Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods Under the Hague, COGSA, Visby and Hamburg Conventions

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TABLE OF CONTENTS

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INTRODUCTION

Maritime legal principles relating to carriage of goods by sea are of ancient origin.[1] Traditionally, the relationship between merchant and shipowner was that of a common adventure, each sharing in the risks and dangers.[2] Due to the whims of nature, poorly trained masters and crew, enemy attacks, poor communications and inadequate navigational aids,[3] there were many risks involved with an ocean voyage which perpetually threatened both the carriers' and the shippers' interests.[4] Generally the shipowner was required to furnish a seaworthy vessel and a competent crew, but the shipowner and merchant would suffer together any loss due

1. ABA, Section of International Law, *Reports to the House of Delegates,* 22 INT'L LAW. 247 (1988) [hereinafter *ABA Reports*].

2. *Id.*

3. *Id.*

4. Gerard Verhaar, *Which Rule Is Best For You? Maritime Transport Rules,* 36 Am. Shipper 44 (1994) [hereinafter *Verhaar*].

to the perils and dangers of the sea.[5] It was then considered reasonable that the risks should be shared more or less equally.[6]

Notwithstanding, substantial economic conflicts have developed in recent centuries between shipowner interests[7] and cargo owning interests[8] over allocation of risk in international shipping for loss, damage and delay of sea-borne cargo.[9] This conflict presents the following problems: (1) who bears the risk and how should the risk be allocated between shipowning and cargo-owning interests? (2) should the shipowner be liable for loss or damage occurring while the goods are in his possession? and (3) should governments intervene to regulate such commercial transactions, or should they leave it to the parties to apportion their respective liabilities by contract?[10]

I. Historic Background of Cargo Damage Law

A. Developments Through the 19th Century

In the sixth century, after the founding of Rome, the sea carrier was essentially made by Roman edict an insurer of the goods it carried. In their view, the sea carrier's duty was to preserve good faith, insure the safety of the goods to be delivered and prevent fraud and robbery. It was the reasoning of Roman law that the carrier should be held liable for all loss and damage because it could best take precautions against such loss. The shipper, on the other hand, might not know how his goods had been abstracted or damaged, nor whether there was anyone whom he could hold responsible. Furthermore, if there had been culpa on the part of the carrier, it could be easily concealed. Based on this reasoning, the Romans sought to protect shippers by placing the entire the risk upon carriers. Over time, however, exceptions to carrier's liability for loss were admitted for shipwreck and piracy.[11]

By the 16th century, there was a growing feeling within the European commercial community that the owner and master of a ship should be excused for non-delivery of damage to cargo due to perils of the sea,

5. *ABA Reports, supra* note 1, at 249.

6. *Verhaar, supra* note 4, at 44.

7. "Shipowner interests" are the carriers, operators, charterers, the P&I Clubs and the hull insurers. Joseph C. Sweeney, *UNCITRAL and The Hamburg Rules—The Risk Allocation Problem in Maritime Transport of Goods,* 22 J. Mar. L. & Com 511, 512 (1991) [hereinafter Sweeney].

8. "Cargo-owning interests" include the shipper/seller, buyer/consignee and cargo insurers. Sweeney, *supra* note 7, at 512.

9. Scott M. Thompson, *The Hamburg Rules: Should They Be Implemented in Australia and New Zealand,* 4 Bond L. Rev. 168 (Australia, 1992) [hereinafter *Thompson*]; See also Sweeney, *supra* note 7, at 512.

10. See Thompson, *supra* note 9, at 168.

11. Eric Fletcher, The Carrier's Liability, 96-97 (1932).

pirates and unusually bad weather.[12] These circumstances were recognized as defenses by the year 1570, available to the shipowner or master who could establish the truth of his contentions.[13] For loss or damage due to any fault or negligence of the master or crew, the master was held liable. Bills of lading during that time period typically reflected what the mercantile law implied (*i.e.* The Law Merchant).[14] The rule of The Law Merchant was that the carrier was liable unless he could prove that the loss of damage occurred through some inevitable mischance, which no amount of care or prudence on his part could have prevented, and was in fact unattended by culpa or negligence.[15]

During the early 19th century, cargo owners using marine carriers to ship their goods continued to enjoy special protection under a strict liability system.[16] In both common law and civil law countries:

> the carrier was held strictly liable for cargo damage or loss that occurred in the course of the conveyance unless it could prove (1) that its negligence had not contributed to the loss and (2) that one of the four excepted causes (act of God, act of public enemies, shipper's fault, or inherent vice of the goods) was responsible for the loss.[17]

In other words, if one of the four exceptions applied, the carrier was liable only if it had been at fault, but in all other cases it was liable without fault. This extensive no-fault liability, in an era when such liability was rare, led many to describe the carrier as an 'insurer' of goods.[18]

In deference to freedom of contract, the shipper and carrier could agree to a different risk allocation — including one in which the carrier assumed virtually no liability — even for its own negligence.[19]

To avoid the role as quasi-insurers of cargo damage and loss, and to reduce or eliminate their responsibilities while in transit, carriers began to use exculpatory clauses in the bill of lading by the late 19th century.[20]

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12. *Id.* at 88, 51.
13. *Id.* at 51.
14. *Id.* at 88, 51.
15. *Id.* at 99-100.
16. Michael F. Sturley, *Basic Cargo Damage Law: Historic Background,* 2A BENEDICT ON ADMIRALTY, 2-1 to 2-3 (MB, 1995) [hereinafter *Basic Cargo Damage*].
17. Michael F. Sturley, THE LEGISLATIVE HISTORY OF THE CARRIAGE OF GOODS BY SEA ACT, 3-4 (1990) [hereinafter CARRIAGE OF GOODS].
18. *Basic Cargo, supra* note 17, at 2-1 to 2-2; *see also* ARNOLD A. KNAUTH, THE AMERICAN LAW ON OCEAN BILLS OF LADING 116 (4th ed., 1953).
19. CARRIAGE OF GOODS, *supra* note 17, at 3.
20. *Basic Cargo Damage, supra* note 16, at 2-2; The exemptive clauses typically included losses and damage from "thieves; heat, leakage, and breakage; contact with other goods; perils of the seas; jettison; damage by seawater; frost; decay; collision; strikes; benefit of insurance; liberty to deviate; sweat and rain; rust; prolongation of the voyage; nonresponsiblity for marks or numbers; removal of the goods from the carrier's custody immediately upon discharge; limitation of value; time for notice of claims; and time for suit." Benjamin W. Yancey, *The Carriage of*

> The bills of lading became so lengthy, and the parties' respective rights and liabilities so difficult to ascertain, that even bankers [were] in doubt as to their security when discounting drafts drawn against bills of lading, cargo underwriters [did not know] the risks which they covered when insuring goods, . . . and carriers and shippers [were] in constant litigation.[21]

All of these exemptive clauses were generally deemed valid if reasonable, and the courts in those days as to reasonableness were rather stringent in the carrier's favor.[22]

If the carrier could establish that the loss resulted from one of the perils excepted in the bill of lading, then the cargo owner had the burden of proving that the carrier caused or contributed to the loss through his negligence, in which event the carrier was liable.[23] That burden of proof was a very real defensive weapon for carriers in the days before effective discovery procedures were developed, and often proved an impossible burden for cargo shippers to bear.[24]

The British and American courts differed in their views on enforceability of broad exclusions on bills of lading. British courts regularly enforced even the most far-reaching exculpatory clauses in bills of lading. They viewed the carrier's strict liability as a default rule which should be applied only in the absence of an agreement to the contrary.[25] American courts gave more restrictive treatment to freedom of contract. The U.S. federal courts permitted carriers to limit their liability under some circumstances, but did not allow carriers to contract away liability for their own negligence.[26]

B. The Harter Act Of 1893

While the international community was accomplishing little toward the unification of the law in the late 19th century, several countries enacted legislation governing exoneration clauses in bills of lading.[27] The operation of short limitation periods and oppressive exemptive clauses provoked a movement in the late 19th century that resulted in passage of the Harter Act Of 1893.[28] The U.S. Act represented a compromise be-

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Goods: Hague, COGSA, Visby and Hamburg, 57 Tulane L. Rev. 1238, 1240 (1983) [hereinafter Yancey].

21. *Id.* at 2-3 to 2-4.
22. Yancey, *supra* note 20, at 1240.
23. *Id.* at 1240.
24. *Id.* at 1240.
25. *Basic Cargo Damage, supra* note 16, at 2-3.
26. *Id.*
27. Carriage of Goods, *supra* note 17, at 5.
28. 46 U.S.C. §§ 190-196. *See* Yancey, *supra* note 20, at 1240-1241.

tween the conflicting carrier and shipper interests.[29]

The Harter Act imposed certain of the old common law obligations on the carrier, and made it illegal to diminish these specific obligations in an ocean bill of lading.[30] As violative of public policy, the Act voided any bill of lading seeking to relieve the carrier from negligence in proper loading, stowage, custody, care or proper delivery of the goods,[31] and also voided any clause purporting to reduce the obligation of the owner to exercise due diligence in providing a seaworthy vessel.[32] However, if the carrier exercised due diligence in furnishing a seaworthy vessel in all respects, then the owner was exempt from liability for damage or loss resulting from faults or errors in navigation or in the management of the vessel.[33] Since communications were often difficult or impossible, and because they could not control their ships after departure, shipowners were not held liable for the negligence or fault of captain and crew in their navigation and management of the vessel after it had left port.[34] Nor was such shipowner liable for perils of the sea, acts of God, acts of public enemies, inherent defects of the goods carried, seizure under legal process, acts or omissions of the cargo owners, and saving or attempting to save life or property at sea.[35]

Though an important step in the development of U.S. law of maritime carriage, the Harter Act ultimately proved disappointing.[36] The Act did not provide shippers an effective solution to the problem of burdensome exculpatory clauses in bills of lading, nor did it establish any positive rules of law.[37] It failed to alter the validity of the very short limitations periods, low valuation clauses, or stringent notice of claims clauses.[38]

Following passage of the Harter Act, about 30 years of instability ensued during which American law differed significantly from that in most other parts of the world.[39] Over time, a movement for uniformity developed, prompting the Comite Maritime International (CMI) to draft

29. *Basic Cargo Damage*, *supra* note 16, at 2-5; *see also* In re Ballard Shipping, 823 F. Supp. 68, 71 n. 2 (D.R.I. 1993).

30. *Basic Cargo Damage*, *supra* note 16, at 2-5.

31. 46 U.S.C. app. § 190 (1976).

32. 46 U.S.C. app. § 191; *see also* Yancey, *supra* note 20, at 1241.

33. 46 U.S.C. app. § 192.

34. *Cargo Liability and the Carriage of Goods by Sea Act (COGSA): Oversight Hearing before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries,* 102d Cong., 2d Sess. 21 (1992) (Statement of Roger Wigen of 3M Corporation on June 24, 1992) [hereinafter *Oversight Hearing*].

35. 46 U.S.C. app. § 192; *see also Basic Cargo Damage*, *supra* note 16, at 2-5.

36. Yancey, *supra* note 19, at 1241.

37. *Basic Cargo Damage*, *supra* note 16, at 2-5.

38. Yancey, *supra* note 19, at 1241.

39. *ABA Reports*, *supra* note 1, at 248.

a set of rules at a 1921 conference at the Hague, based primarily upon Harter Act theory.[40]

C. The Hague Rules

In 1924, the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, commonly known as the Hague Rules, was adopted by 26 participating nations. The Hague Rules were welcomed by most shippers, although they were adopted against the wishes of shipowners who opposed the increase in carrier liability under this new convention.[41] Today, there are about 77 contracting parties to Hague, including a large number of developing countries.[42]

The Hague Rules set out the bases for shipowner liability for cargo loss and damage. They preclude contractual exemptions from liability for shipowners; provide 17 specified defenses to carriers, including the controversial nautical fault defense; and establish a limit of $500 liability per package or customary freight unit.[43]

Although there was major American involvement in the final stages of drafting the Hague Rules, the United States was slow to ratify or enact a statute based upon it.[44] Apparently due to the United States' failure to ratify the convention, other countries had hesitated to adopt the Hague Rules.[45] There was even a movement by British shipowners in the early 1930's to repeal United Kingdom law ratifying the Hague Rules, on the basis that the rest of the world had been unwilling to join the international uniformity effort.[46]

The United States implemented the Hague Rules domestically with the enactment of the Carriage of Goods by Sea Act in 1936 (COGSA),[47] and ratified the international convention in 1937.[48] With the U.S. adoption of the Hague Rules, the remaining major maritime powers joined the new regime quickly. Within two years of the U.S. ratification, most of the European shipping nations followed suit, and by the beginning of World War II, the overwhelming majority of the world's shipping had adopted the Hague Rules.[49]

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40. *Id.*

41. UNCTAD, The Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention, 8-9 (1991).

42. *Id.*

43. *See ABA Reports*, *supra* note 1, at 248.

44. *Basic Cargo Damage*, *supra* note 16, at 2-18.

45. *Id.* at 2-19.

46. *Id.* at 2-20.

47. 46 U.S.C. app. §§ 1300-1314.

48. *See Report From House Majority and Minority Staff to Members of House Subcommittee on Merchant Marine Regarding Oversight Hearing on Cargo Liability Laws*, 102d Cong., 2d Sess. 2 (1992) [hereinafter 1992 *House Staff Report*].

49. *Basic Cargo Damage*, *supra* note 16, at 2-20.

D. COGSA

Derived from the Hague Rules, COGSA governs the use of bills of lading and the relations of cargo and ship.[50] COGSA applies during the period of time between the loading of the goods and the time they are discharged from the ship: i.e. tackle to tackle.[51]

COGSA represents some significant changes from the prior liability scheme. Its provisions are as follows:

(1) COGSA requires an ocean common carrier operating between U.S. and foreign ports to exercise due diligence to make its ship seaworthy, to make the holds fit and safe for carriage and preservation of the goods carried, and to load, handle, stow, carry, keep, care for and discharge the goods properly and carefully.[52] For liability to arise, however, it must be shown that the want of due diligence to make the ship seaworthy was the *proximate cause* of the cargo loss or damage.[53]

(2) A carrier will not be liable for any uncontrollable loss or damage falling under any one of the 17 defenses,[54] which include:

(a) acts, neglect or default of the master or servants of the ship in navigating and managing the ship (the nautical fault defense);
(b) fire — unless caused by the fault of the carrier;
(c) perils of the sea;
(d) acts of God, war, or public enemies;
(e) intervention of law;
(f) acts or omissions of shippers;
(g) strikes, riots, or civil commotion;
(h) attempts to save life or property at sea (this includes damage caused by deviation to save life or property at sea);
(i) inherent vice of the goods or shrinkage, where the damage is caused by the characteristics of the goods (e.g., a liquid that evaporates);
(j) insufficient packing or marking by the shipper;
(k) a latent defect in the goods or damage caused by a defect in the goods, not the negligence of the carrier; and
(l) any other cause arising without the actual fault of the carrier or its agents (although the burden is on the carrier to prove freedom from fault).

(3) A $500 per package or customary freight unit limitation, unless the value of goods is declared on the bill of lading.[55] The carrier is barred

50. Yancey, *supra* note 20, at 1244.
51. *Id.*; *see also* 46 U.S.C. § 1301.
52. 46 U.S.C. §§ 1303(1)(a), 1304(1).
53. *See* Yancey, *supra* note 19, at 1244. COGSA effectively reversed the rule previously set forth in May v. Hamburg-Amerikanishe, 290 U.S. 333 (1933), in which the Supreme Court held that there need not be a causal connection between the lack of due diligence, unseaworthiness and damage for liability to be imposed on the carrier.
54. 46 U.S.C. § 1304; *see also House Staff Report*, *supra* note 48, at 3.
55. 46 U.S.C. app. § 1304(5).

from using a lower limitations amount.[56]

(4) What constitutes a package under COGSA has created some problems for the courts, especially in light of the now-common use of the shipping container.[57] Jurisdictions are split on whether a container should be considered a package for purposes of the $500 limitation.[58]

(5) The Act extends the time to provide notice of claim and file suit against the carrier. Notice of the loss should be provided to the carrier before or upon removal of the goods, or within three days after removal if the loss is not apparent.[59] Claimants have up to one year to file suit following delivery.[60] Lesser time limits are prohibited under COGSA.[61]

(6) COGSA does not apply to cargo carried on deck, where the bill of lading states that the cargo will be carried on deck.[62]

(7) Under COGSA, unexplained losses, those for which there is no clear evidence which of two causes was responsible for the damage, are far more likely to fall on the carrier.[63]

COGSA's principal goal was to *unify* the law governing bills of lading world-wide. It was intended to do more than simply allocate risks between carriers and shippers, but to do so on a uniform, predictable basis that would allow carriers, shippers, consignees, bankers and insurers to know their respective rights and responsibilities with certainty — and to do so without examining long and complicated bills of lading.[64]

Despite the United States' adoption of the Hague Rules through COGSA in the late 1930s, which was subsequently ratified by almost all of the world's nations, several problem areas remained with the Hague scheme, causing uneasiness for both shippers and carriers.[65] These problems included the confused state of American law on the limitation of $500 per package or per customary freight unit; the inadequacy of the $500 package limitation; questions as to what constituted a package in view of the newly-developed container trade; concerns about the rigid

56. 46 U.S.C. app. § 1303(8).

57. A 40-foot shipping container that can carry goods worth hundreds of thousands of dollars. *See* Paul S. Edelman, *Proposed Changes for Cargo Liability,* 208 NEW YORK L.J., 3 (1992) [hereinafter Edeleman].

58. *See House Staff Report, supra* note 48, at 4. *Cf.* Inter-American v. Consolidated Caribbean Transport, 313 F. Supp. 1334 (S.D. Fla. 1970) ($500 "per package" limitation applied to each of a number of cartons of shrimp loaded into a trailer); Standard Electrica v. Hamburg SudAmerica, 375 F.2d 943 (2nd Cir. 1967) (each pallet containing cartons of expensive electrical parts constituted a "package").

59. 46 U.S.C. app. § 1303(6).

60. 46 U.S.C. app. § 1303(6).

61. 46 U.S.C. app. § 1303(8).

62. *See House Staff Report, supra* note 48, at 4.

63. *Basic Cargo Damage, supra* note 16, at 2-22.

64. *Id.*

65. Yancey, *supra* note 20, at 1246.

non-delegability of the duty to use due diligence to make seaworthy; and the contractual extension of the carriers defenses to other parties to the transaction such as stevedores.[66]

E. Visby Amendments of 1968

Decades later, in response to the increased use of containerization in ocean transportation and international dissatisfaction with the per-package limitation, a diplomatic conference, convened in Brussels in 1968, adopted a Protocol amending certain provisions of the Hague Rules.[67] That conference resulted in a 1968 Amendment to the Hague Rules, designated as the Hague-Visby Amendments (also Visby).[68] Under Visby, most of the original Hague Rules survived, thus preserving the majority of the case law decided over the years under that regime.[69] Both Hague and Visby retain the same basic rule as to the carrier's duty of care, that the carrier must exercise due diligence . . . to make the ship seaworthy, and see that the ship is properly manned, equipped and supplied.[70]

The Amendments modified Hague in several respects. First, it increased the per-package limitation to $663, or alternatively, $2 per kilogram of lost or damaged goods, whichever is higher. Second, the Amendment clarified the definition of package to be the number of packages or units enumerated in the bill of lading as packed in such article of transport.[71] Third, it denied the carrier the right to limit its liability for intentionally caused damage, or recklessly caused damage where the carrier had knowledge that damage would result.[72] Certain other minor revisions were included in the 1968 Amendment to render it more consistent with American law, such as making inadmissible any contradictions of the recitals of conditions as set forth in the bill of lading when the bill has been transferred to a party in good faith, and approving the practice of granting extensions of the one year time limitation.[73] The Amendment also defines the carrier as including the owner or the charterer who enters into a contract of carriage with a shipper.[74]

Within only months after the 1968 Visby Convention at which the Hague-Visby Amendment was promulgated, shippers were uniformly

66. *Id.*

67. *ABA Reports*, *supra* note 1, at 248. *See also House Staff Report*, *supra* note 48, at 4.

68. *Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* (February 23, 1968) [hereinafter "Hague-Visby Amendment"].

69. Edelman, *supra* note 57, at B1.

70. *Id.*

71. *Id.*

72. *See House Staff Report*, *supra* note 68, at 4.

73. *Hague-Visby Amendment*, *supra* note 68, at 1. *See also* Yancey, *supra* note 20, at 1248-49.

74. Edelman, *supra* note 57, at B1.

pleased with the results and enthusiastic about prompt ratification by the United States.[75] Joseph Baittner, on behalf of the Singer Company, summed up the views of most U.S. shippers by expressing support for Hague-Visby as a solution equitable to both shipowner and shipper interests.[76] Similarly, speaking at that time on behalf of the Commerce and Industry Association of New York (a shipper's organization), Joseph A. Sinclair wrote to then Secretary of State Dean Rusk that his members were very pleased with Hague-Visby and hoped that the State Department will make every effort to obtain Congressional action during the present session having the assurance that ratification of the Hague-Visby Convention will be widely supported by major U.S. exporters.[77]

In contrast, the carriers vigorously opposed ratification of Hague-Visby following the 1968 convention. Ralph E. Casey, then President of the American Merchant Marine Institute (AMMI), representing most U.S. flag steamship lines, pronounced that any the prospects for ratification were doomed.[78] In his letter to Secretary Rusk dated May 22, 1968, Mr. Casey expressed the strong opposition of the AMMI to U.S. implementation of the Hague-Visby Protocol of 1968. On behalf of shipowners' interests, Mr. Casey criticized the weight liability limitation as excessive, the mixed limitation concept without a ceiling, and the container clause as especially disturbing.[79] Benjamin Yancey, formerly the President of the U.S. Maritime Lawyers Association (MLA), similarly expressed his sharp disagreement with Hague-Visby.[80]

In the face of such determined opposition from significant portions of the maritime industry, the Executive Branch decided not to go forward with ratification.[81] The unwillingness of Congress to act in the absence of an industry consensus has long been recognized.[82] It is for this sole reason, it has been commented, that the Visby Amendments were not ratified by the United States between 1968 and 1978.[83]

F. The SDR Protocol of 1979

In 1979, the Hague-Visby Rules were further amended to account for

75. Allen I. Mendelsohn, *Why the U.S. Did Not Ratify the Visby Amendments*, 23 J. Mar. L. & Com. 29, 40 (1992) [hereinafter Mendelsohn].

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 41-45.

80. *Id.* at 45-49.

81. *Id.* at 51.

82. *Cf.* Peter H. Pfund, *International Unification of Private Law: A Report on United States Participation, 1985-86*, 20 Int'l Law. 623, 625 (1986). *See also Basic Cargo Damage*, *supra* note 16, at 2-23 n. 6.

83. Mendelsohn, *supra* note 75, at 30, 51-52.

currency exchange imbalances.[84] The SDR Protocol of 1979 revised the previously-existing Poincare gold standard for liability limitations to a system using a Special Drawing Right (SDR) in an amount calculated by the International Monetary Fund.[85]

The liability limitation was increased in the SDR Protocol to 667 SDRs per package or customary shipping unit, or 2 SDRs per kilo.[86] During 1992, the SDR fluctuated around US $1.28.[87]

As is the situation with the 1968 Hague-Visby Amendment, the United States has never adopted the SDR Protocol.[88] Notwithstanding, as of 1992, 31 nations have adopted or were adopting the SDR Protocol and Hague-Visby Amendment.[89]

G. Hamburg Rules of 1978

In 1978, the United Nations Commission on International Trade Law (UNCITRAL) held a conference in Hamburg, Germany, in response to a demand for revision of the Hague-Visby Rules.[90] In promulgating the Hamburg Rules at that conference, UNCITRAL dealt with all of these problems in terms of "economic warfare" between cargo and carrier, and between 'traditional maritime nations' and the "developing world."[91]

The construct of the Hamburg Rules is significantly different from previous international cargo liability conventions, and as found by the U.S. Department of Transportation, would provide for an increase in carrier liability.[92] The major features and changes of the Hamburg Rules are as follows:

(1) Elimination of the nautical and managerial fault defenses;[93]

(2) Reduction of the 17 defenses of COGSA, down to three defenses:

(a) that the carrier took all reasonable measures to avoid the damage;

(b) that the loss, damage or delay was caused by fire;

(c) that the loss, damage or delay was due to efforts of the carrier to

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84. *See House Staff Report 6-23-92, supra* at page 30.

85. *Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* (December 21, 1979).

86. Edelman, *supra* note 57, at B1.

87. *Id.*

88. *See House Staff Report, supra* note 48, at 30.

89. Edelman, *supra* note 57, at B1.

90. *See House Staff Report, supra* note 48, at 30; Yancey, *supra* note 20, at 1249-50.

91. Yancey, *supra* note 20, at 1249-50.

92. *House Staff Report, supra* note 48, at 31.

93. *See Oversight Hearing, supra* note 34, at 125 (Background Paper by the U.S. Department of Transportation).

save life or property at sea;[94]

(3) The $500 per package limitation first appearing in the Hague Rules in 1924 and adopted by COGSA 12 years later, would be increased to 835 SDR's (Special Drawing Rights) per package, or approximately $1,169 per package or customary shipping unit;

(4) Shippers would be given an option of claiming damages based on the *weight* of the cargo rather than the value of the package (maximum recovery of 2.5 SDR's per kilo, approximately $1.59 per lb. or $1169 per package, whichever is higher);

(5) The term "per package" would be defined as the packaging units described in the bill of lading, thus curtailing shipowners' attempts to limit their liability to $500 for an *entire container* on the grounds that it is the package when no other packaging was described on the bill of lading;

(6) Carriers would be liable for delays, but only up to two and a half times the amount of freight charges;

(7) On-deck cargo would be covered by liability rules for the first time;

(8) Cargo moving without a bill of lading would be covered for the first time;

(9) The burden of proof would shift to shipowners to prove they took all measures that could reasonably be required to avoid the occurrence and its consequences, thus eliminating negligence of the master or crew as a defense;[95]

(10) Notice of loss or damage would be permitted to be given not later than one working day after delivery to the consignee (rather than before removal from the port);

(11) Notice of concealed loss or damage would have to be given within 15 days, in lieu of 3 days;

(12) Suits or arbitration could be instituted within 2 years from delivery rather than one year at present;

(13) Cargo owners would be relieved of General Average contributions if the ship owner's negligent navigation or mismanagement of the ship caused the catastrophe which resulted in the claim for general damage.[96]

The United States has not ratified the Hamburg Rules, which went into force on November 1, 1992 after 20 other nations had ratified it.[97] To

94. *Id.*

95. Under COGSA, the carrier only has the burden of proving *seaworthiness* at the time of the voyage; then the burden shifts to the shipper to prove the carrier's negligence.

96. *See Oversight Hearing*, *supra* note 34, at 100-01 (Testimony on Behalf of the Transportation Claims and Prevention Council, Inc., on Oversight on Cargo Liability).

97. DOT Paper, *supra* note 93, at 124-25.

date only 22 states have adopted the Hamburg Rules,[98] of which seven are land-locked states having no ports, and all 22 states, as a group, represent only a very small portion of U.S. trade.[99] These 22 nations are not major shipping powers, and are concerned mostly with protection for their imports and exports.[100]

H. The Great Switch

During the mid-1970's, a dramatic reversal of positions took place between carrier and shipper interests in the United States.[101] Partly out of concern for the evolving Hamburg Rules, the shipowners and MLA changed their views on Hague-Visby, viewing Visby as a positive contribution to international maritime law. Shippers on the other hand, abandoned their previously strong support for Hague-Visby, and quickly embraced the unfolding Hamburg Rules.[102] Though the sides flip-flopped completely, the controversy continues to be very intense.[103]

Now, shipowners and cargo underwriters support Visby but not Hamburg, while shippers largely support Hamburg but not Visby.[104] Consequently the United States suggested a compromise colloquially known as the trigger approach; the U.S. Government's approach was to transmit a package arrangement to the Senate, requesting its advice and consent to the ratification of both Visby and Hamburg in stages.[105]

This trigger approach was first proposed in 1978, in expectation that the Hamburg Rules would be ratified at a later date.[106] In 1988, the U.S. Department of Transportation had sought to achieve a compromise by developing a trigger mechanism, under which the United States would ratify the Visby Protocol immediately with the commitment to adopt the Hamburg Rules once a significant number countries trading with the U.S. had enacted Hamburg.[107] To date, virtually all of the commercial inter-

98. As of 1993, Austria, Barbados, Botswana, Burkina Faso, Cameroon, Chile, Egypt, Guinea, Hungary, Kenya, Lebanon, Lesotho, Malawi, Morocco, Nigeria, Romania, Senegal, Sierra Leone, Tanzania, Tunisia, Uganda and Zambia adopted the Hamburg Rules. *See Status of the Hamburg Rules*, UNCITRAL, U.N. Doc. A/CN.9/401 at 4 (1994).

99. Memorandum from George Chandler, Chairman of the Carriage of Goods Committee of the Maritime Law Association of the United States 1 (August 19, 1994) [hereinafter Chandler Memorandum].

100. *House Staff Report*, *supra* note 48, at 30.

101. Mendelsohn, *supra* note 75, at 52.

102. *Id.*

103. *Id.* at 53.

104. *ABA Reports*, *supra* note 1, at 250.

105. *Id.*

106. *See The Speakers' Papers for the Bill of Lading Convention Conference*, November 29, 1978 (Lloyd's of London Press).

107. *See Basic Cargo Damage*, *supra* note 16, at 2-25 n. 13.

ests have rejected this trigger approach.[108]

> The sad truth is that carriers, their insurers and the cargo insurers will not yield an inch on the Hague-Visby system, and shippers are adamantly opposed to Visby *unless* it surely leads to Hamburg — a classic stalemate which has produced governmental inaction until the maritime industry can solve its own problems.[109]

I. The Current State of U.S. Law

Although the United States government has signed both the Hague-Visby Amendments and the Hamburg Rules, neither has been ratified by the United States Congress.[110] Thus, COGSA of 1936 essentially remains the controlling law of the United States governing risk allocation.

By 1993, it was estimated there were 78 countries that adhered to either Hague and/or Visby, covering 63.9 percent of U.S. trade.[111] Of that group, in early 1993 there were 32 nations that acceded to Visby.[112] As the United States has not yet adopted or ratified the Hague-Visby Amendments to date, the COGSA 1936 provisions remain substantially unchanged.[113] Accordingly, the United States today has a law that is different on its face from the laws of most of its major trading partners and different in application from the law of any other country.[114]

Most bills of lading currently reflect Hague-Visby, as carriers reluctantly adjust to changes that containerization brought by raising liability limits.[115] Interestingly, the U.S. courts have been applying Hague-Visby under choice of law rules.[116]

II. Comparison of the Hague, Visby and Hamburg Regimes

A. Scope of Application

The Hague Rules apply only to bills of lading issued in a contracting state. The Hague-Visby Rules apply to bills of lading covering the carriage of goods between different states, so long as the bill of lading is issued in a contracting state, the carriage begins in a contracting state, or

108. *Id.*

109. *See* Sweeney, *supra* note 7, at 535.

110. *ABA Reports*, *supra* note 1, at 250.

111. *See Oversight Hearing*, *supra* note 34, at 8 (Statement of George F. Chandler, III, of the Maritime Law Association).

112. *See Oversight Hearing*, *supra* note 34, at 58.

113. *Basic Cargo Damage*, *supra* note 16, at 2-23.

114. *Id.*

115. Verhaar, *supra* note 4, at 44.

116. *See* Daval Steel Products v. M/V Acadia Forest, 683 F. Supp. 444 (S.D.N.Y. 1988); Francosteel Corp. v. M/V Deppe Europe, 1990 AMC 2967 (S.D.N.Y. 1990); Uhl-Baumaschinen GMBH v. M/V Federal Seaway, 1990 U.S. Dist. LEXIS 908 at 3 (S.D.N.Y. January 29, 1990).

the parties have agreed to the application of the Convention. The Hague and the Visby Rules are inapplicable when a document other than a bill of lading is used in connection with the carriage.[117] For example, COGSA, Hague and Hague-Visby do not apply when electronic data interchange EDI is used.[118]

The Hamburg Rules apply to all contracts of carriage by sea between different states if the port of loading, the port of discharge or the place where the bill of lading or other transport document was issued is located in a contracting state. Hamburg may apply even when a contract for transport other than a bill of lading is utilized.[119]

Carriers take the position there is no problem with [EDI] use under the Hague Rules and no reason to think the Hamburg Rules will facilitate them.[120] In contrast, shippers maintain that COGSA requires a paper bill of lading, which creates a competitive disadvantage when compared to the inexpensive efficiency of an EDI.[121]

B. Definition of Carrier

COGSA, Hague and Hague-Visby only apply to the contracting carrier, but do not apply to the liability of the actual non-contracting carrier who has not issued a bill of lading to the consignor.[122]

In contrast, the Hamburg Rules governs liability of both the contractual carrier and actual carrier. Essentially, Hamburg makes the contractual carrier liable for the whole carriage, including those portions performed by the actual carrier, and also enables the shipper to hold the actual carrier liable.[123]

C. Period of Carrier Responsibility

COGSA, Hague and Hague-Visby provide for liability only from the time that the goods are *loaded* onto the ship up until they are *discharged* from the ship.[124] Hamburg covers the goods from the moment the carrier takes the goods in charge at the port of loading, until the carrier actually

117. *Status of the Hamburg Rules,* UNCITRAL, at 2 para. 12, U.N. doc. A/CN.9/401/Add. 1 (1994).

118. *Oversight Hearing, supra* note 34, at 125 para. 2. *See also* COGSA, 49 U.S.C. app. § 1301(b).

119. *Status of the Hamburg Rules, supra* note 98, at 2 para. 11.

120. *Oversight Hearing, supra* note 34, at 247 [hereinafter *American Flag Position Paper*].

121. *Oversight Hearing, supra* note 34, at 77 (Position of National Industrial Transportation League).

122. *Status of the Hamburg Rules, supra* note 98, at 5 para. 23. *See also Oversight Hearing, supra* note 34, at 125 para. 1.

123. *Id.*

124. COGSA, 46 U.S.C. app. § 1301(e); *Status of the Hamburg Rules, supra* note 117, at 3 para. 14; *Oversight Hearing, supra* note 34, at 125 para. 1.

delivers the goods at the port of discharge. Thus, the Hamburg liability regime extends beyond the actual carriage, even before loading and after unloading.[125]

According to carriers, the Harter Act of 1893 also provides coverage during custody, so that the shipper has better protection under existing American law than he would under the Hamburg Rules.[126] Shippers contend that only the Hamburg Rules provide for door-to-door liability coverage.[127]

D. 17 Defenses, Nautical Fault and Burden of Proof

Under COGSA, Hague and Visby, carriers have the burden to prove their vessel is seaworthy and the exercise of due diligence. However, the carrier has 17 defenses from liability. The most controversial is the nautical fault defense, which exempts a carrier from liability when the loss or damage arose from a negligent act in the navigation or management of the ship.[128]

The Hamburg Rules reduce the 17 defenses down to three, and no longer exonerate the carrier from negligence for nautical fault.[129] Carriers maintain that the Hague-Visby approach is appropriate, noting that most of the 17 defenses are implicitly retained anyway in the Hamburg regime, other than the nautical fault defense.[130] However, carriers feel the lack of specificity of multiple defenses into the three generalized defenses of Hamburg is a giant step backward in legal process; they view Hamburg as only creating vagueness and inconsistency in the law on their available defenses.[131]

Shippers, in contrast, see the change in Hamburg on these defenses as a positive move, as more properly placing the risks of loss upon the carrier where it is negligent.[132] In any event, shippers contend, the Hamburg Rules do not really abolish the entire list of carrier defenses, but rather effectively leave all defenses intact except for nautical fault.[133]

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125. *Status of the Hamburg Rules*, *supra* note 117, at 2 para. 13.

126. *See American Flag Position Paper*, *supra* note 120, at 244.

127. *See Oversight Hearing*, *supra* note 34, at 21 (Statement of Roger Wigen of 3M Corporation).

128. COGSA, 46 U.S.C. app. §§ 1303-1304; *Status of the Hamburg Rules*, *supra* note 117, at 2 para. 15; *Oversight Hearing*, *supra* note 34, at 126 para. 5.

129. *Status of the Hamburg Rules*, *supra* note 117, at 2 para. 15; *Oversight Hearing*, *supra* note 34, at 125.

130. *American Flag Position Paper*, *supra* note 120, at 234.

131. *Id.* at 233-235.

132. *Oversight Hearing*, *supra* note 34 at 68 (*Shipper Comments on Papers Submitted by APL and International Chamber of Shipping in Opposition to the Hamburg Rules*) [hereinafter *Shipper Comments*].

133. *Id.*

Carriers view the exemption of nautical fault as an important device for risk distribution among insurers in major casualties.[134] It works to spread loss among numerous underwriters, with little effect on the world's cargo premiums. In any event, carriers maintain, the defense of nautical fault is unimportant in the vast, routine majority of claims, and potentially important in major casualties, such as collisions, strandings or fires.[135]

In contrast, shippers see no justification for the nautical fault defense.[136] Shippers contend that given today's advanced telecommunications, which allow shipowners to maintain constant verbal and visual contact their vessels, the historic rationale of the ship owner's inability to control its vessel at sea no longer exists.[137] Shippers maintain that the nautical fault defense has only served to aid carriers in evading any liability for their wrongs. It is an embarrassment to exonerate a carrier based upon a showing of negligence, and unfair to make the shipper pay for established nautical or managerial negligence on the part of the carrier and/or its management and agents.[138]

Carriers contend that under Hamburg, the burden there is not really any shifting of the burden of proof, other than as a result of vague draftsmanship of the ship owner's defense. It may be said, carriers argue, to have cast a heavier onus upon the carrier only because of the burden of resolving that "vagueness."[139]

Shippers feel that existing cargo liability laws unfairly place major risks of loss on cargo owners, and that Hamburg properly shifts that risk.[140]

E. Package Limitation and Increased Limits of Liability

As already noted, COGSA and Hague limit the carrier's liability to $500 per package. The 1979 Protocol to Hague-Visby raised the limit to 667.67 SDRs or 2 SDRs per kilogram of goods, whichever is higher. The Visby Amendment allows a shipper an opportunity to limit the carrier's liability to the equivalent of one package, when a large container is packed with multiple packages of valuable goods.[141] Under Hamburg, the liability limits have been increased to 835 SDRs (about $1,000) per

134. *American Flag Position Paper, supra* note 120, at 236-237.

135. *Id.*

136. *Shippers Comments, supra* note 132, at 68-69.

137. *See Oversight Hearing, supra* note 34, at 21-22 (*Statement of Roger Wigen of 3M Corporation*).

138. *Id.*

139. *American Flag Ship Position Paper, supra* note 120 at 239.

140. *Oversight Hearing, supra* note 34, at 101 (Augello Testimony) [hereinafter Aguello].

141. *Oversight Hearing, supra* note 34, at 126-127; *Status of the Hamburg Rules, supra* note 117, at 4 para. 17-18.

package or 2.5 SDRs per kilogram.[142]

Carriers maintain all costs in the end fall back upon the shippers of cargo, who have to pay their own insurance premiums and ultimately, through freight rates, the carrier's premiums and liabilities.[143] Even though increased recovery limits might be a gain for individual shippers, it would not be a gain for shippers as a class.[144] Regarding the per-package definition, as well as the effect of containerization, carriers contend that the state of the law in the United States has become substantially settled in litigation.[145]

Shippers believe that higher liability limits should result in a substantial reduction in their cargo insurance premiums.[146] According to shippers, the shifting of risks to shipowners who have direct control over the degree of protection to cargo in transit is equitable.[147] A specific provision defining what is a package is necessary, shippers urge, in view of the containerization age.[148]

F. Delay Damages

Neither COGSA, Hague nor Hague-Visby cover carrier damage for delay of goods.[149] However, Hamburg provides for delay damages up to two-and-a-half times the freight payable for the goods delayed.[150]

Carriers argue that damages for unreasonable delay are nonetheless recoverable under present law, and that Hamburg merely limits damages for delay.[151] Shippers disagree, contending that Hamburg properly allows for two-and-a-half times the freight charges.[152]

G. Deck Cargo

Under Hague, the carrier is not liable for cargo carried or stacked on deck under a bill of lading stating that the cargo is to be carried in that manner.[153] The Hamburg Rules, on the other hand, take into account modern transport techniques involving stowage of containers on deck and

142. *Status of the Hamburg Rules*, *supra* note 117, at 4 para. 16; *Oversight Hearing*, *supra* note 34, at 127.

143. *American Flag Ship Position Paper*, *supra* note 120, at 230.

144. *Id.*

145. *Id.* at 240.

146. Augello, *supra* note 140, at 100-101.

147. *Id.*

148. *American Flag Ship Position Paper*, *supra* note 120, at 239-40.

149. *Status of the Hamburg Rules*, *supra* note 117, at 4 para. 21; *Oversight Hearing*, *supra* note 34, at 127.

150. *Id.*

151. *American Flag Ship Position Paper*, *supra* note 120, at 246.

152. *Status of the Hamburg Rules*, *supra* note 117, at 4 para. 21.

153. *Id.* at 4 para. 19; *Oversight Hearing*, *supra* note 34, at 126.

provide appropriate rules for deck cargo.[154]

H. Uniformity of Law and Increased Litigation

Carriers state that the Hamburg Rules are inconsistent, unclear and confusing, and replacing the Hague Rules will create another half century of litigation to interpret the new treaty.[155]

To the contrary, shippers maintain that the Hamburg Rules will result in *less* litigation due to removal of the nautical fault defenses, the introduction of the presumed fault standard, and increased time limits.[156] Extensive litigation is not required, shippers argue, to determine what the Hamburg standards of liability means.[157] Comparing the Hamburg standards to those of the Warsaw Convention, shippers comment that no oppressive litigation or claims payments have been reported.[158]

I. Economic Implications of the Regimes

Carriers maintain that adoption of the Hamburg Rules would necessarily lead to higher costs both in the short term and the long run.[159] In contrast, shippers argue that Hamburg *must* result in lower costs for them since it eliminates double insurance on the same risk.[160] But after five years of futile searching for reliable data, both sides abandoned the effort to resolve the economic argument, recognizing that neither economic proposition is provable to its opposition.[161]

J. The Ongoing Stalemate

As the conflict was summarized in 1992 by Professor Joseph Sweeney of Fordham University Law School:

> Because theoretical positions for or against the alternative solutions are wedded to economic self-interest, we have reached the point where organized shippers (something hardly possible before changes in the antitrust law in 1984) and organized carriers (carriers have always been very effectively organized) are glaring at each other and saying *NEVER*. The voice of the insurance industry is also not heard as the voice of experience but rather the voice of self interest as P&I clubs — responsive to their shipowner members'

154. *Status of the Hamburg Rules*, *supra* note 117, at 4 para. 20; *Oversight Hearing*, *supra* note 34, at 126.

155. *American Flag Ship Position Paper*, *supra* note 120 at 235.

156. *Shipper Comments*, *supra* note 132, at 69.

157. *Id.*

158. *Id.*

159. *See* Moore, *The Hamburg Rules*, 10 J. Mar. L. & Com. 1 (1978). *See also* Sweeney, *supra* note 7, at 530; George A. Chandler, *A Comparison of COGSA, the Hague-Visby Rules and the Hamburg Rules*, 15 J. Mar. L. & Com. 233, 237 (1984).

160. *See* Sweeney, *supra* note 7, at 531.

161. *Id.*

concerns — and cargo insurers — forced to justify their continued existence — have been unable to present a convincing rationale for doing nothing.[162]

III. Proposals for World Uniformity

At this time, most of the United States' trading partners have adopted the Hague-Visby Amendments.[163] These include such commercial allies as Australia, Canada, Japan, Belgium, China, Denmark, France, Germany, Hong Kong, Italy, Netherlands, Norway, Spain, Sweden, Switzerland and the United Kingdom, an estimated 63.9 percent of U.S. trade.[164]

The 22 nations adhering to the Hamburg Rules to date are generally developing nations with an import-export focus, estimated at less than 2 percent of U.S. trade.[165] Ship owning interests often raise the criticism that the Hamburg Rules have only been adopted by a minuscule portion of the world's foreign trade, with no major commercial power adopting the rules.[166] However, as commented by Professor Sturley, the U.S. adoption of the Hamburg Rules would undoubtedly be a major factor in their gaining wide-spread international acceptance.[167]

Some U.S. trading partners have compromised with variations of the trigger approach, ratifying Hague-Visby immediately and adopting Hamburg at a later time. However, most recent enactments of Hague-Visby by other countries have included custom-tailoring in the domestic legislation.[168] Some states have adopted, and others are about to adopt, laws that combine elements of the Hague and Hamburg approaches. Those laws, unfortunately, are far from uniform in combining the two regimes.[169]

A. Australian Carriage of Goods by Sea Act 1991

For example, Australia enacted its Carriage of Goods by Sea Act in 1991 under which the Visby Amendments with the SDR Protocols were ratified immediately, with automatic adoption of the Hamburg Rules in

162. Joseph C. Sweeney, *The Uniform Regime Governing the Liability of Maritime Carriers*, 13 (unpublished lecture prepared for Ente Colombo '92 Conference on Current Issues in Maritime Transportation held in Genoa) reprinted in *Oversight Hearing*, *supra* note 34, at 155-156.

163. *Basic Cargo Damage*, *supra* note 16, at 2-23.

164. *Oversight Hearing*, *supra* note 34, at 42-44.

165. *Id.* at 40.

166. *E.g.*, *Oversight Hearing, supra* note 34, at 55 (*Statement of American Institute of Marine Underwriters*, June 24, 1992).

167. *Basic Cargo Damage*, *supra* note 16, at 2-24 n. 9.

168. Chandler Memorandum, *supra* note 99, at 2.

169. *See Status of the Hamburg Rules, supra* note 117, at 2.

three years.[170] In its bill the Australian Parliament pointed out that Visby and SDR Protocol do not alter the inherent balance of liability between shipper and carrier.[171]

The Australian Parliament commented that under Hamburg carrier liability is extended to reflect the different categories of cargo now carried, new technology and loading methods, and other practical problems incurred by shippers such as losses incurred through delays in delivery.[172] The deferred implementation of the Hamburg Rules is necessary, the Australian Parliament stated, as they had not yet come into force internationally and do not provide a viable alternative marine cargo liability regime at this time.[173]

B. Canadian Carriage of Goods By Water Act 1993

In 1993 Canada enacted its Carriage of Goods by Water Act, implementing the 1968 Visby Amendments and the 1979 Special Drawing Rights Protocol immediately. The law also includes provisions for future adoption of the 1978 Hamburg Rules.[174] The Act will require the Minister of Transport to conduct a review within five years to determine whether the Hague Visby Rules should be replaced by the Hamburg Rules. Thus the Act allows Canada to implement new liability rules as Canada's trading partners adopt these conventions. The Minister called it a staged approach with respect to the two international conventions. Canada naturally would like to move in concert with the United States, because the United States is Canada's second largest trading partner in terms of waterborne trade.[175]

C. Korean Carriage of Goods Law

Korea also took liberties with the Hague-Visby Amendment.[176] Article 789 of the Korean Carriage of Goods Law for Maritime Commerce contains 11 defenses available to a carrier.[177] Significantly, the Korean version of Visby has specifically eliminated the nautical fault and fire defenses.[178] The Korean law does not allow a shipowner to limit his liability

170. 1991 Austl. Acts 160 (October 31, 1991). As of this writing, Australia has not yet implemented the Hamburg Rules.

171. *See Oversight Hearing, supra* note 34, at 170 (Explanatory Memorandum to Australian Carriage of Goods By Sea Bill).

172. *Id.* at 171.

173. *Id.*

174. Acts of the Parliament of Canada, Vol. 1 Ch. 21, Bill No. C-83 (1983).

175. *Oversight Hearing, supra* note 34, at 128.

176. Chandler Memorandum, *supra* note 99, at 2.

177. *See* Korean Commercial Code, Ch. IV, § 1, at Art. 787-89.

178. *Id.*

for delay in the carriage of sea cargo.[179]

D. The Scandinavian Maritime Codes

Thus far the most radical departure has occurred in the Scandinavian countries who have incorporated much of the Hamburg Rules in their version of Hague-Visby.[180] Even the Scandinavian countries, "with their long history of supporting international uniformity in this field, have adopted legislation . . . that strikes a compromise between Hague-Visby and the Hamburg Rules."[181]

Finland, Norway, Sweden and Denmark believe that the Hamburg Rules look to the future, and are implementing as much of the Hamburg Rules in the new legislation as is allowed by Hague-Visby.[182] The legislation is expected to give rise to many conflicts and much uncertainty in the industry when coming into force.[183] The major changes in the new Scandinavian codes include the following, as aptly summarized by Christopher Lowe and Ulrik Andersen:

> In the new codes, the so called tackle-to-tackle principle the Hague-Visby rules is abandoned. The carrier will no longer be allowed to exclude liability for damage to or loss of the goods occurring, at the loading port, before the goods pass the ship's rail or, at the unloading port, after passing of the rail. The carrier will be liable for as long as it is in charge of the goods at the port of loading, during the carriage and at the port of discharge. In other words, the Scandinavian countries have adopted the compulsory period of responsibility of the Hamburg Rules, which cannot be contracted out of.
>
> The Scandinavian countries also give up the catalogue of defenses available to the carrier in the Hague-Visby Rules. Instead, the carrier must prove that its servants and agents took all measures that could reasonably be required to avoid the damage in order for the carrier to avoid liability for damage to the goods whilst they were in its charge. This rule has also been picked from the Hamburg Rules, but unlike the Hamburg Rules, the Scandinavian countries will continue to keep the carrier's defenses in respect of fire and navigational mismanagement of the ship.
>
> The stricter provisions in the Hamburg Rules relating to carriage of live animals and deck cargoes have also found favour in Scandinavia. According to the new Codes, the carrier can no longer exclude liability for damage to or loss of live animals.
>
> . . .

179. *Id.* at Art. 746.

180. Chandler Memorandum, *supra* note 99, at 2.

181. *See Basic Cargo Damage*, *supra* note 16, at 2-26 n. 19.

182. *See* Scandinavian Codes, Ch. 13, *On Carriage of General Cargo. See also* Christopher Lowe & Ulrik Andersen, *Scandinavia: The Scandinavian Compromise — Maritime Codes*, Lloyd's List (1994) [hereinafter *The Scandinavian Compromise*].

183. *Id.*

> Similarly, the carrier will no longer be allowed to exclude liability for loss of or damage to deck cargo, and cargo may only be carried on deck under very special circumstances. If the carrier carries a cargo on deck in breach of an express agreement with the shipper to carry it below deck, the carrier will lose his right to limit its liability.
>
> The new Codes maintain the limitation amounts of the Hague-Visby Rules for damage to or loss of goods. The carrier may limit his liability to 2 SDR per kg of the goods or to 667.67 SDR per package, whichever is the higher amount.
>
> . . .
>
> The Scandinavian Codes also adopt the jurisdiction and arbitration provisions of the Hamburg Rules, ensuring a plaintiff that it can always commence proceedings in a minimum number of places: where the defendant has its principal place of business; where the transport agreement was entered into; or, where the goods were taken over or delivered by the carrier.[184]

E. The Chinese Maritime Code

China has also enacted legislation, which combines the characteristics of both Hague-Visby and Hamburg.[185] In an attempt to follow those principles recognized internationally in the shipping world in its 1993 Maritime Code, China tailored carriers' main responsibilities based primarily upon the Hague-Visby Rules, while also adopting significant qualities of Hamburg.[186] The pertinent provisions of the new Chinese act are as follows:

(1) The law adopts the Hamburg definitions of carrier, to include both contracting carrier and the actual carrier;[187]

(2) Modified from the Hamburg Rules, the carrier has responsibility over goods in containers from the time of receiving the goods at port, until the goods are delivered at the port of discharge. With non-container goods, the carrier is responsible from the time of loading until the time of unloading, derived from Hague-Visby.[188]

(3) The carrier is liable to the shipper for delay as per Hamburg, but damages are limited to the (actual) freight payable for the goods delayed.[189] There is no 2 1/2 times enhancement factor as in the Hamburg Rules;

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184. *Id.*

185. *See Carriage of Goods by Sea, Chapter 4 of the Chinese Maritime Code 1993).*

186. Yin Dongnian, et al., *The Characteristics of the Law of Contract Relating to Carriage of Goods by Sea of the Chinese Maritime Code, 1993*, Conference Materials for the International Conference on Maritime Law, 2-4 (1994).

187. Chinese Maritime Code, *supra* note 185, at Art. 42.

188. *Id.* at Art. 46.

189. *Id.* at Art. 50, 57.

(4) Following the SDR Protocol of Hague-Visby, the carriers' liability for loss or damage to goods is 666.67 SDRs, or 2 units of account per kilogram, whichever is higher.[190]

(5) Twelve (12) defenses to carrier liability are maintained in the new Chinese code, derived from the 17 exceptions of the Hague Rules. Notwithstanding, as provided in the Hamburg Rules, the *carrier* shall bear the burden of proof for these defenses.[191]

(6) The carrier is liable for loss or damage to deck cargo, unless the shipper had contractually agreed to deck carriage beforehand. This provision is derived from Article 9 of Hamburg.[192]

F. MLA-Proposed U.S.Carriage of Goods By Sea Act of 1995

A recent attempt for industry consensus in the United States has been made by the Maritime Lawyers Association. In February 1995 the MLA proposed a draft bill titled the Carriage of Goods by Sea Act of 1995.[193]

The proposal appears to be an attempted harmonization of Hague-Visby and Hamburg, although primarily based on Hague-Visby. A problem with the MLA proposal of this sort is that for unilateral action to take place the United States would probably have to denounce the Hague-Visby Rules, a step which is viewed as not conducive to international uniformity.[194]

The MLA proposed bill is modeled from the form of the existing 1936 COGSA statute. Key features and revisions to COGSA are as follows:

(1) The nautical fault defense of 46 U.S.C. § 1304(2) has essentially been eliminated, as a carrier would be liable where the cargo claimant presents proof of negligence in the navigation or management of the ship. Section 4(2)(a) of the proposal provides:

(2) The carrier and their ships shall not be responsible for loss or damage arising or resulting from —

(a) Act of the master, mariner, pilot, or the servants of the ocean carrier in the navigation or in the management of the ship, *unless the*

190. *Id.* at Art. 56.

191. *Id.* at Art. 51.

192. *Id.* at Art. 53.

193. *See* Carriage of Goods by Sea Act §§ 1 to 16, 46 U.S.C. app. §§ 1300 to 1315 (Proposed Official Draft, Mar. Law. Assoc. 1995) [hereinafter *Proposed Changes to COGSA*]. The M.L.A. proposal consists of two appendices; the first is the proposed Act, the second is a copy of the Proposed Act striking out material to be deleted from the existing Act, and underlining new language. Further references to this material are to page numbers in the second appendix.

194. *Cf.* Sweeney, *supra* note 7, at 534.

person claiming for such loss is able to prove negligence in the navigation or management of the ship; (emphasis added)

(2) The fire defense is limited, as a carrier is liable if the cargo claimant proves the fire was caused by actual fault or privity of the carrier;[195]

(3) The balance of the 17 defenses are restricted to circumstances only where loss was not caused by the actual fault and privity of the carrier and/or its agents, the burden of proof for the defense *falling on the carrier*;[196]

(4) The carrier is proportionately liable for loss or damage shown to be caused by its agents;[197]

(5) Absent any proof of cause of loss or damage, the carrier is liable for one-half of the loss or damage;[198]

(6) A carrier is liable for loss or damage from any unreasonable deviation in saving or attempting to save life or property at sea. If deviation is reasonable, the exemption remains;[199]

(7) Limitation of damages to 666.67 SDRs per package or two SDRs per kilogram, whichever is higher. These limits do not apply if a greater value was previously declared on a contract of carriage;[200]

(8) Contracts of carriage include both negotiable and non-negotiable bills of lading, whether printed or EDI;[201]

(9) The definition of carrier would encompass both shipowner and charterer, as well as the contracting carrier and performing carrier;[202]

(10) Carriers would be liable from time of receipt to time of delivery of goods;[203]

(11) The definition of goods does not exclude cargo by which the contract of carriage is carried on deck;[204]

(12) Notice of damage or loss can be tendered to the carrier until delivery of the goods to the person entitled to receipt, or if not apparent, within three days thereafter;[205]

(13) Inclusion of a three-month period for a carrier to bring an indemnification or contribution claim against another party; and allowing

195. *Proposed changes to COGSA, supra* note 193, at 14 (if adopted, this provision will be codified at 46 U.S.C. app. § 1304(2)(b)).

196. *Id.* at 13-17 (if adopted, this provision will be codified at 46 U.S.C. app. § 1304).

197. *Id.* at 15-16 (if adopted, this provision will be codified at 46 U.S.C. app. § 1304(2)).

198. *Id.* at 13-17 (if adopted, this provision will be codified at 46 U.S.C. app. § 1304).

199. *Id.* at 16 (if adopted, this provision will be codified at 46 U.S.C. app. § 1304(4)).

200. *Id.* at 16-17 (if adopted, this provision will be codified at 46 U.S.C. app. § 1304(5)).

201. *Id.* at 2 (if adopted, this provision will be codified at 46 U.S.C. app. § 1301(b)).

202. *Id.* at 1-2 (if adopted, this provision will be codified at 46 U.S.C. app. § 1301(a)).

203. *Id.* at 2 (if adopted, this provision will be codified at 46 U.S.C. app. § 1301(e)).

204. *Id.* at 2 (if adopted, this provision will be codified at 46 U.S.C. app. § 1301(c)).

205. *Id.* at 12 (if adopted, this provision will be codified at 46 U.S.C. app. § 1303(6)).

one year to file an arbitration claim following delivery;[206]

(14) Invalidating any prior covenants providing a choice of foreign forum for litigation if goods originated or passed through the United States;[207]

(15) There is no liability for delay in delivery of goods.

The MLA proposal attempts to strike a compromise between carrier and shipper interests. To date, there has been no formal action taken on the MLA's proposal.

IV. What Should the United States Pursue for a New Legal Regime?

Though having served shipping and international trade well for years, the Hague/COGSA regime is now substantially outdated.[208] It was designed for marine transportation as existing before the late 1920s, and is unsuitable for entry into the 21st century.[209] The original drafters of the Hague Rules could not have possibly anticipated the electronic data revolution, advanced satellite telecommunications, the containerization age, the elimination or reduction of most tariffs on trade, the world's emergence into a global economy with GATT and NAFTA, or the proliferation in international ocean transport of goods.

The importance of the ocean shipping industry to the United States cannot be understated.

> The United States is the world's largest trading nation. In 1990, U.S. exports were valued at $393.6 billion, and U.S. imports at $495.3 billion. Hence, U.S. international trade amounted to $888.9 billion during 1990. These goods were transported into or out of the United States by surface, air, or ocean transportation modes. Ocean transportation, which consists of cargo carried by liner vessels, non-liner vessels (tramps) and tankers, totaled $445.2 billion in 1990.[210]

The implementation of GATT and NAFTA in 1994-95 is expected to result in a dramatic increase of international ocean shipping for the United States. These multilateral trade pacts essentially eliminate most tariffs and many restrictions in international commerce.[211]

With the passage of NAFTA and GATT, the important role ports

206. *Id.* at 12 (if adopted, this provision will be codified at 46 U.S.C. app. § 1303(6)(d)).

207. *Id.* at 13 (if adopted, this provision will be codified at 46 U.S.C. app. § 1303(8)(b)).

208. *Oversight Hearing*, *supra* note 34, at 127.

209. *Id.*

210. Andrew H. Card, Jr., U.S. Secretary of Transportation, *Report to the President and Congress of the Advisory Commission on Conferences in Ocean Shipping*, (Washington, D.C., April 10, 1992) at 17. [hereinafter *Card Report*].

211. *Senate Approves GATT Trade Bill 76-24, Clearing Way for WTO Early Next Year* 11 BNA Int'l Trade Rep. 1874 (1994); *House, Senate Conferees Complete Work on GATT Bill*, 11

and marine transportation play in the economic well-being of the United States will only grow.

> Foreign trade is an increasingly important part of the U.S. economy, currently accounting for over 20 percent of our Gross Domestic Product. U.S. exports and imports are projected to increase in value from $454 billion in 1990 to $1.6 trillion in 2010, while the volume of cargo is projected to increase from 875 million metric tons to 1.5 billion in 2010.[212]

Various international shipping lines are now experiencing substantial increases in cargo volume and net profits from ocean shipping, which is attributed to the finalization of GATT and NAFTA.[213] Capitalizing on the 1994-95 agreements liberalizing world trade (*i.e.* GATT and NAFTA), which are expected to increase trade at U.S. ports by significantly reducing or eliminating tariffs, major U.S. port cities such as Baltimore, Seattle and Tacoma already report significant expansion of international cargo trade ranging from three percent to 16 percent.[214]

The United States can no longer proceed under an outmoded risk allocation system. Shipper and carrier interests, by necessity, must be prepared to make compromises for this purpose. With the significant growth of international ocean shipping as discussed above, an increase of cargo claims and litigation will be determined within an ancient system that is no longer prepared to efficiently, fairly and effectively resolve these disputes.

Due to strongly opposing sentiments of carrier and shipper interests, it is questionable whether the U.S. Congress will ever have the impetus to enact either the Hague-Visby or Hamburg regime. Notwithstanding, all shipping interests agree that COGSA has long been outmoded, and that devising a new legal regime is essential.

What type of liability scheme would be fair, realistic and serve the better long-term interests of American society? In this regard, there is no reason why the United States is constrained to rigidly adopt either Hague-Visby or Hamburg *in toto*, without exploring combinations, compromises and other alternatives. If substantive variations of these rules are contemplated, it may be necessary for the United States to denounce the particular compact being revised.[215] In addressing these issues, vari-

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BNA INT'L TRADE REP. 1470 (1994). *See also Over 100 Nations Sign GATT Accord to Cut Barriers to World Trade*, 11 INT'L TRADE REP. 610 (1994).

212. *Hearing before the Subcomm. on Water Resources and Environment of the House Comm. on Transportation and Infrastructure*, 105th Congr., 2d Sess. (1995) (statement of the American Association of Port Authorities by Erik Stromberg, President).

213. *Reversal of Fortunes for Liner Industry*, BUS. TIMES, May 5, 1994, at 18.

214. *As Tariffs Fall, Cargo Rises*, BALTIMORE SUN, January 1, 1995, at 2E; *Report Forecasts Port Volumes Will double Over Next 20 Years*, THE NEWS TRIBUNE, March 4, 1995, at B4.

215. *C.f.* Sweeney, *supra* note 7, at 534.

ous policy factors should be considered.

A. World Uniformity

It serves the international trade community of coming decades to promote a new legal regime upon the framework of the Hague-Visby Amendment with its SDR Protocol. As most of the industrialized world and trading nations have gravitated towards Hague-Visby, there are strong considerations for proceeding in that direction. However, the Hamburg Rules have some attractive attributes as well. Enactments of other countries, as discussed above, attempt an equitable balancing of interests between carriers and shippers.

B. Strong U.S. Flag Fleet

National merchant fleets not only contribute to the prestige of countries that sponsor them, they are often viewed as essential to protecting national security and guaranteeing unimpeded access to international markets on reasonable terms. Extensive government intervention in the support of national fleets, is said to be the most distinguishing feature of the ocean shipping industry.[216] "A basic goal of the [U.S.] Shipping Act of 1984 is to preserve and encourage the development of an economically sound and efficient United States-flag liner fleet capable of meeting national security needs."[217]

An important factor that must necessarily be considered is the survival of the "U.S. flag fleet which has experienced a marked decrease in the number of American-flagged carriers since 1984. Regrettably, this trend is continuing."[218]

In response to 1992 reports that two of our largest liner companies would leave the U.S. flag and possibly change their corporate status by 1995, U.S. Representative Robert W. Davis noted that the liners' decision would be "based on many factors — but principally centers around their need to be competitive in the world market."[219] He stressed the importance of a "continued and significant presence of a U.S. flag, U.S. owned and U.S. crewed liner operation."[220] Even the shippers, Congressman Davis maintained, the polar opposite of carriers, "would rue the day when there are no U.S. carriers 'at the table.'"[221] To prevent the loss of our U.S. flag fleet, he suggested that we revisit regulatory and economic approaches, to maintain the delicate balance between the carriers and

216. *See Card Report, supra* note 206 at app. E-24.
217. *Id.* at 170 (statement of U.S. Representative Walter B. Jones).
218. *Id.* at 175 (statement of U.S. Representative William J. Hughes).
219. *Id.* at 173-74 (statement of Representative Robert W. Davis).
220. *Id.*
221. *Id.*

shippers.[222]

On this note, a strict Hamburg regime, expected to "provide for an increase in carrier liability,"[223] might not be a source of encouragement for a U.S. flag fleet. It is perhaps better, considering the important national interest of the United States of maintaining a U.S. flag fleet, to pursue a more balanced approach to risk allocation.

C. Compromise on the "Nautical Fault" Defense

Undoubtedly one of the major sources of controversy between shippers and carriers is the nautical fault defense, effectively exonerating shipowners from the negligence of their captains and crew in the navigation and management of the ship. The nautical fault defense is said to be at odds with traditional American tort concepts, as well as the liability laws governing the trucking and railroad companies.

As was testified in 1992 before the House Subcommittee on Merchant Marine by Roger Wigen, on behalf of the National Industrial Transportation League (a shipper's organization):

> The world has changed a great deal since the Hague Rules were adopted in 1924. Wooden ships have given way to highly automated steel ships. Marconi's wireless has been replaced with satellite communications. Gangs of longshoremen lifting loads of breakbulk cargo have yielded to lines of intermodal containers hoisted aboard ships by cranes. Formerly isolated national economics now compete fiercely in global commerce.
>
> However, the laws governing international maritime cargo liability have failed to keep pace. They seem to be tied to a philosophy which believes a carrier has no liability for cargo once a seaworthy ship leaves port, even if the captain or crew are guilty of negligence. These laws accept the premise that once at sea, the carrier has no control over its vessel, captain, and crew. While this may have been true in the first third of this century, it certainly is not true today. Telecommunication advances allow maritime liner companies to have as much control over its vessel and crew as do trucking and railroad companies.[224]

The nautical fault defense might be revised, as its historic rationale has been virtually eliminated. The ship owner's lack of control over his vessel, captain and crew while out at sea has become a diminishing problem, due to satellite telecommunications and other advanced technologies which enable the shipowner to continuously monitor and control the operation of his vessels through regular verbal, visual and radar communications.

As there may be certain situations in which the historic rationale for

222. *Id.*
223. *Oversight Hearing*, *supra* note 34, at 31.
224. *Id.* at 21-22 (statement of Roger Wigen).

the nautical fault defense would still be applicable, a fair and logical compromise might be reached on this issue by creating a *qualified* nautical fault defense. Circumstances may still exist where the shipowner is unable to exercise reasonable control over his vessel, captain, and crew, or where the shipowner is unaware of facts and circumstances leading to the negligence of his captain and crew in their operation and management of the vessel. For example, evidence showing an unexpected technical break in communications preventing conveyance of a ship owner's directions to his captain or crew, or a ship owner's lack of knowledge of their negligent propensities due to concealment, might suffice to establish the defense.

Thus, rather than maintain a complete exemption, a *qualified* nautical fault defense would be equitable to both sides to the debate, and still retain its traditional rationale. The shipowner should have the burden of presenting evidence to establish his lack of control or lack of knowledge of facts under these circumstances.

D. An Effective & Economical Loss Compensation System

The better interests of a commercial society may be advanced with a strong first-party claims resolution system, primarily reliant on cargo damage coverage. Once damage to freight is shown to be a covered loss, a shipper's own cargo insurer will routinely investigate and evaluate the claim, promptly compensating the shipper. It can be expected to be a relatively quick process. A cargo insurer can always pursue contribution, indemnification and/or subrogation against any other responsible parties, including the carrier. Hague-Visby seems to allocate the greater risk of loss upon the shipper, essentially furthering a strong first-party indemnity system. In contrast, the Hamburg Rules create a new regime of third party rights and remedies against the carrier, shifting somewhat to a third-party recovery process.

Despite the shift of risk in the Hamburg Rules favoring shippers, it is always the shipper that ultimately pays for the loss.[225] Even if the Hamburg Rules are adopted in the United States, the need for cargo damage insurance for the shipper would not be eliminated.

Cargo insurance, unlike shipowners' protection and indemnity insur-

225. *See* William Warren, *Red Hot Issue or Red Herring? Legal Liability and Cost of Cargo Insurance*, 34 Am. Shipper 40 (1992) (where a maritime attorney expressed a view not long ago that "the whole issue is a red herring, because no matter who buys coverage, shippers end up paying the premium. Increasing liability may be shrewd public relations [for the carrier], but it is an essentially meaningless gesture . . . because increased premiums will eventually be passed along to the shipper." According to that maritime attorney, the party in the best position to purchase cargo insurance is the shipper, because only the shipper has certain knowledge of what is being shipped. Thus, it might be that shippers and carriers really have little in substance to argue about anyway).

ance, is a form of property insurance ordinarily paid promptly on proof of loss without regard to liabilities, which may be the subject of later disputed claims. This feature in itself is of great value to cargo owners, who are unlikely to give it up for the privilege of pursuing third-party claims; especially since such third-party claims will be dependent upon the proof of liability under new, unclear, and controversial rules, and with a new network of claims agents responsible mainly to foreign protection and indemnity underwriters.[226]

V. Conclusion

The United States is the world's largest trading nation, with international trading approaching $1 trillion annually. The importance of ocean transportation to U.S. foreign trade is great, as approximately half of that trade consists of cargo carried by liner vessels.

The emergence of the United States into the global economy of the 21st century with GATT and NAFTA underscores the need for an effective and uniform risk allocation system for cargo loss, damage and delay. The United States should consider adoption of a Hague-Visby regime incorporating aspects of Hamburg, fairly balancing the interests of carriers and shippers.

226. *American Flag Position Paper*, *supra* note 120, at 254.