

COGSA OR HAGUE-VISBY: CARGO DAMAGES IN INTERNATIONAL SHIPMENTS

Trevor R. Jefferies†

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† Associate; Royston, Rayzor, Vickery & Williams, L.L.P.; B.S. 1981, University of Hawaii; J.D. 1994, *cum laude*, University of Houston.

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In this article, the reader will find an examination of an area of cargo damages law that most trial courts have apparently misconstrued and has not been discussed in any depth by an appellate court. To illustrate the principles analyzed below, I offer the following example. A large shipment of high quality stainless steel coils departs Spain on a vessel for Houston, along with sundry other cargo. Caught in a storm, the aging vessel succumbs to the Deep. All hands are rescued, but the valuable cargo sinks to the bottom. Cargo interests seek a favorable satisfaction from the carrier. Finding settlement offers lacking, they file suit.

In large part, the question of liability is settled. The carrier must pay for the loss, but what is the extent of its liability? That question depends on the contract for carriage, as evidenced by the bill of lading.¹ Specifically, what law applies when the Clause Paramount² in the bill of lading specifies that the Carriage of Goods by Sea Act (COGSA)³ or the law of another country will be compulsorily applicable? In essence, the issue is a specialized choice of law problem.

1. A bill of lading is a document issued by a carrier as receipt of goods and usually describes the goods, names the consignor and consignee, and sets out the terms of carriage. BLACK'S LAW DICTIONARY 168 (6th ed. 1990) [hereinafter BLACK'S]. For the sample bill of lading clauses used in our example, see *infra* note 12 and accompanying text. These sample bill of lading clauses, although hypothetical, reflect the nature and substance of these clauses in typical bills of lading.

2. WILLIAM TETLEY, MARINE CARGO CLAIMS 5 (3d ed. 1988). A "clause paramount" states that the bill of lading is subject to a particular statutory regime, such as the Carriage of Goods by Sea Act (COGSA); see also ERIC SULLIVAN, MARINE ENCYCLOPEDIA DICTIONARY 353 (3d ed. 1992); Carriage of Goods by Sea Act, 46 U.S.C. app. § 1312 (1994) (stating, in relevant part, "every bill of lading . . . shall contain a statement that it shall have effect subject to the provisions of this chapter").

3. 46 U.S.C. app. §§ 1300-1315 (1994).

I. INTRODUCTION

A line of cases, predominately from the Southern District of New York, holds that a Clause Paramount in an international bill of lading that expressly mentions both COGSA and the Hague-Visby Rules⁴ incorporates Hague-Visby's higher carrier liability limits. The Clauses Paramount discussed in these cases generally maintain that the contract of carriage is controlled by either COGSA or the Hague-Visby Rules.⁵ However, the two regimes incorporate different levels of package liability limitation, with Hague-Visby allowing the shipper a greater recovery against the carrier.⁶ Courts generally hold that COGSA applies *ex proprio vigore*⁷ but sometimes still allow the conflict between COGSA and Hague-Visby liability limits to be resolved in favor of the shipper by allowing for the higher Hague-Visby recovery.⁸ Courts arrive at this conclusion by one of two analytical

4. Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155, *reprinted in* 3 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 747 (2d ed. 1994) [hereinafter Hague Rules], and the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, 1977 Gr. Brit. T.S. No. 83 (Cmnd. 6944) (entered into force June 23, 1977), *reprinted in* 3 SCHOENBAUM, *supra*, at 753 [hereinafter Visby Amendments], make up the "Hague-Visby Rules." The Hague-Visby Rules have been ratified by Belgium, Denmark, Ecuador, Egypt, Finland, France, Germany, Italy, Lebanon, Luxembourg, the Netherlands, Norway, Oman, Poland, Singapore, South Africa, Sri Lanka, Spain, Sweden, Switzerland, Syrian Arab Republic, Tonga, and the United Kingdom. 6 BENEDICT ON ADMIRALTY 1-30 (Frank L. Wiswall, Jr. ed., 7th ed. 1996).

5. See discussion *infra* part III.

6. See discussion *infra* part II.C. The per-package liability limits are significantly higher under the Hague-Visby Rules.

7. *Ex proprio vigore* means "by their or its own force." BLACK'S, *supra* note 1, at 582.

8. See *Associated Metals v. M/V Star Skarven*, 1995 AMC 505, 508 (S.D. Fla. 1994); *Iiva U.S.A., Inc. v. M/V Botic*, 1993 AMC 240, 243-44 (E.D. Pa. 1992), *aff'd*, 1993 AMC 2445, 2448 (3d Cir. 1993); *Francosteel Corp. v. M/V Kapetan Andreas G*, 1993 AMC 1924, 1925 (S.D.N.Y. 1993); *Associated Metals & Minerals Corp. v. M/V Arktis Sky*, 1991 AMC 1499, 1505 (S.D.N.Y. 1991), *vacated on other grounds*, 978 F.2d 47 (2d Cir. 1992); *Francosteel Corp. v. M/V Deppe Europe*, 1990 AMC 2962, 2964 (S.D.N.Y. 1990); *Insurance Co. of N. Am. v. S/S Sealand Developer*, 1990 AMC 2967, 2969 (S.D.N.Y. 1989); *Daval Steel Prods. v. M/V Acadia Forest*, 683 F. Supp. 444, 446 (S.D.N.Y. 1988); *Rockwell Int'l Corp. v. S/S Koeln Express*, 1987 AMC 2537, 2539 (D. Md. 1987); *Sunds Defibrator, Inc. v. M/V Atlantic Star*, 1986 AMC 368, 369 (S.D.N.Y. 1983);

paths. First, some courts have held that the bill of lading is ambiguous because the Clause Paramount makes reference to Hague-Visby and so it must be construed against the carrier (who is usually the drafter).⁹ Other courts have held that because Hague-Visby allows a higher recovery, any reference to Hague-Visby in the bill of lading constitutes the carrier's "agreement" to accept the higher package liability scheme.¹⁰ Neither analysis withstands careful scrutiny.

In this article, I will show how the foregoing analyses are flawed. Part II discusses the Clause Paramount and explains how both COGSA and the Hague-Visby Rules may apply *ex proprio vigore*, whether or not explicitly mentioned in the bill of lading. Part III discusses the decisions of the district courts in cases that turned on the interpretation of the Clause Paramount. Finally, in part IV, I analyze the reasoning of the decisions and suggest factors courts should consider in future cases of this type, including interpretation of the bill of lading as a whole, the sufficiency of consideration, and the "arm's length" nature of international shipping contracts. The contract of carriage evidenced by a bill of lading must be drafted flexibly enough to deal with a multitude of possible circumstances, and courts must weigh the realities of modern business when interpreting bills of lading and applying the relevant law.¹¹

II. THE CLAUSE PARAMOUNT

The relevant language at issue in the bill of lading is included in the following hypothetical clauses:

5. CLAUSE PARAMOUNT AND CARRIER'S RESPONSIBILITY:

- 1) In so far as this bill of lading covers the carriage of goods by sea either by the carrier or by

Mitsui & Co. v. M/V Glory River, 1981 AMC 1237, 1239 (W.D. Wash. 1979). For a complete discussion of these cases, see *infra* part III.

9. See, e.g., *M/V Acadia Forest*, 683 F. Supp. at 447.

10. See, e.g., *M/V Deppe Europe*, 1990 AMC at 2966.

11. See *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S. Ct. 2322, 2328 (1995) (stating that prior case law "must give way to contemporary principles of international comity and commercial practice"); *The Bremen v. Zapata Off-shore Co.*, 407 U.S. 1, 8-12 (1972) (observing that "overseas commercial activities" have expanded and that we are "in an era [where] . . . businesses once essentially local now operate in world markets").

any underlying transporter the contract evidenced by this bill of lading shall have effect subject to the Hague Rules or any enactment (such as COGSA) making such rules or the Hague-Visby Rules compulsorily applicable. If no other enactment is compulsorily applicable to such carriage, the Hague Rules shall apply. These enactments shall be deemed incorporated herein and made a part hereof and nothing in this bill of lading shall be deemed a surrender of any of the rights and immunities or an increase of any responsibilities thereunder. . . .

8. AMOUNT OF COMPENSATION AND LIMITATION OF LIABILITY: . . .

2) Except where a higher value is declared as provided in Clause 8(3) below, neither the carrier nor the vessel shall in any event be liable for any loss of damage to or in connection with the goods in an amount exceeding US \$500 per package or per unit. If such limitation is invalid under local law, the carrier's liability shall be limited as provided by such law.¹²

A. *Application of COGSA*

The opening section of COGSA prescribes that

[e]very bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter.¹³

This language necessarily makes COGSA applicable to all shipments of goods¹⁴ that enter a U.S. port from abroad or

12. These bill of lading clauses are hypothetical ones used for demonstrative purposes in developing my thesis. I have provided these particular clauses because the language differs from the clauses analyzed by the decisions discussed herein. I believe this will enhance the analysis, and possibly assist drafters of bills of lading.

13. 46 U.S.C. app. § 1300 (1994).

14. Goods are defined by COGSA as "goods, wares, merchandise, and articles

leave a U.S. port bound for a foreign port.¹⁵ Therefore, a bill of lading covering any shipment to or from U.S. ports should be read as though COGSA were expressly incorporated by reference.¹⁶

The legislative history surrounding the passage of COGSA illustrates Congress' intent that COGSA should apply to both imports and exports. For example:

I want to suggest this, that if we pass a law regulating and specifying the character of bill of lading which shipowners are bound by in the carriage of commerce to and from the ports of the United States, that bill of lading will be equally binding on the ships of foreign countries and so, as compared with them, it could not hurt the American shipowner, because they would both be bound by exactly the same bill of lading.¹⁷

In hearings several years earlier, it was stated that

of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried." 46 U.S.C. app. § 1301(c) (1994).

15. 46 U.S.C. app. § 1312 (1994). Section 1312 states, in relevant part: "This chapter shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. . . . The term 'foreign trade' means the transport of goods between the ports of the United States and ports of foreign countries." *Id.*

16. GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* 145 (2d ed. 1975). COGSA requires that all *outbound* bills of lading contain a clause that COGSA is applicable:

[E]very bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this chapter.

46 U.S.C. app. § 1312 (1994). The effect of failure to comply with § 1312 on an outbound shipment is that the carrier may become the insurer of the goods. *See GILMORE & BLACK, supra*, at 185-86; *see generally* William Tetley, *Acceptance of Higher Visby Liability Limits by U.S. Courts*, 23 J. MAR. L. & COM. 55, 56 (1992) (describing COGSA's application to exports and imports as "nationalistic"); Michael F. Sturley, *The History of COGSA and the Hague Rules*, 22 J. MAR. L. & COM. 1, 48 (1991) (stating that "[t]wo separate provisions made the new rules mandatory for inbound and outbound foreign trade").

17. *Relating to the Carriage of Goods by Sea: Hearings Before the House Comm. on the Merchant Marine & Fisheries*, 71st Cong., 2d Sess. 29 (1930) *reprinted in* 3 *THE LEGISLATIVE HISTORY OF THE CARRIAGE OF GOODS BY SEA ACT AND THE TRAVAUX PREPARATOIRES OF THE HAGUE RULES* 395 (Carol Boyle trans., Michael F. Sturley ed., 1990) [hereinafter *LEGISLATIVE HISTORY*] (statement of Rep. Ewin L. Davis, Tennessee).

[this legislation] applies not only to cargo going out of the country, but cargo coming into the country; and where the bill of lading has been signed abroad, between two foreign citizens, if the stuff is brought within the United States, the Supreme Court claims that the Harter Act governs. Now the foreigners resent to the limit of our contention of control over their contracts made between foreign citizens in foreign ports, but we have claimed it and exercised it, and we are going to keep on; so that this law is going to be perfectly good for American citizens on cargo going out and on cargo coming in and we rest content with that.

. . . .

I know the Harter Act has always been construed by the Supreme Court as applying to cargo inward as well as outward, and this is nothing but a codification of the Harter Act.¹⁸

The Fifth Circuit agreed in *Wirth Ltd. v. S/S Acadia Forest*.¹⁹ Judge John R. Brown wrote:

[I]t is quite clear that § 1300 subordinates [bill of lading] provisions to COGSA when the [bill of lading] is for the Carriage of Goods either *to or from* the United States and regardless of whether the [bill of lading] contains a "subject to" clause.²⁰

Judge Brown then cited Gilmore & Black's *The Law of Admiralty*²¹ for the proposition that COGSA is incorporated by reference in every bill of lading for foreign transport whether to or from the United States.²²

18. *Relating to the Carriage of Goods by Sea: Hearings Before the Comm. on the Merchant Marine & Fisheries*, 68th Cong., 2d Sess. 190 (1925), reprinted in 3 LEGISLATIVE HISTORY, *supra* note 17, at 190 (statement of Rep. Charles S. Haight, Chairman of the Bill of Lading Committee of the International Chamber of Commerce).

19. 537 F.2d 1272 (5th Cir. 1976).

20. *Id.* at 1277-78 n.19.

21. GILMORE & BLACK, *supra* note 16, at 147-48.

22. *S/S Acadia Forest*, 537 F.2d at 1278. Judge Brown also opined that where the Hague Rules (as implemented by a foreign country) and COGSA conflict, COGSA would prevail. *Id.* Specifically:

B. Application of Hague-Visby Rules

The Hague-Visby Rules operate much like COGSA for shipments outbound from a signatory country.²³ Hague-Visby applies *ex proprio vigore* whenever the bill of lading is issued in a contracting state or the carriage is from a port in the contracting state.²⁴ Furthermore, if the bill of lading makes reference to Hague-Visby, then the rules apply *ex proprio vigore*.²⁵ The Visby Amendments to the Hague Convention apply to every bill of lading relating to the carriage of goods between ports in two different States if:

- (a) the bill of lading is issued in a Contracting State,
or
- (b) the carriage is from a port in a Contracting State,
or
- (c) the Contract contained in or evidenced by the bill of lading provides that the rules of this Convention or legislation of any State giving effect to them are to govern the contract, whatever may be the nationality of

The [bill of lading] involved here was expressly made subject to Belgian Law in which the Hague Rules are incorporated. . . .

Although the Hague Rules under Belgian Law probably vary little, if any, from the corresponding COGSA provisions which bear on this case, we are aware of the so-called "Clause Paramount" contained in § 1312 of COGSA which requires each Bill of Lading evidencing a contract for carriage of goods from the ports of the United States to contain a statement that it shall be subject to COGSA. . . .

Of course, this section does not strictly apply because this is a contract of carriage *to, not from*, the United States. Thus, even if the Hague Rules were incongruous with COGSA, the latter would prevail.

Id. at 1277 n.19.

23. Visby Amendments, *supra* note 4, art. 5. The Hague-Visby Rules are not applicable of their own force for inbound shipments to a signatory country. *See id.* COGSA is somewhat unique in its application to inbound shipments. *See* Michael F. Sturley, *Contracts of Carriage Governed by the Carriage of Goods by Sea Act*, in 2A BENEDICT ON ADMIRALTY 5—2 n.9 (7th ed. 1996). Only Belgium and perhaps the Philippines apply their versions of COGSA to inbound shipments. *Id.*

24. Visby Amendments, *supra* note 4, art. 5(a)–(b).

25. *Id.* art. 5(c); *see* TETLEY, *supra* note 2, at 6–9.

the ship, the carrier, the shipper, the consignee, or any other interested person.²⁶

C. *Conflicting Limitation of Liability Provisions*

Under our hypothetical fact pattern, we have two statutory regimes that simultaneously apply *ex proprio vigore*: COGSA and the Hague-Visby Rules.²⁷ The bill of lading was issued in Spain, a Hague-Visby Contracting State,²⁸ and the intended destination was Houston, where COGSA is the applicable law.²⁹

COGSA provides for a \$500 per package limitation to the carrier's liability.³⁰ As the steel used in our example would likely have a value much higher than \$500 per package or unit,³¹ the carrier would certainly want to limit its liability under COGSA. The cargo plaintiff prefers, if it must accept any limit at all, the Hague-Visby Rules, which limit a carrier's liability to about \$800 to \$900 per package, depending on the current price of gold.³²

The issue is thus established: In a suit against the carrier, which liability limit applies—the lower COGSA limit or the more generous Hague-Visby limit? Before proposing my solution to the problem, I will discuss the cases that have addressed this

26. Visby Amendments, *supra* note 4, art. 5; see TETLEY, *supra* note 2, at 6-9.

27. 46 U.S.C. app. § 1312 (1994); Visby Amendments, *supra* note 4, art. 5.

28. Spain adopted the Hague-Visby Rules on January 6, 1983. 6 BENEDICT ON ADMIRALTY, *supra* note 4, at 1-30.

29. See *supra* part II.A (detailing the application of COGSA to Clauses Paramount).

30. 46 U.S.C. app. § 1304(5) (1994).

31. Telephone Interview with Kevin Highfield, London Offshore Consultants, Inc. (Jan. 22, 1996) (notes on file with author) (stating that an eight-ton roll of stainless steel has a value of roughly U.S. \$20,000).

32. Visby Amendments, *supra* note 4, art. 2.

Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 10,000 francs per package or unit or 30 francs per kilo of gross weight of the goods lost or damaged, whichever is the higher.

Id. art. 2(a). "A franc means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900." *Id.* art. 2(d); see also 3 SCHOENBAUM, *supra* note 4, at 63; 2A BENEDICT ON ADMIRALTY, *supra* note 23, at 5-12 n.4.

issue, beginning with those from the Southern District of New York, since this forum has issued the most opinions on the subject. Cases from other jurisdictions follow in part III.B.

III. ANALYSIS OF DECISIONS

A. Cases from the Southern District of New York

1. *Sunds Defibrator*

*Sunds Defibrator, Inc. v. M/V Atlantic Star*³³ is often cited as the first decision to deal with the issue. In *Sunds*, the bill of lading for a shipment from Sweden to New York contained a Clause Paramount that held the carrier's liability subject to the Hague Rules and any legislation making those rules compulsorily applicable, including COGSA.³⁴ No express limitation amount clause existed such as the sample paragraph 8(2).³⁵ Both parties agreed that COGSA applied, but the plaintiff argued that the carrier had agreed to the higher limitation in Hague-Visby.³⁶ The court found no such agreement because Hague-Visby was not mentioned in the bill of lading.³⁷ The court reasoned, "It stretches these words beyond recognition or good sense to construe them as a reference to an unratified subsequent treaty of modification which is not explicitly designated in the text."³⁸ Thus, the court held that the lower COGSA limit applied.³⁹

The *Sunds* decision is important for three reasons. First, the court implicitly decides that where two conflicting provisions

33. 1986 AMC 368 (S.D.N.Y. 1983).

34. *Id.* at 369. The bill of lading in this case stated that the defendant "shall be responsible for the goods . . . subject to the Hague Rules . . . and any legislation . . . including the Carriage of Goods by Sea Act." *Id.* (first alteration in original).

35. *See id.*; see also *supra* note 12 and accompanying text.

36. *Sunds Defibrator*, 1986 AMC at 368-69.

37. *Id.* at 369. However, as in our example, the Hague-Visby Rules were compulsorily applicable because the bill of lading was issued in a Contracting State regardless of whether there was an express mention of the Hague-Visby Rules in the bill of lading. See *supra* part II.B. The *Sunds* court did not address this issue.

38. *Sunds Defibrator*, 1986 AMC at 369-70. The court recognized that Sweden had ratified the Visby Amendments, but the United States had not. *Id.* at 370 n.2.

39. *Id.* at 368.

are compulsorily applicable, COGSA will prevail.⁴⁰ Second, the court makes a mistake common in many of these cases in finding that because a bill of lading does not explicitly mention the Hague-Visby Rules they do not apply.⁴¹ Like COGSA for shipments inbound to the U.S., there does not have to be an express mention of Hague-Visby before they will apply *ex proprio vigore* to bills of lading covering shipments departing a Hague-Visby contracting state.⁴² Third, *Sunds* provides the seed from which most of the following decisions sprout.⁴³

2. *M/V Acadia Forest*

The next case was *Daval Steel Products v. M/V Acadia Forest*.⁴⁴ Covering a shipment from Antwerp, Belgium, to New Orleans, Louisiana, the Clause Paramount provided that the bill of lading would be subject to COGSA or, if issued in a nation where the Hague Rules had been enacted, the bill of lading would be subject to provisions of that enactment and "rules thereto annexed."⁴⁵ The plaintiffs argued that the Hague-Visby Rules, and thus the higher carrier liability limits, were compulsorily applicable because Belgium was a Contracting State and the bill was issued there.⁴⁶ The defendant argued that the provision in the Clause Paramount that mentioned Hague-Visby was meant to apply only to intra-European shipments because all foreign shipments to and from the United States were governed by COGSA.⁴⁷ Unfortunately for the defendant, it could not explain sufficiently to the court why the clause re-

40. *See id.* at 369.

41. *Id.*

42. *See supra* part II.B.

43. Almost all of the cases discussed below either cite *Sunds*, or a case which relied on *Sunds*. *See, e.g.*, *Associated Metals & Minerals Corp. v. M/V Arktis Sky*, 1991 AMC 1499, 1505 (S.D.N.Y. 1991), *vacated on other grounds*, 978 F.2d 47 (2d Cir. 1992) (citing *Sunds*); *Francosteel Corp. v. M/V Deppe Europe*, 1990 AMC 2962, 2965 (S.D.N.Y. 1990) (citing *Daval Steel Prod. v. M/V Acadia Forest*, 683 F. Supp. 444 (S.D.N.Y. 1988) and *Insurance Co. of N. Am. v. S/S Sealand Developer*, 1990 AMC 2967 (S.D.N.Y. 1989) which both cite *Sunds*); *Insurance Co. of N. Am. v. S/S Sealand Developer*, 1990 AMC 2967, 2969 (S.D.N.Y. 1989) (relying on *Sunds*); *Daval Steel Prods. v. M/V Acadia Forest*, 683 F. Supp. 444, 447 (S.D.N.Y. 1988) (citing *Sunds*).

44. 683 F. Supp. 444 (S.D.N.Y. 1988).

45. *Id.* at 445.

46. *Id.* at 445-46.

47. *Id.* at 446.

ferred to Hague-Visby Rules at all when the vessel operated only between Europe and the United States and not between intra-European ports.⁴⁸ The court then decided that because COGSA allows the shipper and carrier to agree to liability above \$500 per package, and the reference to two separate controlling bodies of law created an ambiguity, the contract would be construed against the carrier.⁴⁹ The bill of lading also contained an express limitation of liability of \$500 per package.⁵⁰ The defendant argued that application of the Hague-Visby limitation would offend the canon of contractual construction that requires "all provisions of [the] contract to be read and applied harmoniously."⁵¹ The court disagreed and construed the bill of lading clauses that mentioned COGSA as applicable when only COGSA could apply but not when Hague-Visby could apply.⁵² *Sunds*⁵³ did not apply because the language here referred to the Hague Rules and to "rules, thereto annexed."⁵⁴ This annexation language incorporated the Visby amendments, defeating the *Sunds* proposition that COGSA applied because only the Hague rules, not the Hague-Visby Rules, were explicitly mentioned.⁵⁵

This case is distinguishable from our example because the *Acadia Forest* Clause Paramount looked to the country in which the bill of lading was issued.⁵⁶ Even so, the decision is puzzling for several reasons. The judge here could not decide which set of rules were applicable. In one paragraph, he says that "COGSA governs the bill of lading here at issue,"⁵⁷ then two

48. *Id.* The court's explanation is unconvincing. *See id.* at 446 & n.2. The draftsman for the bill of lading, a maritime attorney, would have known that the rules "annexed" to the Hague Rules of 1924 increase a carrier's liability over that found in COGSA. The court implied that the lawyer was attempting to secure a package limitation below COGSA; more likely the lawyer was drafting a bill that could be used in more than one trade route.

49. *Id.* at 447.

50. *Id.* at 445.

51. *Id.* at 447. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 203(a) (1979) (stating the preference for an interpretation which gives effective meaning to all terms).

52. *M/V Acadia Forest*, 683 F. Supp. at 447.

53. *Sunds Defibrator, Inc. v. M/V Atlantic Star*, 1986 AMC 368, 368 (S.D.N.Y. 1983).

54. *M/V Acadia Forest*, 683 F. Supp. at 447.

55. *See id.*

56. *Id.* at 445.

57. *Id.* at 447.

paragraphs later says that COGSA does not apply to some clauses in the bill of lading.⁵⁸ In addition, the court rules that the Clause Paramount is ambiguous because it expressly applies COGSA or the Hague-Visby Rules. However, both the Hague-Visby Rules and COGSA were incorporated even if not mentioned because the shipment departed a Hague-Visby Contracting State and was bound for a U.S. port.⁵⁹ Following the *Acadia Forest* court's reasoning, a carrier could never draft an unambiguous bill of lading when the carrier is shipping goods from a foreign port in a Contracting State to the United States. Following this court's reasoning, all bills of lading in which COGSA is applicable *ex proprio vigore* are latently ambiguous when Hague-Visby is not mentioned.

3. *S/S Sealand Developer*

The next COGSA/Hague-Visby case considered in the Southern District of New York was *Insurance Co. of North America v. S/S Sealand Developer*.⁶⁰ The Clause Paramount stated that the bill of lading was subject to COGSA, or a statute "similar" to the Hague Rules of 1924⁶¹ if such law was compulsorily applicable where the bill was issued or where the goods were delivered.⁶² The bill also contained a clause which explicitly limited damages to \$500 per package,⁶³ as do the sample clauses. Even though the shipment came from the United Kingdom, a Hague-Visby Contracting State and the bill was issued there, the court held that the Hague-Visby Rules did not apply.⁶⁴ The court found that the bill of lading evidenced an intent that compulsory legislation be "similar to" the Hague Rules of 1924,⁶⁵ and because the Hague-Visby Rules are a substantial modification of the 1924 Hague Rules and not sufficiently "similar,"⁶⁶ Hague-Visby did not apply. Additionally,

58. *Id.*

59. *See supra* part II.B.

60. 1990 AMC 2967 (S.D.N.Y. 1989).

61. *Id.* at 2968.

62. *Id.*

63. *Id.*

64. *Id.* at 2969.

65. *Id.* (citing *Sunds Defibrator, Inc. v. M/V Atlantic Star*, 1986 AMC 368, 369-70 (S.D.N.Y. 1983)).

66. *Id.* at 2969-70. The court distinguished *Acadia Forest* because the bill of lading there contained the language "rules, thereto annexed" when referring

the Clause Paramount stated that the “[c]arrier shall be entitled to the full benefit of all rights and immunity” under COGSA.⁶⁷ The court decided that this clause allowed the carrier to take advantage of the \$500 limitation provided by COGSA.⁶⁸ The court also decided that the Clause Paramount was not ambiguous because the reference to rules similar to the 1924 Hague Rules clearly excluded the Hague-Visby Rules.⁶⁹ Finally, the court considered the canon of contractual construction that holds that a specific clause controls over general provisions.⁷⁰ Here, the valuation clause in the bill of lading set a limitation of \$500 per package.⁷¹ This was the package limitation to which the parties had specifically agreed and therefore must prevail over any liability limitation set out in a law incorporated generally by the Clause Paramount.⁷²

The *Sealand Developer* case involved two compulsorily applicable rules: Hague-Visby, despite not being specifically mentioned, because the shipment originated in the United Kingdom; and COGSA, because the shipment was destined for Virginia.⁷³ Furthermore, this case contained a limitation clause, like our sample clause,⁷⁴ which specifically limited the amount of damages to \$500 per package.⁷⁵

4. *M/V Deppe Europe*

In *Francosteel Corp. v. M/V Deppe Europe*,⁷⁶ the Clause Paramount provided that the rules applicable in the country

to the Hague Rules of 1924. *Id.* No such language existed in the *Sealand Developer* bill of lading.

67. *Id.* at 2970.

68. *Id.* at 2970–71. This argument did not prevail in the next case discussed herein, *Francosteel Corp. v. M/V Deppe Europe*, 1990 AMC 2962 (S.D.N.Y. 1990), where the court decided that one of the “rights” of a carrier under COGSA is the right to agree to a higher limitation of liability with the shipper. *Id.* at 2966–67.

69. *See S/S Sealand Developer*, 1990 AMC at 2969 n.2.

70. *Id.* at 2970; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 203(c) (1979) (giving greater weight to specific terms over general language).

71. *S/S Sealand Developer*, 1990 AMC at 2968.

72. *Id.* at 2970 (citing *Mitsui & Co. v. American Export Lines*, 1981 AMC 331, 354, 636 F.2d 807, 823 (2d Cir. 1981)).

73. *See id.* at 2967, 2969.

74. *See supra* note 12 and accompanying text.

75. *S/S Sealand Developer*, 1990 AMC at 2968.

76. 1990 AMC 2962 (S.D.N.Y. 1990).

where the bill was issued would control but that the carrier would be entitled to all of COGSA's benefits.⁷⁷ In addition, the limitation of liability language in the bill made no reference to any specific monetary amount, but merely incorporated the act or statute in force according to the Clause Paramount.⁷⁸ The court found that COGSA applied but that the shipper and carrier had agreed, pursuant to 46 U.S.C. app. § 1304(5), to raise the carrier's liability to an amount exceeding \$500 per package.⁷⁹ The court held that because the Clause Paramount made reference to the Hague Rules and any "rules thereto annexed", this "annexed" language unambiguously incorporated the Visby Amendments.⁸⁰ The bill of lading in dispute was issued

77. *Id.* at 2963-64. The court noted, accordingly:

[T]his Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, 1936 If this Bill of Lading is issued in a locality where there is in force a Carriage of Goods by Sea Act or Statute, Ordinance or Law giving effect to the International Convention for the Unification of Certain Rules Relating to Bills of Lading, signed at Brussels on August 25, 1924, and which is compulsorily applicable to the sea carriage herein contracted for, this Bill of Lading is subject to the provisions stated in such Act, Statute, Ordinance or Law and rules thereto annexed. When there is no such legislation of a mandatory nature in force at the port of loading or the port of discharge and in case of all shipments to or from Belgian ports, this Bill of Lading shall be subject to the provisions of Article 91 of the Belgian Maritime Law. The Carrier shall be entitled to the full benefit of and right to all limitations of, or exemptions from liability authorized by . . . any other provisions of the laws of the United States or of any other country whose laws shall apply. The choice of applying either the said article of the Belgian Maritime Law or . . . any other provisions of the laws of the United States or of any other country whose law shall apply, rests with the Carrier Whether or not the contract evidenced by this Bill of Lading is subject to the Carriage of Goods by Sea Act, the Carrier shall nevertheless be entitled to the benefit of all privileges, rights and immunities provided for in said Act.

Id.

78. *See id.* at 2966-67.

79. *Id.*

80. *Id.* at 2966. The court noted that the Clause Paramount was very similar in form to the one in the *Sealand Developer* case, with the exception of the "annexed thereto" language. *Id.* Defendants argued that the Clause Paramount was multi-purpose by design so as to apply Hague-Visby to intra-European trades and COGSA to U.S. trades, and the "compulsorily applicable" language was meant to apply where suit was filed. *Id.* The court rejected this contention, holding that the shippers must understand their rights and liabilities under the law at the time and place of contracting—in this case, Belgium's version of Hague-Visby. *Id.*

in Belgium, which had adopted the Hague-Visby Rules.⁸¹ Since the limitation of liability clause depended on the rules in the Clause Paramount, then Hague-Visby controlled.⁸² However, in concluding the court noted:

Having allowed the Hague/Visby limitations to apply based on the place where the bill of lading was issued, the defendant cannot disallow applicability of its limitations *absent an express \$500 per package limitation in every circumstance.*⁸³

This case is factually distinguishable from our example. Again, the Clause Paramount required application of the rules in effect in the country where the bill of lading was issued, and the limitation of liability clause contained no express mention of a \$500 per package limitation.⁸⁴ The passage quoted above implies that the result may have been different had the carrier included an express \$500 per package limitation.

5. *M/V Arktis Sky*

In *Associated Metals & Minerals Corp. v. M/V Arktis Sky*,⁸⁵ a bill of lading for a shipment from Spain to Newark, New Jersey, contained a Clause Paramount providing for application of the Hague Rules as enacted in the country of shipment.⁸⁶ It also stated that where the Hague-Visby Rules compulsorily applied, they would be considered incorporated in the bill of lading.⁸⁷ The defendant argued that COGSA's \$500 package limitation applied *ex proprio vigore*.⁸⁸ The court agreed in part, stating that COGSA applied, but that § 1304(5)⁸⁹ allows shippers and carriers to raise the carrier's liability above the \$500 limitation.⁹⁰ The court found such an agreement in

81. *Id.*

82. *Id.*

83. *Id.* at 2967 (emphasis added).

84. *See id.*

85. 1991 AMC 1499 (S.D.N.Y. 1991), *vacated on other grounds*, 978 F.2d 47 (2d Cir. 1992).

86. *Id.* at 1505.

87. *Id.*

88. *Id.*

89. 46 U.S.C. app. § 1304(5) (1994).

90. *M/V Arktis Sky*, 1991 AMC at 1505.

the Clause Paramount's "country of shipment" language.⁹¹ The court noted that the carrier could have specifically excluded the Hague-Visby Rules since the carrier prepared the bill of lading.⁹² Reference to Hague-Visby created an ambiguity, which was construed against the carrier who drafted the documents.⁹³

The *Arktis Sky* analysis, like that in *Acadia Forest*,⁹⁴ is logically flawed. The *Arktis Sky* court stated that the carrier could have avoided ambiguity by specifically excluding the Visby amendments,⁹⁵ yet earlier, it stated that Spanish law made the Hague-Visby Rules compulsorily applicable.⁹⁶ The Hague-Visby Rules do not require a specific reference in the bill of lading to make them applicable when the goods are shipped from a country that has adopted the Rules.⁹⁷ Therefore, a cargo plaintiff may argue that such a bill of lading is always ambiguous, despite the lack of any reference to Hague-Visby, when goods are shipped to the United States from a Hague-Visby nation. Such a result is untenable.

6. *M/V Kapetan Andreas G*

In *Francosteel Corp. v. M/V Kapetan Andreas G*,⁹⁸ the plaintiff brought an action for damages regarding several shipments of steel from Belgium and France to the United States.⁹⁹ The Clause Paramount in the bills of lading stated that the bills would have effect subject to the law of the country in which claims were brought or to the extent whereby the rights, liberties, and limitations available to the carrier were incorporated.¹⁰⁰ The court found that there was insufficient evi-

91. *Id.* at 1506.

92. *Id.* at 1507.

93. *Id.*

94. *Daval Steel Prods. v. M/V Acadia Forest*, 683 F. Supp. 444 (S.D.N.Y. 1988).

95. *M/V Arktis Sky*, 1991 AMC at 1507.

96. *Id.* at 1506.

97. *See supra* part II.B.

98. 1993 AMC 1924 (S.D.N.Y. 1993).

99. *Id.* at 1924.

100. *Id.* at 1925. The Clause Paramount reads as follows:

9. The contract evidenced by this Bill of Lading shall have effect subject to the Hague Rules or Hague Visby [sic] Rules as the case may be or any equivalent Rules or amendments thereof only:

(a) If so incorporated by Statutory Instrument in the country in which claims hereunder are properly brought, or

dence presented by the parties to determine their intent when they negotiated the bill of lading.¹⁰¹ The court opined that COGSA and its limitation might apply based on the language that the law of the country where the claim was brought would control.¹⁰² However, that would make the alternative provision superfluous.¹⁰³ This would violate basic contract law which requires that contractual terms be given effect and not read as meaningless.¹⁰⁴ The plaintiff argued that the alternative provision incorporated the higher package limitation of Hague-Visby.¹⁰⁵ However, this interpretation conflicted with a liability clause which explicitly incorporated COGSA's \$500 per package limit.¹⁰⁶ The court found both parties' interpretations to be problematic and held that there was a material issue of fact concerning the intent of the parties which prevented granting partial summary judgment for the plaintiff.¹⁰⁷ The court recognized the bill of lading might be ambiguous, and that the usual rule was that ambiguous contractual clauses are construed against the drafter.¹⁰⁸ However, the court warned that this construction might not apply in this case because both parties were sophisticated business entities.¹⁰⁹

The *Kapetan Andreas G* decision is insightful for two reasons. First, it illustrates the uncertainty a court may experience when considering whether to apply Hague-Visby in the face of a specific clause limiting liability to \$500 per package. Second, it observes an exception to the rule that ambiguous contracts are construed against the drafter.¹¹⁰

(b) to the extent whereby only the rights, liberties, limitations and defenses available to the carrier are incorporated.

Id.

101. *Id.* at 1928-29.

102. *Id.* at 1927.

103. *Id.*

104. *Id.* "[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part . . . of no effect." RESTATEMENT (SECOND) OF CONTRACTS § 203(a) (1979).

105. *M/V Kapetan Andreas G*, 1993 AMC at 1926.

106. *Id.*

107. *Id.* at 1928.

108. *Id.*

109. *Id.* at 1928 n.3.

110. *Id.* The rule that ambiguous clauses are construed against the drafter has less force when the other party is particularly knowledgeable. RESTATEMENT (SECOND) OF CONTRACTS § 206 reporter's note (1979).

7. *M/V Pal Marinos*

The most recent decision from the Southern District of New York is *FrancoSteel Corp. v. M/V Pal Marinos*.¹¹¹ Steel coils from Belgium to various U.S. ports were damaged in transit.¹¹² The Clause Paramount incorporated COGSA or the Hague-Visby Rules, "as the case may be,"¹¹³ if they either were incorporated by statute in the country where the claim was filed or only to the extent that the carrier's rights, liberties, limitations, and defenses were incorporated.¹¹⁴ Another clause in the bill of lading stated that under no circumstances would the carrier's liability exceed \$500 per package unless a higher value was inserted in the bill.¹¹⁵ The parties agreed that COGSA applied, but the plaintiff argued that the reference to Hague-Visby incorporated Hague-Visby instead of COGSA,¹¹⁶ which would raise the limitation of liability.¹¹⁷ The defendant argued that the reference to COGSA, combined with the situs of the suit, mandated application of COGSA.¹¹⁸ The court disagreed with both parties, and ruled the language to be ambiguous.¹¹⁹ The court then turned to available extrinsic evidence to determine the intent of the parties.¹²⁰ Finding the evidence insufficient to ascertain the parties' intent, the court construed the clause against the carrier and held the carrier subject to the Hague-Visby package limitations.¹²¹

The decision contains some remarkable reasoning. The court first disagreed with the defendant's argument that the Clause Paramount incorporated COGSA because suit was filed in the United States,¹²² stating that parties to a bill of lading should be assured of their potential liabilities at the time and place of issuance of the bill.¹²³ The court then excised the clause that

111. 885 F. Supp. 86 (S.D.N.Y. 1995).

112. *Id.* at 87.

113. *Id.* (emphasis omitted).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 87-88.

120. *Id.* at 89.

121. *Id.* at 90.

122. *Id.* at 88.

123. *Id.* (citing *FrancoSteel Corp. v. M/V Deppe Europe*, 1990 AMC 2962, 2964

expressly limited the carrier's liability to \$500 per package.¹²⁴ Finally, the court reasoned that COGSA did not apply, contrary to the stipulation by the parties that it did apply,¹²⁵ and contrary to the express language of COGSA that makes it applicable to any shipment to or from a U.S. port.¹²⁶ The court may have reached the end result by reasoning that the parties agreed to a higher package limit under COGSA, but there is no discussion on that point. The court merely notes that "[p]arties to bills of lading subject to COGSA often raise the liability limitation above \$500 by incorporating into their bills of lading . . . the Hague-Visby Rules."¹²⁷

B. Cases from Other Jurisdictions

1. *M/V Glory River*

The earliest case dealing with the COGSA/Hague-Visby issue is *Mitsui & Co. v. M/V Glory River*.¹²⁸ A bill of lading covering a shipment from Japan to Oakland contained a Clause Paramount that incorporated Japan's version of COGSA¹²⁹ with a proviso that the carrier was entitled to the full benefit of U.S. law or any other country's laws which "shall be applicable."¹³⁰ The carrier argued that Japanese law controlled, which limited the carrier's liability to \$450 per package.¹³¹ The court held that COGSA applied, rather than Japanese law, and therefore the limitation of liability provision in the bill was void under § 1303(8).¹³² Once the limitation of liability clause was

(1990)).

124. *Id.* at 88-89.

125. *Id.* at 87.

126. *Id.* In applying COGSA, the court noted that the statute "applies of its own force to 'all contracts for carriage of goods by sea to or from ports of the United States in foreign trade.'" *Id.* (quoting 46 U.S.C. app. § 1312).

127. *Id.* (citing *Daval Steel Prods. v. M/V Acadia Forest*, 683 F. Supp. 444, 447 (S.D.N.Y. 1988)).

128. 1981 AMC 1237 (W.D. Wash. 1979).

129. *Id.* at 1238.

130. *Id.* at 1240 n.9.

131. *Id.* at 1238. The limitation of liability clause in the bill stated the carrier's liability at 100,000 yen per package, which was equivalent to U.S. \$450. *Id.*

132. *Id.* at 1239. Section 1303(8) provides that

[a]ny clause, covenant, or agreement in a contract for carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obliga-

held invalid, the court stated that "absent a bill of lading provision limiting carrier's liability to a specified sum per package or unit, sec[ti]on 1304(5) would prescribe the measure of damage."¹³³

This case is clearly distinguishable from the facts of our hypothetical but still recognizes that COGSA applies of its own force, even though another law is specifically mentioned in the Clause Paramount.¹³⁴ Furthermore, the decision states that the § 1304(5) \$500 limitation would prescribe the measure of damage absent a bill of lading provision that limits the carrier's liability to a specified sum.¹³⁵ Therefore, the case implies that where the bill of lading *does* provide a specified sum, that specified sum would control so long as it is not less than the \$500 provided in § 1304(5).

2. *S/S Koeln Express*

In *Rockwell International Corp. v. S/S Koeln Express*,¹³⁶ a printing press was shipped from Hamburg, Germany, to Baltimore, Maryland.¹³⁷ The bill of lading contained a Clause Paramount that provided for the application of the Hague Rules or the Hague-Visby Rules, whichever was "compulsorily applicable to the contract."¹³⁸ If the Hague-Visby Rules were not compulsorily applicable, the carrier's limitation of liability would be \$500 per package.¹³⁹ Rockwell argued that the Hague-Visby Rules as enacted in Germany were compulsorily applicable.¹⁴⁰ Rockwell failed to provide any authority for that assertion, but the court opined that it was irrelevant anyway because COGSA applied *ex proprio vigore*.¹⁴¹ Therefore, the \$500 limitation per package would apply unless Rockwell had declared a higher

tions provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

46 U.S.C. app. § 1303(8) (1994).

133. *M/V Glory River*, 1981 A.M.C at 1239.

134. *Id.*

135. *Id.*

136. 1987 AMC 2537 (D. Md. 1987).

137. *Id.*

138. *Id.* at 2538.

139. *Id.*

140. *Id.* at 2538-39.

141. *Id.* at 2539.

value.¹⁴² The court found that Rockwell had made no such declaration but had a fair opportunity to do so.¹⁴³ The court then concluded that the language in the bill of lading taken as a whole, by mentioning COGSA and a potential \$500 per package limitation, was sufficient to bind Rockwell to the terms of the contract and was adequate notice of a potential limitation.¹⁴⁴

This case illustrates that only one law can be compulsorily applicable to the contract. When the bill concerns goods shipped into the United States, only COGSA can be compulsorily applicable. Therefore, under the language in the sample clauses,¹⁴⁵ the contract is controlled by the enactment of the Hague Rules or the Hague-Visby Rules that is compulsorily applicable. Based on the ruling in the *Koeln Express* case, only COGSA is compulsorily applicable, and its limitation provisions should apply.

3. A.T.I.C.A.M.

Another "country of shipment" decision was *A.T.I.C.A.M. v. Cast Europe Ltd.*¹⁴⁶ This case involved a shipment from Antwerp, Belgium, to Montreal, Canada, followed by subsequent carriage to Chicago.¹⁴⁷ The bill of lading contained an express limitation of liability clause to the extent of 500 Canadian dollars *per container*.¹⁴⁸ The issue decided by the court was whether the container was a package.¹⁴⁹ The court held that because Hague-Visby would not allow a container to be construed as a package, the limitation of liability clause was invalid.¹⁵⁰ However, the court did not actually decide whether the Canadian COGSA dollar amount or the Hague-Visby dollar amount would apply to the packages inside the container.¹⁵¹

This case is distinguishable because of the "country of shipment" terms and the fact that it does not expressly decide which dollar amount is used for the purpose of limitation of

142. *Id.*

143. *Id.*

144. *Id.* at 2540.

145. *See supra* note 12 and accompanying text.

146. 1988 AMC 305 (N.D. Ill. 1987).

147. *Id.* at 306.

148. *Id.* at 307.

149. *Id.*

150. *Id.* at 309-14.

151. *Id.* at 314 n.8.

liability. It merely strikes down a clause that is unenforceable under Hague-Visby Rules that are applied by virtue of the language in the Clause Paramount.

4. *M/V Lumbe*

Another "country of shipment" case is *Associated Metals & Minerals Corp. v. M/V Lumbe*,¹⁵² involving a shipment from Argentina to New Jersey. The court simply held with little discussion on the matter that the Clause Paramount's plain language amounted to an agreement under § 1304(5)¹⁵³ that the limitation amount would be higher than that provided by COGSA.¹⁵⁴ No authority is cited by the court.

5. *M/V Botic*

In *Ilva U.S.A. v. M/V Botic*,¹⁵⁵ a shipment from Italy to Philadelphia was covered by a bill of lading with "country of shipment" language.¹⁵⁶ Relying on the *Arktis Sky*¹⁵⁷ decision, the court found that the Hague-Visby Rules as enacted in Italy applied compulsorily to the shipment, as did COGSA, and because COGSA allows the parties to agree on a higher limit, the Hague-Visby limitation would apply.¹⁵⁸

Again, this decision is distinguishable because of the language in the Clause Paramount. Likewise, there is no mention of any clause explicitly limiting liability to \$500. The court stated that the general paramount clause language used in the bill of lading was evidence of intent to raise the \$500 limitation contained in COGSA to the higher limit of the Hague-Visby Rules.¹⁵⁹ A clause expressly limiting liability to \$500 might have been useful in arguing that no such intent to raise the limit existed. The court does not rely on an ambiguity argument

152. 1993 AMC 700 (D.N.J. 1991).

153. *Id.* at 701.

154. *Id.* at 704.

155. 1993 AMC 240 (E.D. Pa. 1992), *aff'd*, 1993 AMC 2445 (3d Cir. 1993).

156. *Id.* at 241-42.

157. *Associated Metals & Minerals Corp. v. M/V Arktis Sky*, 1991 AMC 1499 (S.D.N.Y. 1991), *vacated on other grounds*, 978 F.2d 47 (2d Cir. 1992). For a discussion of this case, see *supra* part III.A.5.

158. *M/V Botic*, 1993 AMC at 243-44.

159. *Id.* at 244.

but simply based the decision on the language of the clause as evidence of intent.¹⁶⁰

6. *M/V Alps Maru*

In *Pyropower Corp. v. M/V Alps Maru*,¹⁶¹ a shipment of boiler parts from Korea to Philadelphia, Pennsylvania, travelled pursuant to a bill of lading issued in Houston, Texas.¹⁶² The Clause Paramount had three subparagraphs.¹⁶³ The first sub-

160. See *id.* Furthermore, the court noted, "[T]he parties, by utilizing this particular General Paramount Clause, intended to raise the \$500 limitation contained in COGSA" *Id.*

161. 1993 AMC 1562 (E.D. Pa. 1993).

162. *Id.* at 1563-64.

163. *Id.* at 1570. The subparagraphs read as follows:

Trades where Hague Rules apply

The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipment to which no such enactment is compulsorily applicable, the terms of the said Convention shall apply.

Trades where Hague-Visby Rules apply

In trades where the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on February 23rd 1968—The Hague-Visby Rules—apply compulsorily, the provisions of the respective legislation shall be considered incorporated in this Bill of Lading. The Carrier takes all reservations possible under such applicable legislation, relating to the period before loading and after discharging and while the goods are in the charge of another Carrier, and to deck cargo and live animals.

Trades where U.S. COGSA applies

This Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the Carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. The provisions stated in said Act shall (except as may be otherwise specifically provided herein) govern before the goods are loaded on and after they are discharged from the vessel and throughout the entire time the goods are in the custody of the Carrier. The Carrier shall not be liable in any capacity whatsoever for any delay, non-delivery or mis-delivery, or loss of or damage to the goods occurring while the goods are not in the actual custody of the Carrier

paragraph provided that the Hague Rules as applicable in the country of shipment would apply to the contract, but if there was no such enactment, then the rules enforced in the country of destination would apply.¹⁶⁴ The second subparagraph had a provision that if the Hague-Visby Rules applied compulsorily, then Hague-Visby was incorporated in the bill of lading.¹⁶⁵ The third subparagraph only applied if COGSA applied, and nothing in the bill would be deemed an increase of any of the carrier's responsibilities or liabilities under COGSA.¹⁶⁶ Finally, the bill had a jurisdiction clause wherein the law of the Netherlands would apply.¹⁶⁷ The court assumed for the purposes of argument that the law of the Netherlands controlled and looked at Article 5 of the Hague-Visby Rules, which is incorporated into the Netherlands Code of Commerce as Article 467(a).¹⁶⁸ Article 467(a) 3(a) and (b) did not apply because the bill of lading was issued in the United States, not a Contracting State, and the boiler parts were shipped from Korea, also not a Contracting State.¹⁶⁹ Using Article 467(a), section 3(c), the court then analyzed the first subparagraph of the Clause Paramount and decided that since Korea has not enacted the Hague Rules, then the legislation of the country of destination, the United States, would apply.¹⁷⁰ Therefore COGSA and COGSA's limitations applied.

This case uses the Hague-Visby Rules to determine that COGSA applies. This convoluted reasoning could have been short-circuited simply because both parties agreed that COGSA applied.¹⁷¹ Therefore, by virtue of the third subparagraph of the Clause Paramount entitled "Trades Where U.S. COGSA Applies," the court could have ruled that COGSA applied by using the language "nothing herein contained shall be deemed to surrender by the carrier of its rights or immunities or an increase of any of its responsibilities or liabilities under said

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 1568 n.4.

168. *Id.* at 1569.

169. *Id.*

170. *Id.* at 1571.

171. *See id.* at 1568 n.5. The court noted that the "plaintiff does not dispute that COGSA applies in this case." *Id.*

Act.¹⁷² This analysis should have recognized that COGSA applied of its own force, and the language in the Clause Paramount preempted any argument by the plaintiff that the parties had agreed to a higher limitation.

7. *M/V Star Skarven*

*Associated Metals v. M/V Star Skarven*¹⁷³ involved another "country of shipment" Clause Paramount.¹⁷⁴ In countries where the Hague-Visby Rules applied compulsorily, the provisions of that legislation would be incorporated into the bill of lading.¹⁷⁵ The parties agreed that COGSA applied to the shipments.¹⁷⁶ Relying on the *Botic*¹⁷⁷ and *Arktis Sky*¹⁷⁸ decisions, the court held that Finland had adopted the Hague-Visby Rules and by virtue of the Clause Paramount's language those rules would apply.¹⁷⁹

There was no discussion concerning any express \$500 per package limitation clause. The court noted that the provisions of the Clause Paramount are ambiguous because they referred to Hague-Visby where COGSA might be applicable *ex proprio vigore*.¹⁸⁰ This argument is subject to the same criticism earlier leveled at the *Acadia Forest* and *Arktis Sky* decisions. Hague-Visby was compulsorily applicable to the bill of lading under

172. *Id.* at 1570.

173. 1995 AMC 505 (S.D. Fla. 1994).

174. *Id.* at 507. The clause states in part:

[T]he Hague Rules contained in the International Convention for the Unification of Certain Rules Relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this contract. When no such enactment is enforced in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply.

Id.

175. *Id.*

176. *Id.* at 508.

177. *Ilva U.S.A. v. M/V Botic*, 1993 AMC 240 (E.D. Pa. 1992), *aff'd*, 1993 AMC 2445 (3d Cir. 1993). For a complete discussion of this case, see *supra* part III.B.5.

178. *Associated Metals & Minerals Corp. v. M/V Arktis Sky*, 1991 AMC 1499 (S.D.N.Y. 1991), *vacated on other grounds*, 978 F.2d 47 (2d Cir. 1992). For a complete discussion of this case, see *supra* part III.A.5.

179. *M/V Star Skarven*, 1995 AMC at 510-12.

180. See *id.* at 515-16 (applying "the contractual rule that ambiguities, if any, are to be construed against the party proffering the contract").

Finnish law, even where no reference to Hague-Visby existed in the bill of lading. Therefore, it is hard to see how the carrier could have written an unambiguous bill of lading.

IV. DISTILLATION AND APPLICATION OF THE AVAILABLE CASE LAW

Most of the above decisions recognize that COGSA applies *ex proprio vigore* to the shipment of goods to the United States from a foreign port.¹⁸¹ This is the correct result, and arises from a statutory mandate that some courts still ignore.¹⁸² Because COGSA applies, the higher Hague-Visby limitation of liability should be allowed if it can be shown, under § 1304(5),¹⁸³ that there was an agreement by the carrier to accept a higher limit.¹⁸⁴ The language of the bill itself may evidence the parties' agreement. Rules of contractual interpretation may aid the court. Lastly, extrinsic evidence may provide clues. The following is a discussion of how each kind of evidence of intent should be analyzed and applied to our example.

181. See *Associated Metals v. M/V Star Skarven*, 1995 AMC 505, 508 (S.D. Fla. 1994); *Francosteel Corp. v. M/V Kapetan Andreas G*, 1993 AMC 1924, 1925 (S.D.N.Y. 1993); *Ilva U.S.A. v. M/V Botic*, 1993 AMC 240-43 (E.D. Pa. 1992), *aff'd* 1993 AMC 2445 (3d Cir. 1993); *Associated Metals & Minerals Corp. v. M/V Arktis Sky*, 1991 AMC 368, 369 (S.D.N.Y. 1991), *vacated on other grounds*, 978 F.2d 47 (2d Cir. 1992); *Francosteel Corp. v. M/V Deppe Europe*, 1990 AMC 2962, 2964 (S.D.N.Y. 1990); *Insurance Co. of N. Am. v. S/S Sealand Developer*, 1990 AMC 2967, 2969 (S.D.N.Y. 1989); *Daval Steel Prods. v. M/V Acadia Forest*, 683 F. Supp. 444, 446 (S.D.N.Y. 1988); *Rockwell Int'l Corp. v. S/S Koeln Express*, 1987, AMC 2537, 2539 (D. Md. 1987); *Sunds Defibrator, Inc. v. M/V Atlantic Star*, 1986 AMC 368, 369 (S.D.N.Y. 1983); *Mitsui & Co. v. M/V Glory River*, 1981 AMC 1237, 1239 (W.D. Wash. 1979).

182. See, e.g., *Francosteel Corp. v. M/V Pal Marinos*, 885 F. Supp. 86, 89 (S.D.N.Y. 1995) (holding that COGSA did not apply contrary to both the express language of the statute and stipulations by the parties that it did apply).

183. 46 U.S.C. app. § 1304(5) (1994).

184. I do not mean to infer that § 1304(5) provides the sole means by which the parties to the bill can agree to a higher limit of liability. Section 1304(5) has the advantage of providing evidence on the face of the bill that the parties have so agreed. The decisions that hold that an agreement was reached often rely on § 1304(5) but do not explore any further evidence of an agreement other than the reference to Hague-Visby. I submit that a reference to Hague-Visby, without more, is insufficient to evince an agreement for a higher liability limit.

A. *Express Terms in the Bill of Lading and Rules of Interpretation*

1. *Clause Paramount Language*

There is no language in the sample clauses that limit the scope to any "country of shipment" or "country where the bill of lading is issued" used by some courts to resolve conflicts of interpretation.¹⁸⁵ The language simply states the contract will be subject to "any enactment (such as COGSA)" making the Hague or Hague-Visby Rules compulsorily applicable.¹⁸⁶ The term "enactment" is singular, and the relationship between "Hague" and "Hague-Visby" is disjunctive.¹⁸⁷ Therefore, one may argue that the parties intended and understood that only one statute would be compulsorily applicable.¹⁸⁸

The Clause Paramount also says that "these enactments shall be deemed incorporated herein and made a part hereof and nothing in this bill of lading shall be deemed . . . *an increase of any responsibility thereunder.*"¹⁸⁹ Because COGSA applies as the courts hold it must,¹⁹⁰ this language evidences intent that the carrier does not agree to a limitation of liability above COGSA's \$500 per package. However, the phrase refers to the enactments in the plural, and expressly incorporates them both. This plural reference could be construed as creating an ambiguity.¹⁹¹

185. See *supra* text accompanying note 12.

186. See *supra* text accompanying note 12.

187. See *supra* text accompanying note 12.

188. See *Francosteel Corp. v. M/V Deppe Europe*, 1990 AMC 2962, 2964 (S.D.N.Y. 1990) (holding that the intent of the parties at the time and place of issuance of the bill of lading determines which statute is compulsorily applied, thus COGSA applied).

189. See *supra* text accompanying note 12 (emphasis added).

190. See *Insurance Co. of N. Am. v. S/S Sealand Developer*, 1990 AMC 2967, 2969 (S.D.N.Y. 1989); *Rockwell Int'l Corp. v. S/S Koeln Express*, 1987 AMC 2537, 2539 (D. Md. 1987).

191. See, e.g., *Daval Steel Prods. v. M/V Acadia Forest*, 683 F. Supp. 444, 447 (S.D.N.Y. 1988) (holding that the reference to both COGSA and the Hague-Visby Rules created an ambiguity that should be construed against the defendants, resulting in the incorporation of the higher per package limitation contained in the Hague-Visby Rules).

2. *Limitation of Liability Clause*

While the Clause Paramount is arguably ambiguous, the whole contract must be analyzed to interpret the meaning of individual terms.¹⁹² Therefore, evidence of intent is found in sample paragraph 8(2) which limits "in any event" the liability of the carrier to no more than \$500 per package, unless a higher amount is declared on the bill of lading and the shipper pays extra freight in accordance with the carrier's tariff. This clause alone has been recognized as sufficient to find that the parties did not agree on the higher Hague-Visby limits.¹⁹³ Furthermore, this interpretation comports with the rule that a specific clause is given greater weight than general language.¹⁹⁴

B. *Extrinsic Evidence*

This argument is based on a brief examination of the shipping business and its realities. An adequate presentation of this line of reasoning to a court might require a significant factual burden to show the relative sophistication of the parties and the circumstances surrounding the negotiation of the contract(s).¹⁹⁵

192. RESTATEMENT (SECOND) OF CONTRACTS § 202(2) (1979) ("A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together."); see also *S/S Koeln Express*, 1987 AMC at 2540 (concluding that the bill of lading, when taken as a whole, required the application of COGSA's \$500 per package limitation); cf. *M/V Acadia Forest*, 683 F. Supp. at 447 (construing "bill of lading clauses that refer to COGSA as applying when COGSA itself applies, but not when it doesn't").

193. See *S/S Koeln Express*, 1987 AMC at 2540 (holding that cargo owner's failure to declare higher value of the shipped goods caused carrier's liability to be limited to \$500 per package); *Francosteel Corp. v. M/V Deppe Europe*, 1990 AMC 2962, 2967 (S.D.N.Y. 1990) (noting that the absence of an express \$500 per package limitation allowed the cargo interests to successfully argue for Hague-Visby package limits).

194. *S/S Sealand Developer*, 1990 AMC at 2970; RESTATEMENT (SECOND) OF CONTRACTS § 203(c) (1979).

195. Course of performance, course of dealing, and trade usage are involved as well, but are technically canons of construction. RESTATEMENT (SECOND) OF CONTRACTS § 203(a). However, they deal with extrinsic evidence by nature and fit better in this section of the paper.

The decisions that construe a reference to Hague-Visby as an agreement to raise the COGSA package limitation rely on § 1304(5) which states in pertinent part:¹⁹⁶

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

[2] By agreement between the carrier . . . and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.¹⁹⁷

The language of the statute allows the shipper to recover more than the \$500 limit in two ways: (1) The shipper either declares the nature and value of the goods to the carrier and inserts that information into the bill of lading,¹⁹⁸ or (2) the carrier and the shipper agree on a higher limit.¹⁹⁹

Under paragraph one, the carrier becomes the virtual insurer of the goods.²⁰⁰ The carrier does not accept this in-

196. The paragraphs are not numbered in the statute, but are here for easy reference.

197. 46 U.S.C. app. § 1304(5) (1994) (emphasis added to paragraph 1).

198. *See, e.g., Brown & Root, Inc. v. M/V Peisander*, 648 F.2d 415, 424 (5th Cir. 1981) (stating that COGSA applies unless the value of the goods is declared by the Shipper and the Carrier is provided the opportunity to increase the freight rate).

199. *See, e.g., Sunds Defibrator, Inc. v. M/V Atlantic Star*, 1986 AMC 368, 368 (S.D.N.Y. 1983) (holding that COGSA's \$500 liability limit applies absent explicit language in the bill of lading referencing the higher liability limit of the Hague-Visby Amendments).

200. 46 U.S.C. app. § 1304(5) (1994). At common law, carriers are considered virtual insurers for the safe delivery of goods. *Granite State Ins. Co. v. M/V Caribe*, 825 F. Supp. 1113, 1118 (D.P.R. 1993) (citing SCHOENBAUM, ADMIRALTY

creased liability freely but instead charges an *ad valorem* freight charge.²⁰¹ The agreement by the carrier to accept the unlimited liability is easily found because there are annotations on the bill of lading, and the freight charges reflect the *ad valorem* rate.²⁰²

Under paragraph two, the carrier has not agreed to be the insurer of the goods but agrees to a higher limit of liability.²⁰³ COGSA does not require any annotation on the bill of lading.²⁰⁴ Nothing is written in the cases concerning increased freight charges for the carrier's acceptance of the higher limit to liability, but based on the realities of the carriage business and the practice discussed in the preceding paragraph, one would expect a court to look at the consideration offered by the shipper in exchange for a higher limit as evidence of an agreement.

Based on sound business practices, it is unlikely a carrier will increase the limit of liability without a concurrent increase in freight.²⁰⁵ For a slightly higher *ad valorem* charge, the carrier would become the insurer of the goods without any limitation.²⁰⁶ Therefore, it is unlikely that the shipper would pay extra for an increase in limited liability. Hence the second clause of § 1304(5)²⁰⁷ will rarely be exercised in practice. Finally, it is unlikely the shipper will ship goods that are not insured.²⁰⁸

AND MARITIME LAW 294 (Practitioner's ed., 1987)).

201. See, e.g., *M/V Peisander*, 648 F.2d at 424 (stating that shipper could choose between valuations in the published tariff by paying more or less freight).

202. See, e.g., *id.* (describing facts where the bill of lading provided adequate space for the shipper to declare the value of goods and to state its choice of valuation based on freight rates).

203. See 46 U.S.C. app. § 1304(5) (1994) (allowing carrier and shipper to agree to an amount higher than \$500).

204. See generally *M/V Peisander*, 648 F.2d at 424 (stating that COGSA does not require that a bill of lading contain a space in which the carrier or shipper should note the increased valuation).

205. Michael F. Sturley, *The Fair Opportunity Requirement Under COGSA Section 4(5): A Case Study in the Misinterpretation of the Carriage of Goods by Sea Act (Part II)*, 19 J. MAR. L. & COM. 157, 185-86 (1988).

206. See *id.* at 181 (stating that the "shipper can unilaterally impose full liability on the carrier simply by declaring the true value of the goods").

207. 46 U.S.C. app. § 1304(5) (1994).

208. See Sturley, *supra* note 205, at 202 (recognizing that the principal beneficiaries of a higher package limit are the underwriters).

The average shipper, therefore, has a choice. He may choose to take some risk of shipment and accept the limited liability of COGSA, or he may pay the *ad valorem* charge and put the risk of carriage on the carrier. Since almost all shippers have independent insurance, virtually none of them will pay the *ad valorem* charges for what is, in essence, double insurance coverage.²⁰⁹ The same argument follows in the context of any agreement for a higher limitation of carrier's liability under paragraph two of the statute. Since most shippers are independently insured, paying additional charges would, like paying *ad valorem* charges, constitute double insurance coverage. The general practice is for the shipper to accept the \$500 package limitation and insure the difference, when the goods are coming to the United States.²¹⁰ This practice should be given "great weight" in determining the intent of the parties.²¹¹

The general practice outlined above demonstrates that no agreement for higher liability is intended. The agreement issue seldom arises until there is a loss. Then, the subrogated cargo underwriters argue that a higher package limit should apply because a reference to Hague-Visby means the parties "agreed." Often, the courts are persuaded without thoughtful analysis of the identity and its practices because they wish to circumvent COGSA and its seemingly low and unfair limits to liability.

C. Ambiguity

A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content

209. See, e.g., *Insurance Co. of N. Am. v. M/V Ocean Lynx*, 901 F.2d 934, 940 (11th Cir. 1990), cert. denied, 498 U.S. 1025 (1991) (inferring that by relying on its insurance policy instead of declaring excess value, the shipper has insured against its losses only once, not twice).

210. See *Sturley*, supra note 205, at 180 (stating that most shippers insure their cargo directly with a cargo insurer).

211. RESTATEMENT (SECOND) OF CONTRACTS § 202(4) (1979). The *Restatement (Second) of Contracts* reads as follows:

Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given *great weight* in the interpretation of the agreement.

Id. (emphasis added).

according to the circumstances and the time in which it is used.²¹²

As Justice Holmes alludes in the foregoing passage, discerning the meaning of words may be frustrating for the court, as, invariably, the parties cannot recreate the circumstances that existed at the time the contract was negotiated and signed. Fortunately, analysis of a bill of lading for ambiguity only occurs after the court analyzes the language of the bill, rules of contract interpretation, and extrinsic evidence, and is still unable to rule out all but one reasonable reading of the bill's provisions.²¹³ Based on the preceding analysis, a court should hold that the sample clauses are unambiguous.

Should the bill be ruled ambiguous, the language is generally construed against the drafter.²¹⁴ However, in circumstances of sophisticated parties of comparable bargaining power in an arm's length transaction, this rule carries less weight and should not be applied.²¹⁵ Much of the proof needed to credibly make this contention will lie in the business practices discussed in the previous section of this article.

At first glance, an argument that the Clause Paramount is ambiguous seems warranted. The Clause refers to the Hague-Visby Rules and their compulsory nature, and this reference seems to make the Clause ambiguous because COGSA applies *ex proprio vigore*. As noted above, this contention was successful in the *Star Skarven*,²¹⁶ *Arktis Sky*,²¹⁷ and *Acadia Forest* deci-

212. *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.).

213. See RESTATEMENT (SECOND) OF CONTRACTS § 206 (1979) (stating that in choosing between reasonable readings of a contract, one generally chooses the reading that operates against the drafter).

214. See, e.g., *Daval Steel Prods. v. M/V Acadia Forest*, 683 F. Supp. 444, 447 (S.D.N.Y. 1988) (stating that where there is ambiguity in the bill of lading, it must be construed against the profferer); see also RESTATEMENT (SECOND) OF CONTRACTS § 206 (1979). However, one commentator notes that the application of COGSA to bills of lading should level the field between carriers and shippers by allowing them to increase the \$500 liability limit. See Alan Nakazawa & B. Alexander Moghaddam, *COGSA and Choice of Foreign Law Clauses in Bills of Lading*, 17 TUL. MAR. L.J. 1, 11 (1992).

215. See, e.g., *Francosteel Corp. v. M/V Kapetan Andreas G*, 1993 AMC 1924, 1928 n.3 (S.D.N.Y. 1993); see also RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. b (1979) (expressly referring to bill of lading language as one of the cases in which a contract against the drafter is inapplicable).

216. *Associated Metals v. M/V Star Skarven*, 1995 AMC 505, 515-16 (S.D. Fla. 1994).

217. *Associated Metals & Minerals Corp. v. M/V Arktis Sky*, 1991 AMC 1499,

sions.²¹⁸ As shown in the discussion of those cases above, Article 5 of the Hague-Visby Rules provides for application of the Rules whether they are specified in the Clause Paramount or not.²¹⁹

The ambiguity argument does not survive in light of common shipping business practice. Because the Clause Paramount might be construed as ambiguous even though no mention of the Hague-Visby Rules is made, the carrier would have severe difficulty drafting an unambiguous bill of lading form. The carrier would have to draft individual bills of lading for each carriage, depending on where the bill was issued and from where the goods departed or to where they were destined. This would place an unreasonable burden on the international carriage business and has been recognized as such by at least one court:

[I]n international shipping it is not uncommon for large carriers to use bills of lading with a hierarchical paramount clause like the one used [here]. This allows the carrier to use the same bill of lading form for all of its contracts, rather than having to work up a special bill for each individual shipment. It seems unlikely . . . that the Eleventh Circuit meant to require a dramatic change in the practice of international carriers by forcing them to insert the specific name and each applicable provision of "the corresponding legislation" in every bill of lading.²²⁰

V. CONCLUSION

In the end, the Clause Paramount is a choice of law clause that shippers and carriers understand. The shipping industry knows that shipments bound for various countries will have various applicable statutory schemes. Carriers try to draft a few

1507 (S.D.N.Y. 1991).

218. *Daval Steel Prod. v. M/V Acadia Forest*, 683 F. Supp. 444, 447 S.D.N.Y. 1988).

219. *See, e.g., id.* (demonstrating that when the bill of lading was issued in a jurisdiction where the Hague-Visby Rules apply, the Rules shall be incorporated into the bill of lading even though the bill only refers to the Hague Rules and does not explicitly refer to the Visby Amendments).

220. *Z.K. Marine, Inc. v. M/V Archigetis*, 808 F. Supp. 1561, 1565-66 (S.D. Fla. 1992).

bill of lading forms that will cover a myriad of possible voyages, as there are virtually infinite combinations of origins and destinations. Shippers understand that parts of the bill's language are not applicable. Such is the case when a bill refers to both COGSA and the Hague-Visby Rules; in some parts of the world, COGSA does not apply, while in voyages to and from the United States it does.

COGSA's package limitation must apply to shipments bound for the United States, as Congress has mandated, absent evidence that the parties agreed to a higher limitation. To decide the agreement issue, courts should analyze whether additional consideration from the shipper to the carrier supported the contract for a higher liability limit. Usually, the bill of lading is the clearest evidence. Too often the courts decide without evidentiary support that an agreement has been made or a bill is ambiguous before evaluating the nature of the transaction between shipper and carrier. Sometimes counsel do not provide enough evidence for the court to make that evaluation. Nevertheless, a perspective of the shipping business should lead the courts to understand that a shipper of steel from Spain to the United States is sophisticated enough to know the terms of the bill of lading. The shipper does not find the bill ambiguous and does not want to pay extra freight for a higher package limitation.

