# An Optimal Model For Reforming COGSA In The United States: Australia's COGSA Compromise

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## 1. INTRODUCTION

> "[W]ould it not have been better to have gone the route of Australia . . .and to have adopted changes to COGSA, which were compatible with Hague/ Visby and Hamburg, thus placing the United States in a position to accept new international legislation in the future, while leaving it with a regime that is not out of step internationally?"
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> — William Tetley, Q.C., *The Proposed New US COGSA*[1]

Reform of the U.S. Carriage of Goods by Sea Act has recently been the subject of debate both domestically and internationally. Efforts in the last ten years to win congressional approval of a newly redesigned COGSA have been resisted and stalled numerous times, most recently by

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1. William Tetley, Q.C., US COGSA and Other Developments, Lecture at Nottingham University (February 22, 2001). *at* http://tetley.law.mcgill.ca/comment.htm (last modified Aug. 8, 2001).

foreign interests.[2] Powerful influence, wielded by organizations on either side of this debate have to date been sufficient to deter Congress from taking measures to bring the United States into uniformity with the international shipping community.[3] At the center of this debate are several stumbling blocks that continually prevent a Congressionally acceptable solution from being reached.

In the considered opinion of this author, these obstacles are: The desire for international compatibility or uniformity in the regime; the need to incorporate elements from several conventions and the apparent mutual exclusivity of those conventions; and agenda-driven demands by shipping interests for inclusion or non-inclusion of individual provisions that comprise the convention.

One potential solution to the current COGSA dilemma has received very little attention in the atmosphere of inflexibility and intransigent posturing being adopted by various shipping interests. The compromise reached by the Australian government was made under much less internationally controversial circumstances than those facing the U.S. Congress in this debate. Perhaps that aided the drafters of the Australian Carriage of Goods Act of 1991[4] (Australian COGSA) in overcoming the stumbling blocks currently menacing U.S. COGSA reform.

The result of Australia's novel approach is an international regime that appears to satisfy the majority of domestic and international shipping interests, while purporting to retain uniformity with the regime adopted by a majority of large trading nations. This approach has won praise from at least one respected maritime authority, but seems to have been largely unmentioned by the large interests debating the matter before the U.S. Congress.[5]

It is proposed in this paper that the Australian COGSA resolution could be readily adapted to meet the needs of U.S. lawmakers in finding an appropriate and universally attractive vehicle for modernizing U.S. COGSA. While not every component of Australia's COGSA would be appropriate for the United States, the overall approach and structure would appear to meet the needs voiced by all sides of the U.S. debate. An analysis follows, examining the development of both the Maritime Law Association's proposed COGSA and Australia's newly amended

2. Letter from BIMCO, CENSA, ICS, International Group of P&I Clubs and Intertanko, to the National Industrial Transportation League, with copy to U.S. Senator Kay Hutchison (March 23, 2000), *at* http://www.bimco.dk/html/documentary.html; see also Andrea Felsted, *Row Over Planned Changes to U.S. COGSA*, LLOYD'S LIST INT'L, May 5, 1998 at 3.

3. *See* Joseph Bonney, *Time for the ship to sail*, J. OF COM., February 12, 2001 at 46.

4. CARRIAGE OF GOODS BY SEA ACT, (1991) (Austl.).

5. *See* Tetley, *supra* note 1.

COGSA, with a comparative analysis of the components of the Australian COGSA that might be applied in the United States.

## 2. Background of the U.S. COGSA debate

American maritime law has influenced the shape of ensuing international maritime conventions from the outset. The U.S. Harter Act[6] of 1893 contributed to the structure used by the Comité Maritime International (CMI) in its subsequent draft of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (the "Hague Rules").[7] The Hague Rules were subsequently ratified by the United States, after allowing for 15 years of contemplation. The minimally modified Carriage of Goods by Sea Act (COGSA, or "the act") was adopted domestically in 1936.[8] Such reluctance to commit to a foreign-initiated convention would come to typify the U.S. approach to treaty law in the twentieth century.[9]

COGSA provides a means of governing the international relationship between parties to a bill of lading (issued in cargo transport).[10] Its original purpose was to facilitate uniformity in international cargo shipping, and for many years it was the sole international regime applied by the majority of the world's shipping countries. As the years passed, technology, commercial practices and worldwide economics all underwent considerable change.[11] Shipping parties attached to nations that remained bound by the Hague Rules increasingly noted their dissatisfaction with its outdated provisions.[12]

### 2.1 Shortcomings of the U.S. COGSA

The United States is in an increasingly unique position, being a nation at the global center of international commerce, and yet operating under a nearly century-old cargo regime that the vast majority of its international trading partners have abandoned or amended.[13] This is a cause of great concern for both American and international shipping interests, as those

6. 46 U.S.C. §§ 190-92 (1994).

7. *Compare* 46 U.S.C. §§ 190-92 (1994) *with* Hague Rules, arts. 3-4.

8. *See* Thomas J. Schoenbaum, Admiralty and Maritime Law 536 (2nd ed., 1994).

9. As is further evinced by the subsequent U.S. reluctance to update its maritime cargo regime; *see also* Letter, *supra* note 2, at 15.

10. *See* Schoenbaum, *supra* note 8, at 537.

11. *See id.* at 548-49.

12. *See id.* at 524.

13. *See Increasing Compensation to Air Crash Victims Survivors, 1998: Hearings on Proposed Changes to COGSA Before the Subcomm. on Surface Transportation and Merchant Marine*, 105th Cong. 2 (1998) (statement of Chester D. Hooper, Immediate Past President, Maritime Law Association of the United States) [hereinafter *Hearings: Hooper*].

having any commercial maritime cargo dealings with the United States are ultimately bound by COGSA as well.

Objections are often voiced from across the shipping industry to specific provisions of the long-standing U.S. COGSA. Those objections include:

The inadequacy of the limitation of $500 per package / customary freight unit, which has become entirely unpractical and inadequate as a realistic means of balancing compensation and liability;[14]

The uncertainty created by the outdated definition of "package", as modes of shipping have come to embrace the use of containers;[15]

The span of the carrier's liability lasts only so long as the cargo is on or within the vessel. Thus, while sitting at dock or in storage at dock, prior to or after shipping, the stevedores and freight consolidators can potentially attract liability for damage to such cargo;[16]

That deficiency, in turn, gives rise to the commercial requirement of a "Himalaya Clause", which is a contractual mechanism that extends the convention's liability limits to dockside agents of the carrier;[17]

Carriers may escape liability for damage to cargo under the "navigational fault exception" by demonstrating negligence of the carrier's agents in navigating or managing the vessel. Many oppose the continuance of this defense, as it is felt to no longer be a realistic ground for the exoneration of liability. It is argued that advances in communication technology, vessel navigation and safety, and employee education and training provide the carrier with a higher degree of control of the vessel and cargo than was available when this defense was adopted;[18]

The act fails to allow for modern commercial reality with respect to bills of lading. Widespread use of electronic communication and data transfer systems are not within the scope of COGSA's recognized forms

14. *See Increasing Compensation to Air Crash Victims Survivors, 1998: Hearings on Proposed Changes to COGSA Before the Subcomm. on Surface Transportation and Merchant Marine*, 105th Cong. 2 (1998) (statement of Jon Roethke, Director of Risk Management, Sea-Land Service, Inc.) [hereinafter *Hearings: Roethke*].

15. *See Increasing Compensation to Air Crash Victims Survivors, 1998: Hearings on Proposed Changes to COGSA Before the Subcomm. on Surface Transportation and Merchant Marine*, 105th Cong. 2 (1998) (statement of Walter M. Kramer, President American Institute of Marine Underwriters) [hereinafter *Hearings: Kramer*].

16. *See* Leslie W. Taylor, *Proposed Changes to the Carriage of Goods by Sea Act: How Will They Affect the United States Maritime Industry at the Global Level*, 8 CURRENTS: INT'L TRADE L.J. 32, 34 (1999).

17. *See* Schoenbaum, *supra* note 8, at 501.

18. *See Increasing Compensation to Air Crash Victims Survivors, 1998: Hearings on Proposed Changes to COGSA Before the Subcomm. on Surface Transportation and Merchant Marine*, 105th Cong. 2 (1998) (statement of William J. Auguello Esquire, National Industrial Transportation League) [hereinafter *Hearings: Augello*].

of sea-carriage documentation;[19]

Deck cargo is excluded from the subject matter for which the carrier may be held liable. This reflects the reality of a time when such on-deck stowage was much more prone to damage or loss at sea than is the case today;[20]

The bill of lading may not be structured by agreement between the parties such that the carrier's liability is decreased below those levels set forth in COGSA, thus eliminating flexibility in certain commercial situations. At the time of COGSA's adoption, it was thought that the bargaining power of the parties to bills of lading strongly favored the carrier;[21]

Until the recent decision in *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*,[22] COGSA was interpreted to afford U.S. courts the jurisdiction to hear matters arising under the act, irrespective of any foreign forum selection clauses. Since the *Sky Reefer* decision, it is feared that the inability of cargo owners to negotiate the contents of a bill of lading will result in foreign ship owners unilaterally depriving American cargo owners of an option to pursue claims for damage or loss in a U.S. court.[23] It is also felt that costs of pursuing such actions in foreign jurisdictions can be prohibitive, and that the outcome of such litigation would often be unpredictable or disappointing.[24]

### 2.2 Alternative International Regimes

After half a century of global change, there was at last an international movement to modernize the Hague Rules, culminating in an amended modification being drafted at an international convention in Brussels.[25] The 1968 Hague-Visby Amendments retained the underlying structure of the long-enduring Hague Rules in order to present as little disruption to the established laws and procedures that had grown up internationally under Hague. The amended convention featured a number of central modifications to its predecessor. One was the new weight-based package limitation that allowed a formulaic increase, based on Special Drawing Rights, ranging from roughly $900 per package upward, as compared with a flat $500 limitation per package under COGSA.[26] Hague-Visby also in-

19. 46 U.S.C. § 1301(b) (1994).

20. *See* Schoenbaum, *supra* note 8, at 547.

21. *Id.* at 603, 604.

22. *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995); see also *Indussa Corp. v. S/S. Ranborg*, 377 F.2d 200 (2d Cir. 1967).

23. *See* Camilo Cardozo, *Sky Reefer and COGSA 2000*, World Arbitration and Mediation Report, July 2000, at 192; *see also* Taylor, *supra* note 16 at 36.

24. *See* Hearings: Kramer, *supra* note 14.

25. *See* Schoenbaum, *supra* note 8, at 524.

26. *See* Alan I. Mendelsohn, *The Best Way To Uptdate Cargo-Damage Limits*, J. Of Comm., August 3, 1999, at 8; *see also* Schoenbaum, *supra* note 8, at 524, 525.

troduced unlimited liability for the carrier, where the carrier's actions involved intentional damage or recklessness.[27] A sign of its times, Hague-Visby also enacted a container clause, in recognition of the new cargo packaging techniques adopted throughout the industry.[28]

Internationally, there has been a gradual movement toward this amended convention. Currently, approximately 80% of the United States' principal maritime trade partners operate under Hague-Visby.[29] There was originally great support for this regime among shippers in the United States, but with the vigorous opposition posed by the U.S. carrier interests, the U.S. government did not take action to adopt it.[30] Opposition to this convention by carriers would later be dropped, in light of the greater perceived threat of the Hamburg Rules.

The Hamburg Rules were the product of the U.N. Convention on the Carriage of Goods by Sea, held in 1978. Its purpose was to achieve a modernized international regime that would govern ocean cargo carriage liability.[31] This conference was attended by cargo and carriage interests worldwide. A central theme supported throughout the conference by cargo owners was the abolition of the "nautical fault" defense of the Hague Rules. The modifications agreed to in this conference were integrated into the Hamburg Rules.[32]

When compared to either the Hague Rules or the Hague-Visby amendments, the Hamburg Rules further tipped the scales of protection in favor of the shipper.[33] Specifically, Hamburg provides higher financial limits of carrier liability and eliminates the controversial "navigational fault" exception, as described below. In recognition of the necessity to update its international maritime cargo carriage regime, the U.S. government deliberated means by which the improvements of the Hamburg Rules could be adopted. The U.S. Department of Transport proposed the use of a "trigger mechanism", whereby the Hamburg Rules would be ratified by the United States once a threshold number of U.S. trade partners had adopted it.[34] This approach was met with great opposition in the United States and it was nonetheless soon apparent that Hamburg was

27. *Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, Feb. 23, 1968, [hereinafter Hague/Visby Protocol], art. 2(e), reprinted in Schoenbaum, *supra* note 8, at X.

28. *Id.* art. 2(c).

29. *See* Letter, *supra* note 2, at 12.

30. *See* Samuel R. Mandelbaum, Esq., *Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods Under the Hague, COGSA, Visby and Hamburg Conventions*, 23 TRANSP. L. J. 471, 481 (1996).

31. *See* Schoenbaum, *supra* note 8, at 528, 529.

32. *Id.* at 531.

33. *Id.*

34. *See* Mandelbaum, *supra* note 30, at 484.

not widely favored by the international community either. This new convention has not been ratified in the United States, nor by most of its trade partners. To date, only 22 countries have adopted Hamburg, a significant number of which have no coastline.[35] It now appears extremely unlikely that Hamburg will become a prevalent international regime.

The Hamburg Rules have, however, had a significant impact on the U.S. COGSA debate. Shortly after their adoption in 1978, organizations representing the interests of cargo owners realized that this convention would greatly benefit them, and promptly dropped their support of the Hague-Visby Convention in favor of Hamburg.[36] Defensively, the opposing carrier interests took up support of the Hague-Visby Rules, for fear that a continued lack of willingness to modify carrier liabilities might result in a congressional move toward Hamburg.[37] By supporting Hague-Visby, carriers hoped to demonstrate a willingness to compromise, and thus to "bend" rather than to be "broken". This balance of interests remained largely static until the recent *Sky Reefer*[38] decision brought home the urgency of maritime cargo reform through compromise, as is explained in the following part.

### 3. The U.S. COGSA Reform Proposal: Disagreement and Stalemate

The Maritime Law Association of the United States initiated a series of conferences, beginning in 1992, which were part of a commendable effort to promote productive dialogue among the conflicting American interests in international cargo shipping. The M.L.A. working group brought representatives from numerous areas of the maritime transportation industry together and attempted to find areas of compromise for a period of three years.[39] At that time, the U.S. Supreme Court issued its ruling in the *Sky Reefer* case.[40] The perceived threat to U.S. shipping interests represented by this decision produced a galvanizing effect on both sides of the debate. Both shippers and carriers recognized the necessity of asserting control over the national regime, and now seemed more willing to compromise in order to achieve that control.

Thus, after further consideration and negotiation, the working group presented its final proposal to the M.L.A. in 1996.[41] The recommenda-

35. *Id.*

36. *See* Taylor, *supra* note 16, at 484, *quoting* Allan I. Mendelsohn, *Why the U.S. Did Not Ratify the Visby Amendments*, 23 J. Mar. L. & Com. 29, 40 (1992).

37. *Id.*

38. *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995).

39. *See* Hearings: Hooper, *supra* note 13.

40. *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995).

41. *See* Hearings: Hooper, *supra* note 13.

tions contained in that report formed the basis of the M.L.A.'s proposed Carriage of Goods by Sea Act, which was drafted as a bill for congressional submission. The proposed regime bore no structural resemblance to either the Hague, the Hague-Visby, or the Hamburg Conventions, having borrowed elements from each and been rearranged in an entirely new format. This was presented as a bill before the Senate's Sub-Committee on Surface Transportation and Merchant Marine on April 21, 1998.[42] During this presentation, a number of representatives from different areas of the U.S. maritime shipping industry also testified before Congress. Their testimonies largely advocated the adoption of various provisions of the M.L.A.'s COGSA which had been borrowed from the Hague-Visby or Hamburg Rules.[43] The matter of the M.L.A. bill's non-conformity with any existing international convention was not specifically addressed by the testifying industry representatives.

Despite such support, the Senate declined the COGSA draft and the Maritime Law Association worked for another year on a version that Congress would find acceptable.[44] The M.L.A.'s latest COGSA draft was finalized on September 24, 1999. However, a number of ensuing congressional priorities have emerged, taking precedence over COGSA reform in the U.S. Senate.[45] Furthermore, the former Chairperson of the Senate Sub-Committee, Senator Hutchison, has been reassigned to chair another committee. The Senator was a supporter of U.S. COGSA reform, well-versed in maritime cargo shipping concerns and not easily replaceable in such matters.[46] As of this writing, the bill is still awaiting congressional attention. It seems unlikely that this bill will be of congressional priority in the near future.[47]

### 4. The Australian COGSA Compromise

Australia, a young nation whose existence depended on seagoing trade for most of its early years, followed the lead of the United States in 1904 by enacting its own Sea Carriage of Goods Act, having been directly modeled on the U.S. Harter Act.[48] However, despite domestic implementation of the Hague Rules in 1924, accession to the international convention did not take place for some 50 years. As a result of this extremely

42. *Id.*

43. *See* Hearings: Roethke, *supra* note 14; *see also* Hearings: Kramer, *supra* note 15; *see also* Hearings: Augello, *supra* note 18.

44. *See* Tetley, *supra* note 1.

45. *See* Sandra Speares, *APL and Maersk Sealand oppose new US legislation*, Lloyd's List Int'l, Sept. 6, 2000 at 14.

46. *See* Logistics Management & Distribution Report, *Taking the lead on Capitol Hill*, Vol. 39, Issue 11, Nov. 1, 2000 at 68.

47. *See* Letter, *supra* note 2.

48. *See* M.W.D. White, Australian Maritime Law, 62 (1991).

late ratification of the Hague Rules, Australia's industry and government were not as firmly attached to this regime as perhaps was the case in the United States. That being the case, there was somewhat less resistance from members of the shipping industry when, inevitably, the government looked to modernization of its cargo shipping regime. Thus, in 1988, Australia was able to ratify the Hague-Visby Rules, enacted as the Carriage of Goods by Sea Act 1991.[49]

After enacting the Australian COGSA in 1991, a debate took place that largely paralleled the recent COGSA debate in the United States. Maritime interests divided into two camps: the carriers, who supported the continuation of the Hague-Visby model, and the shippers, who supported ratification of the Hamburg Rules.[50] The lines were drawn along much the same lines as those between carriers and shippers in the United States, although with somewhat less urgency and controversy, as the "first step" of Hague-Visby ratification had already taken place.

As was the case in the United States, the Australian government considered the use of a "trigger mechanism" to automatically implement the Hamburg Rules when sufficiently adopted by Australia's trading partners, or at the end of three years if that threshold had not been reached.[51] This mechanism was actually included as a Schedule in the Australian COGSA, and was therefore set to automatically activate in October 1994.

Prior to that deadline, due to the internationally cool response to the Hamburg Rules, the Australian government considered alternative options for modernization of its COGSA.[52] Toward that end, the Australian government conducted a series of consultations with members of the shipping industry. Subsequently, the Australian Minister for Transport announced that Australia would "defer" adoption of the Hamburg Rules. The Minister then directed that a new series of discussions should be held "with a view to developing a [cargo liability] regime which provides fair and reasonable protection for both shippers and carriers."[53]

In much the same fashion as the U.S. Maritime Law Association's working group meetings, the Australian Department of Transport gathered expert representatives from both the cargo and carrier factions, as well as from maritime insurance and legal bodies.[54] The 1995 Working

49. *See Australian Transport and Regional Services Site, Carriage of Goods by Sea – Background to the Changes to Australia's Regime, at* http://www.dotrs.gov.au/xmt/cogsa%5Fback ground.htm (last modified July 26, 2001).

50. *Id.*

51. *See Australian Transport and Regional Services Site, Introduction, at* http://www.dotrs. gov.au/xmt/cogsa%5Freport.htm#1a (last modified Aug. 2, 2001).

52. *See Australian Transport and Regional Services Site, The International Context, at* http:// www.dotrs.gov.au/xmt/cogsa%5Freport.htm#1a (last modified Aug. 2, 2001).

53. *See Introduction, supra* note 51.

54. *See* CARRIAGE OF GOODS BY SEA, *supra* note 49.

Group's objective was to "identify areas of agreement or possible compromise" on a range of related issues, and to put forward proposals for addressing them.[55] These discussions resulted in a report that contained a "Package of Measures" recommended by the attending representatives. This report was presented to the Australian government and was endorsed by the Minister for Transport.[56]

The government's deferral of the Hamburg Rules Trigger bought only a short span of breathing room before it was next set to become active, in October 1997. With the foundation of an alternative regime in hand, endorsed by both industry and government, timely removal of the Hamburg Rules trigger became critical. As in the United States, the process of enacting federal legislation is complicated, fickle and slow. Drafters began work on a bill that would give effect to the Working Group's Package and correspondingly remove the Hamburg trigger. The new bill was only at the earliest stages of drafting by April, 1997. It was clear that a satisfactorily completed bill could not be drafted in time to beat the deadline presented by the Hamburg trigger.

A parliamentary drafter conceived of a solution, which provided a means of both overcoming the deadline and ensuring that the Working Group's Report was given full effect. This would be achieved by introducing a regulation-making power into the bill, which would allow the current Australian COGSA to be modified by those regulations and subsequently to give effect to the Report's Package.[57] This solution overcame a central obstacle faced in the United States and doubtlessly elsewhere; that of unilaterally incorporating the provisions required by modern industry into an existing international convention, without being required to denounce the convention.

Australia thus passed the Carriage of Goods by Sea Amendment Act in 1997, and Carriage of Goods by Sea Regulations in December, 1998. Australia's position is that it has remained within the internationally popular framework of Hague-Visby Rules, while satisfying the bulk of its national maritime shipping industry's priorities.[58] The Regulations are empowered in Part 2 of the act, which states, "[A]mendments made by regulations for the purposes of this section are to be treated as if they had been made by an Act."[59] The Regulations themselves are set out in Schedule 1A of the act. The New Australian COGSA further mandates that periodic reviews be made by the government of the international

55. *Id.*

56. *Id.*

57. *Id.*

58. *See Introduction*, *supra* note 51, which sets out the Working Group's broad purposes of international compliance; *see also* Carriage of Goods by Sea, *supra* note 49.

59. CARRIAGE OF GOODS BY SEA, (1991) pt. 2(5) (Austl.).

state of affairs regarding the adoption of a subsequent international convention.[60] This ensures that Australia's regime will in the future stay abreast of the current global standards.

### 5. The M.L.A.'s Proposed Changes, Analyzed and Contrasted with the Austrlian COGSA Alternative

In addition to the sheer weight of the argument against adoption of a new unilateral regime on the basis of international uniformity, there are a number of areas in which both Australia's and the M.L.A.'s proposed COGSA either share commonalties or diverge widely. In presenting a complete alternative to the M.L.A.'s COGSA proposal, it is useful to review the means by which the same objects can be achieved through incorporation of a model similar to the Australian COGSA.

#### 5.1 Compatibility With Existing International Regimes

The Maritime Law Association's stated purpose underlying its draft COGSA is "to bring the U.S. into unity with the rest of maritime nations."[61] It has been argued that in effect, by unilaterally adopting a regime that is outside of mainstream international law, the M.L.A.'s COGSA bill flies in the face of international uniformity.[62] The M.L.A.'s bill is not affiliated in any way with the existing international maritime regimes. It represents an attempt to unilaterally adopt an international regime which, it is argued, will inevitably have adverse consequences for all U.S. trade partners. In response to the M.L.A.'s bill, the Canadian Maritime Law Association stated, "The CMLA believes that any such legislation must be introduced on a multi-lateral basis and not imposed on the world unilaterally."[63] Canada is the United States' largest international trade partner.[64]

There is further evidence that the M.L.A.'s COGSA might well adversely affect the United States' trade relations with our principal maritime trading partners. Eighty percent of U.S. oceangoing trade is conducted with nations operating under the Hague-Visby Rules.[65] A harbinger of the potential for international trade problems that the M.L.A.'s regime represents may be found in the current Australian COGSA. Section 7(2)(b) sets forth that regardless of the regime adopted in the ship-

60. *Id,* ¶ 3(2)(b).

61. *See* Hearings: Hooper, *supra* note 13; *see also* Tetley, *supra* note 1.

62. *See* Tetley, *supra* note 1; *see also* Letter, *supra* note 2, at 12.

63. A. Barry Oland, President Canadian Maritime Law Association, *Submission Regarding U.S. COGSA'99 Sixth Draft*, Sept. 1, 1999, *at* http://tetley.law.mcgill.ca/cmlarecogsa.htm (last modified Aug. 19, 2001).

64. *See* Tetley, *supra* note 1.

65. *See* Letter, *supra* note 2, at 12.

per or carrier's nation, the Australian COGSA will apply to carriage of goods by sea from countries that are not parties to "*relevant*" international conventions! "Relevant" is defined therein as the Hague, Hague-Visby, or Hamburg Conventions.[66] In effect, Australia will only honor the regime governing a maritime cargo shipment if it is one that conforms with these "relevant" conventions. This provision demonstrates one practical outcome of such a nonconformist convention, in which foreign nations might dismiss the application of the U.S. regime in favor of recognized international rules, thus unnecessarily subjugating the interests of U.S. trade.

The U.S. M.L.A. has furthermore declared that the among the greatest disadvantages of Hamburg is that its ratification would "discard all the case law that has interpreted COGSA in the United States since 1936."[67] Yet, it is held by those who oppose the M.L.A. draft that this new bill would be even more likely to derail the existing jurisprudence on interpretation and application of maritime cargo shipping law.[68] Arguments have been made by numerous authorities in U.S. maritime law, that the new language, structure and objects of the M.L.A.'s COGSA bill would lead to both international and domestic confusion.[69] The judiciary would find itself heavily burdened by the removal of such well-established precedents as established under Hague-Visby, and by the requirement to "find its way" through the new regime. Litigants would also face difficulty, as any predictability they might have relied on would be eliminated, inevitably resulting in higher attorney fees and litigation. Stated concisely, the M.L.A.'s bill would be a "nightmare" for all operating under it.[70] Authorities also point out that the adoption of the M.L.A.'s COGSA would require formal denunciation by the U.S. government of the Hague Rules.[71]

It is the submission of this author that the application of a modified Hague-Visby Convention, as demonstrated by the Australian COGSA 1991, would effectively overcome all of the controversial drawbacks described above. By ratifying the Hague-Visby Convention in the United States, America's international maritime relationships would at least be maintained, if not improved. With the introduction of a regulation-making power into the U.S. COGSA, the stipulations of the domestic shipping community, as ascertained by the M.L.A.'s working group, could

66. Carriage of Goods by Sea Act, (1991) (Austl.).

67. *See* Tetley, *supra* note 1; *see also* Hearings: Hooper, *supra* note 13.

68. *See* Tetley, *supra* note 1.

69. *Id.*

70. *Id.*

71. *Id.*; *see also* Alan I. Mendelsohn, *US should join trade partners on cargo-damage limits*, J. Of Comm., November 17, 1998.

then be given effect. Denunciation would be unnecessary, American case law would be largely preserved, the international community would largely be assuaged, and even the M.L.A.'s stated objectives would be realized.

### 5.2 Forum Selection

The M.L.A.'s 1999 COGSA bill would overturn the Supreme Court's *Sky Reefer* decision, setting forth that foreign forum and arbitration clauses would be invalid unless agreed to after the claim has arisen.[72] Although a controversial topic, it appears that the majority of U.S. shipping interests largely considered this a restoration of the law as it should be.[73] However, in the opinions of some maritime authorities, due to peculiarities of its drafting, there is the possibility that this will result in an international conflict of laws situation.[74]

This criticism originates mainly from non-American shipping interests, rather than those in the United States.[75] At issue is the M.L.A.'s COGSA § 7(i)(2)(A) & (D), "Foreign Forum Provision." These subsections specify that the party may dismiss a foreign arbitration or jurisdiction clause, where the defendant's principal place of business or habitual residence is in the United States, or where the contract was made in the United States. The following concern is that certain foreign claimants *operating between non-American ports* could potentially disregard a foreign claim clause and instead opt for suit or arbitration in the United States. It is stated that this amounts to a violation of the rules of comity and of private international law respecting national laws. These "worrisome. . . extraterritorial implications of the MLA proposal"[76] would, however, seem to be problems primarily advanced by the foreign community, as a number of U.S. shipping interests have made statements supporting the legislative reversal of *Sky Reefer*.[77] Such a reversion is further supported by U.S. marine insurance interests.[78]

Recent statements issued by Maersk Sealand and American President Lines echo the sentiments of the foreign interests above in condemning this provision.[79] It is interesting to note however, that both these organizations formerly supported the reversal of *Sky Reefer* and have

72. *See* Tetley *supra* note 1; *see also* Taylor, *supra* note 16, at 36.
73. *Id.*
74. *See* Felsted, *supra* note 2.
75. *Id.*
76. *See* Letter, *supra* note 2.
77. *See* Hearings: Roethke, *supra* note 14; *see also* Hearings: Kramer, *supra* note 15; *see also* Hearings: Augello, *supra* note 18; *see also* Taylor, supra note 16, at 36, 37.
78. *See* Hearings: Kramer, *supra* note 15.
79. *See* Speares, *supra* note 45.

only reversed their positions since being sold to non-American companies, as was exemplified by the 1998 Senate testimony in support of the M.L.A. draft.[80]

The Australian COGSA contains provisions that would apply similarly to overturn the *Sky Reefer* decision. Article 10 essentially states that the Australian COGSA will apply to goods carried by sea from ports in Australia outward, and conditionally to carriage of goods from outside of Australia homeward. As stated earlier, the Australia-bound cargo will only come within the Australian COGSA where the country from which the cargo originates operates under a "non-relevant" cargo convention.[81]

This is an approach that might bear some consideration by the U.S. shipping industry, should there be an interest in maintaining friendly and cooperative relationships with international trading partners.

### 5.3 Period of Carrier's Liability

The current U.S. COGSA provides at §1301(e) and §1302 that the carrier's liability under the act only effectively applies from the time when the goods are loaded onto the ship to the time they are discharged from the ship, a period known as "tackle to tackle." The continued application of this provision has long been widely opposed by non-carrier interests.[82] This sentiment seems to have become more generally popular. During the M.L.A.'s negotiations with industry, there was even some willingness among carrier interests to accept an increased span of liability for goods.[83]

As a result, the M.L.A. COGSA draft emulates one of the advances made at Article 4 of the Hamburg Rules, by extending the carrier's liability to a period beginning upon receipt of the goods by the carrier and lasting until the goods are delivered to the recipient authorized under the bill of lading.[84] The practical effect of this is that certain dock-side workers would enjoy limits of liability under the act, from damage or loss occurring to cargo on the dock, or in storage at dock.[85] The use of "Himalaya Clauses" would thus become unnecessary. While there has been some comment made by foreign freight interests,[86] the provision

80. For a demonstration of the pro-M.L.A. Bill position adopted by Sea-Land prior to its sale to foreign interests, *see* Hearings: Roethke, *supra* note 14; *see also* Bonney, *supra* note 3.

81. Carriage of Goods by Sea Act, (1991), ¶ 7(2)(b) (Austl.).

82. *See* Schoenbaum, *supra* note 4, at 529.

83. For an illustration of carrier interests giving way to the stipulations set forth in the M.L.A.'s Bill, *see* Hearings: Roethke, *supra* note 14.

84. *See* Tetley, *supra* note 1; see also Maritime Law Association of America's Draft COGSA of 1999, § 2(a)(8) & 5(a), (b) & (c)(1), *at* http://tetley.law.mcgill.ca/cogsa99.htm (last modified Aug. 19, 2001).

85. *See* Taylor, *supra* note 8, at 34.

86. *See* Taylor, *supra* note 16, at 38.

has generally been favored by U.S. interests.

The international opposition voiced with regard to this provision refer to the use of the term "delivery of goods", which it is feared, could be interpreted to extend the definition of "carrier" to include those involved in subsequent periods of delivery, far beyond the dock.[87] The Australian COGSA, like the M.L.A. draft, does away with the Hague shipboard period of carrier liability, in favor of an extended period.

However, unlike the M.L.A. draft, the Australian COGSA provides for liability for the "time during which the carrier is in charge of the goods."[88] That is defined in the act to begin when the goods are delivered to the carrier at the wharf, and terminate when delivered to the consignee at the wharf.[89] It thereby clearly restricts the application of the act to the intended parties. Such drafting would potentially be suitable to an updated U.S. COGSA.

### 5.4 Deck Cargo

Both the proposed M.L.A. draft and the Australian COGSA provide that the acts now apply to cargo properly stowed on deck.[90] Modern shipping techniques and equipment have made deck stowage the preferable alternative in certain circumstances. There have nonetheless been misgivings voiced over the lack of restrictions placed on such stowage in the M.L.A. draft. Specifically, where the M.L.A. draft simply includes deck cargo in its definition of "goods", the Australian COGSA provides a level of further protection to the shipper,[91] as are also found in the Hamburg Rules. Article 2, Sections 2, 3 & 4 allow the shipper to provide the carrier with any special requirements for deck-stowed cargo in writing, and stipulate that any deviation from such instructions will result in loss of liability limitation for the carrier. Such clarification of the specific duties of parties in deck cargo transportation may be attractive to parties in the United States.

### 5.5 Electronic Documentation

The M.L.A. draft does make some concession to the use of modern electronic business practice by allowing electronic bills of lading (or con-

87. *Id.*

88. Carriage of Goods by Sea Act, (1991), Schedule 1A, Subsection. 7(2), Art. 3 (Austl.).

89. *Id.*, Schedule 1A, Subsection 7(2), Art.1(e).

90. Maritime Law Association of America's Draft COGSA of 1999, § 2(a)(6) *at* http://www.tetley.law.mcgill.ca/cogsa99.htm (last modified Aug. 19, 2001); *see also* Carriage of Goods by Sea Act, 1991, Schedule 1A, Subsection. 7(2), Art. 2 (Austl.).

91. Carriage of Goods by Sea Act, (1991) (Austl.).

tracts for the carriage of goods by sea).[92] While essentially providing the same extended application, the Australian COGSA goes further by allowing also for the use of electronic data transmissions, including databases, facsimile and email.[93] This would seem a sensible inclusion, in light of the clear trend of modern commerce.

### 5.6 Creation of Separate Classes of Carrier

Since its original submission to Congress in 1998, the M.L.A. has revised several portions of its draft, largely due to congressional input. One such revision is found in the definitions of "carrier" under Section 2(a). The current draft features three separate classes of carrier; the "Contracting Carrier", the "Performing Carrier", and the "Ocean Carrier".[94] While the "Contracting Carrier" (essentially the ship owner) and the "Ocean Carrier" (essentially the charter party) are defined clearly, the definition of "Performing Carrier" is extremely complicated, listing exhaustively those to whom the classification does NOT apply, and failing to clearly indicate the party to whom it DOES apply. The M.L.A. has offered an explanation for this arcane drafting, but has failed to redraft it.[95] It is feared that the new and complicated drafting style typified by this provision will wreak havoc with both industrial compliance and judicial application.[96]

The Australian model being submitted in this paper makes no such unusual distinctions, retaining the standard Hague-Visby definition of "carrier" at Article 1.[97] Should greater specificity be desired, the Hamburg Convention provides for two classes of carrier.[98] In recognition of the M.L.A.'s desire for "international uniformity", not to mention the need to keep legislation from presenting an interpretive nightmare,[99] it is proposed that the United States adopt a definition in accordance with one of these internationally accepted conventions.

### 5.7 The "Error In Navigation" Defense

Once again, this issue appears to be one in which American interests have reached a level of consensus, whereas some minimal evidence of

92. Maritime Law Association of America's Draft COGSA of 1999, ¶ 2(a)(5)(a)(i) & (ii), 2(a)(5)(c), *at* http://www.tetley.law.mcgill.ca/cogsa99.htm (last modified Aug. 19, 2001).

93. Carriage of Goods by Sea Act, (1991) (Austl.).

94. Maritime Law Association of America's Draft COGSA of 1999, *at* http://www.tetley.law.mcgill.ca/cogsa99.htm (last modified Aug. 19, 2001).

95. *See* Tetley, *supra* note 1.

96. *Id.*

97. Carriage of Goods by Sea Act, (1991) (Austl.).

98. *See* Hamburg Rules, art. 10, as set forth in Carriage of Goods by Sea Act, (1991) (Austl.), for the distinction made between "carrier" and "actual carrier".

99. *See* Tetley, *supra* note 1.

international opposition still exists.[100] In its proposed bill, the U.S. Maritime Law Association eliminated the "error in navigation" defense, which has long been criticized as an outmoded Hague-era relic.[101] This defense had previously been eliminated in the Hamburg Convention. Of those members of the U.S. shipping industry that have made public their support of the discontinuance of the navigational fault exception, one major U.S. carrier testified to that effect before the U.S. Senate, comparing the old Hague provision to an exemption of liability for a trucker who falls asleep at the wheel.[102] U.S. shippers, of course, also support the abolition of this defense.[103]

The principal thrust of opposition to the elimination of this defense appears to have come from a coalition of foreign shipping interests.[104] The group's position includes the claims that the elimination of this defense would end a longstanding tradition in shipping.[105] That apparently being the extent of persuasive force behind the foreign coalition's argument, it is submitted that the defense is likely to be eliminated when the U.S. act is updated. Toward that end, individual provisions of the Australian act can be of no assistance in providing a model for this provision. The Australian Working Group submitted that the defense should be retained and it remains in the Australian act presently.[106] Nonetheless, this serves as a demonstration that where the U.S. shipping community speaks with one voice on a given issue, the regulation-making power recommended in this paper would enable modification of the U.S. COGSA in accordance with that consensus.

### 5.8 Freedom of Parties to Agree On Reduced Liability

The M.L.A.'s COGSA draft departs from the current regime by permitting parties to contractually reduce the liabilities of the carrier below the

100. *See* Taylor, *supra* note 16, at 37.

101. *See* Schoenbaum, *supra* note 4, at 528.

102. *See* Hearing: Roethke, *supra* note 14. (Bear in mind, however, Sea-Land was sold to a non-U.S. company. Recent press-release statements from this company demostrate a reversal on this position.)

103. *See, e.g.*, Taylor, *supra* note 16, at 36.

104. *See, e.g.*, Felsted, *supra* note 2; *see also* Taylor, *supra* note 16, at 37.

105. *Id.*

106. *See* Australian Transport and Regional Services Site, Cargo Liability Workgroup Paper, *at* http://www.dotrs.gov.au/xmt/cogsa%5Freport.htm#1a (last modified Aug. 2, 2001). ("The Working Group could not find strong supporting evidence that the existing liability regime regarding Nautical Fault or Basis of Liability has caused major practical problems for shippers. Nevertheless, it was agreed that, providing there is clear international support for such a move by Australia's major trading partners, Australia also should support abolition or partial abolition of the nautical fault defense. . .")

limits set forth by the act.[107] As inequality of bargaining power is no longer a common menace in this industry, it is widely believed that such a restriction is no longer appropriate.[108] There are, however, safeguards built in which purport to protect unsuspecting third parties to the contract.[109]

In very similar language, the Australian COGSA allows that the carrier and shipper may enter into a special agreement that reduces the carrier's responsibilities and liabilities for goods and vessel seaworthiness. The provision also contains similar safeguards to those in the M.L.A. draft. One such stipulation restricts application of this provision to shipments other than "ordinary commercial shipments made in the ordinary course of trade", where they are justified by special circumstances and not antagonistic to public policy.[110]

The Australian version provides an additional noteworthy departure. Article 6A states that the carrier and shipper may enter into agreement that the Carriage of Goods Act of 1991 does NOT APPLY. By so providing, parties would have available the full freedom of contract to make such arrangements as they may deem necessary, unrestricted by the regime. This freedom to contract, however, is restricted to agreements where the shipment does not involve container goods, the goods are being carried on deck, and where the special character of the contract justifies special treatment. Such carriage documents, moreover, must be endorsed by both parties on their face, thus demonstrating actual consent.

Article 6A was a last-minute addition to the Australian COGSA, inserted when the contributing parties to the Working Group voiced a late dissatisfaction with their inability to "break free" of the convention under special circumstances.[111] It is possible that such an additional option could be a means of providing greater accord between U.S. shipping interests, when the act is next examined by Congress.

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107. Maritime Law Association of America's Draft COGSA of 1999, *at* http://tetley.law.mcgill.ca/cogsa99.htm (last modified Aug. 19, 2001).

108. See Tetley, *supra* note 1.

109. Maritime Law Association of America's Draft COGSA of 1999, *at* http://tetley.law.mcgill.ca/cogsa99.htm (last modified Aug. 19, 2001).

110. Carriage of Goods by Sea Act, (1991), Schedule 1A, Art. 6A (Austl.). (The circumstances referred to include that the goods not include containerized goods, that they be carried on deck, and that they include breakbulk cargo.)

111. *See* Australian Transport and Regional Services Site, Carriage of Goods by Sea – Background to the Changes to Australia's Regime, *at* http://www.dotrs.gov.au/xmt/cogsa%5Fback ground.htm (last modified July 26, 2001).

### 5.9 Further Hague-Visby and Australian COGSA Provisions for Consideration

The M.L.A. draft adopted several Hague-Visby improvements outright. These are also found in the Hague-Visby structured Australian COGSA. Their inclusion in the M.L.A. draft is further evidence that a modified version of the Hague-Visby model can provide an optimal means of achieving the working group's purposes.

Provisions directly borrowed by the M.L.A. from the Hague-Visby Rules include the reversal of the $500 Hague limitation on package liability value and the use of a weight-based liability algorithm, as described above. This provision attracted broad support in the U.S.[112] Another transplant is the Hague-Visby container clause, defining "package", which makes allowance for modern containerization of cargo.[113] Once again, there was widespread support among U.S. interests for this change.[114]

The Australian Working Group proposed another interesting improvement over the Hague model that is not found in the standard Hague-Visby Rules. The Australian COGSA has introduced, through its modifying regulation, a ground for holding the carrier liable for *delay of goods* causing loss to the shipper.[115] The carrier may avoid liability by demonstrating that the delay was "excusable", a term defined by a subsequent list of nautical mishaps that essentially arise despite the carrier's competence and diligence. The quantum of liability is limited to the amount of the shipper's loss, or according to a floating formula where the amount of loss is unspecified.[116] Again, this modification may be of interest to shipping interests in the U.S.

## 6. Conclusion

The recent *Sky Reefer* decision introduced an element of urgency in the need for legislative changes to the U.S. COGSA. In the aftermath of that ruling, a great degree of consensus was reached in the United States between both the shipping and carrier interests toward the adoption of an updated regime. Compromise was once close at hand with regard to the growing acceptance of the M.L.A.'s COGSA draft. Its greatest shortcoming, however, is its lack of conformity with established international maritime regulation.

112. *See* Hearings: Augello, *supra* note 18; *see also* Hearings: Roethke, *supra* note 14; *see also* Hearings: Kramer, *supra* note 15.

113. Maritime Law Association of America's Draft COGSA of 1999, *at* http://tetley.law.mcgill.ca/cogsa99.htm (last modified Aug. 19, 2001).

114. *See* Hearings: Kramer, *supra* note 15.

115. Carriage of Goods by Sea Act, (1991) (Austl.).

116. *Id.*

That drawback has attracted criticism from America's trading partners[117] and has made the adoption of the M.L.A.'s COGSA model unlikely. Despite congressional recognition of the many improvements this bill proposes, Senator Hutchison, while Chairperson of the Senate Subcommittee on Surface Transportation and Merchant Marine, has expressed anxiety that some maritime interests might find the changes proposed by the M.L.A. inequitable.[118]

Regardless of one's position regarding shipper's interests, carrier's interests, third party interests or insurance interests, the adoption of the M.L.A.'s proposed act would inevitably cause chaos throughout the industry.[119] Well-established trade customs and practices would break down, just as international trade barriers were being created. The entire framework of American jurisprudence in the area of maritime cargo shipment would need to be "junked".[120] The potential for resulting costs, disagreements, and disruption to international trade generally should be weighed very carefully in the minds of all interests supporting legislative change.

And yet, the question remains to be answered: If the *same* legislative purpose can be achieved in *accordance* with established international legal framework, *why* hasn't that approach been taken?

This paper has sought to provide an insight into a process by which the United States can achieve its legislative goals, retain the goodwill and cooperation of the international shipping community, and leave its options open for the future adoption of any legal framework that comes to the forefront of international shipping. It is the submission of this author that the COGSA model adopted in Australia would be ideal in meeting the needs of COGSA reform in the United States.

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117. *See* Oland, *supra* note 63.

118. *See Increasing Compensation to Air Crash Victims Survivors, 1998: Hearings on Proposed Changes to COGSA Before the Subcomm. on Surface Transportation and Merchant Marine*, 105th Cong. 2 (1998) (statement of Senator Kay Hutchison).

119. *See* Tetley, *supra* note 1; *see also* Oland, *supra* note 63.

120. *See* Tetley, *supra* note 1.