Articles

The Extension of Damage and Time Limitations of the Hague, Warsaw, and Lausanne Conventions to Agents and Independent Contractors of Ship Lines and Air Lines

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I. INTRODUCTION

The Hague Convention (codified in the United States Code),[1] The Warsaw Convention[2] and the Lausanne Convention[3] all have a common theme of protection to maritime carriers and air carriers in limiting their liability for loss or damage to goods. None of the conventions expressly attempt to extend this umbrella of protection to agents, servants, and independent contractors of these carriers.

It would seem natural (at least to the author) that employees of carriers and the carriers' agents would like to share the same protective umbrella as the employing carrier, and the carrier would also like to share this extension because it would reduce the possibility of sharing in the increased costs of these servants, agents and independent contractors who would have to charge more to defray the costs of insurance protection. Of course, shippers would not share this desire to extend these conventions—especially to deep-pocket independent contractors.

On the other hand, if shippers realize that they have little chance of full recovery against anyone in the transportation of their goods, they can then make a rational decision as to either declaring the full value of their goods, or procuring insurance coverage from their own insurers or simply

1. *See* 46 U.S.C. §§ 1303 (1994).
2. *See* 49 Stat. 3000 (1988) (current version at 49 U.S.C. § 1502 (1994)).
3. *See* United States Postal Union Convention, Jan. 1, 1976, 27 U.S.T 345, T.I.A.S. No. 5231.

gambling that the goods will arrive in good condition with reduced freight charges.

In addition to this discussion of the umbrella of protection in the limiting of damages, it is hoped that this article will increase awareness of the strict limitations on the time for suing both the carriers and their agents and independent contractors. The time limitations in these conventions are much shorter than are found in most state limitation statutes.

II. "HIMALAYA CLAUSE" ORIGINS

A. ENGLAND

1. Early History

The "Himalaya Clause" is the common name for the exculpatory clauses found in most bills of lading which attempt to extend the protective clauses of the Hague Rules or the Hague Visby Rules to third parties such as agents, servants, warehousemen, stevedores, etc., who are not directly protected by the language of these two Conventions. It seems ironic that the *Himalaya* rule had its genesis in dicta in the case of *Adler v. Dickson and another*[4] wherein the court refused to protect the captain and boatswain of the ship Himalaya from liability for injuries suffered by a passenger. A female passenger, while returning to the ship Himalaya[5] docked in a port in Trieste, fell sixteen feet to the dock when the gangplank suddenly shifted. The passenger suffered severe injuries, and she sued the captain and the boatswain for their alleged negligence. The passenger was unable to recover from the shipline because the ticket bore the legend that, "Passengers and their luggage are carried at passengers' entire risk . . . [T]he company will not be responsible for and shall be exempt from all liability in respect of any . . . damage or injury whatsoever of or to the person of any passenger . . . ."[6]

The three judges agreed that the above language protected only the shipline, and it did not extend to protect the captain and the boatswain from liability. The court simply held that the captain and the boatswain were strangers to the contract, but that if the ticket-contract had expressly included them as being immune from suit then the law would protect them. The court was careful to note that any immunizing or liability limiting contract between shipline and passenger would have to clearly indicate that the shipline was contracting on behalf of any third party (such as the captain and boatswain) as an agent for these person. Although the

4. 2 Lloyd's List L. Rep. 267 (C.A. 1954).
5. *Id.* at 269.
6. *Id.*

opinion made no mention of the third party beneficiary concept, it seems evident that the judges were carefully attempting to articulate how third parties could become parties to a contract arranged by their agent—the shipline.

This somewhat convoluted approach was necessitated by the fact that the United Kingdom did not and does not recognize third party beneficiary contracts,[7] and this fact may account for some of the much criticized language in international bills of lading. These clauses are trying to take advantage of American third party beneficiary notion and the English notion of the carrier contracting as agent and trustee for the stevedores, warehouses, etc. One lengthy clause is being asked to do too much.

The irony of the *Himalaya* case was continued in the famous case of *Midland Silicones, Ltd. v. Scruttons, Lts.*[8] A shipment of chemicals was made from the United States to London on an American ship which issued bills of lading subject to the Carriage of Goods by Sea Act which limits liability for loss to $500 per package. A drum of chemicals valued at more than this limited figure was damaged by stevedores in London and suit was brought against the stevedores who pleaded that the bill of lading protected them because it stated, "[T]he stevedores to have such protection as is afforded by the terms, conditions and exceptions of the Bills of Lading Westbound and Eastbound."[9]

The trial court and the court of appeals held that the stevedores were not protected by this clause, and the House of Lords affirmed. The majority of the court seemed to agree that there was no express statement in the bills of lading that the carrier was contracting for the stevedores as agents of the stevedores: this was the very point made by Lord Denning in *Adler v. Dickson*—the *Himalaya* case.[10]

The "agency approach" utilized by Lord Denning was further enlarged upon by Lord Reid in a statement which has come to be known as the "Lord Reid Test."

> I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consid-

7. Andrew Barrows, Reforming Privity of Contract: Law Commission Report No. 242 [1996] Lloyd's Maritime and Commercial Law Quarterly 467.

8. Midland Silicones, Ltd. v. Scruttons, Lts., 2 Lloyd's List L. Rep. 365 (1962).

9. *Id* at 368.

10. *See supra* note 4.

> eration moving from the stevedore were overcome. And then to affect the consignee it would be necessary to show that the provisions of the Bills of Lading Act, 1855, apply.
>
> But again there is nothing of that kind in the present case. I agree with your Lordships that "carrier" in the bill of lading does not include stevedore, and if that is so I can find nothing in the bill of lading which states or even implies that the parties to it intended the limitation of liability to extend to stevedores. Even if it could be said that reasonable men in the shoes of these parties would have agreed that the stevedore should have this benefit that would not be enough to make this an implied term of the contract. And even if one could spell out of this bill of lading an intention to benefit the stevedore there is certainly nothing to indicate that the carrier was contracting as agent for the stevedore in addition to contracting on his own behalf. So it appears to me that the agency argument must fail.
>
> And the implied contract argument seems to me to be equally unsound. From the stevedores' angle, they are employed by the carrier to deal with the goods in the ship. They can assume that the carrier is acting properly in employing them and they need not know whom the goods belong to.
>
> There was in their contract with the carrier a provision that they should be protected, but that could not by itself bind the consignee. They might assume that the carrier would obtain protection for them against the consignee and feel aggrieved when they found that the carrier did not or could not do that. But a provision in the contract between them and the carrier is irrelevant in a question between them and the consignee. Then from the consignees' angle they would know that stevedores would be employed to handle their goods, but if they read the bill of lading they would find nothing to show that the shippers had agreed to limit the liability of the stevedores. There is nothing to show that they ever thought about this or that if they had they would have agreed or ought as reasonable men to have agreed to this benefit to the stevedores. I can find no basis in this for implying a contract between them and the stevedores. It cannot be said that such a contract was in any way necessary for business efficiency.[11]

Lord Denning, in a brilliant dissent, pointed out that until recent times the shipper would not have a negligence action against the stevedore because the stevedore had no direct contractual duty of care towards the cargo, and now, as a result of this case, the stevedore is liable for negligence and cannot plead the carrier's defenses because he (the stevedore) has no defenses because he is a stranger to the contract! Lord Denning suggested that the stevedore should be protected on the grounds that it was implied that the agent-stevedore would be protected because he was carrying out the shipline's contract.

The "Lord Reid Test" was soon given application in the

11. *Id.* at 374-75.

Eurymedon.[12] A large, expensive drilling machine was shipped from Liverpool, England to Wellington, New Zealand on board the *Eurymedon*. The stevedore in Wellington damaged the machine in the unloading process, and the consignee sued the stevedore which was the owner of the carrier shipline. The bill of lading issued by the shipline provided in part:

> In accepting this Bill of Lading the shipper, consignee and the owners of the goods and the holder of this bill of lading agree to be bound by all of its conditions, exceptions and provisions whether written, printed or stamped on the front or back hereof.[13]
>
> * * *
>
> It is hereby expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Shipper, consignee or Owner of the goods or to any holder of this Bill of Lading for any loss or damage or delay of whatsoever kind arising or resulting directly or indirectly from any act neglect or default on his part while acting in the course of or in connection with his employment and without prejudice to the generality of the foregoing provisions in this Clause, every exemption limitation, condition and liberty herein contained and every right, exemption from liability, defense and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or deemed to be parties to the contract in or evidenced by this Bill of Lading.[14]

The consignee failed to sue the shipline within the COGSA one year limitation period, and then filed suit against the stevedore, so the issue presented was whether the stevedore came within the one year limitation period. The New Zealand Supreme court held that the exemption provisions of the bill of lading were made available to the stevedore through the agency of the carrier and that the stevedore's act of unloading the machine constituted consideration for the contract between shipper-consignor and the stevedore. The New Zealand Court of Appeal reversed the lower court's decision on the grounds that there was no consideration moving from the stevedore. The Privy Council majority repeated the "Lord Reid Test" and then held on the consideration issue:

12. The New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd., 1 Lloyd's Rep. 534 (1974).

13. *Id.* at 537.

14. *Id.* at 538.

> There is possibly more than one way of analyzing this business transaction into the necessary components; that which their Lordships would accept is to say that the bill of lading brought into existence a bargain initially unilateral but capable of becoming mutual, between the shippers and the appellants, made through the carrier as agent. This became a full contract when the appellant performed services by discharging the goods. The performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the appellant should have the benefit of the exemptions and limitations contained in the bill of lading. The conception of a "unilateral" contract of this kind was recognized in *Great Northern Railway Co. v. Witham,* (1873) L.R. 9 C.P. and is well established. This way of regarding the matter is very close to if not identical to that accepted by Mr. Justice Beattie in the Supreme Court: he analyzed the transaction as one of an offer open to acceptance by action such as was found in *Carlill v. Carbolic Smoke Ball Company,* (1893) 1 Q.B. 256.[15]

The Privy Council then held that the action was time barred.

The one year time bar rule of the Hague Rules was later upheld by the Judicial Committee of the Privy Council in 1980 in favor of a stevedore who apparently misdelivered 37 cartons of razor blades to an impostor after the blades were in the stevedore's possession for some time. The language of the bill of lading closely resembled the language in the *Eurymedon* bill of lading, and the lower courts in Australia seemingly had difficulty with the consideration concept and in the notion of "fundamental breach". The Privy Council basically followed the *Eurymedon* view in favor of the stevedore.[16]

A few years later, the Australian Supreme Court of New South Wales Court of Appeal was faced with a case[17] where a lady had shipped furniture from Genoa, Italy to Sydney, Australia, on board a Russian vessel. The container containing the furniture was unloaded in Sydney and left on the dock between February 21, and March 5, 1975. The container was exposed to heavy rains, and the container leaked water causing damage to the furniture. On March 10, 1975, the woman was informed of the arrival of the ship and she "attended"[18] the wharf on March 11, 1975. She then filed a claim against the stevedore on May 6, 1977. The stevedore relied upon the following clauses in the bill of lading supplied by the ship to the woman shipper:

> Cl. 5(c)(2)(b):
> . . . all liability whatsoever of the Carrier shall in any event cease unless suit is brought within eleven months after delivery of the goods or the date when the goods should have been delivered.

15. *Id.* at 539.
16. 2 Lloyd's Rep. 317 (Privy Council 1982).
17. Godina v. Patrick Operation Pty. Ltd., 1 Lloyd's Rep. 333 (1983)
18. *Id.* at 334.

> Cl. 4(2):
> The Merchant undertakes that no claim or allegation shall be made against any servant, agent or sub-contractor of the Carriers which imposes or attempts to impose upon any of them or any vessel owned by any of them any liability whatsoever in connection with the Goods, and, if any such claim or allegation should nevertheless be made, to indemnify the Carrier against all consequences thereof. Without prejudice to the foregoing, every such servant, agent and sub-contractor shall have the benefit of all provisions herein benefiting the Carrier as if such provisions were expressly for their benefit; and, in entering into this contact, the Carrier, to the extent of those provisions, does so not only on its own behalf but also as agent and trustee for such servants, agents and sub-contractors.[19]

The court of appeals held that the bill of lading contract did not become "exhausted" (in the sense of coming to an end), but it still remained effective between the shipper and the stevedore; that the lady consignee by acting upon the bill of lading ratified the contract and that the carrier as agent for the consignee for the stevedore gained the benefit of the contract against the consignee which contained the eleven month time bar. The court relied primarily upon the *New York Star*[20] and *Eurymedon*[21] cases for its decision. The case made no mention as to why the consignee waited for over two years to institute suit.

In *Glebe Island Terminals Pty. Ltd. v. Continental Seagram PTY Ltd.*,[22] the court had to interpret the *Himalaya* clause in a bill of lading:

> Every servant agent or subcontractor of the carrier: . . . shall have the benefit of every exemption from liability, defense, limitation, condition, and liberty herein contained, as if such provisions were expressly for his benefit, and in entering into this contract, the carrier, to the extent of this provision does so not only on his own behalf but also as agent and trustee for such persons.[23]

In addition, the bill of lading provided:

> (8)(3) the exemptions limitations terms and conditions in this bill of lading shall apply whether or not loss or damage is caused by the negligence or actions constituting fundamental breach of contract.[24]

Thirteen containers of Chivas Regal blended Scotch whiskey were sent from England to Sydney, Australia. The 13 containers were safely unloaded into the custody of a terminal operator. Two of the containers

19. *Id.*

20. Port Jackson Stevedoring Pty. Ltd. v. Salmond & Spraggon Pty. Ltd., 2 Lloyd's Rep. 317 (1980).

21. The New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd., 1 Lloyd's Rep. 534 (1974).

22. 1 Lloyd's Rep. 213 (Supreme Court of New South Wales Court of Appeal 1983).

23. *Id.* at 233.

24. *Id.* at 236.

(each of which weighed approximately 22 tons) mysteriously disappeared from the terminal operator's premises; the disappearance seemingly required the corrupt cooperation of one or more employees of the terminal operator. The consignee sued the carrier and the terminal operator, and the appellate court held that the *Himalaya* clause extended the bill of lading immunities to the terminal operator and even if the employees of the terminal operator were involved in the theft, that the terminal operator would be protected under clause (8)(3) in light of the House of Lords decision in the case of *Photo Production Ltd. v. Securicor Transport Lts.*[25]

In *Securicor* a factory owner contracted with Securicor to supply a guard for night patrol of the owner's factory. One evening, one of Securicor's guards threw a lit match into a pile of paper on the floor of the factory. The ensuing fire destroyed the factory, and the owners sued Securicor. The motivation of the guard was never completely established. Securicor asserted the following contractual clause as its defense:

> Under no circumstances shall the Company be responsible for any injurious act . . . by any employee of the Company unless such act . . . could have been foreseen and avoided by the exercise of due diligence on the part of the Company as his employer, nor in any event shall the Company be held responsible for:
> (a) any loss suffered by the customer through . . . fire . . . except insofar as such loss is solely attributable to the negligence of the Company's employees acting within the course of their employment . . . .[26]

The trial court held that Securicor was liable for the fire, but the Court of Appeals reversed holding that the wrongful act of the guard was a total breach of the contract and Securicor could not be immunized because it was a fundamental breach of contract which rescinded the entire contract including the immunizing clause.

The House of Lords reversed the Court of Appeals by holding that the court had incorrectly analyzed prior case law regarding the fundamental breach notion, and that with the exception of maritime deviation, the fundamental breach concept would not take away contractual protection in this non-consumer commercial setting. As Lord Diplock expressed it:

> My Lords, the reports are full of cases in which what would appear to be very strained constructions have been placed upon exclusion clauses, mainly in what today would be called consumer contracts and contracts of adhesion. As Lord Wilberforce has pointed out, any need for this kind of judicial distortion of the English language has been banished by Parliament's having made these kinds of contracts subject to the Unfair contract Terms Act, 1977. In commercial contracts negotiated between business-men capable of

25. 1 Lloyd's Rept. 545 (A.C.1980).
26. *Id.* at 547.

> looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne (generally by insurance), it is, in my view, wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning only even after due allowance has been made for the presumption in favour of the implied primary and secondary obligations.
>
> * * *
>
> For the reasons given by Lord Wilberforce it seems to me that this apportionment of the risk of the factory being damaged or destroyed by the injurious act of an employee of Securicor while carrying out a visit to the factory is one which reasonable business-men in the position of Securicor and the factory owners might well think was the most economical. An analogous apportionment of risk is provided for by the Hague Rules in the case of goods carried by sea under bills of lading. The risk that a servant of Securicor would damage or destroy the factory or steal goods from it, despite the exercise of all reasonable diligence by Securicor to prevent it, is what in the context of maritime law would be called a "misfortune risk" —something which reasonable diligence of neither party to the contract can prevent. Either party can insure against it. It is generally more economical for the person by whom the loss will be directly sustained to do so rather than that it should be covered by the other party by liability insurance.[27]

2. *Damage Occuring Before the Bill of Lading is Issued*

Consider when a carrier has yet to issue a bill of lading and the delivered goods are damaged while in the possession of a warehouse or dock.. May the warehouse be covered by an immunity clause which would have appeared in the forthcoming bill of lading? In *Raymond Burke Motors*,[28] motorcycles were delivered to a dock and placed in containers; the motorcycles were to be placed on a ship for transport to Canada. The motorcycles were harmed by the negligent driving of one of the operators of the dock in the unloading of a ship which had no connection with the prospective transport of the motorcycles. The dock operator and the shipline had a prior history of dealing, and the proposed bill of lading did contain an adequate *Himalaya* clause. The court held that the dock operator was not in the process of loading the motorcycles; that the loss incurred had nothing to do with the carrying out of the contract with the shipline, and that the unloading of a ship not owned by the shipline had nothing to do with the transport of the motorcycles and the *Himalaya* clause had no application .[29] Contrary United States cases will be dis-

27. *Id.* at 554.

28. Raymond Burke Motors, Ltd. v. The Mersey Docks and Harbour Co., 1 Lloyd's Rep. 155 (Q.B. Comm. Ct. 1986).

29. *Id.*

cussed later in this article.[30]

3. Extensions of the Hague One Year Rule for Suit

English law permits the extension of time limitations to sue in many situations. However, it has been recently held that if the wrong plaintiff sues the proper defendant, the court does not have the power to substitute plaintiffs and thereby to extend the Hague one year substantive rule barring suits as distinguished from a mere limitation of liability statute.[31] Nor does the court have the power to extend the Hague one year rule to allow a plaintiff to join a different defendant (there was a mix up of the parties) after the expiration of the same one year limitation rule.[32] On the other hand, if the bill of lading contract is controlled by English law and the contract provides for English arbitration, then the English court could grant an application for an extension for arbitration under Section 27 of the Arbitration Act, 1950,[33] but the courts cannot extend statutes of limitations under sections 12 and 13 of the English Arbitration Act of 1996.

It has been suggested that if the facts show that the solicitors for the defendant had misled the plaintiff's solicitors into believing that a case would be settled and that there was no necessity to file suit, that the defendant may be equitably estopped from pleading the one year bar of the Hague Rules.[34] The court held, however, that the alleged estoppel facts had not been proved.

B. United States Development

As pointed out in the famous case of *Grace Line, Inc. v. Todd Shipyards Corporation*[35] there are six possible exemptions or limitations of liability under COGSA which may possibly be extended by contract to defendants who are not carriers. The two most important exemptions of limitations are: (1) the one year period of limitations for instituting suit;[36] (2) the limited liability of $500 per package or freight unit, unless the shipper declares the nature and value of the goods before shipment and these items have been inserted into the bill of lading.[37] Four less substan-

30. *See infra* note 97.

31. Transworld Oil (USA) Inc. v. Minos Compania Naviera S.A., 2 Lloyd's Rep. 48 (A.B. Comm. Ct. 1992).

32. Zainalabdin Payabi & Baker Rastilari v. Armstel Shipping Corp., 2 Lloyd's Rep. 62 (Q.B. Comm. Ct. 1992).

33. Mitsubishi Corp. v. Casteltown Navigation Ltd., 2 Lloyd's Rep. 383 (1989).

34. P.S. Chelleram & Co., Ltd. v. China Ocean Shipping Co., 1 Lloyd's Rep. 493 (Australia Supreme Court of New South Wales Court of Appeal 1990).

35. 500 F.2d 361 (9th Cir. 1974).

36. 46 U.S.C. § 1303(6) (1994).

37. 46 U.S.C. § 1304(5) (1994).

tial exemptions or limitations are the immunities from liability for the following: unseaworthiness of the vessel unless caused by want of due diligence;[38] negligent acts in the navigation or management of the ship;[39] damage caused by fire, unless caused by the actual fault or privity of the carrier;[40] or damage arising from any cause without actual fault or privity.[41]

1. The Wording of the Himalaya Clause

In 1958 the Fourth Circuit in *Herd & Co.,Inc. v. Krawill Machinery Corp.*[42] held that a stevedore does not come within the definition of "carrier" as defined in the Carriage of Goods by Sea Act nor within the terms of the bill of lading, while the Fifth Circuit in *A.M. Collins & Co. v. Panama R. Co.*[43] had held just the opposite. The Supreme Court of the United States granted certiorari from the Fourth Circuit's *Herd* decision to resolve the conflict.[44] The Supreme Court pointed out that the prior case law of the Supreme Court had held that an agent is liable for all damages caused by his negligence "unless exonerated therefrom, in whole or in part, by a statute or a valid contract binding on the person damaged."[45] The Supreme Court then considered the case of *Elder, Dempster & Co. Ltd. v. Paterson, Sochonis & Co., Ltd*[46] and stated:

> A careful reading of the several lengthy opinions of their lordships in that case discloses that the question whether a provision in the bill of lading limiting the liability of the carrier likewise limits the liability of its negligent agent, though the agent is neither a party to nor an express beneficiary of the bill of lading, was not involved in or decided by that case. Nor has any English case ever held that a bill of lading that expressly limits the liability of only the carrier nevertheless applies to and limits the liability of its negligent agent.[47]

The Court concluded the decision by stating:

> No statute has limited its (the stevedore) liability, and it was not a party to

38. 46 U.S.C. § 1304(1) (1994).

39. 46 U.S.C. § 1304(2)(a) (1994).

40. 46 U.S.C. § 1304(2)(b) (1994). *See* Hanson & Orth, Inc., v. M/V Jalatarang, 450 F.Supp. 528 (S.D. Ga. 1978) (holding stevedores liable as the cause of a fire which destroyed a cargo of burlap and jute during the unloading stage).

41. 46 U.S.C. § 1304(2)(q) (1994).

42. 256 F.2d 946 (4th Cir. 1958).

43. 197 F.2d 893 (5th Cir. 1952).

44. *Herd & Co., Inc. v. Krawill Mach. Corp.,* 359 U.S. 297 (1959).

45. *Id.* at 303.

46. 18 Lloyd's List L. Rep. 319 (A.C. 522 1924). *See,* CATHARINE MACMILLAN, ELDER DEMPSTER SALES ON PRIVITY OF CONTRACT AND BAILMENT ON TERMS (1997). For a recent discussion of Elder, Dempster & Co., Ltd. v. Paterson, Sochonis & Co., Ltd.

47. *Herd,* at 307.

> nor a beneficiary of the contract of carriage between the shipper and the carrier, and hence its liability was not limited by that contract. It follows that petitioner's (stevedore) common-law liability for damages caused by its negligence was in no way limited.[48]

At this point, the English and American courts had agreed that strangers to a contract were not entitled to shelter under it.

In *Brown & Root, Inc. v. M/V Peisander*,[49] a crate of machinery was being transported to the side of a ship for loading when the forklift operator of the stevedore dropped the machinery causing damages of $56,048.75. All parties agreed that the stevedore was at fault; the stevedore pleaded the $500 package rule, and the shipper pleaded that the damage limitation was void because the bill of lading did not provide that the shipper could declare a higher valuation for the goods and secure full coverage for any damages. The bill of lading provided:

> 18. Amount of limitation
> The responsibility of the carrier shall in no case, whether governed by the U.S. Carriage of Goods by Sea Act, the Hague Rules or not, exceed the amount of $500.00 per package or customary freight unit.[50]

The court noted that the Ninth Circuit in the case of *Pan American World Airways, Inc. v. California Stevedore and Ballast Company*[51] had held that the "no case" language in the above clause made the limitation void unless the carrier could prove that the shipper did have a choice of rates for higher valuation.

The *Brown & Root* court held that the bill of lading was subject to the Carriage of Goods by Sea Act (COGSA) by virtue of the wording of the bill of lading and the fact that COGSA as a matter of law controls the bill of lading contract. The published tariff of the shipline also gave the shipper the right to declare a higher valuation of the cargo, and COGSA does not prescribe that the bill of lading contain a specified space or blank in which the increased valuation is to be written and that the face of this bill of lading "leaves ample space in the middle of the front page for "Description of Packages and Goods" under the heading of "Particulars Furnished by Shipper."[52] The Fifth Circuit then held that the *Pan American* case does no more than relieve the shipper from disproving the availability of increased valuation, and if the carrier's tariff shows the availability of a choice of valuation, then the clause in the bill of lading is upheld.[53]

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48. *Id.* at 308.
49. 648 F.2d 415 (5th Cir. 1981).
50. *Id.* at 419 note 8.
51. 559 F.2d 1173 (9th Cir. 1977).
52. *Brown & Root*, at 424.
53. The *Brown & Root* case was expressly followed in Gebr. Bellher K G. v. Terminal Serv.

What happens if the stevedore is also a "terminal operator"—does he come within the *Himalaya* language of: "(i)n the bill of lading the word "carrier" includes the shipowner, and any of its employees, agents or contractors."?[54] In *Barber Blue Sea Line*, goods were discharged from a ship to the custody of a stevedore who also had contractual authority from the Port Authority in Miami, Florida. Some of the goods mysteriously disappeared, and the insurer sued the stevedore who claimed protection under the package rule of COGSA. The court held that the quoted language covered the stevedore. Further, the stevedore was still acting under the bill of lading for the carrier until the time that the cargo was loaded on the consignee's trucks. The stevedore as "terminal operator" had no authority to deliver the cargo to the Port Authority; the contractual authority extended to the use of the port authority for delivery of cargo.[55]

The *Barber Blue Sea Line* case involving a stevedore who was also a "terminal operator" should be compared with the *La Salle Machinery Tool* case.[56] In *La Salle* a terminal operator also acting as a stevedore in the port of Baltimore negligently unloaded a crate of machinery components from a truck for loading on a ship. A bill of lading was later issued, but it did not cover the crate which was damaged. The standard bill of lading of the shipline stated:

> "(t)he limitation of liability . . . shall inure not only to the benefit of the carrier, its agents, servants and employees, but also to the benefit of any independent contractor performing services including stevedoring in connection with the goods hereunder.[57]

The shipper sued the "terminal operator" who relied on a series of cases[58] holding that when goods are delivered to the dock with the expectation that they will be carried by a carrier with a known bill of lading form that these goods are subject to this proposed bill of lading even when the damage occurs before the issuance of the bill of lading. The court rejected these cases in light of the fact that this case involved a

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Houston 711F.2d 622 (5th Cir. 1983) and WuerttembergGische and Badische Versicherungs - Aktiengesellschaft v. M/V Stuttgart Express, 711 F.2d 621 (5th Cir. 1983).

54. Certain Underwriters at Lloyds v. Barber Blue Sea Line, 675 F.2d 266 (11th Cir. 1982).

55. *Id.* at 270.

56. La Salle Mach. Tool, Inc. v. Maher Terminals, Inc., 611 F.2d 56 (4th Circuit 1979).

57. *Id.* at 58.

58. United States v. Central Gulf S.S. Co., 340 F.Supp. 473 (E.D. La. 1972); Berkshire Knitting Mills v. Moore-McCormack Lines, Inc., 265 F.Supp 846 (S.D.N.Y. 1965); John Deere & Co. v. Mississippi Shipping Co., 170 F.Supp. 479 (E.D. La. 1959); Eastern Outfitting Co. v. Pacific Mail S.S. Co., 26 F.2d 270 (N.D. Cal. 1928). *See also* Baker Oil Tools, Inc. v. Delta S.S. Lines, Inc., 387 F.Supp. 617 (S.D. Tex. 1974), aff'd 562 F.2d 938 (5th Cir. 1977) (*Luckenback* doctrine not applicable where carrier makes unilateral decision not to carry particular cargo before damages occurs).

terminal operator functioning as an independent contractor and not as an agent of the carrier. In the absence of any proof that "the relationship between such an independent contractor and the shipper is customarily governed by the carrier's bill of lading, and Maher [the terminal operator] has offered no such proof, we do not believe that *Luckenback* line of cases provides any support for Maher's position."[59]

In addition, the court was of the view that the term "all independent contractors" did not clearly include the defendant's terminal operations within its scope."[60] The Court cited the *Herd* case for the requirement of clarity of language to show that the language includes the particular defendant.

The Second Circuit of Appeals has had to determine in two cases whether the following definition of the word "carrier" was sufficient to include a stevedore:

> Clause 2 defines "carrier" as follows: "2 . . . [T]he word 'carrier' shall include the ship, her owner, operator, demise charterer, time charterer, master and any substituted carrier, whether acting as carrier or bailee, and *all persons rendering services in connection with performance of this contract* . . . ." (emphasis added by the court).

In accord with the *Herd* case, the court held that this language was not sufficiently clear to show the intent of the contracting parties.[61] On the other hand, the same court extended the protection to a stevedore when the *Himalaya* clause mentioned "legal entities" and "independent contractors."[62]

What is the result if the phrase "independent contractor" is used in the *Himalaya* clause, but the carriage of goods is not covered by terms of the Carriage of Goods by Sea Act but the parties have adopted COGSA as part of the contract of carriage, i.e., the bill of lading? It has been held that the term "independent contractor" under the bill of lading contract would cover the stevedore who damaged goods (an expensive yacht) in the unloading process.[63]

In an often cited case, *Secrest Machine Corp. v. S.S. Tiber*,[64] the *Himalaya* clause tersely provided:

> All defenses as aforesaid shall inure also to the benefit of the Carrier's agents, servants and employees and of any independent contractor perform-

59. *La Salle*, at 59.

60. *Id.*

61. *See* Cabot Corp. v. S.S. Mormacscan, 441 F.2d 476, 478 (2d Cir. 1971); Rupp v. Int'l Terminal Operating Co., Inc., 479 F.2d 674, 676 (2d Cir. 1973).

62. Bernard Screen Printing Corp. v. Meyer Line, 464 F.2d 934 (2d Cir. 1972).

63. Institute of London Underwriters v. Sea-Land Serv., Inc. 881 F.2d 761 (9th Cir. 1989).

64. 450 F.2d 285 (5th Cir. 1971).

> ing 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.
> For the purpose of this clause all such persons, firms or legal entities as alluded to above shall be deemed to be parties to the contract evidenced by this B/L.[65]

A stevedore in the unloading process negligently allowed a box containing a steel press to fall with $17,000 worth of damages occurring to the press. The court held that it was clear that the phrase "independent contractors" applied to the stevedore, and, in addition, the court held that the consignee could recover $500 per package from either the carrier or the stevedore, it could not recover $500 from both ship and stevedore.

The cumulative holding of the *Bernard Screen* and *Secrest Machine Co.* cases was nicely stated and adopted in *Tessler Bros. (B.C.) Ltd. v. Italpacific Line*:[66]

> Whether a bill of lading extends limitations of liability to stevedores depends on whether "the clarity of the language used expresses such to be the understanding of the contracting parties." *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. at 305, 79 S.Ct. at 771. Two circuits have recently held that a bill of lading mentioning independent contractors clearly includes stevedores. *Bernard Screen Printing Corp. v. Meyer Line*, 464 F.2d 934, 936 n. 1 (2d Cir. 1972), cert. denied, 410 U.S. 910, 93 S.Ct. 966, 35 L.Ed.2d 272 (1973); *Secrest Machine Co. v. S.S. Tiber*, 450 F.2d 285, 287 (5th Cir. 1971).

The language of the district court in *Bernard Screen* is instructive:

> To exclude "stevedores," who are independent contractors, from the scope of the more inclusive term would, in effect, be holding that parties by using the more inclusive term had accomplished the opposite result.

When the bill of lading extends the *Himalaya* clause's protections to:

> 1(a) The Carrier shall be entitled to the full benefit of, and right to, all limitations or exemption from liability authorized by any provisions of Section 4281 to 4288 inclusive of the Revised Statutes of the United States and amendments thereto and of any other provisions of the laws of the United States or of any other country whose laws shall apply. The terms of this bill of lading constitute the contract of carriage, which is between the shipper, consignee and authorized owner of the goods, and the Carrier, owner or demise charterer of the vessel designated to carry the shipment. It is understood and agreed that other than the Carrier, owner or demise charterer, no person, firm or corporation or other legal entity whatsoever (including the Master, officers and crew of the vessel, all agents, employees, representatives, and all *terminal operators*, stevedores, watchmen and other independent contractors whatsoever) is, or shall be deemed liable with respect to the goods *as carriers, bailee or otherwise,* howsoever in contract or in tort. *If*

65. *Id.* at 286.
66. 494 F.2d 438, 446-47 (9th Cir. 1974).

> *however, it shall be adjudged that any other than said shipowner or demise charterer is carrier or bailee of the goods or under any responsibility with respect thereto, all limitations of and exonerations from liability provided by law or by the terms hereof shall be available to such other.* In contracting from the foregoing exemptions, limitations and exonerations from liability, the Carrier is acting as agent and trustee for the other above mentioned. (Emphasis added by the Court.)[67]

The italicized words show a clear intent to extend the COGSA limitations of liability to the terminal operators.[68] The designation "pier to pier" stamped on the face of a bill of lading has been held to mean that the carrier's stevedore had to load cargo on trucks for delivery to an inland city in the United States and delivery had not yet been made when the stevedore dropped the goods causing damage. As a result, the stevedore was within the *Himalaya* clause and entitled to the package rule limitation.[69]

If the umbrella protection of the *Himalaya* clause extends to the carrier and "other bailee" or to the word "bailee" is this sufficient clarity of language to protect a stevedore, for example? The Third Circuit seems to reject this language[70] while the Eleventh Circuit approves this language.[71] In the famous "container" case of *Leather's Best, Inc. v. S.S. Mormaclynx,*[72] one of the many issues presented was whether a terminal service company, Tidewater Terminal, Inc., was a contractual party to a bill of lading issued by the carrier. The bill of lading described the carrier as, "the word 'carrier' shall include the ship, her owner, operator, demise charterer, time charterer, master and any substituted carrier, whether acting as carrier or bailee, and all persons rendering services in connection with performance of this contract."[73] The court held that Tidewater was not a party to the contract of carriage and it was a bailee or agent for the carrier, and was liable for its negligence in safeguarding a container (containing 99 bales of leather) thereby allowing it to be stolen from the premises.

One wonders what Judge Friendly would have held if the above bill of lading language had further mentioned stevedores, warehouseman, terminal operators, etc.?

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67. *Id.* at 1308.

68. B. Elliott (Canada) Ltd. v. John T. Clark & Son of Maryland, Inc., 704 F.2d 1305, 1308 (4th Cir. 1983).

69. Koppers Co., Inc. v. S/S Defiance, 704 F.2d 1309 (4th Cir. 1983) following *B. Elliott (Canada) Ltd. v. John T. Clark & Son of Maryland, Inc.,* 704 F.2d 1305 (4th Cir. 1983).

70. De Laval Turbine, Inc. v. West India Indus, Inc. 502 F.2d 259 (3d Cir. 1974).

71. Generali v. D'Amico, 766 F.2d 485 (11th Cir. 1985).

72. 451 F.2d 800 (2d Cir. 1971).

73. *Id.* at 805.

In the equally famous *Cabot* case[74] a shipper's goods were loaded into the hold of a ship; subsequently, the stevedore dropped two heavy steel plates owned by a stranger to this suit. The two steel plates damaged goods of the first shipper, and the shipper sued the stevedore who pleaded that it was covered by the clause, "the word 'carrier' shall include the ship, her owner, operator, demise charters, . . . and all persons rendering services in connection with the performance of this contract. . . . "[75] The court held that if the parties intended to include stevedores in the protected class it would have been simple to include the word "stevedores." And, even if it were:

> to be assumed that the limitation provisions in the instant bill of lading applied to the stevedores here then they would still be precluded from its protective provisions because they were not rendering services in connection with Cabot's (i.e. this) contract, but were instead rendering services in connection with another shipper not a party to this action.[76]

As a result, the stevedores were held fully liable for the value of the damaged goods.

In *Taisho Maritime & Fire Ins. Co., Ltd. v. The Vessel "Gladious"*, the *Himalaya* clause stated:

> All servants, agents and independent contractors (including in particular, but not by way of limitation, any stevedores) *used or employed by the Carrier* for the purpose of or in connection with the performance of any of the Carrier's obligations under this Bill of Lading, shall, in consideration of their agreeing to be so used or employed, have the benefit of all rights, defenses, exceptions from or limitations of liability and immunities of whatsoever nature referred to or incorporated herein applicable to the Carrier as to which the Carrier is entitled hereunder.[77]

The inland trucking firm ABF was hired by the consignee to transport the steel from the Port of Los Angeles to Tulsa, Oklahoma. The ABF firm issued its own bill of lading to the consignee. The steel was damaged in transit, and the consignee sued all parties including ABF. The court held that the *Himalaya* clause did not protect ABF because the clause did not protect ABF because the clause refers to servants, agents and independent contractors "used or employed" by the ocean carrier; ABF was not hired by the carrier (but by another company) and was performing a nonmaritime function after the shipline's obligations under its bill of lading had terminated. As a result, the carrier ABF was not entitled to use the one year limitation period of COGSA.

74. Cabot Corp. v. S.S. Mormacscan, 298 F.Supp. 1171 (S.D.N.Y. 1969).
75. *Id.* at 1172.
76. *Id.* at 1174.
77. *Id.* at 1366 (emphasis supplied).

The wording of the *Taisho* bill of lading should be compared with the slightly different wording in a later case whose bill of lading defined a "subcontractor" as including:

> owners and operators of Vessel (other than the Carrier), stevedores, terminal operators, warehousemen, road and rail transport operators and any independent contractor *employed by the Carrier* in performance of the whole or any part of the handling, storage or carriage of the Goods and any and all duties whatsoever undertaken by the Carrier in relation to the Goods. (emphasis added)[78]

And the Court also held that a truck carrier not directly "employed by the Carrier" cannot claim the damage limitations of COGSA when the truck carrier damages the goods after the completion of the maritime voyage.[79]

Some circuits seem to hold that only those parties who are in a direct contractual relationship with the carrier may take advantage of bill of lading provisions and then only if the intent to extend is clearly expressed.[80] Many *Himalaya* clauses use language to the affect that the exemptions for the carrier should enure for the benefit of independent contractors "including their servants, employees and agents, whose services the carrier from time to time may engage in the operation of the vessel . . ."[81] What happens if the defendant independent contractor was not engaged directly by the carrier but by another independent contractor? In the subject case the facts showed that the carrier's agent notified one of the stevedores who telephoned a third person of its needed services and this third person caused the negligent damage to cargo. The three independent contractors were closely interrelated in the port area, some of them sharing the same offices and telephones, etc. The court then used a "common-sense" approach and held that the last independent contractor was "engaged" by the carrier.

This view should be compared to the view expressed in *Toyomenka, Inc. v. S.S. Tosaharu Maru.*[82] Bales and cartons of woolen goods were unloaded by the stevedore and placed in sheds on a pier. The stevedore employed a guard service to guard the goods; unfortunately, the goods mysteriously disappeared. The shipper sued the carrier which impleaded the stevedore and the guard service. The trial court held that the $500 package rule protected all the parties, and the shipper appealed. The ap-

78. Canon USA, Inc. v. Norfolk Southern Ry. Co., 936 F.Supp 968, 973 (N.D. Ga. 1996) (emphasis added).

79. *Accord*, Toyomenka, Inc. v. S.S. Tosaharu Maru,523 F.2d 518 (2d Cir. 1975).

80. Tokio Marine and Fire Ins. Co. Ltd. v. NipponYusen Kaisha Lines, 466 F.Supp. 212 (W.D. Wash. 1979).

81. *Gebr. Bellmer KG v. Terminal Services Houston, Inc*, 711 F.2d 622, 625 (5th Cir. 1983).

82. *Toyomenka*, 523 F.2d 518 (2d Cir. 1975).

pellate court held that the terms of the *Himalaya* clause which applied only to "all servants, agents and independent contractors . . . used or employed by the Carrier for the purpose of or in connection with the performance of any of the Carrier's obligations. . . ."[83] did not cover the guard service because it was not employed by the carrier in the usual sense of the term. The guard service was an independent contractor hired by the stevedore. The court noted that the last sentence of the clause stated:

> It is hereby further expressly agreed that for the purpose of the foregoing provision the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or may be its servants, agents or independent contractors . . . and that all such persons shall to this extent be or be deemed to be parties to the contract contained by this Bill of Lading.[84]

The court was of the view that this language was further evidence that the parties did not intend the protection of the *Himalaya* clause to extend to the guard service.

In the second circuit it is the rule that when COGSA exemptions or limitations have been extended by contract to stevedores, warehousemen, etc., then COGSA does not have force as a statute but merely as a contractual term which means that these clauses are not to be construed under state law but under federal law in order to obtain uniform results in international maritime commerce.[85]

It would not be proper to finish discussion of this "wording of the bill of lading" section without discussing the "long form versus the short form" bill of lading. In *Encyclopedia Britannica, Inc. v. S.S. Hong Kong Producer*,[86] Britannica shipped 1300 cartons of encyclopedias from Chicago to a freight forwarder in New York which packed the cartons into seven containers. The forwarder delivered the containers to the carrier in New York which issued its short form bill of lading. The bill of lading was a "clean" bill. Unknown to the forwarder, six of the containers were stowed on deck and only two were stowed below deck. The short form bill of lading incorporated by reference all of the clauses in the long form including clause 13 (which Britannica claimed to have to knowledge of this clause) which stated:

> 13. Stowage on Deck, Etc.—Goods stowed in poop, forecastle, deckhouse, shelter deck, passenger space, storeroom, bunker space, or any other cov-

83. *Id.* at 521.

84. *Id* at 521-22.

85. Wemhoener Pressen v. Ceres Marine Terminals Inc., 5 F.3d 734, 736 (4th Cir. 1993).

86. 422 F.2d 7(2d Cir. 1969).

> ered-in space shall be deemed to be stowed under deck for all purposes, including General Average.
> The shipper represents that the goods covered by this bill of lading need not be stowed under deck and it is agreed that it is proper to and they may be stowed on deck unless the shipper informs the carrier in writing before delivery of the goods to the carrier that under deck stowage is required.With respect to goods carried on deck, all risk of loss or damage by perils inherent in or to incidental [sic] such carriage shall be borne by the shipper and the carrier shall have the benefit of all and the same rights, immunities, exemptions, and limitations as provided for in Act 4 of the Hague rules or the corresponding provision of any Act that may be applicable, excepting subdivisions (1),(2)(j), (2)(q), (3) and (4) thereof. In no event shall the carrier be liable for any loss or damage to goods so carried on deck arising or resulting from any cause whatsoever, including unseaworthiness, unless affirmatively proved to be due to lack of due diligence or to the fault or the neglect of the carrier or those for whom it may otherwise be responsible, but the carrier shall not in any event be liable for any act, neglect or default in the navigation or the management of the ship.[87]

No copy of the long form bill of lading was given to the forwarder, although the short form mentioned where the long form could be obtained. The short form was issued after the containers were loaded on the ship and, of course, there was no way that the forwarder could issue a demand in writing before loading that all the containers be carried below deck, nor was there any proof of a verbal understanding nor of any custom in the New York port to ship containers on deck.

During the trip to Japan, heavy seas came over the weather decks and some of the containers' contents were damaged by sea water. Britannica sued the carrier, and it asserted that the short form bill of lading permitted deck carriage, and that the carrier acted in accordance with the contract. The trial court held in favor of the carrier, but the court of appeal held that the on deck bill of lading implies under deck loading in the absence of information brought home to shipper that its goods were to be deprived of that status under the terms of the long form of lading. In addition, the bill of lading was a contract of adhesion and strictly construed against the carrier, and that the carrier was estopped from pleading Clause 13 because it was issued after the goods were loaded on the ship. Finally, in the absence of proof of a contrary custom in New York as to the loading of cargo on deck, then the containers were to be construed as "goods" entitled to all of the protections of goods under COGSA.

Judge Hays, in a pithy dissenting opinion, opined that this bill of lading was not a contract of adhesion because it was negotiated by an experienced freight forwarder; that the freight forwarder had a duty to

87. *Id.* at 10.

examine the conditions under which the goods were being carried; and if it chose to ship the cargo without knowing of the terms and conditions of the bill of lading it could not complain later. In addition, Judge Hays pointed out that bills of lading generally are not issued until after the shipping contract has been made, and that there was no deviation in this case and even if it were a deviation, the carrier should not be deprived of the package rule of COGSA.

Whatever one may think of the contrasting views in *Britannica*, it has been followed in the Fifth Circuit,[88] in the Eleventh Circuit,[89] and in a district court in the First Circuit.[90] In *Insurance Company of North America v. Puerto Rico Marine Management, Inc.*[91] goods were shipped from Elizabeth, New Jersey to San Juan, Puerto Rico. The goods (dried fish) were unloaded in the carrier's storage facilities. Two days later, the carrier delivered the goods to an impostor purporting to represent the consignee. The consignee's insurance company paid the consignee, and it sued the carrier who asserted the one year limitation rule. The court of appeal affirmed the district court, and held that the subrogating insurance company has no greater rights than the consignee. Further, even though the transaction was governed by the Harter Act rather than by the COGSA, the bill of lading "long form" bill of lading adopted COGSA to govern the shipment and the "short form" bill of lading adopted this rule by incorporation by reference. This procedure is authorized by 46 U.S.C. § 844 which authorizes filing of the long form bill of lading with the Federal Maritime Commission and this gives shippers (and their insurance companies) constructive notice of the one year rule. The court in this case distinguished two contra cases, *Allstate Ins. Co. v. Int'l Shipping Corp.*,[92] and *Puerto Rico Marine Mgmt, Inc. v. Ken Penn Amusement, Inc.*[93] In the first case, the *Allstate* Court relied upon a Fifth Circuit

88. Marvirazon Compania Naviera, S.A. v. H.J. Baker & Bros., 674 F.2d 364 (5th Cir. 1982).

89. Allstate Ins. Co. v. Int'l Shipping Corp., 703 F.2d 497 (11th Cir. 1983).

90. Caribbean Produce Exch., Inc. v. Sea Land Serv., Inc., 415 F.Supp. 88 (D. Puerto Rico 1976). A federal district court in following Encyclopedia Britannica v. S.S. Hong Kong, has held that a limitation of liability clause must appear in a short-form bill of lading to be effective. If the short form bill merely incorporates by reference the long-form bill of lading which has a limitation of liability clause, this is not effective against the shipper and because there was an inequality of bargaining power between the shipper and the carrier this clause would also be invalid as a contract of adhesion. (*Caribbean Produce Exch., Inc. v. Sea Land Service, Inc.*, 415 F.Supp. 88 (D. Puerto Rico 1976). *Allstate Insurance Company v. Int'l Shipping Corp.*, 703 F.2d 497 (11th Cir. 1983) follows the holding of *Encyclopedia Britannica, Inc. v. SS Hong Kong Producer*, 422 F.2d 7, (2d Cir. 1969) and *Marvirazon Compania Naviera, S.A. v. H.J. Baker & Bros.*, 674 F.2d 364 (5th Cir. 1982) regarding short forms and long forms of bills of lading.

91. 768 F.2d 470 (1st Cir. 1985).

92. 703 F.2d 497 (11th Cir. 1983).

93. 574 F.Supp 563 (W.D. Pa. 1983).

case,[94] and the latter case was primarily based upon 46 USC § 814 rather than on § 844. The second case, *Puerto Rico Marine*, "is based on decisions which either misinterpreted § 844 or simply did not interpret § 844 at all."[95]

On a cost-benefit analysis it would seem that the savings in paper and printing costs between the short and long form bill of lading would not come near the potential liability costs in using the short form. In addition, the use of "fine print" in exculpatory clauses (as decried in the majority opinion in *Britannica*[96]) would seem to be self-destructive; why not put these clauses in bold face print in order to show good faith by the carriers? Manufacturers in the United States have been issuing disclaimers of warranty in conspicuous print under § 2-316 of the UCC without disastrous results for many years.

2. *Hague Coverage of Independent Contractors Before the Issuance of the Bill of Lading*

As previously stated, one English case held that if a bill of lading was never issued then its provisions (including the *Himalaya* clause) could not apply.[97] The concept that a shipper and carrier may be held to the terms of a bill of lading which was not issued until after the goods have been damaged or lost, seemed to have originated in the United States in the case of *Luckenbach S.S. Co., Inc. v. American Mills Co.*,[98] A shipper delivered 2,852 cots for shipment. After 1,402 cots had been loaded, fire broke out on the wharf and destroyed 1,450 of the unloaded cots. The shipper sued the carrier, which pleaded the exemption from fire loss contained in the bill of lading which was issued after the fire. The district court held in favor of the shipper, and the court of appeals reversed by stating:

> Appellant was required by law to issue a bill of lading, but it had the right to except liability for loss by fire. The memorandum merely acknowledged receipt of the goods; it did not purport to be a contract of carriage. Appellee is presumed to know the law, and therefore must have known that the terms and conditions on which its goods were received and would be transported would be contained in a bill of lading to be issued later. In the circumstances, it cannot be inferred that it was the intention of the parties to enter into a contract that would bind the carrier as insurer; but an implied understanding arose from common business experience that the carrier would issue such bill of lading as it was its custom to issue to shippers in the usual

94. *Marvirazon Compania v. H.J. Baker & Bros.* 674 F.2d 364 (5th Cir. 1982).
95. 768 F.2d at 478.
96. 422 F.2d at 10.
97. *See supra*, note 28.
98. 24 F.2d 704 (5th Cir. 1928).

> course of its business. The Caledonia (C.C.) 43 F. 681, 685; s.c., 157 U.S. 124, 139, 15 S.Ct. 537, 39 L. Ed. 644.
> Appellant's bill of lading was issued after the fire, but it was in accordance with its standard form, issued to all shippers alike, and was not made to fit a special case, in order to escape a liability that had already accrued. It, therefore, but evidenced the contract the parties entered into at the time the goods were delivered and accepted. In the ordinary case of a shipment of goods, it is not to be assumed, upon proof of delivery without condition, that the carrier intends to become insurer; but a shipper, in the absence of a special contract, must be presumed to deliver his goods on the terms and conditions usually and customarily imposed by the carrier in the regular course of business.[99]

The *Luckenback* case was followed in the same year by another federal court which held that the time bar limitation for suit in the bill of lading was applicable even though the goods (furniture) were damaged prior to the issuance of a bill of lading while the goods were still in the possession of the carrier on an Army base.[100] Two American cases have held that the *Himalaya* clause in bills of lading would apply even though in one case the goods were destroyed before the loading and bills of lading were never issued[101] and in another case where the bill of lading was issued after the goods were placed in a container which was allegedly contaminated and which caused damage to the rice contents.[102]

It has been held that when a dock receipt incorporates by reference the carrier's usual bill of lading which has a *Himalaya* clause protective of stevedores and the stevedore negligently drops a 45,000 pound steel shear which damages the shear and the vessel, that the stevedore is protected even though a bill of lading was never issued because of the accident.[103] If the parties understand that a contract for maritime carriage of goods exists even though a bill of lading has not been issued, then the parties are covered by COGSA time limitations.[104]

The facts in *Scott & Williams, Inc. v. Pittston Stevedoring Corp.*[105] illustrate the old saw that "truth is stranger than fiction." A shipper delivered goods to a stevedore for maritime transport. The stevedore issued a dock receipt on behalf of the shipline; the dock receipt stated that:

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99. *Id.* at 705.

100. Eastern Outfitting Co. v. Pacific Mail S.S. Co., 26 F.2d 270 (N.D. Calif. 1928).

101. Baker Oil Tools v. Delta S.S. Lines, Inc. 562 F.2d 938 (5th Cir. 1977), Caterpillar Overseas, S.A. v. Marine Transp., 900 F.2d 714 (4th Cir. 1990).

102. Uncle Ben's Int'l Div. of Uncle Ben's, Inc. v. Hapag-Lloyd Aktiengesellschaft and Biehl & Co., 855 F.2d 215 (5th Cir. 1988).

103. Mediteranean Marine Lines, Inc. v. John T. Clark & Son of Md., Inc., 485 F.Supp. 1330 (D. Maryland 1980) *Accord*, Berkshire Knitting Mills, v. Moore-McCormack Lines, Inc., 265 F.Supp. 846 (S.D. N.Y. 1965).

104. *Miller Export Corp. v. Hellenic Lines, Ltd.*, 534 F.Supp. 707 (S.D. N.Y. 1982).

105. 422 F.Supp. 40 (S.D. N.Y. 1976)

> [r]eceived the above described goods or packages subject to all the terms of the undersigned's [Mormac's] regular form of dock receipt and bill of lading which shall constitute the contract under which the goods are received, copies of which are available from the carrier on request and may be inspected at any of its offices[106]

Unfortunately, the stevedore did not realize that the Mormac shipline was using an old form and a new form bill of lading simultaneously, and:

> Under these circumstances, it cannot be said that either form of bill of lading was incorporated into the parties' agreement concerning the transportation of the knitting machine into Brazil. Given that the new form was either not being used at all or was being used along with the old form, the dock receipt did not refer to either document with the specificity necessary to effect an incorporation by reference.[107]

The court pointed out in a footnote that the new form was apparently filed because the old form did not refer to stevedores with enough specificity to extend to them the COGSA limitations of liability.[108] If a dock receipt is issued by the carrier and this receipt expressly adopts COGSA as governing and also adopts by reference the carrier's standard bill of lading including the $500 package rule) and the goods are damaged while in the ship's sling, then the shipper is bound by the package rule in its suit against the carrier.[109]

On the other hand, a different result was reached in a case where a dock receipt was issued by the carrier to the shipper (no mention of the terms of the receipt was made in the decisions) and then the shipline unilaterally canceled the port of call agreed by the carrier and the shipper and then the goods mysteriously disappeared. The court held that the shipline became a common law bailee and could not plead the $500 package rule of COGSA[110] When a terminal operator in Baltimore, Maryland also operates as a warehouseman and he issues a dock receipt which incorporates by reference a proposed bill of lading and a blank copy of the proposed bill of lading is supplied by the terminal operator to the shipper, then:

> The provisions of the bill of lading are applicable even though the bill was never issued. Where an unissued bill of lading is incorporated by reference in an issued dock receipt, its provisions become part of the maritime contract between the parties. (Ferrex International Inc. v. M/V Rico Chone, 718 F.Supp. 451 (D.Md. 1988) and Mediterranean Marine Lines v. John T. Clark

106. *Id.* at 42.

107. *Id.*

108. *Id* at 42 n 5.

109. John Deere & Co. v. Mississippi Shipping Co., Inc., 170 F.Supp. 479 (E.D. La. 1959).

110. Baker Oil Tools, Inc. v. Delta S.S. Lines, Inc., 562 F.2d 938 (5th Cir. 1977).

& Son, 485 F. Supp. 1330, 1335 (D.Md. 1980).[111]

3. Non-Maritime Transportation and the Wording of the Bill of Lading

How wide an interpretation should the phrase "independent contractor" be given in the context of a *Himalaya* clause? It has been held that an independent truck-carrier in the hauling of a large tractor between two separate ports in the United States would be a non-maritime transaction and not fall within the exemption and, in addition, the bill of lading talked about the time when goods were "in custody of the carrier" that this would not include the time when the truck carrier was transporting the tractor on the public highways outside of the area of a port and the damage occurred on a public highway.[112]

In the case of *Lucky-Goldstar Int'l (America) Inc. v. S.S. California Mercury*[113] the *Himalaya* clause stated:

> the Carrier shall be entitled to sub-contract on any terms the whole or any part of the handling, storage or carriage of the Goods . . . . [E]very such servant, agent and sub-contractor shall have the benefit of all provisions herein, for the benefit of the Carrier as if such provisions were expressly for their benefit.[114]

Goods were shipped from Korea to Seattle, Washington and for final delivery to New Jersey via railroads. The goods were seemingly damaged during the railroad transit, and the railroads claimed the package rule protection under the marine bills of lading. The court held that the above quoted language was not sufficient in itself to show an intention to extend the COGSA protections to a non-maritime carrier. The court suggested that if the parties really intended to cover non-maritime carriers it would have been so effortless to include the words "inland carriers" to the clause.[115]

The extensive reach of a "*Himalaya*" clause was well illustrated in a recent case[116] A large shipment of shoes was made from Hong Kong to Los Angeles for further shipment to New York. While the shoes were being carried on the railroad, the shoes were destroyed as a result of a derailment and fire which occurred in Arizona. The subrogating insur-

111. The Ferrex case has an interesting discussion about the warehousing function and its liabilities in cases of mysterious disappearance.

112. Caterpillar Overseas, S.A. v. Marine Transport, Inc., 900 F.2d 714, 726 (4th Cir. 1990).

113. 750 F.Supp. 141 (S.D.N.Y. 1990).

114. *Id.* at 144.

115. *Id.* at 145. (citing *Tokio Marine & Fire Ins. Co. v. Hyundai Merchant Marine Co.*, 717 F.Supp. 1307 (N.D. Ill. 1989) and *Royal Insurance v. Westwood Transpacific Service*, No C-88-832M, April 25, 1990 (W.D. Wash. 1990)).

116. *New York Marine & General Insurance Co. v. S/S Ming Prosperity*, 920 F.Supp. 416(S.D.N.Y. 1996).

ance company sued the maritime and railroad carriers. Clause 26(1) of the ship's bill of lading provided that all claims for which the carrier may be liable shall be adjusted based on the "net invoice value of the goods."[117] which amounted to $51,282. Further, the *Himalaya* clause (clause 2) stated that if any other carrier is deemed "carrier or bailee of the Goods or under any responsibility with respect thereto, all exemptions and limitations of an exoneration from liability provided by law or by terms hereof shall be available to such other."[118] The court held that this latter clause served effectively as a *Himalaya* clause limiting the railroad's liability to the same extent as the shipline.[119]

When an expensive press used in woodworking is placed inside a wooden crate which is then strapped by steel cables to a wheeled non-motorized flatbed trailer called a "mafi" and shipped to Baltimore, Maryland and then the steel cables are cut by a cutting torch which ignites the crate thereby damaging both the press and the "mafi," the cutting of the cables was deemed within the concept of "carriage" and the marine terminal employer of the welder was protected by the package rule.[120]

4. The Package Rule and Unreasonable Deviation

The Carriage of Goods by Sea Act provides that:

> (5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.
> 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

117. *Id.* at 419.

118. *Id.* at 427.

119. *C.f.* Seguros Commercial Americas S.A. v. American President Lines, Ltd, 910 F.Supp. 1235 (S.D. Tex. 1995) Another shoe case, but with a somewhat different result. For a painstaking analysis of the facts surrounding the mysterious disappearance of 498 cartons of shoes from a sealed, apparently intact, untampered-with container when it was unloaded in Buenos Aires after a voyage from New York, *See* R.B.K. Argentian, S.A., v. M/V Dr. Juan B. Alberdi, 935 F. Supp. 358 (S.D.N.Y. 1996). This case is a virtual law book trial guide in the preparation and presentation of proof in a mysterious disappearance case.

120. Wemhoener Pressen v. Ceres Marine Terminals, Inc., 5 F.3rd 734 (4th Cir. 1993). For a very careful analysis of a maritime Himalaya clause in the context of inland transporation from a maritime voyage and an expensive hauling accident suffered by a trucking line at the destination city, see Taisho Marine and Fire Ins. Co., Ltd. v. Maersk Line, Inc., 796 F.Supp. 336 (N.D. Ill. 1992) *aff'd.*, 7 F.3d 238 (7th Cir. 1993).

> 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.

It is beyond the scope of this article to discuss the concept of "package" in light of the current use of containers in ocean transport. The case law seems to agree that when smaller "cartons" or "packages" are concealed in containers, it is imperative for the shipper to adequately state the number, character and value of these small packages in the bill of lading for adequate declaration of value under COGSA under pain of having a court declare that the container itself is this "package."[121] Unfortunately, when the contents are described by the shipper it is almost a guaranty in some ports that the goods will be stolen at some point in transit.

Even though the shipper is a sophisticated shipper (an airline) and it acted through a sophisticated freight forwarder, the carrier must give the shipper an opportunity by leaving spaces on the bill of lading wherein the shipper may declare a higher value for the goods and pay increased freight charges to the carrier. If the carrier fails to do this, a stevedore acting under this bill of lading cannot plead the $500 package rule as a successful defense.[122]

Subsection 4 of Section 1304 provides that:

> 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 facie, be regarded as unreasonable.

Prior to the adoption of the Hague Convention (COGSA) in the United States it was the rule that an unreasonable deviation from the contract of carriage made the vessel an insurer of the goods if the goods were lost or damaged as a result of the deviation. After the adoption of COGSA, the Second circuit,[123] the Fifth Circuit,[124] and the Ninth Circuit[125] have con-

121. *See e.g.*, Universal Leaf Tobacco Co., Inc. v. Companhia de Navegacao Maritime Netumar, 993 F.2d 414 (4th Cir. 1993); Belize Trading Ltd. v. Sun Ins. Co. of New York, 993 F.2d 790 (11th Cir. 1993); All Pacific Trading, Inc. v. Vessel M/V Hanjin Yosu, 7 F.3rd 1427 (9th Cir. 1993).

122. Pan Am. World Airways, Inc. v. California Stevedore & Ballast Co., 559 F.2d 1173 (9th Cir. 1977).

123. DuPont de Nemours Int'l S.A. v. S.S. Mormacvega, 493 F.2d 97 (2d Cir. 1974).

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

125. Nemeth v. General S.S. Corp., Ltd., 694 F.2d 609 (9th Cir. 1982)

tinued this rule while the Seventh Circuit[126] has held that COGSA was intended to change the former rules, and that the $500 per package limitation rule has survived in spite of the unreasonable deviation.

When the bill of lading states that the port of discharge is New York but the destination is Boston and the goods are delivered to a trucking company for transport to Boston, but the driver parks the trailer and chassis overnight on a public street in Queens, New York, where it was stolen, the trucker has lost the protection because of his unreasonable deviation.[127] The carrier under 46 USC §§1304(4) and (5) may lose the protection of the $500 package rule of COGSA if it commits an unreasonable deviation in the carriage of the goods, and the loading of goods on deck in violation of a clean bill of lading or in violation of an agreed under-deck stowage will deprive the carrier of the protection of the package rule.[128] The general rule is that a carrier is liable for an unreasonable geographic deviation to a port other than the destination port, but the liability is still limited under the $500 package rule in the Seventh Circuit.[129]

The Fifth Circuit has held that when an Israeli vessel was instructed by the Israeli government to divert the vessel to Mobile, Alabama, on a journey from Israel to New Orleans, and the shipper's watch parts were discharged on the docks in Mobile and damaged by rain, that this was an unreasonable diversion even though the ship was to use the vacant cargo space to transport military supplies to Israel.[130] The court then held that this unreasonable diversion precluded the use of the package rule by the ship when the shipper brought suit.

Section 4(5) of COGSA requires that the carrier give the shipper an opportunity to declare the true value of the goods and to pay a larger freight bill if required by the carrier, otherwise the carrier cannot plead the package rule. If the carrier prints the offer to the shipper in print that can not be read with the naked eye this does not impart notice to the shipper and is not prima facie evidence of "fair opportunity."[131]

At least one court has held that the alleged negligence of the stevedore in unloading goods from a ship cannot constitute unreasonable deviation thereby precluding the defense of the COGSA package rule.[132]

126. Atlantic Mut. Ins. Co. v. Poseidon Schiffahrt, 313 F.2d 872 (7th Cir. 1963), *cert. denied*, 375 U.S. 819, 84 S.Ct. 56 (1963).

127. Asahi America Inc. v. The M/V Arild Maersk, 602 F.Supp. 25 (S.D.N.Y. 1985).

128. *See* Calmaquip Eng'g W. Hemisphere Corp. v. West Coast Carriers Ltd. 650 F.2d 633 (5th Cir. 1981) and the cases discussed therein.

129. *See Atlantic Mut. Ins. Co.*, 313 F.2d at 874.

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

131. Nemeth v. General S.S. Corp., Ltd. 694 F.2d 609, 611 (9th Cir. 1982) (holding that deck stowage is a deviation).

132. Rockwell Int'l Corp. v. M/V Incotrans Spirit, 998 F.2d 316 (5th Cir. 1993).

The alleged deviation of "restowage" was involved in a recent case.[133] Cargo was sent from China to California; when the ship arrived in Japan the cargo was removed from the ship and restowed in another ship. The cargo was damaged in the restowing process, and the shipper sued. The ship pleaded the package rule, and the shipper alleged unreasonable deviation which precludes this defense. The carrier then pleaded a clause in the bill of lading:

> Carrier shall have the right, without notice, to substitute or employ a vessel, watercraft, or other means rather than the vessel named herein to perform all or part of the carriage.

The district court held that that this procedure was a "transshipment" and that the above clause did not cover this. The court of appeal held that the words "all or part of the carriage" means that: "[U]se of a substitute vessel for part of the voyage necessarily encompasses a transshipment."[134] As a result, there was no unreasonable deviation, and the package rule prevailed. Under a *Himalaya* clause which mentions bailees, stevedores, etc., an intermediate stop stevedore who damaged the shipper's goods while restowing them for final delivery and this restowage was customary or contractually contemplated the stevedores' acts in accordance with the carrier's duties, and the stevedore is entitled to the protections of the package rule of COGSA.[135]

Goods were sent from Sunnyvale, California to Dublin, Ireland, but the ship discharged the goods in Antwerp, Belgium and re-loaded them on another vessel for the trip to Dublin. When the goods were unloaded in Dublin, expensive damages to the cargo were discovered. The shipper sued, and the court held there would be no deviation if the testimony shows that in shipments to Dublin it is customary to stop in Belgium. Without a showing of unreasonable deviation the package rule would prevail as to the carrier. However, in this case there was a contract between the shipper and a freight forwarder that damages would be limited to twenty dollars per kilogram, or $9.07 per pound. The court held that the higher limits in this contract prevailed as against the forwarder rather than the COGSA limitation of $500 per package. The irony in this case is that it is obvious that the freight forwarder used the damage limits in the Warsaw Convention governing airline transport and not marine transport. Nine dollars and seven cents a pound for diamond shipments on airplanes is adequate protection to the freight forwarder and to the airline, but the same amount of money for marine cargo weighing tons is not

133. Yang Mach. Tool Co. v. Sea-Land Serv., Inc., 58 F.3d 1350 (9th Cir. 1995).

134. *Id.* at 1353.

135. Spm Corp. v. M/V Ming Moon, 965 F.2d 1297 (3rd Cir. 1992).

adequate protection to the forwarder.[136]

When a shipper and a freight forwarder orally agree with the carrier for underdeck storage of goods and the bill of lading prepared by the forwarder provides for a "clean" bill of lading, the oral contract controls. The acts of the carrier in stamping the issued bill of lading as providing for "deck" carriage cannot unilaterally change the contract of the parties and, the carrier is liable for damage suffered by the cargo in transit. Further, the forwarder cannot successfully use the unilateral change of the bill of lading by the carrier as a defense when it (the forwarder) is sued by the shipper.[137] "It is clear that if there is no definite agreement one way or the other, a shipper is entitled to expect below deck storage, unless there is a showing of a different custom in that port."[138]

If a bill of lading mentions New York City as the only port of call for a shipment originating in Spain, but the ship, in fact, stops at St. John, Newfoundland and Boston, Massachusetts, this will not constitute a deviation if the carrier has made these stops known to the shipper or to the shipping community generally through advertisements and publications. Unrebutted testimony from the carrier's employees that these routes were widely published in Spain and the United States would be sufficient evidence of publication.[139]

A federal district court (in the Fourth Circuit) has followed the lead of the Second Circuit[140] in refusing to find as a matter of law that the carriage of goods on deck under a "clean" bill of lading is an unreasonable deviation depriving the carrier of the protection of the COGSA provisions.[141] In this case the court held that when a carrier can show that on deck stowage is customary, there can be no deviation and the issue of reasonableness does not arise. However, the court went on to state:

> What was unreasonable yesterday may be reasonable today. Thus, the carrier will be given the opportunity to show that stowage on deck of the cargo was only a reasonable deviation from the contract.[142]

This case was heard on a motion for summary judgment filed by the shipper, and no facts were introduced as to why the ship in this case loaded

136. Amdahl Corp. v. Profit Freight Sys., Inc., 65 F.3d 144 (9th Cir. 1995).

137. Ingersoll Milling Mach. Co. v. M.V. Bodena, 829 F.2d 293 (1987).

138. Blasser Bros., Inc. v. Northern Pan-American Line, 628 F.2d 376, 384 n. 13 (5th Cir. 1980).

139. Goya Foods, Inc. v. S.S. Italica, 561 F.Supp. 1077 (S.D.N.Y. 1983), *aff'd* without opinion, 742 F.2d 1434 (2d Cir. 1983). *Accord*, Italusa Corp. Parmalat, S.P.A. , v. M/V Thalassini Kyra, 733 F.Supp. 209, (S.D. N.Y. 1990), *aff'd* without opinion, 916 F.2d 709 (2d Cir. 1990).

140. DuPont de Nemours Int'l S.A. v. S/S Mormacvega, 367 F.Supp. 793 (S.D.N.Y. 1972), *aff'd*, 493 F.2d 97 (2d Cir. 1974).

141. Electro-Tec Corp. v. S/S Dart Atlantica, 598 F.Supp 929 (D.Md. 1984).

142. *Id.* at 934.

two of the shipper's containers below deck and the third one on deck. The third container's contents because of strong wind and seas burst through the sides of the container and were damaged. The case did not indicate that this was a container ship like the one involved in the *DuPont* case.

5. *Time Limitations for Suit-Estoppel, Waiver, Fraud, Extensions, Misdelivery and "Short Form-Long Form Bills of Lading"*

46 USC §1303(6) provides:

> [T]he carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered . . . .

The running of this time bar can only be interrupted by the filing of suit within the one year period, or by an express waiver of the one year rule by the defendant, or the defendant may be equitably estopped from asserting the bar because the defendant has misled the plaintiff. A number of courts have either held or recognized that the one year limitation of action under COGSA may be tolled if the defendant or its attorneys have fraudulently misled the plaintiff into thinking that the case would be settled and the plaintiff acted reasonably in relying upon the misleading conduct of the defendant.[143] Unfortunately, most of the cited cases have held against the shippers by finding either that there was no misrepresentation by the carrier and/or the shipper was not misled. It seems that any prudent attorney for the shipper should first file suit (with service of process) and then negotiations for a settlement should commence.

In a recent case from Puerto Rico, the attorney for the carrier and the plaintiff shipper were negotiating a settlement and while the shipper was awaiting an amended offer, the filing deadline "came and went."[144] The shipper sued, and was met with a motion for summary judgment. The court held that there was no evidence that the carrier expressly waived the running of the statute of limitations. The court then stated that a carrier may be equitably estopped from raising the statute if the

143. General Electric Co. v. M/V Gediz, 720 F.Supp. 29 (S.D.N.Y. . 1989) (settlement Negotiations conducted after one year); Austin, Nichols & Co., Inc. v. Cunard S.S. Ltd., 367 F.Supp. 947 (S.D.N.Y. 1973); Monarch Indus. Corp. v. American Motorist Ins. Co., 276 F.Supp. 972 (S.D.N.Y. 1967) (extension for a fixed period means for that period); United Fruit Co. v. J.A. Folger & Co., 270 F.2d 666 (5th Cir. 1959) (carrier extended period for 60 days and refused further extension); Modern Office Sys., Inc. v. AIM Caribbean Express, Inc., 802 F.Supp. 617 (D. Puerto Rico, 1992) (no malicious representation by carrier); Birdsall, Inc. v. Tramore Trading Co.,771 F.Supp. 1193(S.D.Fla. 1991) (no misleading conduct); Hemis Trading Corp. v. Navieras de Puerto Rico 705 F.Supp. 72 (D. Puerto Rico) (no misleading by carrier).

144. Malgor & Co., Inc. v. Compania Transatlantica Espanola, S.A., 931 F.Supp. 122 (D. Puerto Rico 1996).

plaintiff can show that he was misled into reasonably and justifiably believing that the statute of limitations would not be used as a defense or it would be extended. However, mere settlement negotiations would not be sufficient to equitably estop a carrier from raising the time bar. The court in this case noted that the federal district court in Puerto Rico in *Michelena & Co., Inc. v. American Export and Isbrandtsen Lines, Inc.*,[145] had posed a hypothetical question to the attorney for the defendant carrier which elicited an answer which seemed to state that the attorney believed that the one year bar would prevail even if the defendant had maliciously misled the plaintiff into waiting too long and then telling the plaintiff: "I am very sorry. The time has elapsed. I have been fooling you all these days but the law states that you had just one year in which to make your claim in court. Now I don't owe you anything at all."[146]

One of the best researched cases dealing with the question of estopping a defendant from asserting the COGSA one year rule is *Mikinberg v. Baltic Steamship Co.*,[147] Mr. Mikinberg shipped some of his possessions to the United States on the Baltic line. The goods were unloaded by a stevedore who misdelivered the goods to an impostor who used forged papers to claim the goods. The stevedore claimed coverage under the shipline's *Himalaya* clause. Mr. Mikinberg was not versed in the English language, and his lawyer removed himself from the case "citing unfamiliarity with Russian and Yiddish,"[148] and the plaintiff continued the case pro se. Mr. Mikinberg filed suit after the elapsing of the one year period, and the stevedore moved for summary judgment. The plaintiff contended that he was told that the statute of limitations would be extended while the investigation of the missing shipment was being handled by the stevedore.

> Lawyers and investigator (sic) were busy with this case for more than one year and were not in a hurry to bring this action to Court. I was told that the one year period of statute of limitations should be extended while the investigation is (sic) being processed.[149]

The court rejected the assertion that the statute of limitations under COGSA should be extended during such investigations. However, the court was of the view that there might be an equitable estoppel against the stevedore:

> Rather, we examine whether as a matter of equity Baltic is estopped from

145. 258 F.Supp. 479 (D.C. Puerto Rico 1966).

146. *Id.* at 480. *See* Fireman's Ins. Co. of Newark, New Jersey v. Gulf Puerto Rico Lines, Inc., 349 F.Supp. 952 (D. Puerto Rico 1972).

147. 988 F.2d 327 (2nd Cir. 1993).

148. *Id.* at 329.

149. *Id.* at 330.

> asserting the time bar as a defense. *See Austin*, 367 F.Supp. at 948. This is an issue of fact, and one that need not be proved by documentation if credible testimony is given about misrepresentations by the defendants. In this case, Mikinberg would have to show that Baltic falsely represented to him that the statute would be extended during the investigations into the stolen cargo, or that Baltic would not assert the statute as a defense. Mikinberg would also have to show that he relied on this representation in failing to file suit within one year from delivery. An oral representation would suffice. *See Gourmand, Inc. v. M/V Nedlloyd Inc.*, 1989 WL 54155, at *1(S.D.N.Y. May 18, 1989).[150]

The large volume of *Himalaya* cases seem to display an appalling ignorance by maritime shippers of the fact that the Carriage of Goods Act has a one year statute of limitations which protects not only the maritime carrier but also the carrier's agents, servants and independent contractors if they are embraced under a *Himalaya* clause.[151] The statute of limitations provided for in a bill of lading which is subject to COGSA may not be shorter than the one year period provided by COGSA.[152] In order to be effective, any agreement to extend the one year statute of limitations in COGSA must be entered into prior to the expiration of the one year period.[153] Misdelivery of goods by a stevedore does not take away the one year for suit limitation rule of COGSA under a theory of deviation.[154]

In a similar vein, the misdelivery of goods even if caused by a criminal bribe of an employee of the misdelivering warehouse has been held as not doing away with the protection of the package rule for the warehouse.[155] Even if owners of a vessel keep it hidden and change its ownership and name in order to avoid its being libeled, these acts do not toll the running of the statute of limitations of COGSA.[156] On the other hand, it has been held that the statute of limitations may be extended when a potential corporate defendant fraudulently conceals the identity of another possible corporate defendant controlled by the concealer, and the statute begins to run from the time of the discovery of the identity of the

150. *Id.* at 331.

151. *See, e.g.*, Uncle Ben's Int'l Div. of Uncle Ben's, Inc. v. Hapag-Lloyd Aktiengesellschaft, 855 F.2d 215 (5th Cir. 1988); Barretto Peat, Inc. v. Luis Ayala Colon Sucrs., Inc., 896 F.2d 656 (1st Cir. 1990).

152. William H. McGee & Co. v. M/V Ming Plenty, 164 F.R.D. 601 (S.D.N.Y. 1995); Givaudan Delawanna, Inc. v. The Blijdendijk, 91 F. Supp. 663 (S.D.N.Y. 1950).

153. Chilean Nitrate Corp. v. M/V Hans Leonhardt, 810 F.Supp. 732 (E.D. La. 1992); *Monarch Indus. Corp.*, 276 F.Supp. 972.

154. Timco Eng'g Inc. v. Rex & Co., Inc. 603 F.Supp. 925 (E.D. Pa. 1985).

155. B.M.A. Indus., Ltd. v. Nigerian Star Line, Ltd., 786 F.2d 90 (2d Cir. 1986); Styling Plastics Co. v. Neptune Orient Lines, Ltd., 666 F.Supp. 1406 (N.D. Cal. 1987) (for a comprehensive survey of the applicable cases on misdelivery and "deviation").

156. Rayon y Celanese Peruana, S.A. v. M/V Phgh, 471 F.Supp. 1363 (S.D.Ala. 1979).

concealed defendant.[157]

If the carrier gives a written extension of time to the shipper to sue does this extension also bind an independent contractor who was hired to handle and store the cargo? It has been held that when the independent contractor was a third party beneficiary under the carrier's *Himalaya* clause, that the unilateral extension of time by the carrier does not extend the time for suit against the independent contractor.[158] An unreasonable geographical deviation by the carrier does not abrogate the contract of carriage and thereby take away the protection of the one year time limitation of COGSA.[159]

6. The Position of Freight Forwarders

If the shipper of goods contracts with a freight forwarder to forward the goods and to make contracts of shipment with marine carriers, is the forwarder an agent for the shipper, agent for the carrier or an independent contractor and not an agent for either shipper or carrier?

This question is not of mere academic interest because if the freight forwarder is an agent for the shipper and the forwarder makes an improper contract of carriage with the carrier, then the carrier may not perhaps be liable in case of loss while the agent may bear the loss. For example, in *Constructores Tecnicos, S. de R.L., v. Sea-Land Service, Inc.*,[160] a shipper shipped a truck and drilling rig from New Orleans, Louisiana to Honduras. The truck and rig were shipped on deck, and the goods were severely damaged by other containers which broke loose from their lashings and fell on the truck and drill rig during a severe storm. The shipper sued the carrier (and others) for placing the truck and drill on deck under a clean bill of lading. The shipper pleaded the deviation rule when the carrier asserted that the freight forwarder knew that the carrier retained the option to store on deck or below deck in the absence of a specific instruction in the bill of lading, and that the agent's knowledge bound the shipper.

The court followed the general rule that a clean bill of lading imports that goods are not being carried on deck and holding that even if the freight forwarder was the agent of the shipper and had knowledge of the carrier's right to stow on deck, this would not bind the shipper. The court

157. Ross Indus., Inc. v. M/V Gretke Oldendorff, 483 F.Supp. 195 (E.D.Tex. 1980).

158. Intsel Corp. v. M/V Antonia Johnson, 549 F.Supp. 526 (W.D. Wash. 1982); Dorsid Trading Co. v. S/S Fletero, 342 F.Supp. 1 (S.D.Tex. 1972).

159. Bunge Edible Oil Corp. v. M/V Storm Rask and Fort Steele, 949 F.2d 786 (5th Cir. 1992); Francosteel Corp. v. N.V. Nederlandsch Amerikaansche, Stoomvart-Maatschappij, 249 Cal. App. 2d 880, 57 Cal. Reptr. 867 (1967) *cert. denied*, 389 U.S. 931, 88 S.Ct. 293, 19 L.Ed.2d (1967).

160. 945 F.2d 841 (5th Cir. 1991).

also found that there is no hard and fast rule in American law that freight forwarders are deemed to be agents of the shipper; the facts of each case determine the result. The court determined that the freight forwarder was not the agent of the shipper, and that:

> The key under non-agency circumstances is not who obtains the bill, but rather its contents. If the shipper has in no way consented to on deck stowage, and cannot be deemed to have done so through a freight forwarder acting as its agent, the law's concern is with the shipper's expectations. It is immaterial whether the shipper or the shipper's freight forwarder has made the arrangements under which a clean bill of lading has been obtained. Thus, the *Ingersoll* presumption is equally applicable where, as here, the shipper obtains a clean bill of lading for its shipment through the actions of a freight forwarder working as an independent contractor.[161]

The court then upheld the findings of fact by the district court that the damage to the goods was caused by the inadequate lashings of the adjacent containers, and that there was no contrary evidence indicating that under deck stowage would not have entailed the same risk to the goods. The deviation was deemed unreasonable by the court, and the package limitation rule would not protect the carrier.

7. Indemnification of the Shipline by Third Party Contractors

When the carrier is held liable for the mysterious disappearance of cargo from the possession of a stevedore-warehouse the carrier can recover indemnification from the stevedore-warehouse for its breach of implied warranty of workmanlike service. However, the *Himalaya* clause which protects the stevedore-warehouse by limiting its liability as to the shipper under the package rule can also limit the stevedore warehouse's liability to the carrier under the same rule.[162]

If a stevedoring contractor who is also acting as steamship agent of the carrier delivers the goods to the consignee at the port of destination without receiving a surrender of the negotiable bill of lading and the shipper-seller is thereby deprived of control of the goods and is unable to secure the purchase price from the consignee and it sues the stevedore, then a properly drafted *Himalaya* clause covering independent contractors will also protect the stevedore who may then plead the one year statute of limitations rule of COGSA.[163]

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161. *Id.* at 848.

162. *See* Seguros "Illimani" S.A. v. M/V Popi, 929 F.2d 89 (2d Cir. 1991) *modified,* Monica Textile Corp. V. S.S. Tana, 952 F.2d 636 (year).

163. Barretto Peat, Inc. v. Luis Ayala Colon Sucres, Inc. 896 F.2d 656 (1st Cir. 1990). The *Orient Verseas Line* court provides an interesting and through analysis of the negligent discharge, unloading, and mishandling of a cargo of hand tools and the allocation of losses between carrier,

III. The Warsaw Convention

A. Introduction

The Warsaw Convention of 1929 (Convention for the Unification of Certain Rules Relating to International Transportation by Air[164]) was designed to limit damages for personal injuries, death, and damage or loss to baggage and cargo. Currently, airlines are liable for not more than $9.07 per pound for baggage and air cargo unless a higher declaration of value is made by the passenger or shipper and reflected in the airway bill. Of course, the airline may impose increased charges for the declared higher value.

The Warsaw Convention made no clear declaration concerning extending its protective limits to employees of the airlines, nor did it cover agents and third party contractors under any kind of protective umbrella. This omission in coverage seems strange (at least to the author) when one considers that Article 20 (1) mentions that the "carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage . . . ," and sub-section (2) of this article mentions that the carrier would not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid damage."[165] In addition, Article 25 provides that the carrier may not avail himself of the liability limiting provision of Warsaw if any employee acting within the scope of his employment is guilty of wilful misconduct. On the other hand, it might well be that in spite of the agent-employee focus in these articles, the real focus was on the protection of the air carrier in light of the civil approach of treating the corporate-human agents as one entity.

B. Extension of Warsaw Convention's Protections to Third Parties

Article 22 of the 1929 Warsaw Convention originally limited recovery for injuries and death of passengers to 125,000 French francs (approx. $8,241.00) which was subsequently raised to $75,000 per passenger on all flights into or out of the United States (Montreal Agreement). These relatively low limits encouraged efforts to circumvent them, and the first appellate case to attempt to do so, *Reed v. Wiser*,[166] involved passenger representatives suing the president and vice-president in charge of secur-

stevedore, and warehouse. Orient Verseas Line v. Globemaster Baltimore, Inc., 365 A.2d 325 (Md. Ct. Spec. App. 1977).

164. 49 Stat. 3000 (1988) (current version at. 49 U.S.C. § 1502 (1994)).

165. *Id.* at art. 20(1) & (2).

166. *Reed v. Wiser*, 555 F.2d 1079 (2d Cir. 1977).

ity for Trans World Airlines (TWA) for their alleged negligence in failing to prevent the terrorist bombing of an aircraft which killed 79 passengers. The airline was not sued by these plaintiffs. The defendants pleaded the Warsaw Convention limits, and the district court held that the Convention did not protect the officers of TWA; the district judge then certified the question of law to the Court of Appeal.

The Court of Appeal made an extensive analysis of the wording of the Warsaw Convention, the proposed Hague Convention which provided that any servant or agent of the carrier shall "be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Article 22,"[167] the historical background of the Warsaw and Hague with the conclusion:

> Thus the plain language of the original Convention, read according to the meaning that would ordinarily be given to the pertinent official French-language text, tends to support appellants' contention that its liability limits were intended to apply to a carrier's employees, with little or no further light on the issue being contributed by its legislative history, subsequent events, or decided cases. That interpretation, moreover, although not necessarily according with common law principles, which separate the corporation and its employees for liability purposes, does reflect the legal principles of many civil law states, which treat the corporation and its employees as one.[168]

> To the extent that the decided cases indicate anything, they would tend to support, on balance, the conclusion that employees should be covered. In *Wanderer v. Sabena*[169] the court held that agents were protected by the liability limits. Following *Wanderer,* the court in *Chutter v. KLM*[170] also held that the Convention protects agents. In 1957, the court in *Pierre v. Eastern Airlines, Inc.*[171] apparently unaware of *Wanderer* and *Chutter* and relying on the failure of this country to ratify the Hague Protocol, held that the defendant pilot was not protected even though his co-defendant and employer Eastern Airlines was. The ultimate disposition of this case was unclear. (Appellants assert that the case was not appealed and was settled for a nominal amount. Amicus asserts that the nominal sum was greater than that permitted by the Convention.) In 1961, a Canadian trial court ruled that the Carriage by Air Act, which embodied the Warsaw Convention in Canada, did not limit the liability of the estates of employee pilots.[172] The Court of Appeals held that the flight was not "international" for purposes of the Convention, so that the limitations of the Convention did not apply, and that in any event any cause of action against the pilots did not survive their deaths, and therefore concluded that "it is not necessary to consider whether

167. *Id.* at 1086 note 9.
168. *Id.* at 1087-88 note 11.
169. 1949 U.S. Av. Rep. 25 (N.Y. Sup. Ct. 1949)
170. 132 F. Supp. 611 (S.D.N.Y. 1955).
171. 152 F. Supp. 486 (D.N.J. 1957).
172. Stratton v. Trans Canada Airlines [1961] 27 D.L.R.2d 670 (B.C. Sup. Ct.).

> the pilots would have been entitled to its benefits had it been applicable to the flight in question."[173]
>
> The parties and amicus curiae cite in addition *Scarf v. Trans World Airlines, Inc.*[174] and *Hoffman v. Brittish Overseas Airways Corp.*[175] and Judgment of Dec. 3, 1969, Cass.Crim., France (1970) D.S. Jur. 81. In *Scarf*, no allegations of agency were made, and the court distinguished *Chutter* on that basis. In *Hoffman*, the court refused to dismiss for improper venue a suit against an airport portable stairway company where the company refused to concede jurisdiction over the claim in any other court, distinguishing *Chutter* as not dealing with venue problems. Why amicus curiae cites the French case, *Judgment of Dec. 3, 1969*, in support of its position is something of a mystery, since France ratified the Hague Protocol prior to that decision. In any event, the case involved the jurisdictional peculiarities of the French *action civile*, in which criminal and civil liberties are assessed simultaneously against an alleged wrongdoer—in this case the pilot. The court upheld a motion to dismiss the adjoined suit against the employer carrier for lack of venue under the Warsaw Convention. No motion was made to dismiss the civil half of the *action civile*, and no consideration was given by the court to problems that might be involved in doing so.
>
> Thus, with the possible exception of *Pierre*, to our knowledge there has never, during the entire 40-odd years of the Convention, been a Warsaw case in any country in which a plaintiff has obtained, by suing the carrier's employees instead of the carrier itself, more than the sum for which the carrier itself would be liable under the Convention as modified by applicable protocols and agreements.[176]

The court stated that the Warsaw Convention's objectives of uniformity and for airlines being able to define the limits of their liability would be furthered by extending the shelter of Warsaw to the servants of the airline.

Perhaps the most telling reason for protecting employees and agents was expressed in the following words:

> Most carriers, at their employees' insistence, provide their employees with indemnity protection. The pressure for indemnification is attributable principally to the difficulty confronted by certain employees, such as pilots or their estates, in defending against personal liability, regardless of the amount claimed, in view of the common law presumption of liability created by the doctrine of *res ipsa loquitur*, see Lowenfeld, Aviation Law § 4.32, at VI-100 (1972), and the imposition of absolute liability under certain civil law systems.[177] It is inconceivable that airlines could long operate without reim-

173. [1962] 32 D.L.R.2d 736, 749 (B.C.C.A.).
174. 4 Av.L.Rep. (CCH) 17,828 (S.D.N.Y. 1955).
175. 9 Av.L.Rep. (CCH) 17,180 (N.Y. Sup. Ct. 1964).
176. *Reed v. Wiser*, 555 F.2d 1079, 1087-88 (2d Cir. 1977).
177. *Id.* at 1090. "Thus the estate of the pilot of the DC-10 that crashed shortly after takeoff

bursing their employees for this cost of doing business.[178]

Seven years after the *Reed* case, a Mrs. Baker was having her baggage checked by a security service company employed by British Airways in the course of her flying from New York to London. Mrs. Baker allegedly lost approximately $200,000 worth of jewelry from her hand luggage between the time she delivered the luggage to the security service and when it was returned to her on the other side of the screening area. Mrs. Baker sued the security service and British Airways. The court held that the Warsaw Convention applied because Mrs. Baker was involved in the embarking phase of her flight which is covered by Warsaw rules. Following the lead of the *Reed* case, the court granted partial summary judgment stating that the security service was performing work that would otherwise have to be performed by employees of British Airways, and that the Warsaw limits of recovery of approximately $400 would apply in favor of the security service.[179]

Mrs. Baker's loss in New York was preceded by another jewelry loss when a jewelry salesman checked jewelry sample cases with jewelry contents worth $55,000 in a flight from Nassau, Bahamas to Bermuda with an intermediate stop at JFK International Airport in New York. The baggage was lost when it was being transported from a Delta Air Lines flight to an Eastern Air Lines flight by a transport company employed by Delta and other airlines to perform inter-line baggage transfer services between connecting airlines at JFK. The court followed the *Reed* holding by stating:

> To allow an agent such as Allied, which is performing services in furtherance of the contract of carriage, and in place of the carriers themselves, to be liable without limit would circumvent the Convention's purposes of providing uniform worldwide liability rules and definite limits to the carriers' obligations. Nor do we see a sufficient basis for departing from the principle of the *Reed* case. See *Leppo v. T.W.A.*, 56 A.D.2d 813, 814, 392 N.Y.S.2d 660, 661.
>
> We are fortified in this conclusion because permitting circumvention in this manner would be inappropriate considering the Convention's express provision in Article 22(2) for consignors to avoid the damage limitations applicable to baggage by declaring an increased value at the time of delivery. Plaintiffs' representative did not avail himself of this opportunity to cover

from Paris, France, on March 3, 1974, *see*, *In re* Paris Air Crash of March 3, 1974, 399 F. Supp. 732 (C.D. Cal. 1975), would be absolutely liable for the death of all 333 passengers on board, despite the pilot's lack of negligence or fault." *Id.* at 1090 note 14.

178. *Reed*, 555 F.2d at 1090. "Here, plaintiffs demand a total of $8,600,000 on behalf of 9 out of the 79 passengers on board. As the amicus brief notes, the case on appeal is the test case for the remainder of the suits consolidated with it below." *Id.* at note 15.

179. Baker v. Lansdell Protective Agency, Inc. 590 F.Supp 165 (S.D.N.Y. 1984).

> the full extent of his loss. Further, there was no privity between plaintiffs-appellants and Allied, and their only relationship arises by virtue of Allied's employment by the carriers.
>
> Accordingly, we hold that the liability limitations of the Convention apply to an air carrier's agent performing functions the carrier could or would, as here, otherwise perform itself. The order of the Supreme Court, New York County (M. Evans, J.) entered on December 29, 1977, should be modified on the law to delete the specific damage limitation, and otherwise affirmed, without costs.[180]

If the shipper declares the value of the cargo as being in excess of the basic Warsaw recovery limitation of $9.07 per pound, then if the cargo (dental gold) is lost, the carrier is liable for the value of the gold as of the time of loss even though the carrier asserts its filed tariff which denies any liability for the carriage of gold and silver bullion in the absence of proof that the shipper knew of the tariff restriction. The mere filing of a tariff rule does not put the shipper on notice (according to this court) unless it is proved that the shipper knew of the restriction; filing is no longer constructive notice after federal deregulation.[181] At least one court has held that the liability limitations of the Warsaw Convention extend to independent corporations which serviced and maintained an airline whose airplane crashed killing all on board.[182]

An independent contractor which provides services for an airline which the airline could have provided for itself and which it was bound to supply under a contract of carriage is subject to the two year statute of limitations of the Warsaw Convention.[183] In *Johnson v. Allied Eastern States Maintenance Corporation*,[184] a woman arrived at an airport terminal and was met by a skycap employed by Allied who offered her a wheelchair just as she stepped out of a car. As the skycap was wheeling her onto a boarding ramp, the wheelchair struck a metal strip and it turned over throwing her against the wall and then to the floor. The woman suffered a broken bone in her foot and other injuries. Almost three years later, she sued Allied, who pleaded the two year limitation statute. The court followed the *Reed* case, and held that Allied was performing services for the airline and should be protected by Warsaw, and that her

180. Julius Young Jewelry Mfg. Co. v. Deltal Air Lines, 414 N.Y.S.2d 528, 530 (N.Y. App. Div. 1979).

181. Williams Dental Co. v. Air Express Int'l, 24 Av. L. Rep. 17,567 (S.D.N.Y. 1993). *But see Lyegha v. United Air Lines, Inc.*, 24 Av. L. Rep. 14,864 (Ala. 1995) (holding the liability limitations of the Warsaw Convention applicable in the absense of "willful misconduct").

182. *In re* Air Crash Disaster at Gander, Newfoundland on Dec. 12, 1985, 660 F. Supp. 1202 (W.D. Ky. 1987).

183. Garlitz v. Allied Aviation Serv. Int'l Corp., 17 Av. L. Rep. 238 (N.Y. Sup. Ct. 1982). However, the opinion did not disclose the nature of the services.

184. 19 Av. L. Rep. 17,847 (D.C. Cir. 1985).

action was time barred.[185]

C. Warsaw Wording Requirements Under Articles 4 and 8 for Baggage Checks and Air Way Bills

Article 8 of the Warsaw Convention requires, among other things, that the airway bill state the "agreed stopping places" of any particular transport. This requirement may be satisfied (at least in the second circuit) if the air waybill incorporates by reference the airline's published timetables, provided that they accurately reflect the "agreed stopping places" for any particular flight.[186]

Article 4 of the Warsaw Convention states rather formal requirements as to the wording of baggage claim checks and likewise, Article 8 contains similar requirements for cargo air waybills. In the Second Circuit the federal courts have held in the past that when one or more of the stated "requirements" are missing this will not preclude the carrier from asserting the Warsaw limits of liability where the omissions are insubstantial and do not prejudice the shipper.[187]

More recent cases have, however, placed limitations on these Second Circuit cases. Under the new interpretation of the Warsaw Convention in the Second Circuit, if "the text is clear" the courts cannot insert an amendment.[188] For example, in *Maritime Insurance Co., Ltd. v. Emery Air Freight Corp.* photographic equipment was delivered to Emery in Panama for transport to Toronto. Pan American Airways was the initial air carrier. Emery issued the air waybill. The goods were lost somewhere in transit. Emery's air waybill did not contain: (a) the place and date of its execution; (c) the agreed stopping places . . .; (e) the name and address of the first carrier . . . ." In addition, under section (i) of Article 8 of the Convention, the air waybill did not contain the volume and dimensions of the goods although it did contain the weight and quantity as required by section (1) of Article 8. The district court held in favor of the Emery Air Freight on the grounds that the omissions were not commercially significant or prejudicial under the *Exim* holding.

The Court of Appeals reversed, holding that most of the text of Arti-

185. *Id.*

186. *See* Brink's Ltd. v. South Afr. Airways, 25 Av. L. Rep. (CCH) 17,537 (2d Cir. 1996); Tai Ping Ins. Co., Ltd. v. Northwest Airlines, Inc., 25 Av. L. Rep. (CCH) 17,548 (2d Cir. 1996).

187. Republic Nat'l Bank of N.Y. v. Eastern Airlines, Inc., 815 F.2d 232 (2d Cir. 1987); Exim Indus. v. Pan Am. World Airways, 754 F.2d 106 (2d Cir. 1985); Maritime Ins. Co., Ltd. v. Emery Air Freight Corp., 983 F.2d 437 (2d Cir. 1993). These cases have been followed by a federal district court in California. Tokio Marine & Fire Ins. Co., Ltd v. United Air Lines, Inc., 933 F.Supp 1527 (Cal. Ct. App. 1996).

188. Chan v. Korean Air Lines, 490 U.S. 122, 135 (1989); Victoria Sales Corp. v. Emery Air Freight, 917 F.2d 705, 707 (2d Cir. 1990); *Maritime Ins. Co., Ltd., v. Emery Air Freight Corp.*, 24 Av. L. Rep. 17,381 (2d Cir. 1993).

cles 8 and 9 are clear, and the court cannot amend them. The court reaffirmed *Exim* as good law, but limited it by stating:

> However, *Exim* must be limited to its facts: that is, the "commercially significant" test applies *only* to subsections (h) and (i). Except for those two subsections, the language of Articles 8 and 9 is clear. Article 9 states simply and categorically that if the waybill does not contain the particulars listed in Article 8(a)-(i) and (q), the carrier will not be entitled to limit its liability. Subsections (a), (c) and (e) are also clear, unambiguous statements. No confusion can possibly arise as to the meaning of "the place and date of its execution." "[t]he agreed stopping places" or "[[t]he name and address of the first carrier" *Chan and Victoria Sales* prohibit us from engrafting a commercially significant test on Articles 8 and 9 except where the text is ambiguous, that is, except with respect to subsections (h) and (i). *Exim* is thus limited to its facts, and to the extent any district court cases in this Circuit have expanded the *Exim* holding beyond subsections (h) and (i), they are hereby overruled.
>
> Applying these results to the facts before us, it is clear that Maritime must prevail. Particulars listed in subsections (a), (c) and (e) were missing from the waybill. Under Article 9, the carrier is not permitted to limit its liability if those particulars are absent. We need not address the omission of the subsection (i) particulars and can thereby avoid engaging in any commercial significance analysis. Therefore, we hold that Maritime is entitled to full recovery.[189]

The Second Circuit in companion cases[190] has laid down the required wording requirements of Article 8 and 9 of the Warsaw Convention:

> As we noted in *Brink's Ltd. v. South African Airways*[191] argued contemporaneously with this case, our cases interpreting Articles 8 and 9 of the Warsaw Convention yield three rules. First, if an air carrier omits from its air waybill any of the enumerated particulars of subsections (h) and (I) of Article 8, Article 9 operates to deprive the carrier of limited liability protection if the omitted particular is of commercial significance.[192] Second, if an air carrier omits any other essential particular from its air waybill, Article 9 automatically deprives the air carrier of limited liability protection regardless of commercial significance.[193] Third, if an air carrier includes an essential particular in its air waybill, but deviates in language or some other respect, a court may look beyond the language of the text to secondary tools of interpretation in determining liability.[194] Each of these rules comports with the general rule that where the text is clear, a court has "no power to insert an

189. *Maritime,* at 17,384.

190. *Tai Ping Insurance Company, Ltd. v. Northwest Airlines, Inc.,* 94 F.3d 29 (2d Cir. 1996); Brink's Ltd. v. South African Airways, 93 F.3d 1022 (2d Cir. 1996).

191. *Tai Ping*, at 31-33.

192. *Exim Indus. v. Pan Am. World Airways* 754 F.2d 106, 108 (2d Cir. 1985).

193. *Maritime Ins. Co. Ltd. v. Emery Air Freight Corp.* 983 F.2d 437, 440 (2d Cir. 1993).

194. *Id.*

amendment."[195]

Our decision in *Brink's* enunciated an additional rule. In that case, the shipper contended that Article 8(c) required the air carrier to list the agreed stopping places within the air waybill itself. The carrier instead had referred to its timetables for the stopping places. We reasoned that resort to secondary tools of interpretation was permissible and necessary because the *Maritime* decision addressed only the *pure omission* of agreed stopping places and Articles 8 and 9 were otherwise ambiguous. *Brink's* 93 F.3d at 1033. We noted that other signatories to the Convention approve of satisfying Article 8(c) by incorporating timetables into the air waybill. *Id.* We also noted that incorporation of readily available timetables provides shipper with sufficient notice of the international character of the flight, thereby realizing the drafter's purpose in including the agreed stopping places in the air waybill. *Id.* Accordingly, we held that an air waybill that incorporates readily available timetables satisfies Article 8(c)'s requirement that the air waybill "contain" the "agreed stopping places" and does not deprive the air carrier of limited liability protection under Article 9. *Id.*

The purpose behind Article 8(c), which we examined in *Brink's* is most pertinent here. As we explained, the participants to the Convention included the requirement that the waybill contain the contemplated stopping places so that the waybill itself would notify the shipper of the international character of the flight and, thus, the applicability of the Warsaw Convention. *Brink's*, 93 F.3d at 1034-35. We also explained that while the point of departure and destination ordinarily would indicate the domestic or international character of the flight, Article 8(c) recognizes the possibility that a contract of carriage within one sovereign may include a stopover in another sovereign. *Id.*. Thus, Article 8 requires the air carrier to include in its waybill not only "[t]he place of departure and of destination." Warsaw Convention, Art. 8(b), but also "[t]he agreed stopping places," *id.*, Art. 8(c).

(5) An air waybill cannot realize Article 8(c)'s purpose of establishing the domestic or international character of the carriage unless if effectively conveys the necessary information. In other words, incorporation by reference to readily available timetables satisfies Article 8(c)'s requirement that the waybill "contain" the agreed stopping places only if the incorporation effectively reveals the agreed stopping places. An air waybill can not effectively reveal the agreed stopping places by incorporation of its timetables unless it also includes the information necessary to apply those timetables to the contract of carriage. Thus, effective incorporation depends on the accuracy of other information in the waybill. *Cf. Kramer v. Time Warner Inc.* 937 F.2d 767, 777 (2d Cir. 1991)(stating in context of securities laws that the practice of disclosure through incorporation by reference "should be restricted to circumstances in which no reasonable shareholder can be misled"); *New York Marine & Gen. Ins. Co. v. S/S "Ming Prosperity"*, 920 F.Supp. 416, 427 (S.D.N.Y. 19966) (stating in context of arbitration agreements that "an in-

195. *Id* at 31-32.

complete or inaccurate reference . . . may prove insufficient to incorporate" (quoting *Coastal States Trading v. Zenith Navigation S.A.* 446 F.Supp. 330, 338 (S.D.N.Y. 1977)).

(6) Northwest's waybill did not effect a valid incorporation of regularly scheduled stops in Anchorage, Alaska and Narita, Japan by reference to its timetables. Although the waybill stated that the agreed stopping places were those "shown in Carrier's timetables as scheduled stopping places for the route," the front of the waybill incorrectly identified the flight number and date of the flight as "901/10"—flight number 901 on December 10, 1992. Thus, although the waybill referred to readily available timetables, the timetables referred to did not apply to the transportation of Tai Ping's shipment.

The waybill included incorrect information regarding the date of departure. Without the correct date of departure, the shipper could not refer to the timetables to ascertain the stopping places. Similarly, the waybill did not include any information regarding the transfer of the shipment to flight 907 in Narita, Japan. Although carriage to be performed by several successive air carriers is deemed to constitute a single carriage, Warsaw Convention, Art. 1(3), so that such information generally might not be necessary, transfer information is necessary when an air waybill incorporates regularly scheduled stops in satisfaction of Article 8(c) by reference to it timetables. Without notice of the transfer, the shipper could not track its shipment and discover the scheduled stops from the timetables. Thus, in light of the incorrect and omitted information, Northwest's air waybill did not incorporate or "contain" the agreed stopping places under its contract of carriage with Tai Ping.

The provision contained in the Northwest tariff, to the effect that the carrier does not guarantee any particular flight or time for commencement of carriage, does not protect Northwest from the loss of limited liability under Article 9. Although the air waybill incorporates the Northwest tariff, and although the terms of the tariff are also the terms of the contract of carriage, *Tishman && Lipp v. Delta Air Lines,* 413 F.2d 1401, 1403 (2d Cir. 1969), the terms of the tariff do not address or affect the validity of Northwest's attempt at incorporation by reference. In other words, while the terms of the contract of carriage allow Northwest to change the time for commencement of flight and the flight number unilaterally, the Warsaw Convention still requires Northwest to include the "agreed stopping places" in its air waybill.[196]

D. Freight Forwarders as "Indirect Air Carriers"

The concept of a "freight forwarder" became a little more refined in the case of *Royal Insurance v. Amerford Air Cargo*,[197] Amerford Air

196. *Id.* at 32-33.

197. 654 F.Supp. 679, 21 Av. L. Rep. (CCH) 17,482 (S.D.N.Y. 1987).

Cargo was an air freight forwarder which picked up goods from customers, arranged air transport on direct air carriers, consolidated the goods in preparation for transport, and delivered them to air carriers. Amerford charged a single fee which included the cost of the flight. Amerford picked up some expensive goods from IBM for shipment to Japan. The goods were stored over-night in Amerford's warehouse which was located near JFK International Airport. The following day, Amerford employees could not locate the goods, which were never found. IBM claimed the full value of $97,713.97, while Amerford offered the Warsaw limitation of $1,310.00, which was refused and the subrogating insurance company sued Amerford.

The court rather than entirely following the *Reed* approach, noted that freight forwarders may be classified as "indirect air carriers" under Federal Regulations[198]. This labeling of a freight forwarder as an "indirect air carrier" comes within the notion of air carrier under the Warsaw Convention thereby entitling the freight forwarder to limited liability. The court refused to apply New York law governing warehouses as stated in *I.C.C. Metals, Inc. v. Municipal Warehouse Co.*[199] that a warehousemen is presumed guilty of conversion if he is unable to prove what was the cause of the loss and that he will be responsible for the full value of the missing goods as a converter. The court was of the view that Warsaw Convention governed, not the law of the state.[200]

A shipment of the drug, "coumadin" was made from Frankfurt, West Germany to New York by a freight forwarder. The forwarder sued the Emery Air Freight Company for loss of the goods which occurred in Emery's warehouse located approximately one-quarter of a mile outside the New York airport. Emery claimed the Warsaw Convention limits of $9.07 per pound, or $16,220, while the plaintiff claimed the full market value of $281,571.00. The trial court held that Emery was protected by the Warsaw limits; the court of appeals reversed holding that Section 1 of Article 18 of the Convention provides that liability under the Convention extends to any damage or loss sustained during "transportation by air." Further, Article 18 defines this wording as "the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft." In addition, Section 3 of Article 18 provides that the "period of transportation by air shall not extend to any transportation by land . . . performed outside the airport." Finally, there is a presumption

198. 14 C.F.R. § 296:1(e) (1996). *See DHL Corp. v. Civil Aeronautics Board*, 584 F.2d 914 (9th Cir. 1978); *Zima Corp. v. M.V. Roman Pazinski*, 493 F.Supp. 268 (S.D.N.Y. 1980).

199. 50 N.Y.2d 657, 431 N.Y.S. 372, 409 N.E. 849 (1980).

200. *See* Victoria Sales Corp. v. Emery Air Freight, Inc., 21 Av. L. Rep. (CCH) 18,529 (S.D.N.Y. 1989) (holding that freight forwarders were covered under the Warsaw Convention in the shipping of air cargo).

that "for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air." In this case there was no doubt that the goods disappeared from the Emery warehouse, so the presumption of damage occurring "during the transportation by air" was rebutted.

Of course, Emery advanced the argument that as a matter of common sense the loss occurred during the shipment of the goods, but the court gave the Warsaw Convention a literal interpretation and held against Emery. However, the Court of Appeal upheld the trial court's award of indemnification between Emery and the forwarder for attorneys fees and court costs amounting to $87,929.58.[201]

In accord with *Victoria Sales Corp. v. Emery Air Freight*[202] a California federal district court has held that when goods are transported by truck from the airlines office in the airport to a warehouse three quarters of a mile from the airport, that the Warsaw Convention does not apply to damage occurring at the warehouse when forklift operators damaged the cargo because of Article 18 which excludes from any transportation by air "any transportation by land, sea, or by river performed outside an airport." The court went on to hold, however, that the federal common law governed this shipment and that the air waybill which provided for a limitation of $9.07 per pound (under the Warsaw Convention) would act as a "released rate valuation" which limited the carrier's liability by contract.[203] The cumulative result of these two cases would seem to indicate that freight forwarders (and other handlers of cargo) should attempt to lease quarters on an airport, and if they are unable to do so, then use the "released rate valuation" approach of the *Hitachi Data* case. In addition, warehouses which might not be classified as freight forwarders, should consult Section 7-204 of the Uniform Commercial Code for a possible limitation of liability.

In a recent case, a large container of prescription pills was either lost or misplaced and replaced by a container of bottled water. The shipper sued the airline (KLM) and the freight forwarder which had prepared the airway bill. The airway bill contained a number of non-conforming details, but the court held that the weight was accurately stated and that the incorrect descriptions were not "commercially significant" and did not take away the Warsaw limitations. Further, the shipper alleged that the freight forwarder did not take adequate security protections and that this was willful misconduct under Warsaw. The court then held that even if

201. *Victoria Sales Corp. v. Emery Air Freight*, 917 F.2d 705 (2d Cir. 1990).

202. *Id.*

203. Hitachi Data Sys. Corp. v. Nippon Cargo Airline Co., Ltd., 24 Av. L. Rep. (CCH) 18,433 (N.D. Cal. 1995).

these inadequate precautions were proved, the vital element of "proximate causation" was not shown, and therefore the willful misconduct allegations were insufficient to remove the damage limitations of the Warsaw Convention.[204]

E. Tolling of the Two Year Limitation Rule

The two year limitation section of the Warsaw convention has been interpreted by a number of courts to constitute an absolute bar or a "condition precedent" which cannot be tolled under an equitable estoppel assertion,[205] or under an infancy tolling rule or statute[206] or a third party claim for contribution is not tolled until the cause of action for contribution ripens until payment of a judgment[207] When the shipper sues the freight forwarder within the two year period, the freight forwarder must sue the carrying airline within the same two year period, and the court has no power to extend the period because the freight forwarder was sued toward the end of the two year period.[208]

In a very recent case involving the accidental scalding of a minor passenger by an airlines' flight attendant, the court (in a well researched opinion) held that the scalding met the notion of accident under the Warsaw Convention, and that the minority of the passenger did not toll the running of the two year rule of limitations because the legislative history of the Convention clearly showed that the delegates rejected any kind of tolling of the period based upon local law. The court noted that:

> Fishman (Plaintiff-Parent and Guardian) relies on two cases which reached a different conclusion. In *Joseph v. Syrian Arab Airlines,* 88 F.R.D. 530 (S.D.N.Y. 1980), the court held that whenever a state law would toll a state statute of limitations, the two-year time limitation under the Warsaw Convention is tolled as well. *Joseph* cited *Flanagan v. McDonnell Douglas Corp.*, 428 F.Supp. 770 (C.D. Calf., 1977), a class action brought under California's wrongful death statute. *Flanagan* held that Article 29(2) adopts the forum court's method of calculating statutes of limitations and concluded that California's one-year statute of limitations was tolled pending class action certification. *Id.* at 776, *See also Delaney v. Aer Lingus Irish Airlines*, 16 Av.Cas. (CCH) ¶ 17,725 (S.D.N.Y. 1981)(citing *Josepth* and *Flanagan*).

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204. Tiff v. KLM Royal Dutch Airlines, Circle Airfreight Corp., 25 Av. L. Rep. (CCH) 17,117 (S.D.N.Y. 1995).

205. H.S. Strygler & Co v. Pan American Airlines, Inc., 19 Av. L. Rep. (CCH) 17,280 (S.D.N.Y. 1985).

206. Darghouth v. Swiss Air Transport Co., 18 Av. L. Rep. (CCH) 18,536 (D.D.C. 1984); Kahn v. Trans World Airline, Inc., 82 A.D.2d 696, 443 N.Y.S.2d 79 (1981).

207. L.B. Smith, Inc. v. Circle Air Freight, 488 N.Y.S.2d 547 (N.Y. App. Div. 1985); Split End, Ltd. v. Dimerco Express (Phils) Inc., 19 Av. L. Rep. (CCH) 18,364 (S.D.N.Y. 1986); Oriental F & G Ins. Masterfreight Int'l, 22 Av. L. Rep. (CCH) 17,448 (Ill. App. Ct. 1989).

208. Data General Corp. v. Air Express Int'l Co., 676 F.Supp. 538 (S.D.N.Y. 1988).

> Neither *Joseph* nor *Flanagan* consulted the history of the Warsaw Convention. Moreover, the conclusion reached by these courts is contrary to one of the purposes of the Convention—"to establish uniformity in the aviation industry with regard to "the procedure for dealing with claims arising out of international transportation and the substantive law applicable to such claims.'" *In re Lockerbie*, 928 F.2d at 1270 (citing Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 Harv.L.Rev. 497, 498-99 (1967).[209]

F. Willful Misconduct Under Article 25 of the Warsaw Convention

A combined American and English translation of Article 25 of the Warsaw Convention is as follows:

> (1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court [*seized of the case*] to which the case is submitted, is considered to be the equivalent to wilful misconduct.
>
> (2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent [*servant or agent*] of the carrier acting within the scope of his employment.[210]

The American courts have agreed that the words "wilful misconduct" are the English equivalent of the French word "dol", but they have divergent views as to the application of the "wilful misconduct" wording to various kinds of reckless conduct by airline employees and agent. The latest court to attempt to define this nebulous term has attempted further refinements.[211]

In *Tokio Marine & Fires Insurance Co., Ltd. v. United Airlines, Inc.*,[212] it was held, among other things, that the failure of a carrier to terminate an employee who was later detected as a thief of stolen cargo (watches) was not a reckless misconduct which would deprive the carrier of its limitation of liability under Article 25 of the Warsaw Convention because the prior wrongful conduct did not deal with stealing but with general insubordination and irresponsibility. In addition, the fact that the airline may have known of the valuable nature of the cargo (the shipper

209. Fishman by Fishman v. Delta Airlines, 938 F.Supp. 228, 231-32 (S.D.N.Y. 1996).

210. 49 Stat. 3000 (1988) (current version at. 49 U.S.C. § 1502 (1994)). The italicized words within the brackets are the English law's changes in wording.

211. Mohammand Ali Sava v. Compagnie Nationale Air France 25 Av. L. Rep. (CCH) 17,200 (D.C. 1996) (suggesting that Judge Wald's dissenting opinion is the correct one).

212. 933 F.Supp. 1527 (C.D. Cal. 1996).

did not declare the value) did not amount to a reckless disregard showing willful misconduct when the airline did not place the cargo in a higher security area.

In *Rustenburg Platinum Mines Ltd. v. South African Airways*[213] approximately 50 pounds of platinum were shipped by air from South Africa to London and on to Philadelphia, Pennsylvania. The platinum reached London, and it was seemingly stolen by a "loader" for Pan American while it was loaded for its destination in Philadelphia. The loader positioned the box containing the platinum under a shelf in the cargo bay of the aircraft; the positioning of the box facilitated the stealing of the box either by the loader or his accomplice who drove away with the box.

The shipper's insurance company sued Pan American Airways for the full value of $102,000.00, and Pan American pleaded that the shipper had not declared the high value of the shipment and asked the court to limit its liability to $369.23. The Court of Appeal, in affirming the trial court, held that when the Pan American "loader" was entrusted with the storage of the box of platinum in the aircraft and then either stole it himself or cooperated with an accomplice to steal the box, then he was acting within the scope of his employment and his willful stealing of the goods was willful misconduct under Article 25 of the Warsaw Convention and the airline was liable for the full amount of the loss.

The decision in *Rustenburg* was based on original Article 25 of the Warsaw Convention, which read (as interpreted by Lord Denning):

> (1) The carrier shall not be entitled to avail himself of the provisions of this Schedule which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court seized of the case, is considered to be equivalent of wilful misconduct [—that is the carrier's wilful misconduct. The sub-par, (2) says] Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid —that means by wilful misconduct—] by any servant or agent of the carrier acting within the scope of his employment.[214]

It is to be noted that the nebulous term "willful misconduct" was used twice and without definition (*dol*). In addition, the original Article 25 made no mention of any possible liability or non liability of carriers' "servants or agents."

These omissions were corrected in the Hague Protocol (Carriage by Air Act, 1961, amending the Warsaw Convention, 9 & 10 Eliz. 2, pp. 86-113 (1961). New Articles 25 and 25A now read:

213. (1979) Lloyd's Rep. 19 (C.A.).
214. *Id.* at 23.

> *Article 25.* The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.
>
> *Article 25A.* (1) If an action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Article 22.
>
> (2) The aggregate of the amounts recoverable from the carrier, his servants and agents, in that case, shall not exceed the said limits.
>
> (3) The provisions of paragraphs (1) and (2) of this Article shall not apply if it is proved that the damage resulted from an act of omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

The English codification of original Article 25 uses the term "any servant or agent" while the United State's version is "any agent"; the English version seems more extensive than the American. It would appear that the holding in *Rustenburg* would remain enact under the modified version of the Warsaw Convention.

Years after the decision in *Rustenburg*, a United States District Court had to decide an employee theft case whose facts were very close to the *Rustenburg* facts.[215] A shipment of thirty-two boxes of palladium and two boxes of rhodium were made from South Africa to New York. Upon the South African Airway plane's arrival in New York, it was discovered that five boxes of palladium and one box of rhodium were missing. The plaintiff sued for the full value of $1,789,012.67 while the carrier asserted that its liability was limited to approximately $1,520,00 under Article 22 of the Warsaw Convention. The court held that Article 25(1) states that the "standard for wilful misconduct is to be determined "in accordance with the law of the court to which the case is submitted," and that the courts of the United States in an unbroken line of cases had held that stealing by an employee of an air carrier is not in furtherance of the employee's duties and is not to be charged against the employer.[216] Therefore, the liability of the airline was limited by Article 22 and not enhanced under Article 25.

In *Rustenburg* and *Brink's Limited*, the United States was the com-

215. *Brink's Ltd. v. South African Airways*, 24 Av. L. Rep. (CCH) 18,487 (S.D.N.Y. 1995).
216. *Id.*

mon destination, both cases involved theft by employees and both cases involved valuable metals. But, what a difference in result. *Rustenburg* gave full relief to the shipper, while *Brink's Limited* gave a paltry recovery; same facts different results because the lawyers in *Rustenburg* knew the English rule on employee thefts and the Brink's lawyers perhaps did not know the American law!

Article 28 of the Warsaw Convention provides:

> (1) An action for damages must be brought *at the option of the plaintiff*, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination. (emphasis added)

In the *Rustenburg* case, in the trial court, the trial judge mentioned that the attorney for the defendant-airline had cited a South African case as allegedly holding that the master is not liable for the thefts of his employees. The trial judge paid little attention to this submission because foreign law in England is a question of fact to be proved by expert evidence and this was not done. As a result of this failure to prove, the English court applied English law with only passing reference to civilian text writers.[217]

In light of the wording of Article 25 that the question of wilful misconduct is to be decided "in accordance with the law of the court to which the case is submitted" it is suggested that the chosen court could make no reference to any other law but the law of the jurisdiction of that court. On the other hand, it can be argued that the "law of the Court" should include the choice of law(conflicts), and that reference should be made to the law of another country which controls the case.[218]

On appeal to the Second Circuit, the court chose this latter approach and held that the "law of the court" must include the law of the State of New York (not any kind of federal common law) and that New York courts in contract cases:

> apply a "center of gravity" or "grouping of contacts approach". . . . Under this approach, courts may consider a spectrum of significant contacts, including the place of contracting, the places of negotiation and performance, the location of the subject matter, and the domicile or place of business of the contracting parties.[219]

The court then held that under the above tests, South African law should apply to determine whether the "willful misconduct" rule should apply to impose enhanced liability upon the master for the stealing by an

217. (1977) Lloyd's Rep. 564 (Q.B. Comm. Ct. 1977).
218. Brink's Ltd. v. South African Airways, 93 F.3rd 1022 (2d Cir. 1996).
219. *Id.* at 1031.

employee. The case was then remanded to the district court. From ought that appears, it would seem that this "choice of law" issue was never raised in the trial court, or if it was, it was totally disregarded by the trial judge in crafting his decision.

If the *Brink's Limited* holding becomes widely adopted (which it likely will) then plaintiff's counsel's will have to determine not only the domestic law of two or three possible jurisdictions, but also the choice of law rules of these jurisdictions in order to select the most "generous" jurisdiction.

G. Indemnification of the Airline by Third Party Contractors

An assignee's cross claim against an air carrier for indemnity or contribution is also subject to the two year rule, and even if the consignee has committed fraud or is guilty of wilful misconduct the two year rule will not be extended.[220]

IV. The Lausanne Convention

The Lausanne convention[221] governs the transportation of domestic and international mail. The Convention provides that "[i]n case of loss of a registered letter, the sender shall be entitled to an indemnity the amount of which shall be fixed at 40 francs ($15.76) per item."[222] In the case of *Lerakoli, Inc. v. Pan American World Airways*[223] eleven packages containing diamonds were delivered to the U.S. Postal Service for delivery in Belgium. The postal service put the packages in three separate mail sacks and delivered them to Pan American Airlines. Two of these mail sacks were never delivered in Belgium and were never recovered. The third sack was delivered in Germany, but the diamond packages were missing from the sack. The shipper sued the Postal Service and Pan American. The court held that the Lausanne Convention limited recovery from the Postal Service. The court then went on to hold that the protection of the Lausanne Convention extended to Pan American based upon an un-reported slip decision of a New York district court, *Caribe Diamond Works, Inc. v. Eastern Airlines, Inc.*[224] The judge in the slip decision found that Eastern Airlines was not liable for some missing cargo, but in dicta the judge noted that if the United States Postal Service was a bailee, then Eastern Airlines would be a sub-bailee and "would be

220. Magnus Elec., Inc. v. Royal Bank of Canada, 611 F.Supp. 436 (N.D. Ill. 1985).
221. United States Postal Union Convention, Jan. 1, 1976, 27 US.T 345, T.I.A.S. No. 5231
222. *Id.* at 396.
223. 783 F.2d 33 (2d Cir. 1986).
224. No. 71-2875 (S.D.N.Y. June 24, 1974).

a party to all of the express or implied rights and privileges of its transferor (USOS) arising under the original bailment."[225] The court in *Lerakoli* agreed with this bailment theory and it also advanced the view that Pan American was an agent, and:

> Here, the Lausanne Convention, as part of the federal regulatory framework for the handling of international mail, prescribes some of the terms to which a sender of registered mail agrees when delivering a parcel to the USPS for transport. These terms form the equivalent of a contractual agreement between the sender and the USPS limiting the liability of the USPS, and, pursuant to agency principles, that limitation is passed on to any party performing services for the USPS.[226]

The court went on to cite the cases of *Reed v. Wisner* and *Baker v. Lansdell and Julius Young Jewelry* (previously discussed) extending the protection of the Warsaw Convention to employees and agents.

It is to be noted that the Lausanne Convention does not contain any clause allowing the extension of the Convention to agents and employees; the Lausanne Convention is as neutral as the Hague Conventions (COGSA) about extending its umbrella of protection. Further, if the *Lerakoli* case is correct, then one must wonder about all of the cases under COGSA which have spent so much time and labor trying to find a "contractual" umbrella when the common law ideas of bailment and agency do the job without any quibbling over contractual wording.

V. Conclusion

Under proposed amendments to the Carriage of Goods by Sea Act the definition of the term "performing carrier" would be expanded to read:

> *(iii) The term "performing carrier" means a party who performs or undertakes to perform any of the contracting carrier's responsibilities under a contract of carriage, including any party that performs or undertakes to perform or procures to be performed any incidental service to facilitate the carriage of goods, regardless of whether it is a party to, identified in, or has legal responsibility under the contract of carriage. The term includes, but is not limited to, ocean carriers, inland carriers, stevedores, terminal operators, consolidators, packers warehousemen, and their servants, agents, contractors, and sub-contractors. A contracting carrier may also be a performing carrier.*[227]

Under this expended definition, there would seem to be little doubt that warehousemen, stevedores, inland carriers, etc., and their agents, ser-

225. *Id.* at 18-19.

226. *Id.* at 36.

227. Michael F. Sturley, *Proposed Amendments to the Carriage of Goods by Sea Act*, 18 Houston Journal of International Law 609, 685 (1996).

vants, and employees would be covered by the same limitations of liability as would be the carrying shipline without the inclusion of a "*Himalaya* clause" in the bills of lading. It has been suggested, however, that this proposed legislation has little chance of being adopted.[228] Even if this proposal is adopted, it would have no direct impact, of course, on the aviation industry and its servants, agents, and employees. In the absence of legislative changes, perhaps the bailment and agency theories of the *Lerakoli*[229] decision could be utilized to protect the agents and independent contractors of airlines in the handling of cargo.

228. *Id* at 609-22.
229. 783 F.2d 33 (2d Cir. 1986).