya clause.

Southern Pacific's motion to limit its liability to $500.00 per freight unit was denied on the ground that the network liability provision referred to "Joint Service Connecting Carrier." The term "Joint Service Connecting Carrier" was not one of the specified agents or independent contractors named in the Himalaya clause. Thus, the court held that the intent to extend COGSA's benefits to Southern Pacific was not clearly expressed.[90]

As multimodal transportation has become more developed, the multimodal bills of lading have become clearer and more sophisticated. Granite State Insurance Co. v. Hanjin Shipping Co.,[91] involved a shipment by sea from Yokohama to Georgia pursuant to a multimodal through bill of lading. The ocean bill of lading defined the carrier as Hanjin, its vessel, agents and subcontractors at all stages of carriage; in context of intermodal transportation." The term "subcontractors" was defined to include stevedores, truckers, railroads and their agents. The Himalaya clause extended the benefits of the ocean bill of lading to "every servant, agent and subcontractor." The cargo was discovered damaged at destination and it could not be determined where the damage had occurred. The ocean carrier's multimodal bill of lading provided that where it could not be determined in whose custody the loss or damage occurred, the loss or damage should be deemed to have occurred in the custody of the ocean carrier. The court held that the rail carriers were entitled to the benefit of the package limitation of liability in the ocean carrier's bill of lading pursuant to the Himalaya clause.

F. DEVIATION

A shipper may avoid COGSA's $500.00 per package limitation if the carrier unreasonably deviated from the customary route or the terms of the bill of lading.[92] Deviation implies a departure from usual or customary behavior. In the carriage of goods by sea, the carrier is required to begin the voyage within a reasonable time after receiving the goods for transportation and then to proceed in the most direct, shortest and usual route to the port of delivery.[93] In decisions prior to COGSA, the courts held that a deviation precluded the carrier from relying on the statutory protection of §3 of the Harter Act,[94] or from claiming limited liability under the Limitation of Liability Act.[95]

The doctrine of deviation is now set forth in COGSA:

> Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom; *provided*, however, that if the deviation is for the purpose of loading or unloading cargo or passengers it shall *prima facia*, be regarded as unreasonable.[96]

In Spartus Corp. v. S/S Yafo,[97] the court quoted the following frequently used definition of deviation:

> To deviate, lexicographically, means to stray, to wander. As applied in admiralty law, the term `deviation' was originally and generally employed to express the wandering or straying of a vessel from the customary course of the voyage, but in the course of time it has come to mean any variation in the conduct of a ship in the carriage of goods whereby the risk incident to the shipment will be increased, such as carrying the cargo on the deck of the ship contrary to custom and without the consent of the shipper, delay in carrying the goods, failure to deliver the goods at the port named in the bill of lading and carrying them farther to another port, or bringing them back to the port of original shipment and reshipping them. Such conduct has been held to be a departure from the course of agreed transit and to constitute a `deviation' whereby the goods have been subjected to greater risks, and, when lost or damage in consequence thereof, clauses of exceptions in bills of lading limiting liability cease to apply.

Deviation may be geographic or non-geographic.

1. Geographic Deviation

A carrier's failure to proceed in the most direct, shortest and customary route to the port of delivery may constitute a geographic deviation. COGSA provides that a "reasonable" deviation does not violate the Act or the contract of carriage, and that the carrier is not liable for any loss or damage resulting from a reasonable deviation. COGSA makes no explicit provision for the consequences of an “unreasonable” deviation. The obviously corollary implied is that an unreasonable deviation does violate the Act and the contract of carriage, and that the carrier is liable, at least to some extent, for loss or damage resulting from an unreasonable deviation.

A *prima facia* case of deviation is made by proof that the carrier offloaded at a place other than the stipulated destination. The burden then shifts to the carrier to prove that the offloading was reasonable.[98] The shipper, however, must present proof that the cargo was offloaded at an undesignated place. The fact that the cargo is missing at destination is not sufficient evidence that it has been offloaded elsewhere. Mere nondelivery does not prove a deviation.[99]

It has been held that a deviation by a carrier requires deliberate action, which increases the risk to the cargo beyond that which the shipper anticipated.[100]

Geographic deviation most often comes into play when a vessel strays from its customary route. The question is how far from the customary route must the vessel stray to constitute an unreasonable deviation. Because the test is one of reasonableness, the determination will vary from case to case. Thus, vessels travelling 300 miles from the customary route to obtain bunkers,[101] 184 miles to obtain additional cargo,[102] or 600 to 1,320 miles to obtain inexpensive fuel,[103] have been held to have deviated.

Notice of deviation from the customary route is a criteria for determining whether the deviation is reasonable. Presumably if actual notice is given to the shipper of an intended port call not on the customary route and the shipper fails to object, the courts are less likely to find that a deviation is unreasonable. Where there was no evidence that the shipper had been advised before the voyage of the planned deviation or that the shipper had consented to the intended deviation at the beginning of or during the voyage, and where the purpose of the deviation was to pick up additional cargo, the deviation was held to be unreasonable.[104]

2. Nongeorgraphic Deviation

Originally the doctrine of deviation was applied only to geographic departure from the contract voyage. The doctrine was later extended to situations beyond geographic departure from the customary route. This is known as “quasi-deviation.”

It has been said that an increase of risk of loss or damage to cargo, without the knowledge and consent of the shipper, constitutes and unreasonable deviation.[105] Nevertheless, nongeographic deviation is typically based on a breach of the terms in the bill of lading. “[T]he basis for deviation is departure from the bill of lading, ... mere improper stowage or handling of cargo does not constitute a deviation.”[106]

Nongeographic deviation depriving the carrier of the benefit of the limitation clause has been found where it was agreed that cargo carried on deck would be covered by tarpaulins, but it was not so covered;[107] where the carrier recklessly failed to provide the agreed upon temperature protection service for the cargo;[108] and where cargo was stowed on deck but only below-deck stowage was authorized.[109] Fraudulent misrepresentation by a carrier in a bill of lading also may constitute a deviation.[110]

It appears the trend of the courts since the enactment of COGSA is to restrict the doctrine of deviation. The Second Circuit has limited its application to only two situations — geographic deviation and quasi-deviation by unauthorized stowage on-deck.[111]

II. LIMITATION OF LIABILITY OF CARRIERS BY LAND

In considering the limitation of liability of carriers by land, one must look to the law in existence both before and after the enactment of the ICC Termination Act of 1995.[112] Prior to the Termination Act, the liability provisions of the Carmack Amendment were contained in one section of the Interstate Commerce Act. These provisions, applicable to rail carriers, motor carriers and freight forwarders, also included the provision concerning limitation of liability. The Termination Act has separated the Carmack limited liability provisions by mode and service. They are stated separately for rail carriers,[113] and motor carriers and freight forwarders.[114] These sections contain limited liability provisions which are similar to prior law.

The ICC Termination Act of 1995 became effective January 1, 1996. The Act abolished the Interstate Commerce Commission, which has now been replaced by the Surface Transportation Board. Unlike the original Carmack Amendment, the Termination Act does not refer to "common carriers;" it applies to "motor carriers." All motor carriers must register with the Secretary of Transportation. Once registered, motor carriers, as well as rail carriers, may enter into exempt contracts and contract out of the Carmack liability provisions.

One significant change made by the Termination Act concerns the filing of tariffs. Prior to the Act, carriers were required to file their tariffs with the former ICC. Under the Act, tariffs need only be filed for the transportation of household goods and for transportation in non-contiguous domestic trade. In addition, the Termination Act replaced the provisions of the Motor Carrier Act of 1980,[115] the Staggers Rail Act of 1980,[116] and the Surface Freight Forwarder Act of 1986.[117] Nevertheless, the Termination Act provides that, in relation to motor carriers, freight forwarders and brokers, the remedies under the Act are in addition to the remedies existing under another law or common law.[118] Thus, the Termination Act contains a "Savings Clause," pursuant to which existing remedies under the Interstate Commerce Act are reserved as they relate to motor carriers, freight forwarders and brokers. In contrast, there are no provisions concerning rail carriers, pursuant to which common law remedies are reserved. On the contrary, the provision concerning the general jurisdiction of the Surface Transportation Board provides:

> Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.[119]

A. REQUIREMENTS FOR LIMITING THE LIABILITY OF CARRIERS BY LAND

Prior to the ICC Termination Act, the federal courts held that a carrier must meet the following requirements in order to limit its liability under the Carmack Amendment: (1) maintain a tariff within the prescribed guidelines of the Interstate Commerce Commission; (2) give the shipper a reasonable opportunity to choose between two or more levels of liability; (3) obtain the shipper's agreement as to its choice of liability; and (4) issue a receipt or bill of lading prior to movement of the shipment.[120]

These criteria must be reconsidered in light of the enactment of the Termination Act. First, most transportation by motor carriers and forwarders currently is not performed pursuant to tariffs filed with an administrative agency. Tariffs need only be filed for the transportation of household goods and for transportation of property in non-contiguous domestic trade. These tariffs should be filed with the Surface Transportation Board. Further, any tariff on file with the former ICC on August 26, 1994, and not required to be filed after that date, is declared null and void.[121] Consequently, the effect of a filed tariff is diminished by the sparsity of filed tariffs. Also, rail carriers, motor carriers and freight forwarders are now able to enter into exempt contracts pursuant to which they are permitted to contract out of the Carmack liability provisions. Except for those cases where the carrier or forwarder enters into an exempt contract *and* the exempt contract provides that the Carmack liability provisions are not applicable, a motor carrier who is not required to file a tariff with the Surface Transportation Board must provide the shipper, on request, with a written or electronic copy of the rate, classification, rules, and practices upon which any rate applicable to a shipment is based.[122] This implies an obligation on the part of a motor carrier to maintain an unfiled tariff.

Because the rules and regulations of the former ICC continue in effect under the new Act pursuant to the "Savings Clause," the first requirement for limiting liability remains in effect where applicable. The requirement to obtain the shipper's agreement as to its choice of liability also continues under the Termination Act since the released value must be established by a written or electronic declaration of the shipper or by a written agreement. The requirement for giving the shipper a reasonable opportunity is a judicial, rather than a statutory, requirement and remains so. The fourth requirement, the issuance of a receipt or bill of lading, continues under the new Termination Act.

The burden of proof that these requirements have been met rests with the carrier.[123]

1. Requirement of a Writing

Under prior law, a motor carrier, other than a carrier of household goods, could establish rates under which its liability was established by written declaration of the shipper or by written agreement between the carrier and the shipper.[124] The same was true for a rail carrier,[125] and a motor carrier of household goods was subject to authorization by the former ICC.[126]

The Termination Act contains the same requirement for a rail carrier to limit its liability — a written declaration of value by the shipper or a written agreement between the shipper and the carrier.[127] For motor carriers and freight forwarders, the Termination Act provides that the value may be established by "electronic declaration" of the shipper.[128] With respect to household goods, the right of a motor carrier or freight forwarder to establish rates under which its liability is limited is dependent upon the authorization of the Surface Transportation Board. No provision is made for an electronic declaration of value for household goods.[129] Assuming an electronic declaration is equivalent to a written declaration, a writing is still required under the Termination Act. An oral agreement between the carrier and the shipper which purports to limit the carrier's liability is void.[130]

The Uniform Bills of Lading generally have the provision for a released rate printed on the face of the bill. The Uniform Motor Carrier Bill of Lading provides:

> Note — Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.
>
> The agreed or declared value is hereby specifically stated by the shipper to be not exceeding _______ per _______.

When the blank spaces are filled in, provided they are in accord with the provisions of the carrier's tariff, this generally satisfies the requirement of a writing. The acceptance by the shipper of the bill of lading containing a released valuation clause and the concurrent receipt by the shipper of the lower rate for shipment is all that is required. The shipper need not sign the bill of lading.[131] The claim that the shipper did not know of the released valuation clause or did not read it does not affect the validity of the provision.[132] The standard for determining whether a shipper agreed to a limitation of liability is the same standard for determining whether a party agreed to enter into any other contractual obligation. One who signs a contract, in the absence of fraud or deceit, cannot avoid it on the ground that he or she did not read it.

An interesting problem arises when the space for the declared value is left blank. In Gordon H. Mooney, Ltd. vs. Farrell Lines, Inc.,[133] the Second Circuit held that a limitation of liability is not effective when the bill of lading does not specify either a reduced freight rate or the released value of the property. In Ruston Gas Turbines, Inc. vs. Pan American World Airways,[134] the Second Circuit held that where the bill of lading failed to contain either the reduced freight rate or the released value, the shipper was nevertheless bound to the released rate because it had actual knowledge of the carrier's tariff which specified the released rate. The Ruston case has been said to have "established a rule that when a bill of lading does not specify either a reduced rate or released value, and the shipper has no actual knowledge of the terms of the tariff, limitations of liability contained in the tariff are not effective."[135]

However, in W.C. Smith, Inc. vs. Yellow Freight Systems, Inc.,[136] the Eastern District of Pennsylvania held that lack of knowledge of the terms of the carrier's tariff was insufficient to avoid a limitation of liability clause because the shipper was charged with knowledge of the applicable tariff provisions. In W.C. Smith, the carrier had on file with the ICC a tariff which contained an "automatic release clause" which provided that "[i]f the consignor fails to declare a released value at the time of shipment, shipment will be subject to the lowest released value herein."[137] The bill of lading expressly incorporated all tariffs that governed the shipment. The court held that, in failing to declare a released value in the blank spaces in the bill of lading, the shipper had chosen the lowest released value. The court reached its conclusion even though the released rates were not conspicuous on the face of the bill of lading, because the shipper was charged with knowledge of the applicable tariff provisions.

Similarly, in Mechanical Technologies, Inc. vs. Ryder Truck Lines,[138] the Second Circuit held that lack of knowledge of the terms of the carrier's tariff was insufficient to avoid a limitation of liability clause because the shipper was a sophisticated shipper who used his own bill of lading form incorporating the carrier's tariff which contained an automatic released rate. The court stated that "[w]hen a sophisticated shipper using his own bill of lading form leaves blank the space provided for declaring the released value of the goods, [the court] will presume that he did so deliberately with full knowledge of the consequences under the applicable tariff." The court further noted that "shippers are charged with notice of terms, conditions, and regulations contained in the tariff schedule." The tariff in that case contained an automatic release clause which provided that a failure to designate a released rate would result in a rate of $5.00 per pound. By leaving the spaces blank on the bill of lading, the court said, the shipper "effectively selected the lowest freight rate and its corresponding low level of liability." Having had the opportunity on its own form to secure greater protection, the court ruled that the shipper could not "complain about the consequences of leaving the applicable spaces blank." In short, the court in Ryder Truck held that where the contract was "negotiated between people of at least equal economic stature and commercial awareness" and where the shipper's "own form incorporated the applicable tariff and provided for designation of a released rate," the carrier could limit its liability even though the shipper had no actual knowledge of the carrier's tariff.

However, in Novelty Textile Mills, Inc. vs. C.T. Eastern, Inc.,[139] the court held that even though the bill of lading was negotiated between people of equal economic stature and commercial awareness, and the shipper left blank its own bill of lading which incorporated the applicable tariff, the carrier could not limit its liability because there was no evidence the carrier's tariff contained an automatic released rate in the event the shipper failed to declare a value on the bill of lading.

The foregoing cases stand for the proposition that where a sophisticated shipper who has no actual knowledge of the carrier's tariff fails to declare a value or released rate on the bill of lading, the carrier cannot limit its liability unless the carrier's tariff contains an automatic release clause. Nevertheless, it must be emphasized that the concept of constructive knowledge of the carrier's tariff, as espoused in W.C. Smith and Mechanical Technologies, may no longer completely survive in light of the enactment of the Termination Act, which requires the filing of tariffs only in limited circumstances. It has been recognized that constructive knowledge of the terms of a carrier's tariff applies only when the terms have been filed or otherwise published.[140]

It has been held that the writing requirement for limiting a carrier's liability is met where the bill of lading is in "substantial compliance" with the carrier's tariff.[141] Where the limitation of liability provision was not printed in boldface type, was a truncated version of the sample contained in the tariff, was not set off in an enclosed block or box, and was located inconspicuously between the box for the description of the goods and the block for the shipper's signature, the court held that the bill of lading did not substantially comply with the ICC filed tariff. Therefore, the provisions in the tariff limiting the carrier's liability were inapplicable.[142] Also, where the carrier's tariff filed with the ICC required the bill of lading to have a specific form upon which the released value was to be entered and no such form or similar form was contained on the bill, the court held that a limitation of liability provision in the middle of a densely packed, bold-faced form, was ineffective to limit the carrier's liability. The court held that the limitation of liability clause was invalid because the terms of the bill of lading did not comply with the requirements of the carrier's tariff.[143]

Prior to the enactment of the Termination Act, the rate charged by the carrier was required to be in accord with the rate filed by the carrier with the ICC. Where the rate charged by the carrier was not the rate fixed by the tariff as the released rate, the carrier was liable for the full actual value and not the limited value.[144]

In light of the enactment of the Termination Act, it is not entirely clear what weight the courts will now give to a carrier's tariff.

2. Evidence of Opportunity to Select Higher Rate and Greater Liability

The courts have held that a shipper must be given a fair opportunity to choose a level of liability based upon a choice of rates. A fair opportunity requires that the shipper have reasonable notice of the liability limitation before making the contract and the opportunity to obtain information necessary to make a deliberate and well-informed choice.[145] In other words, a carrier seeking to limit its liability must bring this fact to the attention of the shipper, and the shipper must be given the choice to contract either with the limitation or without it.[146] Because it is the carrier that is seeking to limit its statutory liability, any ambiguity in the language the carrier selects in an effort to satisfy the fair opportunity requirement must be construed against it.[147] The courts may consider various factors in determing whether a fair opportunity has been given. Factors which may be considered are whether the shipper used its own form of bill of lading or the carrier's form;[148] whether the value declared was inserted on the bill of lading by the shipper or by the carrier's agent;[149] or whether the shipper was an experienced, sophisticated shipper or an inexperienced person shipping household goods.[150]

In the case of household goods, the Code of Federal Regulations requires that a prospective shipper in interstate commerce be given a publication entitled "Your Rights and Responsibilities When You Move."[151] This publication discusses the carrier's liability for loss and damage, including the levels of the carrier's liability. If this publication is not given to the prospective shipper of household goods, the carrier may not be able to limit its liability. For example, in Brannon v. Smith Dray Line & Stewards Co.,[152] the court noted that the Interstate Commerce Commission regulations in effect at the time required the carrier to give the prospective shipper of household goods a copy of a "Notice to Shippers of Household Goods." No such notice was given to the shipper. In addition, the carrier's agent typed in the declared value rather than allowing the shipper to write in the valuation as provided in the printed instructions. The court held that the carrier was liable for the full actual value of the goods.

It has been recognized that actual knowledge of the carrier's choice of rates and released values may be found from prior course of dealing or a history of numerous shipments over a period of years.[153] In addition, the bill of lading containing requisite language constitutes *prima facia* evidence that the shipper was offered a choice of rates, but the carrier may be required to provide evidence of its tariff and rate schedules.[154] Under the Termination Act, a motor carrier, in those instances where it is not required to file a tariff, must nevertheless provide the shipper, upon request, with a copy of the carrier's rates, classification, rules and practices.

B. CONVERSION BY THE CARRIER

It has been held that a carrier cannot limit its liability where it has converted the goods to its own use and gain.[155] The doctrine of conversion, however, is restricted to true conversions. Withholding possession of goods for no reason or the wrong reason constitutes conversion. This has been said to include withholding goods for the payment of charges to which a party is not entitled.[156] Nevertheless, the carrier may properly limit its liability where the conversion is by third parties or even by its own employees.[157] The plaintiff must prove that the carrier converted the property to its own use and gain.[158]

C. RECISION AND REFORMATION

As a contract, a bill of lading is subject to those equitable rules governing other contracts and particularly contracts of adhesion. Thus, the contract and the limited liability provided therein may be declared void or rescinded on the grounds of fraud by the carrier.[159] If a signature to a contract is obtained by trick or artifice, the contract may be invalidated.

The bill of lading may be reformed by the court if there has been a mutual mistake. Where cargo was damaged after the shipper's agent gave the carrier's agent a written instruction sheet directing the carrier to insure the cargo at full value and the carrier's agent failed to note the declared value on the bill of lading, the court held that the bill of lading could be reformed on the basis of mutual mistake, thus entitling the shipper to recover full value.[160] There must be clear and convincing evidence of a mutual mistake of fact to support such reformation.

A bill of lading will not be reformed on the basis of a unilateral mistake. For example, where a shipper had inserted the number 61045 in the zip code box which was immediately above the declared value box on the bill of lading and the declared value box was left blank, the shipper's action to have the contract reformed to reflect $61,045.00 as the declared value was denied because the mistake was found to be unilateral on the shipper's part and not a mutual mistake of fact.[161]

D. MOTOR CARRIER EXEMPTIONS

Numerous motor carriers exemptions are provided for in the ICC Termination Act of 1995.[162] They are generally the same exemptions provided for in the statute prior to the enactment of the Termination Act. Further, the exemptions created by the former Interstate Commerce Commission remain in effect until modified or repealed by the Secretary of Transportation, the Surface Transportation Board or other designated parties. In addition, similar to the authority previously granted to the former Interstate Commerce Commission, the Secretary of Transportation and the Surface Transportation Board have been granted authority to exempt "a person, class of persons, or a transaction or service."[163]

Motor carrier cargo exemptions include motor vehicles controlled and operated by a farmer and transporting the farmer's agricultural or horticultural commodities; motor vehicles operated by a cooperative association; motor carriers transporting ordinary livestock, agricultural and horticultural product, and commodities such as fish or by-products of fish not intended for human consumption; and transportation of property by motor vehicle as part of a continuous movement preceding or subsequent to an air movement or in lieu of air movement because of adverse weather conditions, failure of the aircraft or circumstances beyond the control of the carrier or shipper.[164] Other motor carrier exemptions include transportation within commercial zones[165] and terminal areas,[166] transportation furthering a primary business,[167] and motor carrier transportation entirely in one state.[168]

Where motor carrier transportation is exempt by statute either under prior law or the Termination Act, a rate for full value liability may not be required by the administrative agency when the motor carrier has established a released value rate. However, an issue would appear to remain as to whether such exempt transportation is subject to common law, which requires an opportunity to choose greater carrier liability upon payment of a higher freight rate.

ENDNOTES

· *46 U.S.C. app. §§1300-1350 (1997).*

· *46 U.S.C. app. §§190-196 (1997).*

· *46 U.S.C. app. §§181-196 (1997).*

· *46 U.S.C. app. §1312 (1997).*

· *46 U.S.C. app. §1301(b) (1997).*

· *46 U.S.C. app. 1301(c) (1997).*

· *46 U.S.C. app. 1301(e) (1997).*

· ***May v. Hamburg-Amerikanische Packetfahrt Aktiengesellschaft, 290 U.S. 333 (1933). Under COGSA, on the other hand, if th cause of the loss or damage is one enumerated in an exception clause, COGSA "always operates to exonerate the carrier unless due diligence has not been used in some respect proximately causing or contributing to the loss." Horn v. Cia de Navigacion Fruco, S.A., 4 F.2d 422, 432 (5th Cir. 1968).***

· ***Magnolia Transport v. LaPlace Towing Corp., 942 F.2d 1571 (5th Cir. 1992).***

· ***46 U.S.C. §1304(5).***

· ***See Travelers Indem. Co. v. The Vessel Sam Houston, 26 F.3d 895, 900 (9th Cir. 1994); Van Der Salm Bulb Farms, Inc. v. Ha Lloyd, AG, 818 F.2d 699, 701 (9th Cir. 1987); Omark Industries v. Associated Container Transp. (Australia), Ltd., 420 F. Supp. 139, 14 (D. Or. 1976). For a more detailed treatment of this subject, see Michael F. Sturley, "Packages," 2A Benedict on Admiralty §167 (7th r ed. 1996).***

· ***See, e.g., Monica Textile Corp. v. S.S. Tana, 952 F.2d 636, 640 (2nd Cir. 1991); Seguros "Illimani," S.A. v. M/V Popi P., 929 F 89, 94 (2nd Cir. 1991).***

· ***Van Der Salm Bulb Farm, Inc. v. Hapag Lloyd, A.G., 818 F.2d 699 (9th Cir. 1997).***

· ***359 U.S. 297 (1959).***

· ***Mitsubishi Int'l. Corp. v. S.S. Palmetto State, 311 F.2d 382 (2nd Cir. 1962).***

· ***Petition of Isbrandtsen Co., 201 F.2d 281, 286 (2nd Cir. 1953).***

· ***See generally Aggreko, Inc. v. Lep Int'l., Ltd., 780 F. Supp. 429 (S.D. Tex. 1991); Solar Turbines, Inc. v. S.S. Al Shidadiah, 57 Supp. 939 (S.C. N.Y. 1983).***

· ***See Eaton Corp. v. S.R. Galeona, 474 F. Supp. 819, 822 (S.D. N.Y. 1979); Caterpillar Am. Co. v. S.S. Sea Roads, 231 F. Supp. (S.D. Fla. 1964).***

· *Compare* Companhia Hidro Electrica v. S.S. Loide Honduras*, 368 F. Supp. 289, 1974 AMC 350 (S.D. N.Y. 1974) (holding that partially enclosed 239-cubic-foot glass circuit breaker constituted a package) with* Gulf Italia Co. v. American Export Lines*, 263 F.2d 1. (2d Cir. 1959) (holding that a partially enclosed tractor did not constitute a package).*

· *407 F.2d 152 (2d Cir. 1968).*

· See id*. at 155.*

· *491 F.2d 960, 1974 AMC 1475 (9th Cir. 1974).*

· *In* Travelers Indemnity Co. v. The Vessel Sam Houston*, 26 F.3d 895, 901, 1994 AMC 2162, 2169 (9th Cir. 1994), the United St Court of Appeals for the Ninth Circuit declared that it "has rejected only that part of* Aluminios *that examines the subjective purpose of packaging."* Id*.*

· See Hartford Fire Ins. Co. v. Pacific Far E. Line, Inc.*, 491 F.2d 960, 965, 1974 AMC 1475, 1482 (9th Cir. 1974). In* Yang Machine Tool Co. v. Sea-Land Services, INc.*, 58 F.3d 1350, 1995 AMC 2153 (9th Cir. 1995), the United States Court of Appeals for the Ninth Circuit held -- essentially without comment -- that each piece of a large horizontal machining center secured on a flat rack by ste bands was a package.*

· See Travelers Indem. Co. v. The Vessel Sam Houston*, 26 F.3d 895, 901-02, 1994 AMC 2162-2169-72 (9th Cir. 1994);* Nichime Co. v. M/V Farland*, 462 F.2d 319, 334-35, 1972 AMC 1573, 1594-95 (2d Cir. 1972);* Pyropower Corp. v. M/V Alps Maru*, 1993 AMC 15 1572 (E.D. Pa. 1993).*

· *407 F.2d 152 (2d Cir. 1968).*

· id*. at 156.*

· See Allied Int'l Am. Eagle Trading Corp. v. S.S. Yang Ming*, 672 F.2d 1055, 1060-63, 1982 AMC 820, 827-30 (2d Cir. 1982);* In Maritima Aragus, S.A. (The M/V Mar Dorada)*, 1992 AMC 1603, 1606-12 (S.D. N.Y. 1992).*

· *375 F.2d 943 (2d Cir. 1967).*

· *929 F.2d 89, 1991 AMC 1521 (2d Cir. 1991).*

· See The M/V Mar Dorada*, 1992 AMC at 1608.*

· *929 F.2d 89, 94-95, 1991 AMC 1521, 1528-29 (2d Cir. 1991);* see also Pyropower Corp. v. M/VAlps Maru*, 1993 AMC 1562, 15 (E.D. Pa. 1993) (following* Seguros "Illimani"*).* But see Bando Silk Co. v. Hyundai Commander*, 1995 AMC 516, 520-22 (S.D. N.Y. 19 (rejecting the number given in the bill of lading's "NO OF COUNT OR OTHER PKGS" column (and also the "MARKS AND NUMBE column) in favor of number in the "DESCRIPTION OF GOODS" column).*

· Seguros "Illimani," S.A.*, 929 F.2d at 94, 1991 AMC at 1528.*

· See Tamini v. Salen Dry Cargo AB*, 866 F.2d 741, 743, 1989 AMC 892, 894 (5th Cir. 1989).*

· See*,* e.g.*,* Shinko Boeki Co. v. S.S. Pioneer Moon*, 507 F.2d 342, 1975 AMC 49 (2d Cir. 1974);* St. Paul Fire & Marine Ins. Co. Sea-Land Servs., Inc.*, 735 F. Supp. 129, 1991 AMC 523 (S.D. N.Y. 1990);* Cia. Panamena de Seguros v. Prudential Lines*, 416 F. Supp. 641, 643 (D. C.Z. 1976). In the context of containerized cargo, courts are even more skeptical of carriers' attempts to define "package" through a bill of lading clause.* See All Pac. Trading, Inc. v. M/V Hanjin Yosu*, 7 F.3d 1427, 1433-34, 1994 AMC 365, 370-71 (9th Cir. 1993);* Monica Textile Corp. v. S.S. Tana*, 952 F.2d 636, 641, 1992 AMC 609, 615 (2d Cir. 1991) (reviewing cases).* But see Aviles v. S.S San Juan*, 1991 AMC 2681 (S.D. N.Y. 1991).*

· *See Institute of London Underwriters v. Sea-Land Servs., Inc., 881 F.2d 761, 765-66, 1989 AMC 2516, 2520-22 (9th Cir. 1989); Commonwealth Petrochemicals, Inc. v. S.S. Puerto Rico, 607 F.2d 322, 1979 AMC 2772 (4th Cir. 1979); Pannell v. United States Lines, 263 F.2d 497 (2d Cir. 1959); Enterprise, Inc. v. The Vessel Sam Houston, 706 F. Supp. 451, 453, 1988 AMC 2745, 2747 (E.D. La. 1988)*

· *See St. Paul Fire & Marine Ins. Co. v. Sea-Land Servs., Inc., 745 F. Supp. 186, 188, 1991 AMC 523, 524-25 (S.D. N.Y. 1990) (distinguishing Pannell v. United States Lines, 263 F.2d 497 (2d Cir. 1959)); Smythgreyhound v. M/V Eurygenes, 666 F.2d 746, 1982 A 320 (2d Cir. 1981); Institute of London Underwriters v. Sea-Land Servs., Inc., 881 F.2d 761, 1989 AMC 2576 (9th Cir. 1989)). But see Caterpillar Overseas, S.A. v. Marine Transp., Inc., 900 F.2d 714, 1991 AMC 75 (4th Cir. 1990) (relying on Commonwealth Petrochemic Inc. v. S.S. Puerto Rico, 607 F.2d 322, 1979 AMC 2772 (4th Cir. 1979), and Pannell v. United States Lines, 263 F.2d 497 (2d Cir. 1959), the proposition that the parties may define "package" in a bill of lading without regard for the fact that the shipment at issue was gover by COGSA as a matter of law).*

· *451 F.2d 800 (2d Cir. 1971).*

· *id. at 815.*

· *483 F.2d 645 (2d Cir. 1973).*

· *Id. at 648.*

· *id. at 649.*

· *id.*

· *See Rosenbruch v. American Export Isbrandtsen Lines, 543 F.2d 967, 969-70, 1976 AMC 487, 491-92 (2d Cir. 1976); Cameco, Inc. v. S.S. American Legion, 514 F.2d 1291, 1297-1300, 1974 AMC 2568, 2575-78 (2d Cir. 1974).*

· *See, e.g., Complaint of Norfolk, Baltimore & Carolina Line, Inc., 478 F. Supp. 383, 1981 AMC 496 (E.D. Va. 1979); Matsushit Elec. Corp. of Am. v. S.S. Aegis Spirit, 414 F. Supp. 894, 1976 AMC 779 (W.D. Wash. 1976). See also Cameco, Inc. v. S.S. American Legion, 514 F.2d 1291, 1300, 1974 AMC 2568, 2578 (2d Cir. 1974) (Feinberg, J., concurring). The United States Court of Appeals for t Second Circuit reviewed the history and criticism of the functional economics test in Monica Textile Corp. V. S.S. Tana, 952 F.2d 636, (1992 AMC 609, 613 (2d Cir. 1991).*

· *636 F.2d 807 (2d Cir. 1981).*

· *See Monica Textile Corp. v. S.S. Tana, 952 F.2d 636, 641-643 (2d Cir. 1991); Judy-Philippine, Inc. v. S.S. Verazano Bridge, 80 F. Supp. 185, 188 (S.D. N.Y. 1992).*

· *See also Orion Ins. Co. v. M/V Humacao, 851 F. Supp. 575, 1994 AMC 1922 (S.D. M.Y. 1994) (holding that a 40-foot containe packed with 42,298 pounds of bulk resin is a single package because the bill of lading described the shipment as "1 CNT" in the "No. o Pkgs." column and as "BULK RESIN" in the "Description of Packages and Goods" column).*

· *759 F.2d 1006 (2d Cir. 1985).*

· *id. at 1015-16. In Insurance Company of North America v. M/V Xiang He, 1993 AMC 342, 344-345 (S.D. N.Y. 1990), the bill lading had no entry in the "No of Containers or Pkgs" column, but the bill of lading referred to the flat rock container as the "Kind of Package." In the absence of any alternative measure of the packages shipped and any indication that the shipment was one of "goods n shipped in packages," the court treated a flat rock container to which a helicopter was secured as a single package.*

· *Binladen, 759 F.2d at 1013. See also Aviles v. S.S. San Juan, 1991 AMC 2681 (S.D. N.Y. 1991) (holding that the container wa the COGSA package on the basis of the bill of lading definition where the bill of lading indicated that the container held 249 pieces but* *gave no indication of whether or how these pieces were packaged; other evidence showed that the carrier had no knowledge of how the contents of the container were stowed, so the court thus ignored the 249 figure, despite the fact that it was in the "no. of pkgs." column).*

· *929 F.2d 89, 94-95 (2d Cir. 1991).*

· *See Mitsui & Co. v. American Export Lines, 636 F.2d 807, 822, 1991 AMC 331, 353 (2d Cir. 1981).*

· *Seguros "Illimani," S.A., 292 F.2d at 94-95. In Monica Textile Corp. v. S.S. Tana, 952 F.2d 636, 640-41, 1992 AMC 609, 613- (2d Cir. 1991), the United States Court of Appeals for the Second Circuit declared in dicta that the passage from Seguros "Illimani" quo in the text 'is inapposite" and "does not purport to apply when a container is alleged to be the relevant COGSA package."*

· *Austracan (U.S.A.), Inc. v. Neptune Orient Lines, 612 F. Supp. 578 (S.D. N.Y. 1985).*

· *Id.*

· *Westway Coffee Corp. v. M/V Netuno, 675 F.2d 30 (2nd Cir. 1982).*

· *Austracan, supra at n.55.*

· *507 F.2d 342 (2nd Cir. 1974).*

· *Brazil Oiticica, Ltd. v. The Bill, 55 F. Supp. 780, 783 (D. Md. 1944).*

· *Ulrich Amann Building Equipment, Ltd. v. M/V Monsun, 609 F. Supp. 87 (S.D. N.Y. 1985). See also Union Carbide Corp. v. M Michele, 764 F. Supp. 783 (S.D. N.Y. 1990) where the customary freight unit for a transportable tank containing a liquid cargo was also fixed at a flat rate.*

· *Waterman S.S. Corp. v. United States Smelting, Ref. & Mining Co., 155 F.2d 687, 693-94 (5th Cir. 1946).*

· *Brazil Oitica, Ltd. v. The Bill, 55 F. Supp. 780, 783 (D. Md. 1994).*

· *FMC Corp. v. S.S. Marjorie Lykes, 851 F.2d 78 (2nd Cir. 1980).*

· *825 F. Supp. 1113 (D. P.R. 1993).*

· *Id. at 1127.*

· *581 F.2d 268 (1st Cir. 1978).*

· *E.g., General Electric Co. v. Ned Lloyd, 817 F.2d 1022 (1987).*

· *P.T. Keraton Selaras v. M/V Cartagena de Indias, 951 F. Supp. 1196, 1203 (E.D. Pa. 1996) (citing Henley Drilling Co. v. McG 36 F.3d 143, 145 (1st Cir. 1994)).*

· *See General Elec. Co. v. M/V Nedlloyd, 817 F.2d 1022, 1029 (2nd Cir. 1987); Binladen BSB Landscaping v. M/V Nedlloyd Rotterdam, 759 F.2d 1006, 1017 n.12 (2nd Cir. 1985).*

· *E.N.S. Industrie, S.A. v. Polskie Towarzystwo Okretowe, 608 F. Supp. 1133, 1135 (E.D. N.Y. 1985).*

· *Mori Seiki U.S.A., Inc. v. M./V. Alligator Triumph, 990 F.2d 444 (9th Cir. 1993).*

· *Insurance Co. of North America v. M./V. Ocean Lynx, 901 F.2d 934, 941 (11th Cir. 1990).*

· *Cincinnati Milacron, Ltd. v. M./V. American Legend, 784 F.2d 1161 (4th Cir. 1986), rev'd on other grounds, 804 F.2d 837 (4th Cir. 1986).*

· *General Electric Co. v. M/V Nedlloyd Rouen, 618 F. Supp. 62 (S.D. N.Y. 1985), aff'd, 817 F.2d 1022 (2nd Cir. 1987).*

· *Henley Drilling Co. v. McGee, 36 F.3d 143, 146 n.5 (1st Cir. 1994) (refusing to embrace the fair opportunity doctrine "in any form," describing the existence of the doctrine as "a problematic question," and quoting authority for the proposition that "the [COGSA package limitation should not be subject to a fair opportunity requirement"); Mori Seiki U.S.A., Inc. v. M./V. Alligator Triumph, 1992 A.M.C. 1850, 1854 n.1 (C.D. Cal. 1991) (questioning the wisdom of the fair opportunity doctrine).*

· *See generally Michael F. Sturley, Proposed Amendments to the Carriage of Goods by Sea Act, 18 Hou. J. Int'l. L. 609, 637 (19*

· *Robert C. Herd v. Krawill Machinery Corp., 359 U.S. 297 (1959).*

· *Section 1301(a) defines "carrier" as including "the owner or the charterer who enters into a contract of carriage with a shippe*

· *Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297 (1959).*

· *Carle & Montanari, Inc. v. American Export Isbrandtsen Lines, 275 F. Supp. 76, 78 (S.D. N.Y. 1967).*

· *See SPM Corp. v. M/V Ming Moon, 965 F.2d 1297, 1305-06, 1992 AMC 2409, 2420-21 (3d Cir. 1992); Institute of London Underwriters v. Sea-Land Servs., Inc., 881 F.2d 761, 766-67, 1989 AMC 2516, 2524-25 (9th Cir. 1989); Brown & Root, Inc. v. M/V Peisander, 648 F.2d 415, 418 n.6, 1982 AMC 929, 932 n.6 (5th Cir. June 1981). See also Croft & Scully Co. v. M/V Skulptor Vuchetich 508 F. Supp. 670, 674-75, 1981 AMC 305 (S.D. Tex. 1981) (finding that the phrase "any independent contractor performing service including stevedoring in connection with the goods hereunder" is sufficiently clear to include the stevedore). See B. Elliott (Canada) Lt John T. Clark & Son, 704 F.2d 1305, 1308 n.3, 1983 AMC 1742, 1746-47 n.3 (4th Cir. 1983); Hoechst Celanese Corp. v. M/V trident Amber, 1992 AMC 2769, 2787-88 (S.D. Ga. 1992); Breda Costruzioni Ferroviarie, S.p.A. v. M/V American Condor, 1992 AMC 2052 (D.S.C. 1992); Jenkins v. M/V Ever Greet, 1990 AMC 1868, 1879 (E.D. Va. 1990); EM Chem. v. S.S. Sloman Najade, 670 F. Supp. 87, 1987 AMC 1689, 1692-93 (S.D. N.Y. 1987).*

· *See Mori Seiki USA, Inc. v. N/V Alligator Triumph, 990 F.2d 444, 450, 1993 AMC 1521, 1527-28 (9th Cir. 1993) (finding that language "servant, agent and subcontractor" is adequate); Barretto Peat, Inc. v. Luis Ayala Colon Successors, Inc., 896 F.2d 656, 660 (Cir. 1990) (finding that the term "agent" is adequate); General Elec. Co. v. Inter-Ocean Shipping, 862 F. Supp. 166, 169, 1995 AMC 87 875 (S.D. Tex. 1994) (finding that the language "servant or agent of the Carrier (including every independent contractor from time to ti employed by the Carrier)" is sufficient); Rockwell Int'l Corp. v. M/V Incotrans Spirit, 707 F. Supp. 272, 1989 AMC 887 (S.D. Tex. 1989 (finding that the language "servants and agents of the carrier" is adequate); see also Birdsall, Inc. v. Tramore Trading Co., 771 F. Sup 1193, 1198 (S.D. Fla. 1991) (finding that the language "every Agent of the Carrier" is adequate to cover a port agent); Mori Seiki USA, Inc. v. M/V Shin Kashu Maru, 702 F. Supp. 613, 1989 AMC 374 (N.D. Tex. 1988) (finding that the term "subcontractor or agent" is adequate to cover an inland carrier). See Tessler Bros. (B.C.) v. Italpacific Line, 494 F.2d 438, 446-47, 1974 AMC 937 (9th Cir. 1974); Secrest Machine Corp. v. S.S. Tiber, 450 F.2d 285, 287, 1972 AMC 815, 817-18 (5th Cir. 1971). See also Mori Seiki USA, 990 F.2d at 4 1993 AMC at 1527-28 (finding that the phrase "servant, agent and subcontractor" is adequate); General Elec. Co. v. Inter-Ocean Shipp 862 F. Supp. 166, 169, 1995 AMC 871, 875 (S.D. Tex. 1994) (finding that the language "servant or agent of the Carrier (including ever independent contractor from time to time employed by the Carrier") is sufficient).*

· *Hiram Walker & Sons v. Kirk Line, 877 F.2d 1508, 1516 (11th Cir. 1989).*

· *Mikinberg v. Baltic Steamship Co., 988 F.2d 327 (2nd Cir. 1993); Scheiss-Froriep Corp. v. S.S. Finnsailor, 574 F.2d 123 (2nd 1978). But see Mori Seiki U.S.A., Inc. v. M/V Aligator Triumph, 990 F.2d 444, 450-51 (9th Cir. 1993) (rejecting the argument that a stevedore was not entitled to the protection of the Himalaya clause because it was a subcontractor of the terminal operator rather than the carrier; finding that the terminal operator acted as the carrier's agent when it hired the stevedore).*

· *523 F.2d 518 (2nd Cir. 1975).*

· *988 F.2d 327 (2nd Cir. 1993).*

· *Id. at 333.*

· *900 F.2d 714 (4th Cir. 1990).*

· *Sun-Bar Materials Int'l Inc. v. American President Lines, Ltd., ___ F. Supp. ___, No. C-92-2189 (N.D. Cal. 1993).*

· *Case No. CV-93-6711 (C.D.Cal. Sept. 16, 1994).*

· *Id. at 391. See Ingersoll Milling Machine Co. v. M/V Bodena, 829 F.2d 293, 301, 1988 AMC 223, 234 (2d Cir. 1987); English Elec. Valve Co. v. M/V Hoegh Mallard, 814 F.2d 84, 89 (2d Cir. 1987); General Elec. Co. v. S.S. NancyLykes, 706 F.2d 80, 86-88, 1983 AMC 1947, 1957-59 (2d Cir. 1983); Iligan Integrated Steel Mills, Inc. v. S.S. John Weyerhaeuser, 507 F.2d 68, 71, 1975 AMC 33, 36 (2d Cir. 1974); Du Pont de Nemours Int'l, S.A. v. S.S. Mormacvega, 493 F.2d 97, 100 n.9, 1974 AMC 67, 71 n.9 (2d Cir. 1974); Encyclopae Britannica, Inc. v. S.S. Hong Kong Producer, 422 F.2d 7, 18 (2d Cir. 1969). See Constructores Tecnicos, S. de R.L. v. Sea-Land Servs., Inc., 945 F.2d 841, 844-45, 1992 AMC 1284, 1289 (5th Cir. 1991); Calmaquip Eng'g West Hemisphere Cor. v. West Coast Carriers, Ltd 650 F.2d 633, 638, 1984 AMC 839, 845 (5th Cir. 1981); Spartus Corp. v. S.S. Yafo, 590 F.2d 1310, 1317, 1979 AMC 2294, 2303-04 (5th 1979). See Nemeth v. General S.S. Corp., 694 F.2d 609, 612-13, 1983 AMC 885, 889 (9th Cir. 1982); see also Yang Machine Tool Co. v Sea-Land Servs., Inc., 58 F.3d 1350, 1352 (9th Cir. 1995).*

· *Niagra v. Cordes, 62 U.S. (21 How.) 7 (1858).*

· *46 U.S.C. app. §192 (1997). See, e.g., S.S. Willdomino v. Citro Chem. Co., 272 U.S. 718 (1927) (holding that after a deviation, carrier may not rely on the negligent navigation exemption under §3 of the Harter Act). For a more detailed treatment of this subject, s Michael F. Sturley, Deviation, in 2A Benedict on Admiralty ch. 12 (7th rev. ed. 1996).*

· *46 U.S.C. app. §§181, 183-189 (1997). See, e.g., The Pelotas, 66 F.2d 75, 77 (5th Cir. 1933); The Indrapura, 171 F. 929, 938-9 (D. Or. 1909).*

· *46 U.S.C. §1304(4).*

· *590 F.2d 1310, 1313 (5th Cir. 1979).*

· *Spartus Corp. v. S.S. Yafo, 590 F.2d 1310 (5th Cir. 1979).*

· *C.A. La Seguridad v. Delta S.S. Lines, 721 F.2d 321 (11th Cir. 1983).*

· *C.A. Articulos Nacionales de Goma Gomaven v. M/V Aragua, 756 F.2d 1156, 1158-59 (5th Cir. 1985).*

· *The Wildomino v. Citro Chemical Co., 272 U.S. 718, 727-28 (1927).*

· *Worldwide Steamship Co. v. India Supply Mission, 316 F. Supp. 190, 192 (S.D. N.Y. 1970).*

· *General Electric Co. v. S.S. "Nancy Lykes", 706 F.2d 80 (2nd Cir. 1983), cert. denied, 464 U.S. 849 (1983).*

· *Mobile Sales & Supply Corp. v. M/V "Banglar Kakoli", 588 F. Supp. 1134, 1143 (S.D. N.Y. 1984).*

· *Mobile Sales & Supply Corp. v. M/V Banglar Kokli, 588 F.2d*

· *Rockwell Int'l Corp. v. M/V Incotrans Spirit, 707 F. Supp. 272, 273 (S.D. Tex. 1989), aff'd, 998 F.2d 316 (5th Cir. 1993).*

· *Pioneer Imports Corp. v. The Lafcomo, 159 F.2d 654 (2nd Cir. 1947), cert denied, 67 S.Ct. 1310.*

Agfa-Gevaert, Inc. v. S/S "TFL Adams", 596 F. Supp. 338 (S.D. N.Y. 1984).

Constructores Tecnicos, S. de R.L. v. Sea-Land Service, Inc., 945 F.2d 841, 845 (5th Cir. 1991); Ets Gustave Brunet, S.A. v. M/ Nedlloyd Rosario, 929 F. Supp. 694, 709 (S.D. N.Y. 1996).

[110] Agfa-Gevaert, Inc. v. S/S "TFL Adams", 159 F.2d 654 (2nd Cir. 1947) cert denied, 67 S.Ct. 1310.

Sedco, Inc. v. S.S. Strathewe, 800 F.2d 27 (2nd Cir. 1986).

Pub. L. No. 104-88, 109 Stat. 803 et seq. (Dec. 29, 1995).

49 U.S.C. §11706 (1995).

49 U.S.C. §14706 (1995).

Pub. L. No. 96-296, 94 Stat. 793 (July 1, 1980).

Pub. L. No. 96-448, 94 Stat. 1895, Oct. 14, 1980, 96 Congress §211.

Pub. L. No. 99-521.

49 U.S.C. § 13103 (1995).

49 U.S.C. § 10501(b)(2) (1995).

Toledo Ticket Co. v. Roadway Express Inc., ____ F.3d ____, 1998 WL 3316 (6th Cir. 1988); Rohner Gehrig Co., Inc. vs. Tri-St Motor Transit, 923 F.2d 1118, 1121 (5th Cir. 1991); Bio-Lab, Inc. vs. Pony Express Courier Corp., 911 F.2d 1580, 1582 (11th Cir. 1990 Norton vs. Jim Phillips Horse Transportation, Inc., 901 F.2d 821, 827 (10th Cir. 1989); Hughes vs. United Van Lines, Inc., 829 F.2d 14 415 (7th Cir. 1987), cert. denied, 485 U.S. 913 (1988).

49 U.S.C. § 13710(a)(4) (1995).

49 U.S.C. § 14706(e)(1)(B)(1995).

Carmana Designs Ltd. vs. North American Van Lines, Inc., 94 F.2d 316 (3rd Cir. 1991).

49 U.S.C. § 10730(b)(prior to Jan. 1, 1996).

49 U.S.C. § 10730(c)(prior to Jan. 1, 1996).

49 U.S.C. § 10730(a)(prior to Jan. 1, 1996).

49 U.S.C. § 11706(c)(3)(A)(1995).

49 U.S.C. § 14706(c)(1)(A)(1995).

49 U.S.C. § 14706(f)(1995).

First Nat'l Bank of Girard vs. Bankers Dispatch Corp., 721 Kan. 528, 562 P.2d 32, 39 (1977).

American Express Railway Express Co. vs. Lindenburg, 260 U.S. 584 (1923); Caten vs. Salt Lake City Movers & Storage Co., 1 F.2d 428 432 (2nd Cir. 1945).

· *<u>American Express Co. vs. United States Horse Shoe Co.</u>, 244 U.S. 58 (1917).*

· *616 F.2d 619 (2nd Cir. 1980), <u>cert.</u> <u>denied</u>, 449 U.S. 875 (1980).*

· *757 F.2d 29 (2nd Cir. 1985).*

· *<u>Mechanical Technology, Inc. vs. Ryder Truck Lines</u>, 776 F.2d 1085, 1089 (2nd Circuit 1985). Winter, J. concurring.*

· *596 F. Supp. 515 (E.D.Pa. 1983).*

· *An "automatic release clause" or "inadvertence clause" is a provision in a carrier's tariff which provides that if the shipper fa to state a released value in the bill of lading or contract, or if the shipper fails to select a liability limitation from the options offered by t carrier at increased freight charges, then the liability of the carrier will be limited to the lowest released value contained in the carrier's offer or tariff. <u>Sorkin, Goods and Transit</u>, § 13.04[1][c] (Bender's 1996).*

· *776 F.2d 1085 (2nd Cir. 1985).*

· *743 F. Supp. 212 (S.D.N.Y. 1990).*

· *<u>Federal Commerce & Navigation Co., Ltd. v. Calumet Harbor Terminals, Inc.</u>, 542 F.2d 437, 441 (7th Cir. 1976).*

· *<u>See</u> <u>Robinson v. Ralph G. Smith, Inc.</u>, 735 F.2d 186 (6th Cir. 1984). <u>See</u> <u>also</u> <u>American Railway Express Co. v. Lindenburg</u>, 2(U.S. 584 (1923); <u>Stricklind Transportation Co. v. United States</u>, 334 F.2d 172 (5th Cir. 1964); <u>Glickfeld v. Howard Van Lines</u>, 213 F.2d (9th Cir. 1954).*

· *<u>Rohner Gehrig Co., Inc. v. Tri-State Motor Transit</u>, 950 F.2d 1079 (5th Cir. 1992).*

· *<u>Caspe v. Aaacon Auto Transport, Inc.</u>, 658 F.2d 613 (8th Cir. 1981).*

· *<u>Emily Shops, Inc. v. Inter-State Truck Line, Inc.</u>, 207 Misc. 557, 139 N.Y.S.2d 561 (Supp. N.Y. 1955), <u>aff'd</u>, 2 N.Y.S.2d 405, 14 N.E.2d 560 (1957), <u>cert</u> <u>denied</u>, 355 U.S. 827 (1957).*

· *<u>Hughes v. United Van Lines, Inc.</u>, 828 F.2d 1407, 1419-20 (7th Cir. 1987), <u>cert</u> <u>denied</u>, 108 S.Ct. 1068 (1988).*

· *<u>Toledo Ticket Co. v. Roadway Express Inc.</u>, ____ F.3d ____, 1998 WL 3316 (6th Cir. 1998).*

· *<u>Id</u>.*

· *<u>Mechanical Technology, Inc. v. Ryder Truck Lines, Inc.</u>, 776 F.2d 1085 (2nd Cir. 1985).*

· *<u>Sorensen-Christian Industries, Inc. v. Railway Express Agency, Inc.</u>, 434 F.2d 867 (4th Cir. 1970).*

· *<u>Elizabeth Brannon v. Smith Dray Lines & Storage Co., Inc.</u>, 456 F.2d 260 (6th Cir. 1972). <u>Contra</u> <u>Toledo Ticket Co. v. Roadw Express Inc.</u>, 1998 WL 3316 (6th Cir. 1998) (stating that reasonable notice must be given to the shipper regardless of whether the shipp sophisticated).*

· *49 C.F.R. §375.2 (1997).*

· *456 F.2d 260 (6th Cir. 1972).*

· *<u>Fabulous Fur Corp. v. United Parcel Service</u>, 664 F. Supp. 694 (E.D. N.Y. 1987).*

· *<u>Cincinnati & Tex. Pac. R. Co. v. Rankin</u>, 241 U.S. 319 (1916).*

· *<u>See</u> <u>The Baloise Ins. Co., Ltd. v. United Airlines, Inc.</u>, 723 F. Supp. 195, 198 (S.D. N.Y. 1989); <u>Nippon Fire & Marine Ins. Co., Ltd. v. Holmes Transportation, Inc.</u>, 616 F. Supp. 610, 611 (S.D. N.Y. 1985).*

· *<u>See</u> <u>CAB Transportation v. Garden Spot Distributors</u>, 305 Ark. 82, 805 S.W.2d 632 (1991).*

· *<u>Glickfeld v. Howard Van Lines</u>, 213 F.2d 723 (9th Cir. 1954); <u>Moore v. Duncan</u>, 237 F. 780 (6th Cir. 1916).*

· *<u>Quasar Co. v. Atchison, Topeka & Santa Fe Ry. Co.</u>, 632 F. Supp. 1106, 1108 (M.D. Ill. 1986) (collecting cases).*

· *<u>Mitchell v. Union Pacific R. Co.</u>, 188 F. Supp. 869 (D. Cal. 1960); <u>Chandler v. Aero Mayflower Transit Co.</u>, 374 F.2d 129 (4th 1967).*

· *<u>Dover Farms, Inc. v. American Airlines, Inc.</u>, 111 N.J. Super. 267, 268 H.2d 289 (App. Div. 1970), <u>certif</u>. <u>denied</u>, 57 N.J. 140, 2 A.2d 43 (1970).*

· *<u>Hopper Furs, Inc. v. Emery Air Freight Corp.</u>, 749 F.2d 1261 (8th Cir. 1984).*

· *49 U.S.C. §§13502-13508 (1995).*

· *49 U.S.C. §13541(a) (1995).*

· *49 U.S.C. §10526(a)(8)(B) (prior to Jan. 1, 1996); <u>see</u> 49 U.S.C. §13506(a)(8)(1995).*

· *49 U.S.C. §10526(b) (prior to Jan. 1, 1996). The ICC Termination Act does not use the term "commercial zone." However, 49 U.S.C. §13506(b) (1995) provides for exemptions unless otherwise necessary, including "transportation provided entirely in a municipal in contiguous municipalities, or in a zone that is adjacent to, and commercially a part of, the municipality or municipalities, subject to specified exceptions."*

· *49 U.S.C. §10523 (prior to Jan. 1, 1996); 49 U.S.C. §13503 (1995).*

· *49 U.S.C. §10524 (prior to Jan. 1, 1996); 49 U.S.C. §13505 (1995).*

· *49 U.S.C. §10525 (prior to Jan. 1, 1996); 49 U.S.C. §13504 (1995).*