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Cover Page Footnote

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INTERNATIONAL OCEAN SHIPPING AND RISK ALLOCATION FOR CARGO LOSS, DAMAGE AND DELAY: A U.S. APPROACH TO COGSA, HAGUE-VISBY, HAMBURG AND THE MULTIMODAL RULES

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I. INTRODUCTION

The international trade community consists of cargo-owning nations and shipowning nations, with most nations being both.[1] Conflicts often arise between shipowner interests[2] and cargo-owning interests[3] over allocation of risk for loss, damage and delay of sea-borne cargo, raising the following issues: (1) who bears the risk, (2) under what rules of risk allocation should the world's sea-borne cargo cross the oceans, (3) should the shipowner have liability for loss or damage while the goods are in their possession, and (4) should governments withdraw from trying to regulate a commercial transaction and leave it to the parties to determine the extent of liability.[4]

The economic conflict over risk allocation between carriers and shippers goes back centuries. The earliest recorded occurrence of economic conflict was in the 1680s, when shipowners and merchants met at Lloyd's Coffeeshop in England to wrangle over terms of all-purpose marine insurance policies and the risks for loss and damage to cargo.[5] During the 19th century, these differences became more pronounced as carriers formed the Shipowners Mutual Protection Society in England in 1855, and subsequently in 1874 the first modern P&I Club, the Steamship Owners Mutual Protection and Indemnity Association.[6]

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1. Scott M. Thompson, *The Hamburg Rules: Should They Be Implemented in Australia and New Zealand?*, 4 BOND L. REV. 168 (1992); *see also* 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).

2. "Shipowner interests" are the carriers, operators, charterers, the P&I Clubs and the hull insurers.

3. "Cargo-owning interests" include the shipper/seller, buyer/consignee and cargo insurers.

4. *See* Thompson, *supra* note 1, at 168.

5. *Id.*; *see also* Sweeney, *supra* note 1, at 513 n.4.

6. *See* Sweeney, *supra* note 1, at 513-14; *see also* Henry E. Cabaud, Jr., *Cargo Insurance*, 45 TUL. L. REV. 988, 989 (1971).

The general maritime law relating to carriage of goods is of ancient origin.[7] Traditionally, through Roman law, the Middle Ages with its "Law Merchant," the laws of Visby, of Oleron and the Hansa Cities, the merchant and the shipowner each shared in the dangers—the voyage was considered a common adventure.[8] Merchants often accompanied their goods on board. The shipowner was bound to furnish a seaworthy vessel and a competent crew, but if the vessel was lost due to perils and dangers of the sea, shipowner and merchant suffered together.[9]

Until just a few decades ago, maritime transport was still an adventure shared by carriers and shippers. Owing to the whims of nature, poorly trained masters and crew, enemy attacks, poor communications and inadequate navigational aids, the risks of an ocean voyage were many and perpetually threatened both the carriers' and shippers' interests. It was considered reasonable, and even logical, that the risks should be shared more or less equally.[10]

After centuries of uncertainty and controversy concerning the rights and liabilities facing carriers and shippers for loss and damage to cargo, the law has hardly been settled in the United States and many other parts of the world. Despite the rapid growth and importance of ocean shipping to the international economic well-being of an emerging global economy, there is no worldwide uniformity of laws governing shipowners' liabilities. The establishment of a consistent scheme of rights, responsibilities and liabilities of carriers and shippers is essential for movement into the 21st century.

A. The United States In Ocean Shipping

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 by surface, air, or ocean transportation modes amounted to $888.9 billion during 1990. Ocean transportation alone, which consists of cargo carried by liner vessels, non-liner vessels (tramps) and tankers, totaled $445.2 billion in 1990.[11]

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7. Robert Rendell, *Report on Hague Rules Relating to Bills of Lading*, 22 INT'L LAW. 246, 247 (1988) [hereinafter ABA Reports].

8. *Id.*

9. *Id.*

10. Gerard Verhaar, *Which Rule Is Best For You?*, 36 AM. SHIPPER 44 (1994).

11. ANDREW H. CARD, JR., U.S. SECRETARY OF TRANSPORTATION, REPORT TO THE PRESIDENT AND CONGRESS OF THE ADVISORY COMMISSION ON CONFERENCES IN OCEAN SHIPPING 17 (1992) [hereinafter CARD REPORT].

The introduction of the steamship in the 19th century radically transformed ocean shipping, and led to the creation of the modern steam-powered liner system. It was around this time period, beginning at the age of steam propulsion, that the legal community recognizd the economic conflict between cargo-owners and shipowners over risk allocation.[12]

Until the late 1960's or early 1970's, the liner trades used general cargo or break bulk ships. After the truckload or boxcar load of cargo had been delivered to the pier, these break bulk ships were loaded by breaking the truckload into small quantities that were lifted onto the ship by a sling and boom, and then stowed.[13]

In the late 1960's the liner industry was dramatically changed by the introduction of containerization. Containers are large metal boxes that can be placed on a tractor-trailer chassis, loaded at the exporter's plant, sealed, shipped by truck or train to the port, lifted onto a container ship by a dockside crane, and stacked in specially designed slots.[14] The container itself is then unloaded at the destination. This is all accomplished without directly handling the cargo inside the container.[15]

The introduction of containers represented a revolution in cargo handling, and continues to have an impact in the 1990's on shipping patterns, shipping companies and conferences. Before containerization, shipping was very labor-intensive, with limited ship size, increasing wage rates and slow port turnaround.[16] By 1960, labor costs in port accounted for 80% of the total cost of a typical voyage.[17] It was estimated that the average handling time per voyage fell from 157 hours for a non-containerized ship to 31 hours for a containerized ship, reducing cargo handling costs 65 to 80%.[18] All of the major trade lanes now are containerized, and the impact of containerization has shifted to developing intermodal services—the efficient merging of different transportation modes into a seamless whole.[19]

Vessels must be specially designed or adapted to carry containers. Containerization is highly efficient for carriers because it significantly reduces the time and labor needed to load and unload a ship. It is preferred by shippers because it means faster delivery and,

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12. Sweeney, *supra* note 1, at 512.
13. *See* CARD REPORT, *supra* note 11, at 17.
14. *Id.*
15. *Id.*
16. *Id.* at 9.
17. *Id.*
18. *Id.*
19. *Id.*

by reducing handling, it minimizes breakage and pilferage.[20] Today, virtually all liner cargo in the largest U.S. foreign trades are moved by containers.[21] Certain U.S. foreign trades remain substantially uncontainerized because of inadequate financing to purchase the necessary equipment and facilities, the lack of an infrastructure, or the nature of the cargo.[22]

B. Transition to a Global Economy

The implementation of two major multilateral trade pacts in 1994 can be expected to result in a dramatic increase of international ocean shipping for the United States. In December 1994, the United States and over 100 other nations ratified the Uruguay Round of the General Agreement on Tariffs and Trade ("GATT"). GATT creates a World Trade Organization ("WTO") that essentially eliminates most tariffs and many restrictions in international commerce.[23] GATT is viewed as having "an effect on 'generations to come' because it will encourage trade among nations."[24] Included in the potential benefits of GATT is an estimated global income gain of more than $500 billion due to the reduction of tariffs and quotas.[25] By the year 2005, the liberalization of trade will produce an estimated $122 billion gain in annual income for the United States alone.[26]

Similarly, the North American Free Trade Agreement ("NAFTA"), implemented on January 1, 1994 by the United States, Mexico and Canada,[27] creates a free trade zone of over 370 million people comprising a market of over $7 trillion.[28] NAFTA will make North America the largest and richest market in the world.[29] As

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20. *Id.* at 17.

21. Certain ores, grains and wood products cannot be shipped via containers and must be shipped breakbulk. Additionally, certain cargoes must be shipped in refrigerated container facilities. Also, wheeled cargo trailers, containers with chassis, and self-propelled equipment which can be driven onto and off a vessel over ramps are transported by roll-on/roll-off (ro/ro) vessels. Ro/ro vessels are often used to transport automobiles. CARD REPORT, *supra* note 11, at 52 n.3.

22. *See supra* note 21.

23. Gary Yerkley, *Senate Approves GATT Trade Bill 76-24, Clearing Way for WTO Early Next Year*, 11 Int'l Trade Rep. (BNA) 1874 (1994); House, Senate Conferees Complete Work on GATT Bill, 11 Int'l Trade Rep. (BNA) 1470 (1994); *see also* 11 Int'l Trade Rep. (BNA) 610 (1994).

24. Gary Yerkey, *U.S. Companies Say GATT Trade Pact Will Boost Business, Jobs for Decades*, 11 Int'l Trade Rep. (BNA) 1876 (1994).

25. *Sutherland Says Uruguay Round Income Benefits to Top $500 Billion by 2005*, 11 Int'l Trade Rep. (BNA) 1533 (1994).

26. *Report Says Uruguay Round Pact Will Boost World Income $510 Billion*, 11 Int'l Trade Rep. (BNA) 1757 (1994).

27. Jay L. Camillo, *Mexico: NAFTA Opens Door to U.S. Business*, 115 BUS. AM. 14 (Mar. 1994).

28. Bill Richardson, *With NAFTA, Opportunities Will Be Bright for U.S. Business*, 7 HISPANIC 132 (1994).

29. *NAFTA Opens a New Era*, 82 NATION'S BUS. 24 (1994).

commented by U.S. Commerce Secretary Ronald H. Brown following Congress's ratification of GATT in December 1994: These treaties—like the GATT and the NAFTA—are responsive to the realities of global economies. We compete and win by removing tariff and non-tariff barriers, by moving to a day of global free trade, by making sure that our goods, products and services can be exported to our trading partners around the world.[30]

With the passage of NAFTA and GATT, the important role ports and marine transportation play in the economic well-being of the United States will certainly grow. Foreign trade is an increasingly important part of the U.S. economy, currently accounting for over 20% of our gross domestic product. By the year 2010, U.S. exports and imports are projected to increase in value from $454 billion in 1990 to $1.6 trillion, while the volume of cargo is expected to increase from 875 million metric tons to 1.5 billion.[31] Various international shipping lines are now experiencing substantial increases in cargo volume and net profits from ocean shipping that are attributable to the finalization of GATT and NAFTA.[32] Capitalizing on GATT and NAFTA, cities such as Baltimore, Seattle and Tacoma already report significant expansion of international cargo trade ranging from 3% to 16%.[33]

The commercial ports of the United States handle over 95% of international cargo.[34] Port activity links every community in the United States to the world market—enabling the marine industry to deliver imported goods more inexpensively to consumers across the nation and to create export opportunities.[35] Even if the economy slows down, profits in the U.S. transportation business should remain healthy in 1995. Railroads, truckers, airlines and shipping companies have all been doing more with fewer assets. Traffic volumes are up sharply. Rates are rising and profitability is strong. Returns on equity for the group jumped last year to almost 13% from a five-year average of 10%.[36]

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30. Yerkley, *supra* note 23, at 1874.

31. "Testimony February 7, 1995 Erik Stromberg, President, American Association of Port Authorities, House Transportation Water Resources and Environmental Water Resources Development Act," FEDERAL DOCUMENT CLEARING HOUSE CONGRESSIONAL TESTIMONY (Feb. 7, 1995) [hereinafter Stromberg].

32. *Reversal of Fortunes for Liner Industry,* BUS. TIMES, May 5, 1994 (Shipping Times Section), at 18.

33. Suzanne W. Sun, *As Tariffs Fall, Cargo Rises,* BALTIMORE SUN, Jan. 1, 1995, at 2. *Report Forecasts Port Volumes Will Double Over Next 20 Years,* NEWS TRIBUNE, Mar. 4, 1995, at B4.

34. Stromberg, *supra* note 31.

35. *Id.*

36. James R. Norman, *Transport,* FORBES, Jan. 2, 1995, at 194.

The intermodal shipping industry is also is experiencing rapid growth. Intermodal is the fastest growing part of the shipping business, up 15% in November 1994.[37]

Notwithstanding the tremendous growth of international ocean transportation, shipping concerns still await a uniform scheme for allocating and determining responsibility for loss, damage and delay of cargo and goods.

II. HISTORIC BACKGROUND OF CARGO DAMAGE LAW

A. Pre-Twentieth Century Developments

In the early 17th century, Sir John Davies, the Attorney General for Ireland under King James I, discussed the independent development of a body of maritime mercantile law in Great Britain:

> That until he understood the difference betwixt the Law Merchant and the Common Law of England he did not a little marvel that England . . . having so many ports and so much good shipping.what should be the cause that in the books of the common Law of England there are to be found so few cases concerning Merchants of ships. But now the reason thereof was apparent, for that the Common Law of the land did leave those cases to be ruled by another law; namely, the Law Merchant, which is a branch of the Law of Nations.[38]

The "Law Merchant" of early times comprised both the commercial and maritime law of modern codes, but was peculiarly applied to merchants and developed from the customs of merchants themselves.[39] These laws essentially concerned the mercantile and trading community, and were administered in special courts distinct from the ordinary courts of the land. Foreign merchants, over which the common law frequently held no jurisdiction, were subject to the Law Merchant.[40]

Even centuries earlier, the Law Merchant had defined the rights and liabilities of the carrier and shipper. In the sixth century after the founding of Rome, the sea carrier was made by Roman edict an "insurer" of the goods it carried. The sea carrier was viewed as preserving good faith, insuring the safety of the goods delivered, and

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37. *Moneyline: Analysts Worry As Manufacturers Move Jobs Overseas* (CNN television broadcast, Nov. 4, 1994); Intermodal is defined as "[o]f the conveyance of goods: making use of differing modes of transport during the journey between the place of dispatch and the destination." OXFORD ENGLISH DICTIONARY 1120 (2d ed. 1989).

38. ERIC FLETCHER, THE CARRIER'S LIABILITY 36-37 (1932).

39. *Id.*

40. *Id.*

preventing fraud and robbery.[41] The shipper might not know how his goods had been abstracted or damaged, nor whether there was anyone whom he could hold responsible. If there had been "culpa" on the part of the carrier, it could be easily concealed.[42] The reasoning behind the Roman law was that the carrier should be held liable for all loss and damage rather than the shipper being deprived of his remedy. In time, however, "exceptions" to carrier's liability for loss were admitted for shipwreck and piracy.[43]

By the sixteenth 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 or damage to cargo due to perils of the sea, pirates and unusually bad weather.[44] These circumstances were recognized as defenses by the year 1570, available to the shipowner or master who could establish the truth of his contentions.[45] 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 Law Merchant implied.[46] 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.[47]

By the early nineteenth century, general maritime law principles recognized that a cargo owner who shipped his goods by a marine carrier was given special protection.[48] In both common law and civil law countries, the carrier was held strictly liable unless it could prove "(1) that its negligence had not contributed to the loss and (2) that one of the four 'excepted causes' was responsible for the loss."[49] Thus, the carrier was liable if one of the four exceptions applied and the carrier had been at fault, but in all other cases the carrier was liable without fault. Amounting to "no fault" liability, a carrier at the

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41. *Id.*

42. *Id.*

43. *Id.* at 96-97. Carriers were held liable because they could best take precautions against such loss.

44. *Id.* at 51, 88.

45. *Id.* at 51.

46. *Id.* at 51, 88.

47. *Id.* at 99-100.

48. Michael F. Sturley, *Basic Cargo Damage Law: Historic Background*, 2A BENEDICT ON ADMIRALTY 2-1 to 2-3 (1995) [hereinafter Sturley, *Basic Cargo Damage Law*].

49. Michael F. Sturley, 1 THE LEGISLATIVE HISTORY OF THE CARRIAGE OF GOODS BY SEA ACT 3-4 (1990) [hereinafter Sturley, LEGISLATIVE HISTORY]. The four excepted causes include an act of God, an act of public enemies, shipper's fault, or inherent vice of the goods.

time assumed very broad liability for cargo under general maritime law, and was described as an insurer of the goods.[50]

However, 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.[51] To minimize their role as "quasi-insurers" of cargo damage and loss, carriers began to use the bill of lading for avoiding liability. By the late nineteenth century, bills of lading started to contain more exculpatory clauses to reduce or eliminate the carriers' responsibilities.[52] The bills of lading became so lengthy that it became difficult to ascertain rights and liabilities. Even bankers were "in doubt as to their security when discounting drafts drawn against bills of lading, cargo underwriters [had] not known the risks which they covered when insuring goods . . . and carriers and shippers [were] in constant litigation."[53] The exculpatory clauses typically included losses and damage from thieves, heat leakage, and breakage; contracts with other goods; perils of the seas; jettison; damage by sea water; 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.[54] All of these exculpatory clauses were valid "if reasonable," and the courts in those days rather stringently interpreted reasonableness in the carrier's favor.[55]

The British and American courts differed in their views on the enforceability of broad exclusions on bills of lading. The British Courts generally enforced bills of lading with even the most far-reaching exculpatory clauses, viewing the carrier's strict liability under general maritime principles as essentially a "default rule" to be applied only in the absence of an agreement to the contrary.[56] In the United States, freedom of contract was more restricted. The U.S. federal courts allowed carriers to limit their liability in many circumstances, but carriers could not exonerate themselves from

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50. Sturley, *Basic Cargo Damage Law*, *supra* note 48, at 2-1 to 2-2; *see also* A. KNAUTH, THE AMERICAN LAW ON OCEAN BILLS OF LADING 116 (4th ed. 1953).

51. Sturley, LEGISLATIVE HISTORY, *supra* note 49, at 3; *see also* COLINVAUX, THE CARRIAGE OF GOODS BY SEA ACT, 1924 at 1 (1954).

52. Sturley, *Basic Cargo Damage Law*, *supra* note 48, at pg. 2-2.

53. *Id.* at 2-2 to 2-3.

54. Benjamin Yancey, *The Carriage of Goods: Hague, COGSA, Visby and Hamburg*, 57 TUL. L. REV. 1238, 1240 (1983).

55. *Id.*

56. Sturley, *Basic Cargo Damage Law*, *supra* note 48, at 2-3.

liability if either negligence or a failure to provide a seaworthy ship was committed by the carrier.[57]

In 1882, the International Law Association ("I.L.A.") at its Liverpool Conference, prepared a draft of a model bill of lading, amounting to a compromise for voluntary adoption by shipper and carrier.[58] The model draft provided that the carrier should be liable for negligence "in all matters relating to the ordinary course of the voyage," such as the stowage and care of the cargo, but should be exempt from liability for "accidents of navigation," even though losses might be attributable to negligence of the crew.[59] It also required a carrier to exercise "due diligence" to make the vessel seaworthy, provided for a 100 pound (sterling) package limitation in absence of a higher declared value, and included a list of specific "exceptions" for which the carrier would not be responsible.[60] Although it never received widespread acceptance, the I.L.A. model bill achieved some influence in the subsequent Hague rules.[61]

If the carrier brought the cause of the loss or damage within one of the perils excepted in the carrier's bill of lading, the cargo owner then had the burden of proving that the carrier's negligence caused or contributed to the loss, in which event the carrier was liable.[62] During times before meaningful discovery procedures were implemented, that burden of proof was a very real defensive weapon, and a source of serious difficulty for the cargo claimant.[63] In a significant number of cases, this burden was impossible for cargo shippers to bear.[64]

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 exculpatory clauses in bills of lading.[65] The general dissatisfaction with the state of the law, including its short limitation periods and oppressive exemptive clauses, brought about the movement which resulted in the Harter Act of

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57. *Id.*

58. Sturley, LEGISLATIVE HISTORY, *supra* note 49, at 4.

59. *Id.*

60. *Id.* Specific exceptions included an act of God; fire; arrest and retraint of princes, rulers and people; and certain damages arising from the nature of the goods shipped or insufficiency of the packages.

61. *Id.; see also supra* part II.C. (describing the Hague Rules).

62. Yancey, *supra* note 54, at 1239.

63. *Id.*

64. *Id.* at 1240.

65. Sturley, LEGISLATIVE HISTORY, *supra* note 49, at 5.

1893.[66] The Act was "essentially a compromise between the conflicting interests of carriers and shippers."[67]

The Harter Act recognized some of the common law obligations of the carrier, and made it unlawful for an ocean bill of lading to diminish specific obligations.[68] 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,[69] and also voided any clause purporting to reduce the obligation of the owner to exercise due diligence in regard to seaworthiness.[70] 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."[71] A shipowner had no liability for the negligence or fault of his captain and crew in their navigation and management of the vessel because the owner lacked control after his ship left port and communications were often difficult or impossible.[72] The shipowner was no longer liable for perils of the sea, acts of God, acts of public enemies, inherent defects of goods carried, seizure under legal process, acts or omissions of the cargo shippers, and saving or attempting to save life or property at sea.[73]

Though an important step in the development of the law of maritime carriage, the Harter Act was ultimately a disappointment.[74] The Act was not an effective solution to the shippers' problem of burdensome exculpatory clauses in bills of lading, nor did it establish any positive rules of law.[75] It also did not alter the validity of very low limitation or valuation clauses, and failed to address the validity of stringent notice of claim clauses or very short periods for filing suit.[76]

Passage of the Act was followed by about 30 years of instability, during which the law relating to shipments to or from the United

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66. Yancey, *supra* note 54, at 1240-41. The Harter Act of 1893 is found at 46 U.S.C. §§ 190-196.

67. Sturley, *Basic Cargo Damage Law*, *supra* note 48, at 2-5; *see also In re* Ballard Shipping Co., 823 F. Supp. 68, 71 n.2 (D.R.I. 1993).

68. Sturley, *Basic Cargo Damage Law*, *supra* note 48, at pg. 2-5.

69. 46 U.S.C. app. § 190 (1988).

70. 46 U.S.C. app. § 191 (1988); Yancey, *supra* note 54, at 1241.

71. 46 U.S.C. app. § 192 (1988).

72. *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. (1992) (statement of Roger Wigen of 3M Corporation) [hereinafter *Oversight Hearing*].

73. 46 U.S.C. app. § 192 (1988); *see also* Sturley, *Basic Cargo Damage Law*, *supra* note 48, at 2-5.

74. Yancey, *supra* note 54, at 1241.

75. Sturley, *Basic Cargo Damage Law*, *supra* note 48, at 2-5.

76. Yancey, *supra* note 54, at 1241.

States differed from that in most other parts of the world.[77] A movement for uniformity developed, and in culmination of this movement the Committee Maritime International ("CMI") drafted a set of rules at a 1921 conference at the Hague, based upon the Harter Act theory.[78]

C. *The Hague Rules*

As the Harter Act had not ended the controversy, the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading[79] (commonly known as the "Hague Rules) was adopted by twenty-six participating nations in 1924. Most shippers welcomed the Hague Rules, although they were adopted against the wishes of shipowners who opposed the increase in carrier liability under this new convention.[80] Today, there are about 77 contracting parties to Hague, including a large number of developing countries.[81]

The Hague Rules set out the bases for shipowner liability for cargo loss and damage.[82] They preclude contractual exemptions from liability on the part of shipowners; provide shipowners with seventeen specified defenses, including the controversial "nautical fault" defense; and establish a limit of shipowner's liability of $500 per package or customary freight unit.[83]

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 Hague.[84] Apparently due to the United States' failure to ratify the convention, other countries hesitated to adopt the Hague Rules.[85] There even was a movement by British shipowners in the early 1930's to repeal th United Kingdom law ratifying the Hague Rules, on the basis that the rest of the world had been seemingly unwilling to accept international uniformity.[86]

The United States domestically implemented the Hague Rules with the enactment of the Carriage of Goods by Sea Act in 1936

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77. ABA Reports, *supra* note 7, at 248.

78. *Id.*

79. DUBLIN STATIONERY OFFICE, INT'L CONF. IN MARITIME LAW, INT'L CONVENTION FOR THE UNIFICATION OF CERTAIN RULES OF LAW RELATING TO BILLS OF LADING (1994).

80. UNCTAD, THE ECONOMIC AND COMMERCIAL IMPLICATIONS OF THE ENTRY INTO FORCE OF THE HAMBURG RULES AND THE MULTIMODAL TRANSPORT CONVENTION 8-9 (New York 1991).

81. *Id.*

82. *Id.*

83. *See* ABA Reports, *supra* note 7, at 248.

84. Sturley, *Basic Cargo Damage Law*, *supra* note 48, at 2-18.

85. *Id.* at 2-19.

86. *Id.* at 2-20.

(COGSA),[87] and ratified the international convention in 1937.[88] With the U.S. adoption of the Hague Rules, the world's remaining maritime powers joined the new regime fairly 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 majority of the world's shipping was committed to the Hague Rules.[89]

D. COGSA

Derived from the Hague Rules, COGSA "is really a bill of lading act governing the relations of cargo and ship, so long as a bill of lading embodies the contract of carriage."[90] COGSA applies during the time period of between the loading of the goods and the time they are discharged from the ship, "tackle to tackle."[91]

The enactment of COGSA did not repeal or completely supersede the Harter Act.[92] The Harter Act still governs carriage of goods under a bill of lading in interstate commerce, loading and discharge of the cargo, and deck carriage.[93]

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

(1) COGSA requires an ocean common carrier operating between the U.S. and foreign ports to exercise due diligence to make his ship seaworthy, to make the holds fit and safe for carriage and preservation of the goods carried, to properly equip the ship, and to load, handle, stow, carry, keep, care for and discharge the goods properly and carefully.[94] 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.[95]

(2) A carrier will not be liable for any "uncontrollable" loss or damage falling under any one of the seventeen defenses,[96] which include:

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87. 46 U.S.C. app. § 1300 *et. seq.*

88. *See* REPORT FROM HOUSE MAJORITY AND MINORITY STAFF TO MEMBERS OF HOUSE SUBCOMMITTEE ON MERCHANT MARINE REGARDING OVERSIGHT HEARING ON CARGO LIABILITY LAWS 2 (June 23, 1992) [hereinafter HOUSE STAFF REPORT].

89. Sturley, *Basic Cargo Damage Law*, *supra* note 48, at pg. 2-20.

90. Yancey, *supra* note 54, at 1244.

91. *Id.*; *see also* 46 U.S.C. app. § 1301 (1988).

92. *See* HOUSE STAFF REPORT, *supra* note 88, at 3.

93. Sturley, *Basic Cargo Damage Law*, *supra* note 48, at pg. 2-20.

94. 46 U.S.C. app. §§ 1303(1)-(2), 1304(1) (1988).

95. *See* Yancey, *supra* note 54, at 1244. COGSA effectively reverses the previous rule 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.

96. 46 U.S.C. app. § 1304 (1988); *see also* HOUSE STAFF REPORT, *supra* note 88, at 3.

(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; i.e., 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).[97]

(3) A $500 per package or customary freight unit limitation, unless the value of goods is declared on the bill of lading.[98] The carrier is barred from using a lower limitation amount.[99]

(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.[100] Jurisdictions are split on whether a container could be considered a package for purposes of the $500 limitations.[101]

(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.[102] Claimants have up to one year to file suit following delivery.[103] Lesser time limits (which may have been allowed under the Harter Act) are prohibited under COGSA.[104]

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97. 46 U.S.C. app. § 1304 (1988).
98. *Id.* app. § 1304(5).
99. *Id.* app. § 1303(8).
100. A 40-foot shipping container can carry goods worth hundreds of thousands of dollars. *See* Paul S. Edelman, *Proposed Changes for Cargo Liability*, N.Y.L.J., August 7, 1992, at 3.
101. *See* HOUSE STAFF REPORT, *supra* note 88, at 4; *c.f.* Inter-American Foods, Inc. v. Coordinated Caribbean Transp., 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 S.A. v. Hamburg SudAmerikanische Dampfschiltfahrts-Gesellschaft, 375 F.2d 943 (2nd Cir. 1967) (each pallet containing cartons of expensive electrical parts constituted a "package").
102. 46 U.S.C. app. § 1303(6) (1988).
103. *Id.*
104. *Id.* app. § 1303(8).

(6) COGSA does not apply when cargo is carried on deck, where the bill of lading states that the cargo will be carried on deck.[105]
(7) Under COGSA, unexplained losses, or losses where there is no clear evidence which of two causes was responsible for the damage, are far more likely to fall on the carrier.[106]

COGSA's principal goal was not so much to revise the rules of substantive law, but to *unify* the law governing bills of lading worldwide. It attempted to do so in a uniform, predictable manner "that would allow carriers, shippers, consignees, bankers, and insurers to know their respective rights and responsibilities with certainty . . . without the necessity of examining long and complicated bills of lading."[107]

III. INTERNATIONAL PROPOSALS, CONVENTIONS AND AMENDMENTS ATTEMPTING WORLD UNIFORMITY ON LIABILITY RULES

Despite the United States' adoption of the Hague Rules through COGSA, several problem areas remained with the Hague scheme, causing uneasiness for both shippers and carriers.[108] 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 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.[109]

A. Visby Amendments of 1968

Decades later, largely in response to the emergence of containerization in ocean transportation and international dissatisfaction with the per-package limitation, a diplomatic conference convened in Brussels in 1968 to amend certain provisions of the Hague Rules through the adoption of a Protocol.[110] Under Visby, most of the original Hague Rules survived, thus preserving most of the case law decided over the last 50 years.[111] Both the Hague Rules and the Visby Protocol retain the same basic rule of carrier liability, requiring

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105. HOUSE STAFF REPORT, *supra* note 88, at 4.
106. Sturley, *Basic Cargo Damage Law*, *supra* note 48, at 2-22.
107. *Id.*
108. Yancey, *supra* note 54, at 1246. COGSA was ratified by the United States in the late 1930's, and subsequently ratified by almost all nations.
109. *Id.* at 1246-47.
110. ABA Reports, *supra* note 7, at 248-49; *see also* HOUSE STAFF REPORT, *supra* note 88, at 4.
111. Edelman, *supra* note 100.

the carrier to exercise "due diligence . . . to make the ship seaworthy," and to see that the ship is "properly manned, equipped and supplied."[112]

That conference resulted in a 1968 Amendment to the Hague Rules, designated as the "Hague-Visby Amendments".[113] The 1968 Amendment modified Hague in several respects. First, the Amendment increased the per-package limitation to $663 or $2 per kilogram for lost of 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".[114] Third, the Amendment denied the carrier the right to limit liability where damage was intentionally caused or recklessly caused by the carrier with knowledge by the carrier that damage would ensue.[115]

Certain other minor revisions were included in the 1968 Amendment to render it more consistent with American law. For example, the Amendment made inadmissible any contradictions of recitals of condition as set forth in the bill of lading when the bill has been transferred to a party in good faith. The Amendment approved the practice of granting extensions of the one year time limitation.[116] The Amendment also defined the carrier as including the "owner or the charterer who enters into a contract of carriage with a shipper."[117]

By 1993, it was estimated there were seventy-eight countries that adhered to Hague and/or Hague-Visby, covering 63.9% of U.S. trade.[118] Of that group, by 1993, there were thirty-two nations that acceded to Hague-Visby.[119] To date, the United States has not yet adopted or ratified the Hague-Visby Amendments, and the 1936 COGSA remains substantially unchanged.[120] "As a result, 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

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112. *Id.*

113. 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].

114. HOUSE STAFF REPORT, *supra* note 88, at 4.

115. *Id.*

116. Hague-Visby Amendment, *supra* note 113, art. 1; *see also* Yancey, *supra* note 54, at 1248-49.

117. Edelman, *supra* note 100.

118. *Statement of George F. Chandler, III, for Maritime Law Association, reprinted in Oversight Hearing, supra* note 72, at 8.

119. *See Oversight Hearing, supra* note 72, at 58.

120. Sturley, *Basic Cargo Damage Law, supra* note 48, at 2-23.

from the law of any other country."[121] Notwithstanding, most bills of lading currently reflect Hague-Visby, as carriers reluctantly adjust to raising liability limits because of containerization.[122] Interestingly, the U.S. courts have been applying Hague-Visby under choice of law rules.[123]

B. Immediate Shipper Enthusiasm For and Carrier Opposition To 1968 Hague-Visby Amendments

Within only months after the 1968 Visby Convention at which the Hague-Visby Amendment was promulgated, shippers were pleased with the results and encouraged prompt ratification by the United States.[124] Joseph P. Baittiner, 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 . . . ."[125] Speaking 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."[126]

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"), which represented most of the U.S. flag steamship lines, doomed the prospects for any ratification.[127] In his letter to Secretary Rusk dated May 22, 1968, Mr. Casey expressed "strong opposition" by 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,[128] the mixed limitation concept as having no ceiling,[129] and the container clause as especially disturbing.[130]

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121. *Id.*

122. Verhaar, *supra* note 10.

123. *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); and Uhl-Baumaschinen GmbH v. M/V Federal Seaway, 1990 U.S. Dist. LEXIS 91908 (S.D.N.Y. 1990).

124. Allan I. Mendelsohn, *Why the U.S. Did Not Ratify the Visby Amendments*, 23 J. MAR. L. & COM. 29, 40 (1992).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 41.

129. *Id.* at 42.

130. *Id.*

Benjamin W. Yancey, the former President of the U.S. Maritime Lawyers Association, similarly expressed "his sharp disagreement" with Hague-Visby.[131]

In the face of such determined opposition from significant portions of the maritime industry, the Executive Branch decided it could not go forward towards ratification.[132] Congress' unwillingness to act in the absence of an industry consensus has long been recognized.[133] For this sole reason, according to a commentator, the Visby Amendments were not ratified between 1968 and 1978.[134]

C. *The SDR Protocol of 1979*

In 1979, the Hague-Visby Rules were further amended to account for currency exchange imbalances.[135] 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 (IMF).[136]

The liability limitation was increased in the SDR Protocol to 667 SDRs per package or customary shipping unit, or 3 SDRs per kilo.[137] During 1992, the SDR fluctuated at around U.S. $1.28.[138]

As is the situation with the 1968 Hague-Visby Amendment, the United States never adopted the SDR Protocol.[139] Notwithstanding, thirty-one nations adopted or were adopting the SDR Protocol and Hague-Visby Amendment by 1992.[140]

D. *The UNCITRAL 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.[141] UNCITRAL had "conceived all of these problems in terms of

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131. *Id.* at 45.

132. *Id.* at 51.

133. *Cf.* Peter H. Pfund, *International Unification of Private Law: A Report on United States Participation*, 1985-86, 20 INT'L LAW 623, 625 (1986).

134. Mendelsohn, *supra* note 124, at 30, 51-52.

135. HOUSE STAFF REPORT, *supra* note 88, at 4.

136. PROTOCOL AMENDING THE INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES OF LAW RELATING TO BILLS OF LADING (Dec. 21, 1979).

137. Edelman, *supra* note 100, at 3.

138. *Id.*

139. *See* HOUSE STAFF REPORT, *supra* note 88, at 4.

140. Edelman, *supra* note 100 at 3.

141. *See* HOUSE STAFF REPORT, *supra* note 88, at 4; Yancey, *supra* note 54, at 1249-50.

economic warfare between cargo and carrier," and between "traditional maritime nations" and the "developing world."[142]

The Hamburg Rules are quite different from the previous international conventions on cargo liability in both form and structure, and as the U.S. Department of Transportation found, would provide for an increase in carrier liability.[143] The major features and changes of the Hamburg Rules are as follows:

(1) Elimination of the nautical and managerial fault defenses;
(2) Reduction of the seventeen 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; or
    (c) that the loss, damage or delay was due to efforts of the carrier to save life or property at sea.
(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 2 1/2 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. Under COGSA, the carrier only has the burden of proving *seaworthiness* at the time of the voyage, and then the burden shifts to the shipper to prove the carrier's negligence.

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142. Yancey, *supra* note 54, at 1249-50.
143. HOUSE STAFF REPORT, *supra* note 88, at 5.

(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 of 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 shipowner's negligent navigation or mismanagement of the ship caused the catastrophe which resulted in the claim for general damage.[144]

The United States has not ratified the Hamburg Rules, which went into force on November 1, 1992 after ratification by twenty other nations.[145] To date, only twenty-two nations have adopted the Hamburg Rules, of which seven are land-locked nations having no ports. All twenty-two nations combined represent a very small portion of U.S. trade.[146] These nations are not major shipping powers and are more concerned with protecting their imports and exports.[147]

E. The Multimodal Conventions

Today, complex inter-relationships bind together carriers, terminal operators and multimodal service companies.[148] Multimodal conventions are "intended principally to deal with the advent of multimodal door-to-door container shipping practices, and to provide for adequate compensation in cases where damage occurred but the transport mode on which it occurred cannot be determined."[149]

Since 1975, three voluntary sets of model rules have been established in an attempt to resolve the tangled web of multimodal relations and establish uniform principles of liability for multimodal operators. The three sets of rules are the 1975 International Chamber of Commerce Uniform Rules for a Combined Transport Document,[150] the 1980 United Nations Convention on International

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144. *See* "Background Paper by the U.S. Department of Transportation," June 24, 1992, *reprinted in Oversight Hearing, supra* note 72, at 125; "Testimony on Behalf of the Transportation Claims and Prevention Council, Inc. on Oversight on Cargo Liability," June 24, 1992, *reprinted in Oversight Hearing, supra* note 72, at 124-25.

145. DOT Paper, *Oversight Hearing, supra* note 72, at 124-25.

146. George Chandler, *Memorandum; Re: International Uniformity of Law*, 1 (August 19, 1994).

147. HOUSE STAFF REPORT, *supra* note 88, at 4.

148. Hugh Kindred, *New and Improved? The UNCTAD/ICC Multimodal Rules Reviewed*, 33 TRANSP. J. 5 (1994).

149. ABA Reports, *supra* note 7, at 250.

150. INT'L CHAMBER OF COMM., UNIFORM RULES FOR A COMBINED TRANSPORT DOCUMENT (1975).

Multimodal Transport of Goods,[151] and the 1991 United Nations Conference on Trade and Development/International Chamber of Commerce Rules for Multimodal Transport Documents[152] published with effect from January 1, 1992.[153]

The multimodal proposal given the most attention in the United States is the proposal of the 1980 Multimodal Convention. This proposal becomes mandatory upon ratification of a certain number of states and "basically adopts the same approach as the Hamburg Rules."[154] In addition, it allows for the creation of a new entity, called a Multimodal Transport Operator (MTO), which could offer to shippers an optional door-to-door system of liability through a bill of lading.[155]

The 1980 Multimodal Convention limits liability to approximately $1,160 per package or, alternatively, $3.50 per kilogram. These limits are about ten percent higher than the limits in Hamburg. The limits apply when either "(a) the mode on which the damage occurred cannot be determined; or (b) the mode on which the damage occurred can be determined and the limits under that mode are lower than those under the Multimodal Convention."[156] Under the Multimodal Convention, shippers would bring their claims and lawsuits against the MTO who could then bring a subrogation action against the underlying actual carrier.

Adherence to the 1980 Multimodal Convention by thirty nations is necessary to bring it into force. As of May 1991, only five nations had ratified the Multimodal Convention.[157] As with the Hamburg Rules, years may pass before the Multimodal Convention enters into force.[158]

F. American Bar Association Proposal of 1987

In 1987, the American Bar Association ("ABA") attempted to resolve the deadlock with a compromise between shipper and carrier interests.[159] By majority vote, the ABA's House of Delegates recom-

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151. UNITED NATIONS CONF. ON A CONVENTION ON INT'L MUTIMODAL TRANSP., UNITED NATIONS (1980).

152. INT'L CHAMBER OF COMM., UNITED NATIONS CONF. ON TRADE AND DEVELOPMENT, UNCTAD/INTERNATIONAL CHAMBER OF COMM. RULES OF MUTLIMODAL TRANSPORT DOCUMENTS (1992).

153. Kindred, *supra* note 148.

154. ABA Reports, *supra* note 7, at 250.

155. *Id.*

156. *Id.*

157. UNCTAD, *supra* note 80, at 209.

158. ABA Reports, *supra* note 7, at 250.

159. *See* ABA Reports, *supra* note 7.

mended that the U.S. government support ratification of the Hague-Visby Amendments—with revisions.[160] The ABA called for the immediate ratification of the Hague-Visby Amendments, and requested that the U.S. government consider further changes, such as (1) increasing liability limits from $500 per package to the $1,160 per package ($3.50 per kilo) as suggested in the 1980 U.N. Convention on International Multimodal Transport of Goods; (2) eliminating nautical fault as a defense; (3) placing liability with a single party for intermodal shipments; and (4) subjecting terminal operators and stevedores to the same liability rules as carriers.[161]

The ABA's majority report, as outlined above, was drafted by a subcommittee of eight highly experienced maritime lawyers chaired by Allan I. Mendelsohn, a former U.S. State Department Legal Advisor and U.S. delegate to several diplomatic transportation conferences.[162] A minority report favoring adoption of the Hamburg Rules, supported by shippers, was rejected by the ABA.[163] To date, however, there has been no industry consensus or congressional action on the ABA recommendation.[164]

G. *Major Differences Between Hague, Hague-Visby and Hamburg Regimes*

1. *Scope of Application*

The Hague Rules apply only to bills of lading issued in a contracting state. The Hague-Visby Rules apply to the carriage of goods between different states, provided that the bill of lading is issued in a contracting state, the carriage is from a port in a contracting state, or the parties have agreed to the application of the Convention. The Hague and Hague-Visby Rules only apply when a bill of lading is issued in connection with the carriage.[165] For example, COGSA, Hague and Hague-Visby do not apply when electronic data interchange is used.[166]

The Hamburg Rules apply to all carriage by sea contracts between two different states provided that the port of loading, the port

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160. E.J. Muller, *Hamburg's Last Stand? Hamburg Rules; American Bar Association Recommends Ratification of Visby Amendments*, 86 CHILTON'S DISTRIBUTION 70 (1987).

161. ABA Reports, *supra* note 7, at 246. Almost half of all ocean freight damage claims stem from on-dock handling. *Id.*

162. *Id.* at 253.

163. *Id.* at 254.

164. Sturley, *Basic Cargo Damage Law*, *supra* note 48, at pg. 2-26.

165. UNCITRAL, *Status of the Hamburg Rules*, U.N. Doc. A/CN.9/401/Add. 1, at 3-12 (U.N., May 13, 1994).

166. *Oversight Hearing*, *supra* note 72, at 125; *see also* COGSA, 49 U.S.C. app. § 1301 (b) (1988).

of discharge, or the place of issuance of the transport document is located in a contracting state. Hamburg applies whether or not a bill of lading or other transport document has been issued.[167]

2. 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.[168] 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.

3. Period of Carrier Responsibility

COGSA, Hague and Hague-Visby provide for liability only from the time that the goods are *loaded* onto the ship and ends when they are *discharged* from the ship.[169] Hamburg covers from the period of time the carrier takes the goods at the port of loading until the carrier actually delivers the goods at the port of discharge. Thus, the Hamburg liability regime extends beyond the actual carriage, even before loading and after unloading.[170]

4. Exemptions/Defenses from Liability

Under COGSA, Hague and Hague-Visby, carriers have the burden to prove the seaworthiness of the vessel and the exercise of due diligence. However, the carrier has seventeen defenses from liability.[171] 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.[172]

The Hamburg Rules no longer exonerate the carrier from negligence for "nautical fault," and reduce the defenses to three.[173]

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167. UNCITRAL, *Status of the Hamburg Rules, supra* note 165, at 3 ¶ 11.

168. *Id.; see also Oversight Hearing, supra* note 72, at 125.

169. 46 U.S.C. app. § 1301(e) (1988); UNCITRAL, *Status of the Hamburg Rules, supra* note 165, at 4 ¶ 22; *Oversight Hearing, supra* note 72, at 125.

170. UNCITRAL, *Status of the Hamburg Rules, supra* note 165, at 3 ¶ 13.

171. COGSA, 46 U.S.C. app. § 1304(2) (1988).

172. *Id.* app. §§ 1303-1304 (1988); UNCITRAL, *Status of the Hamburg Rules, supra* note 165, at 4 ¶ 15; *Oversight Hearing, supra* note 72, at 126.

173. UNCITRAL, *Status of the Hamburg Rules,* supra note 165, at 4 ¶ 15; *Oversight Hearing, supra* note 72, at 125.

5. Limits of Liability

COGSA and Hague limit the carrier's liability to $500 per package.[174] 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.[175]

Under Hamburg, the liability limits have been increased to 835 SDRs (about $1,000) per package or 2.5 SDRs per kilogram.[176]

6. Delay Damages

Neither COGSA, Hague nor Hague-Visby cover carrier damage for delay of goods.[177] However, Hamburg provides mandatory delay damages in the amount of 2 1/2 times the freight payable for the goods delayed.[178]

7. Deck Cargo

Under Hague, "the carrier is not liable for cargo carried [or stacked] on deck under a bill of lading that states the cargo is so carried."[179] In contrast, the Hamburg Rules, "taking into account modern transport techniques, which often involve stowing containers on deck, provide suitable rules for deck cargo."[180]

H. MLA-Proposed "Carriage of Goods By Sea Act of 1995"

Another attempt for industry consensus was recently made by the U.S. Maritime Lawyers Association ("MLA"). In February 1995, the MLA proposed a draft bill titled the "Carriage of Goods by Sea Act of 1995."[181]

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174. 46 U.S.C. app. § 1304(5).

175. UNCITRAL, *Status of the Hamburg Rules, supra* note 165, at 4 ¶¶ 17-18; *Oversight Hearing, supra* note 72, at 126-27.

176. UNCITRAL, *Status of the Hamburg Rules, supra* note 165, at 4 ¶ 16; *Oversight Hearing, supra* note 72, at 127.

177. UNCITRAL, *Status of the Hamburg Rules, supra* note 165, at 4 ¶ 21; *Oversight Hearing, supra* note 72, at 127.

178. UNCITRAL, *Status of the Hamburg Rules, supra* note 165, at 4 ¶ 21; *Oversight Hearing, supra* note 72, at 127.

179. UNCITRAL, *Status of the Hamburg Rules, supra* note 165, at 4 ¶ 19; *Oversight Hearing, supra* note 72, at 126.

180. UNCITRAL, *Status of the Hamburg Rules, supra* note 165, at 4 ¶ 20; *Oversight Hearing, supra* note 72, at 126.

181. U.S. Maritime Lawyers Association, *Proposed Carriage of Goods by Sea Act of 1995*, app. 2 (1995) (changes to existing law).

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 have to denounce the Hague-Visby Rules, a step which is not conducive to international uniformity.[182]

The MLA proposed bill is modeled from the form of the existing COGSA statute. Key features and revisions to COGSA are as follows:[183]

(1) The "nautical fault" defense of 46 U.S.C. § 1304(2) has essentially been eliminated, as a carrier is now 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:

> The carriers and their ships shall not be responsible for loss of damage arising or resulting from—
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> 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 person claiming for such loss is able to prove negligence in the navigation or management of the ship*[184] . . .

(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;[185]

(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*;[186]

(4) The carrier is proportionately liable for loss or damage shown to be caused by its agents;[187]

(5) Absent any proof of cause of loss or damage, the carrier is liable for one-half of the loss or damage;[188]

(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;[189]

(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;[190]

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182. *Cf.* Sweeney, *supra* note 1, at 534.
183. *Id.*
184. U.S. Maritime Lawyers Association, *supra* note 193, at 13-14 (emphasis added).
185. *Id.* at 14.
186. *Id.* at 14-15.
187. *Id.* at 15.
188. *Id.* at 15-16.
189. *Id.* at 16.
190. *Id.*

(8) Contracts of carriage include both negotiable and non-negotiable bills of lading, whether printed or electronic data interchange (EDI);[191]
(9) The definition of "carrier" would encompass both shipowner and charterer, as well as the contracting carrier and performing carrier;[192]
(10) Carriers would be liable from time of receipt to time of delivery of goods;[193]
(11) The definition of "goods" does not exclude cargo by which the contract of carriage is carried on deck;[194]
(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;[195]
(13) Inclusion of a three-month period for a carrier to bring an indemnification or contribution claim against another party; and allowing one year to file an arbitration claim following delivery;[196]
(14) Invalidating any prior covenants providing a choice of foreign forum for litigation if goods originated or passed through the United States;[197]
(15) There is no liability for delay in delivery of goods.[198]

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. INCONSISTENT POSITIONS OF VARIOUS U.S. SHIPPING INTERESTS

Although the United States government has signed both the Hague-Visby Amendments and the Hamburg Rules, neither has been ratified by the United States.[199]

During the mid-1970's, a dramatic reversal of positions took place between carrier and shipper interests.[200] 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".[201] Shippers, on the other hand, abandoned their previously strong support for Hague-Visby and

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191. *Id.* at 2.
192. *Id.* at 1.
193. *Id.* at 18.
194. *Id.* at 2.
195. *Id.* at 11.
196. *Id.*
197. *Id.* at 21-22.
198. *Id.* at 21.
199. ABA Reports, *supra* note 7, at 249.
200. Mendelsohn, *supra* note 124, at 52.
201. *Id.*

quickly embraced the unfolding Hamburg Rules.[202] Although the shippers and carriers have completely switched interests, the controversy continues between the two groups at an almost identical level of intensity.[203]

Currently, shipowners and cargo underwriters support Visby but not Hamburg, while shippers largely support Hamburg. In response to this controversy the United States suggested a potentially acceptable compromise.[204] The compromise, known as the "trigger approach," was created by the government with the hope that a package arrangement could be transmitted to the Senate, requesting the Senate's advice and consent for the ratification of both Visby and Hamburg.[205] Neither side has been willing to change its position significantly.[206]

The "trigger approach" was first proposed in 1978 in expectation that the Hamburg Rules would be ratified at a later date.[207] In 1988, the United States Department of Transportation had sought to achieve a compromise by developing a "trigger mechanism," whereby the United States would ratify the Visby Protocol immediately and commit itself to adopting the Hamburg Rules when a substantial proportion of U.S. trade invovled countries enacting Hamburg.[208] To date, the trigger approach has been unacceptable to a majority of all of the commercial interests.[209] Carriers, carrier insurers and cargo insurers will not compromise on the Hague-Visby system, and shippers adamantly oppose Visby *unless* it leads to Hamburg. The situation creates a classic stalemate causing governmental inaction until the maritime industry can solve its own problems.[210] Nevertheless, the opposing shipping interests have voiced different theories and arguments on key issues for supporting the particular regimes. The following subsection discusses the differing opinions on key issues.

A. The Seventeen Defenses

Carriers maintain that the Hague-Visby approach is appropriate, noting that most of the seventeen defenses are implicitly "retained

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202. *Id.*
203. *Id.* at 53.
204. ABA Reports, *supra* note 7, at 251.
205. *Id.*
206. ABA Reports, *supra* note 7.
207. *See* THE SPEAKERS' PAPERS FOR THE BILL OF LADING CONVENTION CONF. (Nov. 29, 1978) (Lloyd's of London Press).
208. *See* Sturley, *Basic Cargo Damage Law*, *supra* note 48, at pg. 2-25 n.13.
209. *Id.*
210. *See* Sweeney, *supra* note 1, at 535.

anyway" in the Hamburg regime.[211] However, carriers feel that Hamburg's rephrasing of multiple defenses into the three generalized defenses is a giant step backward in legal process. Carriers view Hamburg as only creating vagueness and inconsistency in the law on their available defenses.[212]

Shippers, in contrast, see the change in Hamburg on these defenses as a positive move, and as more properly placing the risks of loss upon the carrier where it is negligent.[213] 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."[214]

While the rhetoric of the respective interests concerning the "17 versus 3 defenses" debate might sound similar in substance, their ultimate goals for enactment of opposing legal regimes remain steadfast.

B. Nautical Fault Exemption

Carriers view the exemption of nautical fault as an important device of risk distribution among insurers in major casualties.[215] It works to spread loss among numerous underwriters, with little effect on the world's cargo premiums. In any event, carriers maintain that the "nautical fault" defense is unimportant in the vast, routine majority of claims, but potentially important in major casualties such as collisions, strandings or fires.[216]

In contrast, shippers feel there is no justification for the "nautical fault" defense.[217] Shippers argue that in the contemporary times of advanced telecommunications, where shipowners can maintain constant verbal and visual contact with its captains and crews, the historic rationale of the shipowner's inability to control its vessel at sea no longer exists.[218] This defense, the shippers maintain, has succeeded in permitting carriers to evade liability on the high seas. It is an embarrassment to exonerate a carrier based upon a showing of negligence, and unfair to make the shipper pay for established

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211. *Position Paper of American Flag Ship Operators, reprinted in Oversight Hearing, supra* note 72, at 234. The "nautical fault" defense is omitted.

212. *Id.* at 233-35.

213. *Oversight Hearing, supra* note 72, at 68 (shipper comments).

214. *Id.*

215. *American Flag Position Paper, reprinted in Oversight Hearing, supra* note 72, at 236-37.

216. *Id.*

217. *Oversight Hearing, supra* note 72, at 68-69 (shipper comments).

218. *See Statement of Roger Wigen of 3M Corporation, reprinted in Oversight Hearing, supra* note 72, at 21-22.

nautical or managerial negligence on the part of the carrier and/or its management and agents.[219]

C. *Burden of Proof*

Carriers maintain that there is not really any shifting of the burden of proof under Hamburg, other than as a result of vague draftsmanship of the shipowner's defense. It may be, carriers argue, that the carrier has that heavier onus only due to the burden of resolving that "vagueness" of the defense.[220]

Shippers feel that existing cargo liability laws unfairly place major risks of loss on cargo owners, and that Hamburg properly shifts that risk.[221]

D. *Delay*

Carriers argue that damages for unreasonable delay are nonetheless recoverable under present law, and that Hamburg merely limits damages for delay.[222] Shippers disagree, contending that Hamburg properly allows for 2.5 times the freight charges.[223]

E. *Package Limitation and Increase In Liability Limits*

Carriers maintain that, in the end, all costs fall back upon the shippers of cargo, who have to pay their own insurance premiums, and ultimately the carrier's premiums and liabilities, through freight rates.[224] Even though increased recovery limits might be a gain for individual shippers, it would not be a gain for shippers as a class.[225] Regarding the per-package definition, and the effect of containerization, carriers contend that in the Unites States the law has become substantially settled through litigation.[226]

Shippers believe that higher liability limits should result in a substantial reduction in their cargo insurance premiums.[227] It is equitable to shift the risks to shipowners who have direct control over the degree of protection to cargo in transit.[228] Shippers contend

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219. *Id.*
220. *American Flag Position Paper, reprinted in Oversight Hearing, supra* note 72, at 239.
221. *Augello Testimony, reprinted in Oversight Hearing, supra* note 72, at 101.
222. *American Flag Position Paper, reprinted in Oversight Hearing, supra* note 72, at 246.
223. *Oversight Hearing, supra* note 72.
224. *American Flag Position Paper, reprinted in Oversight Hearing, supra* note 72, at 230.
225. *Id.*
226. *Id.* at 240.
227. *Augello Testimony, reprinted in Oversight Hearing, supra* note 72, at 100-101.
228. *Id.*

a specific provision defining "package" is necessary, in view of the containerization age.[229]

F. Deck Carriage

According to carriers, under existing law, carriage on deck of containerized cargo provides at least as much protection to shippers as would be provided by the Hamburg Rules.[230] Responding, shippers maintain that containership operators should not have to fear that their storage on-deck would not be considered, in accordance with the usage of the trade.[231]

G. 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.[232] 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.[233] Extensive litigation is not required, shippers argue, to determine what the Hamburg standard of liability means.[234] Comparing the Hamburg standards to those of the Warsaw Convention, shippers comment that no oppressive litigation or claims payments have been reported.[235]

H. Economic Implications of the Two Regimes

Carriers maintain that adoption of the Hamburg Rules would necessarily lead to higher cost, both in the short term and the long run.[236] In contrast, shippers argue that Hamburg results in lower costs for shippers by eliminating double insurance on the same risk.[237] But after five years of futile searches for reliable data, the effort to resolve the economic argument had to be abandoned, as neither economic proposition was provable to its opposition.[238]

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229. *Oversight Hearing, supra* note 72 (shipper comments).
230. *American Flag Position Paper, reprinted in Oversight Hearing, supra* note 72, at 23.
231. *Oversight Hearing, supra* note 72, at 71 (shipper comments).
232. American Flag Position Paper, *reprinted in Oversight Hearing, supra* note 72, at 71.
233. *Oversight Hearing, supra* note 72, at 69 (shipper comments).
234. *Id.*
235. *Id.*
236. *See* John C. Moore, *The Hamburg Rules*, 10 J. MAR. L. & COM. 1 (1978); *see also* Sweeney, *supra* note 1, at 530; George Chandler, *A Comparison of COGSA, the Hague-Visby Rules and the Hamburg Rules*, 15 J. MAR. L. & COM. 233, 237 (1984).
237. *See* Sweeney, *supra* note 1, at 531.
238. *Id.*

As the conflict was summarized in 1992 by Professor Joseph Sweeney of Fordham 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' concerns—and cargo insurers—forced to justify their continued existence—have been unable to present a convincing rationale for doing nothing.[239]

V. Enactments Throughout the World

The Hague-Visby Amendments have been adopted by most of the United States' trading partners.[240] 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% of U.S. trade.[241]

Adherents to the Hamburg Rules to date amount to twenty-two nations. These are generally developing nations with an import-export focus, whose trade is estimated at less than 2% of total U.S. trade.[242] Shipowning interests often criticize the Hamburg Rules for being adopted by a minuscule portion of the world's foreign traders, with no major commercial power adopting the rules.[243] However, as Professor Sturley comments, the United States action regarding the Hamburg rules could change this perception because United States' adoption of the Hague Rules was a major factor in their gaining wide-spread international acceptance.[244]

Some U.S. trading partners have compromised with variations of the "trigger approach," ratifying Hague-Visby immediately and adopting the Hamburg Rules at a later time. For example, Australia has enacted its Carriage of Goods by Sea Bill of 1991 under which the

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239. Joseph C. Sweeney, *The Uniform Regime Governing the Liability of Maritime Carriers*, ENTE COLOMBO '92: CURRENT ISSUES IN MARITIME TRANSPORTATION 13 (Genoa, June 25, 1992), *reprinted in Oversight Hearing, supra* note 72, at 155-56.

240. Sturley, *Basic Cargo Damage Law, supra* note 48, at pg. 2-23.

241. *See Oversight Hearing, supra* note 72, at 42-44.

242. *Id.* at 40.

243. *E.g., Statement of American Institute of Marine Underwriters, reprinted in Oversight Hearing supra* note 72, at 55.

244. Sturley, *Basic Cargo Damage Law, supra* note 48, at pg. 2-24.

Visby Amendments were ratified immediately, with automatic adoption of the Hamburg Rules in three years.[245]

In 1993, Canada enacted its Carriage of Goods by Water Act, implementing the 1968 Visby Amendments and the 1979 Special Drawing Rights Protocol immediately.[246] The law also includes provisions for future adoption of the 1978 Hamburg Rules.[247] 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 referred to this Act as "a staged approach with respect to the two international conventions."[248] 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.[249]

Most recent enactments of Hague-Visby by other countries have included custom-tailoring in the domestic legislation.[250] Some state have adopted, and other states are adopting, laws that combine elements from the Hague regime and the Hamburg Rules. These "tailored" laws, however, combine the two regimes but do not follow a uniform approach.[251]

New Zealand, the most recent Hague-Visby adherent, took such liberties, including a particularly well-drafted definition of the carrier that may fit in well with U.S. efforts.[252] Korea also took liberties with Hague-Visby.[253]

A. The Scandinavian Maritime Codes

In the most radical departure to date, the Scandinavian countries have incorporated much of the Hamburg Rules in their version of Hague-Visby.[254] Even the Scandinavian countries, with their long history of supporting international uniformity in this field, have

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245. *See* 1991 AUSTL. ACTS 160 (Oct. 31, 1991). As of this writing, Australia has not yet implemented the Hamburg Rules.

246. *See* R.S.C., Ch. 21, (1993) (Can.) (Bill No. C-83).

247. *Id.*

248. *Oversight Hearing, supra* note 72, at 128.

249. *Id.*

250. Chandler, *supra* note 236, at 237.

251. *See* UNCITRAL, *Status of the Hamburg Rules, supra* note 165, at 2.

252. Chandler, *supra* note 236, at 237.

253. *Id.*

254. *Id.*

adopted legislation effective October 1, 1994 that strikes a compromise between Hague-Visby and the Hamburg Rules.[255]

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.[256] The legislation is expected to give rise to many conflicts and much uncertainty in the industry.[257] The major changes in the new Scandinavian codes include the following:

(1) The "tackle-to-tackle" principle of Hague-Visby is abandoned.[258] 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 the load 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.[259]

(2) The Scandinavian countries also give up the catalogue of defenses available to the carrier in the Hague-Visby Rules.[260] 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.[261] 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.[262]

(3) The carrier can no longer exclude liability for damage of or loss to live animals.[263]

(4) 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 its right to limit its liability.[264]

(5) The new Codes maintain the limitation amounts of the Hague-Visby Rules for damage to or loss of the goods. The carrier may

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255. *See* Sturley, *Basic Cargo Damage Law*, *supra* note 48, at pg. 2-26 n.19.

256. *See* Scandinavian Codes, Ch. 13, *On Carriage of General Cargo*; *see also* Christopher Lowe, *The Scandinavian Compromise – Maritime Codes*, LLOYD'S LIST, June 10, 1994, at 8.

257. Lowe, *supra* note 256.

258. Scandinavian Codes, *supra* note 256, at § 24.

259. *Id.*; *see also* Lowe, *supra* note 256.

260. Scandinavian Codes, *supra* note 256, § 25; *see also* Lowe, *supra* note 256.

261. *Id.*

262. Scandinavian Codes, *supra* note 256, § 26; *see also* Lowe, *supra* note 256.

263. Scandinavian Codes, *supra* note 256, § 27; *see also* Lowe, *supra* note 256.

264. Scandinavian Codes, *supra* note 256, § 34; *see also* Lowe, *supra* note 256.

limit its liability to 2 SDR per kilogram of the goods or to 667.67 SDR per package, whichever is the higher amount.[265]
(6) 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: (a) where the defendant has its principal place of business; (b) where the transport agreement was entered into; or (c) where the goods were taken over or delivered by the carrier.[266]

B. The Chinese Maritime Code

The People's Republic of China has also enacted legislation which combines characteristics of both Hague-Visby and the Hamburg Rules.[267] Attempting to follow those principles recognized internationally in the shipping world in its 1993 Maritime Code, China primarily tailored carriers' main responsibilities upon the Hague-Visby Rules, but also adopted significant portions of the Hamburg Rules.[268] The significant 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;[269]
(2) Modified from the Hamburg Rules, the carrier has responsibility over goods in containers from time of receiving the goods at port, until time of delivery 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.[270]
(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.[271] (The Chinese enactment does not provide the 2 1/2 times enhancement factor as in Article 6(1)(b) of the Hamburg Rules);
(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.[272]
(5) Twelve (12) defenses to carrier liability are maintained in the new Chinese code, derived from the 17 exceptions of the Hague

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265. Scandinavian Codes, *supra* note 256, § 30; *see also* Lowe, *supra* note 256.
266. Scandinavian Codes, *supra* note 256, §§ 60-61; *see also* Lowe, *supra* note 268.
267. *See Carriage of Goods by Sea, Chapter 4 of the Chinese Maritime Code* (1993).
268. Dongnian Yin, *The Characteristics of the Law of Contract Relating to Carriage of Goods by Sea of the Chinese Maritime Code*, 1993, *reprinted in Conference Materials for the International Conference on Maritime Law* (Shanghai, Oct. 11, 1994) at 2-4.
269. *Carriage of Goods by Sea, Chapter 4 of the Chinese Maritime Code*, art. 42 (1993).
270. *Id.* art. 46.
271. *Id.* arts. 50, 57.
272. *Id.* art. 56.

Rules. Notwithstanding, as provided in the Hamburg Rules, the *carrier* shall bear the burden of proof for these defenses.[273]
(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.[274]

VI. 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.[275] It was designed for marine transportation existing before the late 1920s, and is unsuitable for entry into the twenty-first century.[276] 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 of international ocean transport of goods.

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

Despite an abundance of theories from all concerned commercial interests expressing many different scenarios and points of view, the current legal and judicial framework cannot properly deal with ever-increasing cargo damage disputes. Fault, or lack of it, is often factually difficult to establish. Once effective legal guidelines are clearly established, there should be less occasions for litigation. It is extremely difficult, expensive and time consuming to litigate or arbitrate disputed facts and legal issues, especially under antiquated laws that do not take into account many of the key developments in contemporary ocean shipping.

Due to the strongly opposing sentiments of carrier and shipper interests, it is doubtful that Congress will ever have the impetus to enact either the Hague-Visby or the Hamburg regime. Nevertheless,

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273. *Id.* art. 51.
274. *Id.* art. 53.
275. *Oversight Hearing, supra* note 72, at 127.
276. *Id.*

all shipping interests agree 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 the Hamburg Rules *in toto*, without exploring combinations, compromises and other alternatives. If substantive variations of these rules are contemplated, it would be necessary for the United States to denounce the particular compact being revised.[277] In addressing these issues, various policy factors should be considered.

A. World Uniformity

It would serve the future international trade community 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. The Scandinavian countries and China seem to have reached 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, but are also viewed as essential to protecting national security and guaranteeing unimpeded access to international markets on reasonable terms. A distinguishing feature of the ocean shipping industry is the over-arching presence of government intervention to support national fleets.[278] A basic goal of the U.S. Shipping Act of 1984 is to preserve and encourage the development of an economically sound and efficient U.S. flag-liner fleet capable of meeting national security needs.[279] In 1992 U.S. Representative Walter Jones had expressed his view that there are many policy problems facing the U.S. maritime industry; he perceived many of them as exacerbated by wrong governmental policies.[280]

An important factor that must be considered is the survival of the U.S. flag fleet. However, for different reasons, the U.S. flag fleet has

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277. *Cf.* Sweeney, *supra* note 1, at 534.

278. *See* CARD REPORT, *supra* note 11, at app. E-24.

279. *See Statement of U.S. Representative Walter B. Jones, reprinted in* CARD REPORT, *supra* note 11, at 170.

280. *Id.*

experienced a marked decrease in the number of American-flagged carriers since 1984. Regrettably, this trend is continuing.[281]

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 upon many factors—but principally center around their need to be competitive in the world market.[282] He stressed the importance of a continued and significant presence of a U.S. flagged, U.S. owned and U.S. crewed liner operation. Even the shippers, Congressman Davis maintained, would regret the day when no U.S. carriers were at the table. To prevent the loss of our U.S. flag fleet, he suggested that we revisit regulatory and economic approaches and maintain a delicate balance between the carriers and shippers.[283]

On this note, a strict Hamburg regime, expected to "provide for an increase in carrier liability,"[284] would not be a source of encouragement for a U.S. flag fleet. It is in the better national interests for the United States 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 at odds with traditional American tort concepts, as well as the liability laws governing the trucking and railroad companies.

As Roger Wigen testified in 1992 before the House Subcommittee on Merchant Marine, 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 conga lines of intermodal containers hoisted aboard ships by cranes. Isolated national economics now compete fiercely in global commerce. However, the laws

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281. *See Statement of U.S. Representative William J. Hughes, reprinted in* CARD REPORT, *supra* note 11, at 175.

282. *See Statement of Representative Robert W. Davis, reprinted in* CARD REPORT, *supra* note 11, at 173-74.

283. *Id.*

284. *Oversight Hearing, supra* note 72, at 31.

> governing international maritime cargo liability have failed to keep pace. They are tied to a philosophy which believes a carrier has no liability for cargo once a seaworthy ship leaves port, even if the captain and/or crew are guilty of negligence. These laws accept the premise that once at sea, the carrier has no control over its captain and crew. While this may have been true in the first third of the century, it certainly is not true today. Telecommunications advances allow a maritime liner carrier to have as much control over its crew as do trucking and railroad companies.[285]

The "nautical fault" defense should be revised, as its historic rationale has been virtually eliminated and the exemption is inconsistent with modern tort liability concepts. The shipowner's non-control over his vessel, captain and crew while out at sea has diminished. Satellite telecommunications and other advanced technologies 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 the nautical fault defense would still be applicable, a fair and logical compromise might be reached on this issue. Circumstances may exist where the shipowner is unable to exercise reasonable control over his vessel, captain and crew, or where the shipowner was 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 shipowner's directions to his captain or crew, or a shipowner'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 of the debate, yet still retain the nautical faults 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. Section 1304(2)(a) of COGSA might be revised as follows to effect this compromise:

> (2) Neither the carriers nor their ship shall be responsible for loss of damage arising or resulting from—
> (a) Act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship, *if the shipowner could not reasonably control such conduct of the*

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285. *See Oversight Hearing, supra* note 72, at 21-22.

carrier's master, mariner, pilot or servants, or the shipowner did not know and could not have reasonably known of facts and circumstances leading to such act, neglect or default of the carrier's master, mariner, pilot or servants.[286]

D. An Effective & Economical Loss Compensation System

The interests of a commercial society are better 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 and 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 party, including the carrier. Hague-Visby seems to allocate the greater risks 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 the shipper that may ultimately pay for the loss. Even if the Hamburg Rules are adopted in the United States, there would not be elimination of the need for cargo damage insurance for the shipper.

Cargo insurance, unlike shipowners' protection and indemnity insurance, 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 dependent the proof of liability under new, unclear and controversial rules, with a new network of claims agents responsible mainly to foreign protection and indemnity underwriters.[287]

In any event, 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."[288] According to that maritime

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286 *See generally* 46 U.S.C. app. § 1304 (1988) (codifying section 1304(2)(a) of COGSA). The text in italics represent the author's proposed revision of COGSA.

287. *American Flag Position Paper, reprinted in Oversight Hearing, supra* note 72, at 254.

288. *Id.*

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.[289] Thus, it might be that shippers and carriers really have little in substance to argue about anyway.

VII. CONCLUSION

The United States is the world's largest trading nation, with international trade approaching almost $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 risk allocation system for cargo loss, damage and delay. Maintaining an antiquated legal regime for determining loss, damage and risk allocation in ocean shipping is detrimental to U.S. trade. The United States should consider adoption of a Hague-Visby regime incorporating aspects of Hamburg, which fairly balances the interests of carriers and shippers.

289. William Warren, *Red Hot Issue or Red Herring? Legal Liability and Cost of Cargo Insurance*, 34 AMERICAN SHIPPER 40 (1992).