Expanding the Carrier's Right to Claim Indemnity under Section 3(5) of COGSA for Inaccurate Bills of Lading

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INTRODUCTION

On April 16, 1986, the United States completed fifty years of experience with the Carriage of Goods by Sea Act.1 The Act, often referred to as COGSA, provides a detailed legal regime2 which regulates the respective rights and obligations of carriers and shippers.3 Since its enactment, COGSA's many provisions have spawned much litigation and scholarly comment.4

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2. Some commentators would take issue with the characterization of COGSA as a "detailed legal regime." Professors Gilmore and Black have written that:

An inspection of Cogsa, particularly of sections 3 and 4, shows that the Act is a limited code of rules governing the most important rights and responsibilities, liabilities and immunities arising out of the relation of issuer to holder of the bill of lading, with respect to goods damage or loss.


3. The term "shipper" as used herein refers to the party who wishes to have cargo transported. The term "carrier" as used herein refers to the shipowner and/or the vessel which is engaged by the shipper to carry out the transportation. The term "shipowner" as used herein refers to the person or corporation which has legal ownership of the ship. The term "ship" as used herein refers to the vessel itself.

4. The major source of controversy has been over the so-called package limitation clause. Section 4(5) of COGSA limits the liability of the carrier and the ship to $500 per package, or, in the case of goods not shipped in packages, to $500 per customary freight unit. Disagreement has arisen regarding the terms "package" and "customary freight unit." At one time, courts approached the package issue in a literal way. In Isbrandtsen Co. v. United States, 201 F.2d 281 (2d Cir. 1953), for example, the court held that a whole locomotive, worth thousands of dollars, was a freight unit. As such, the carrier was entitled to limit its liability to $500. Later, the Second Circuit adopted a "functional economics" test, which
One provision which has not generated much attention is section 3(5). Commonly known as the Guaranty of Statements clause (or the guaranty clause), it requires the shipper to provide the carrier with accurate information regarding the quantity and weight of the cargo. If the information furnished to the carrier proves to be inaccurate, and a third party consequently brings an action against the carrier for misrepresentation, the guaranty clause allows the carrier to bring a suit for indemnity against the shipper.

Although the guaranty clause appears straightforward, two questions raised by the clause have yet to be definitively passed upon by the courts. The first question is whether the shipper can be held liable to the carrier under the guaranty clause when a third party has provided the inaccurate information. The second question is whether, under such circumstances, the third party can be held liable to the carrier. The answers to these questions turn on how broadly the word “shipper” is defined for purposes of the guaranty asked whether the goods as packaged prior to shipping were fit for individual transport as packed. Royal Typewriter Co. v. M/V Kulmerland, 483 F.2d 645 (2d Cir. 1973). Later, however, in Mitsui & Co. v. American Export Lines, 636 F.2d 807 (2d Cir. 1981), the Second Circuit discarded the functional economics test and focused instead on whether the carrier knew of the contents of the packages. These issues have posed problems for other courts as well. The Fifth Circuit’s struggle with the package issue is reviewed in Croft & Scully Co. v. M/V Skulptor Vuchetich, 664 F.2d 1277 (5th Cir. 1982). For an insightful article which reviews the checkered career of the COGSA package problem, see Hooper & Flicker, Admiralty Litigation in Perpetuum: the Continuing Saga of Package Limitation and Third World Delivery Problems, 6 FORDHAM INT’L L. J. 1 (1983). See also De Orchis, The Container and the Package Limitation — The Search for Predictability, 5 J. MAR. L. & COM. 251 (1974).

5. 46 U.S.C. § 1303(5) (1982). The language of section 3(5) appears infra following note 39. To date, the section has been the subject of only a handful of cases. The leading case is Spanish American Skin Co. v. The M.S. Ferngulf, 143 F. Supp. 345 (S.D.N.Y. 1956), aff’d, 242 F.2d 551 (2d Cir. 1957). For more recent cases which have considered the clause, see Oxford Shipping Co. v. New Hampshire Trading Corp., 697 F.2d 1 (1st Cir. 1982); Westway Coffee Corp. v. M/V Netuno, 675 F.2d 30 (2d Cir. 1982); and Nitram, Inc. v. M/V Cretan Life, 599 F.2d 1359 (5th Cir. 1979). The section has escaped the attention of the commentators. Two leading maritime works, A. KNAUTH, THE AMERICAN LAW OF OCEAN BILLS OF LADING (4th ed. 1953) and 2A BENEDICT ON ADMIRALTY (7th ed. 1985), do not even mention the section in their discussions on COGSA and bills of lading. GILMORE & BLACK, supra note 2, reproduce the text of the section but do not comment on it, while H. BAER, ADMIRALTY LAW OF THE SUPREME COURT § 18-5, at 499 (3d ed. 1979) dismisses the clause as “self-explanatory.”

6. COGSA actions may proceed against either the shipowner or the vessel because American admiralty law treats vessels as juridical persons who can be sued in their own right, quite apart from the interests of their owners. For further discussions of the in rem action, see Hebert, The Origin and Nature of Maritime Liens, 4 TUL. L. REV. 381 (1930); Ryan, Admiralty Jurisdiction and the Maritime Lien: An Historical Perspective, 7 W. ONT. L. REV. 173 (1968); and Toy, Introduction to the Law of Maritime Liens, 47 TUL. L. REV. 559 (1973).
Inaccurate Bills of Lading clause. Unfortunately, determining congressional intent in this regard is difficult. No help is provided by COGSA, which does not define the term "shipper" and does not address the possibility that a third party might have provided the inaccurate information. Nor has any assistance been forthcoming from other maritime statutes, since until recently they too avoided defining the term "shipper." Although a common law definition has emerged in another context, that definition is highly unsuited to the guaranty clause.

To date, no court has been called upon to answer the question of whether a shipper can be held liable under the guaranty clause for inaccurate information provided by a third party, and only one court has had to decide whether a carrier may sue a third party under the guaranty clause. In Atlantic Overseas Corporation v. Feder, a federal district court in New York held that section 3(5) granted the carrier an action only against the shipper.

In light of the foregoing, this article will suggest that the time has come to amend section 3(5) so as to require any party which provides inaccurate information to the carrier to indemnify the carrier to the extent of any damages or expenses, including reasonable attorneys' fees, which the carrier has incurred as a result of the inaccuracy. By adopting a new, broader definition of the indemnity action referred to in the guaranty clause, the carrier will have adequate protection and the regime established by COGSA will operate as intended.

In order to demonstrate that an expanded basis of liability under the guaranty clause is not only needed but also proper, the article will begin with a brief overview of the distinctions between private and public marine carriage. It will then explore the role of ocean bills of lading in international sales as they relate to the purpose of COGSA. After an examination of the guaranty clause, the article will then proceed to discuss the rationale for expanding the scope of the guaranty clause. Finally, the article will conclude with a recommendation that Congress amend section 3(5) of COGSA to permit the guaranty clause's indemnity action to be broadly applied.

7. See infra note 45.
I. PRIVATE AND COMMON CARRIAGE DISTINGUISHED

Historically, the carriage of goods by water has been arranged as either private carriage or common carriage. If private carriage is sought, the carrier and the shipper reach a special agreement for the transportation of a particular cargo. Normally, their agreement is embodied in a charterparty, a form of maritime contract by which the shipper obtains the use of some or all of the ship either for a period of time or for a specified number of voyages. By contrast, common carriage (also called public carriage) is arranged when a carrier holds itself out as ready and willing to carry the cargo of anyone able to pay the charge, which is known as freight. Ships engaged in common carriage (called liners) follow specific routes at set times and post fares based on some combination of the weight of the cargo and the length of the journey.

Two major differences—one practical and the other legal—distinguish the two types of carriage. As a practical matter, private carriage, all other things being equal, is preferred because of the shipper’s ability to dictate sailing times and routes. For this right, however, the shipper pays a higher rate than it would if it arranged the transportation by public carrier. In addition, the insurance premium paid to insure goods privately carried is much greater than that paid if the same goods are publicly carried. The legal difference between the types of carriage has to do with the duty that the carrier owes to the cargo. The private carrier owes to the cargo only a duty of general care. The common carrier, however, is held to a much stricter standard of care, and becomes a virtual insurer of the goods. In addition, while the private carrier

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10. There are three different types of charterparties: time, voyage and demise. The characteristics of each are reviewed in Randolph v. Waterman S.S. Corp., 166 F. Supp. 732, 733-34 (E.D. Pa. 1958), and in Gilmore & Black, supra note 2, § 4-1, at 193.

11. Those unfamiliar with maritime nomenclature often use the term “freight” to refer to the goods being transported. While this description is correct for land-based carriage, in water borne commerce the term “freight” refers to the amount that the carrier will earn for completing the voyage. See Continental Ore Corp. v. United States, 423 F.2d 1248, 1250 (Ct. Cl. 1970).

12. See O. W. Holmes, The Common Law 164, 188 (1881). The historical reason for this higher duty of care was based on the perceived bargaining power of the parties. The shipper who sought to engage an entire vessel was considered to be in a position equal to that of the carrier, and therefore could bargain effectively. But the shipper who sought to engage in common carriage was thought to be in a weak position with respect to the carrier, and hence was considered unable to bargain effectively with the carrier. In addition, the law was distrustful of carriers, who sometimes conspired with thieves to steal the cargo. See Friedell, The Deviating Ship, 32 Hastings L.J. 1535, 1537 n.13 (1981). It was also felt that a shipper who hired out the entire vessel could afford to have one of its agents accompany the
enjoys freedom of contract, the common carrier is subject to a plethora of statutory controls.\textsuperscript{13}

The debate over the private carrier-public carrier distinction increased in the eighteenth century, when legislation and judicial practice in many countries began to allow the common carrier to escape, in varying degrees, its statutory duty of strict care.\textsuperscript{14} Carriers in countries which had a large number of carriers were able to join together and convince the government that their economic well-being depended upon a rolling back of the heavy burdens which had been placed on them. The result in such countries was that common carriers began to enjoy the same freedom of contract as private carriers. In countries which had a relatively large number of shippers, however, strict liability continued to be imposed upon the common carrier. Since countries tended to have either large numbers of carriers or large numbers of shippers, a balanced approach to the problem did not emerge. Instead, countries developed highly elaborate choice-of-law principles which tended to promote their own rules in any conflict between a carrier and a shipper.\textsuperscript{15}

In addition to the general confusion which these competing systems of liability engendered, a much more serious problem devel-

\textsuperscript{13} In the United States, these controls are carried out by an administrative agency known as the Federal Maritime Commission ("FMC"). The FMC is the current incarnation of a host of older shipping agencies, the first of which was the United States Shipping Board, formed in 1916. The Board was replaced in 1936 by the United States Maritime Commission, which in turn gave way in 1950 to a Maritime Board lodged in the Department of Commerce. The Maritime Board was abolished in 1961 and was replaced by the FMC.


\textsuperscript{15} For a further discussion, see Asser, Choice of Law in Bills of Lading, 5 J. MAR. L. & COM. 355 (1974).
oped. Because of the varying substantive standards, the ability of ocean bills of lading to be freely negotiated was brought into serious question. As a result, world trade became seriously impaired.

II. THE OCEAN BILL OF LADING IN INTERNATIONAL SALES

A bill of lading is a receipt issued by the carrier to the shipper that acknowledges the acceptance of the cargo by the carrier. In addition to serving as a receipt, the bill acts as a contract of carriage, defining the terms under which the carrier has agreed to carry the goods. With the emergence of the two competing systems of liability (one favoring the common carrier and the other favoring the shipper), the terms embodied in the bill of lading became the subject of much controversy.

The bill of lading is prepared and issued by the carrier. The front of the bill contains a series of blanks to be filled in with such identifying information as the name of the vessel, the name of the shipper, and the type of cargo. The back of the bill contains numerous fine print clauses which describe the terms of the carriage. These terms are offered on a “take it-or-leave it” basis, and are the maritime equivalents of shoreside adhesion contracts. Since the carrier's attorney drafts the clauses, they provide the carrier with the maximum protection available.¹⁶

¹⁶. At their zenith, such exculpatory clauses exonerated the shipowner from almost every conceivable cause of cargo damage. James A. Quinby, a San Francisco admiralty attorney, caught the spirit of such clauses in an amusing poem entitled Them Damaged Cargo Blues:

It is much to be regretted
That your goods are slightly wetted
But our lack of liability is plain,
For our latest Bill of Lading
Which is proof against evading
Bears exceptions for sea water,
rust and rain
Also sweat, contamination,
Fire and all depreciation
That we’ve ever seen or heard of
on a ship.
And our due examination
Which we made at destination
Shows your cargo much improved by the trip.

.......
It really is a crime
That you’re wasting all your time,
For our Bill of Lading clauses
As the split between pro-carrier and pro-shipper countries intensified, courts in pro-shipper countries were routinely voiding exculpatory clauses which the carrier had the right to put into the bill of lading under the law of its country. Thus, for example, the carrier might include in its bill of lading a clause stating that it was not responsible for damage to the cargo caused by stress of weather during the voyage. When the goods arrived at the port of discharge damaged by stress of weather, the shipper would sue the carrier in the shipper's country. There, a court was likely to rule that stress of weather was no defense for the carrier because under the law of the forum its stress of weather clause constituted an invalid attempt by the carrier to lessen its duty of care to the cargo.

While disputes over exculpatory clauses were a problem when the only parties to the bill of lading were the carrier and the shipper, such disputes became intolerable when additional parties gained an interest in the dispute, as when the bill of lading was an "order" bill. To understand this dimension of the problem, a word or two must be said about the third purpose of a bill of lading.

make it plain
That from ullage, rust or seepage,
Water, sweat or just plain leakage,
Act of God, restraint of princes,
thief or war,
Loss, damage or detention,
Lock out, strike or circumvention,
Blockade, interdict or loss twixt ship and shore,
Quarantine or heavy weather.
Fog and rain or both together.
We're protected from all these and many more,
And it's very plain to see
That our liability
As regards your claim is absolutely nil,
So try your underwriter,
He's a friendly sort of blighter,
And is pretty sure to grin and foot the bill.

The poem is reproduced in Tessler Bros., Ltd. v. Italpacific Line, 494 F.2d 438, 444 n.8 (9th Cir. 1974). For a more serious discussion of the problems caused by such exculpatory clauses, see A. Yiannopoulos, NEGLIGENCE CLAUSES IN OCEAN BILLS OF LADING (1962). This excellent work is a tour de force on the issue.
In addition to serving as a receipt and the contract of carriage, the most important purpose of the bill of lading is that it controls title to the goods. Stated otherwise, the goods are merged into the bill of lading, which locks up control over them. The nature of the control exercised by the bill depends upon whether the bill is negotiable or non-negotiable, known in the trade as being either “order” or “straight.” An order bill of lading vests title to the goods in whomever possesses the bill of lading. As a result, an order bill of lading directs the carrier to release the goods to whomever presents the bill of lading. It may be useful, for purposes of understanding, to analogize an order bill of lading to a bearer bond, which requires the payor to pay the amount due to the party which bears the bond. In contrast, a straight bill of lading, sometimes also called a named bill, names the party to whom delivery of the cargo is to be made. This party, known as the consignee, cannot be changed, and the carrier will not release the goods to any other party.17

As is apparent, there is a tremendous benefit to a shipper if the bill of lading is made out as an order bill. The order bill allows the shipper to sell the bill (and title to the goods) to a third party long before the goods arrive at their destination. Since the carrier will deliver the goods to anyone who presents an order bill, the shipper need not wait to sell its goods until they arrive in a foreign market.

There are two advantages to selling the bill rather than the goods. First, the shipper receives its money much sooner than it otherwise would. If the voyage is a particularly long one, the amount of time saved by the shipper can be several weeks or even months. Second, once the shipper sells the bills, its relationship with the carrier is at an end. Thus, if the cargo should arrive damaged, it is the new bill holder’s responsibility to bring suit against the carrier.

Another way to describe bills of lading is in terms of their negotiability. If a bill of lading vests title in the party which holds it, the bill is negotiable because title can be transferred. Once sold, the new holder of the bill is entitled either to keep the bill and claim the goods described in the bill or to sell the bill. A negotiable bill can be sold and resold any number of times. By contrast, a non-negotiable bill vests title in a particular party, and as such

17. Carriers will release the goods to a party which is unable to present the bill of lading if that party gives the carrier a letter of indemnity, which is backed by a bank or some form of security. The party thereby agrees to hold the carrier harmless against any claims of misdelivery which may later be raised.
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cannot be sold. Thus, an order bill is negotiable while a straight bill is not. Ocean bills of lading have historically been considered negotiable, in contrast to other types of bills. The negotiable bill of lading may be sold to a buyer anywhere in the world. In order to facilitate worldwide sales, the bill is usually negotiated through a bank, which collects and pays against the bill of lading.

Although the foregoing description is oversimplified, it illustrates the movement of ocean bills of lading. As is apparent, the value of bills of lading as a means of fostering international sales is a function of their acceptance and enforceability in diverse jurisdictions. If bills of lading are permitted to travel throughout the world, the potential number of buyers increases dramatically. As national legal systems began to diverge in their treatment of bills of lading, however, the ability to negotiate bills began to diminish. By the early part of this century, the diversity of national legal systems had made negotiation extremely difficult.

III. THE PURPOSE OF COGSA

The mounting disarray caused by the split in national treatment accorded to bills of lading led to a cry for reform shortly after the beginning of this century. In order to increase the acceptability of bills of lading, an international effort began prior to World War I to formulate a uniform system for dealing with bills of lading. This effort culminated with the promulgation in 1924 of the so-called Hague Rules. The Hague Rules, which were based on an earlier piece of American legislation known as the Harter Act, were orig-

18. Gilmore & Black, supra note 2, § 3-3, at 94.
20. The Rules are more formally known as the International Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea. They were signed in Brussels on August 25, 1924. The story of the promulgation of the Hague Rules has been told many times. It is therefore repeated here in only such detail as is necessary for the reader unfamiliar with this chapter of maritime history. For a more detailed treatment of the efforts to promulgate the Hague Rules, see James, Carriage of Goods by Sea—The Hague Rules, 74 U. PA. L. REV. 672 (1926); Poor, A New Code for the Carriage of Goods by Sea, 33 Yale L.J. 133 (1923).
21. 27 Stat. 445 (1893), 46 U.S.C. §§ 190-96 (1982). The Harter Act was passed by Congress in an attempt to protect American shippers and encourage the growth of the American merchant marine. Under the Act, clauses relieving carriers from liability for negligence were void. In return, carriers were relieved from liability for negligence in the naviga-
inally drafted as a set of voluntary rules which could be included in a bill of lading. Later, the Rules were turned into a convention. After much political debate, the United States in 1936 adopted the Hague Rules, in modified form, as COGSA.\(^2\)

For the most part, COGSA seeks to establish the rights and duties of the carrier and the shipper as they pertain to stowing and caring for the cargo. In order to do so, COGSA states that its provisions apply to goods carried under bills of lading carried "to or from ports of the United States, in foreign trade . . . ."\(^2\) Thus, COGSA does not affect privately carried goods,\(^4\) goods carried solely between two American ports\(^2\) or goods carried between two

\(^{22}\) Although the Hague Rules were modeled on the Harter Act, it took the United States more than a decade to ratify the Rules. Ratification eventually took place in two steps. First, Congress enacted COGSA on April 16, 1936. As enacted, COGSA contained several variations from the text of the Hague Rules. Then, on June 29, 1937, the United States deposited its ratification of the Hague Rules. The ratification was made subject to the understanding that in any case where COGSA and the Rules conflicted, COGSA would govern. The understanding is contained in a memorandum issued by the State Department on June 5, 1937. For a discussion of the memorandum, see KNAUTH, supra note 5, at 454, 457-58.

The United States' delay in ratifying the Hague Rules was due in part to the fact that they displayed a strong continental flavor and in part to the strong resistance of American carrier interests. Although Charles S. Haight, a noted New York maritime attorney, campaigned tirelessly for American adoption of the Hague Rules, it was not until the Supreme Court's decision in May v. Hamburg-Amerikanische Packetfahrt Aktiengesellschaft (The Isis), 290 U.S. 333 (1933), that serious efforts at adoption began. The Court's decision in The Isis frightened carriers because it reduced the carrier's right to be exonerated from liability. Justice Cardozo held that if a shipowner failed to use due diligence to make its vessel seaworthy the carrier could be held liable for any cargo damage which resulted, even if the unseaworthy condition did not cause or contribute to the damage. Recognizing that they were now in a highly vulnerable position, American carriers began to push for adoption of COGSA, which they felt would return them to the position they had enjoyed prior to The Isis. The case is discussed in Notes which appear in 8 Tul. L. Rev. 471 (1934) and 22 Calif. L. Rev. 567 (1934).


\(^{24}\) Goods which are carried under a charterparty can be made subject to COGSA if the parties incorporate COGSA into the charterparty. Incorporation is accomplished by means of a "Clause Paramount." For a case which discusses this subject, see Jamaica Nutrition Holdings, Ltd. v. United Shipping Co. and M/V El Zorro, 643 F.2d 376 (5th Cir. 1981). See also Zock, Charter Parties in Relation to Cargo, 45 Tul. L. Rev. 733 (1971).

foreign ports.26

The heart of COGSA is found in sections 3 and 4. These two sections effect the basic compromise of COGSA. In return for using due diligence to provide a seaworthy ship and for carefully loading, stowing and caring for the cargo, the carrier is relieved of liability for all the other risks to the cargo during the voyage. Such risks are termed by COGSA as "uncontrollable causes of loss," and include fire, acts of God, war, public enemies and foreign sovereigns, strikes, lockouts, riots and quarantine restrictions.27 In addition, negligence by the crew is considered an uncontrollable cause of loss for which the carrier is not liable.28

26. Since COGSA states in 46 U.S.C. § 1300 (1982), that it applies to carriage to or from ports of the United States, carriage from a foreign port to another foreign port is not covered by COGSA. In Fednav Ltd. v. Sterling Int'l, 572 F. Supp. 1268 (N.D. Cal. 1983), however, the court disregarded this rule and applied COGSA to a shipment between Canada and Iraq. The court justified its application of COGSA by citing the need for uniformity in maritime commerce. Id. at 1270-71.

27. The breadth of the carrier's excluded risks was recently criticized by William J. Augello, Executive Director and General Manager of the Shippers National Freight Claim Council. Mr. Augello said in part, "[COGSA] is the only law in the world that I've ever seen that places a premium on negligence." Mr. Augello went on to state that in his opinion COGSA saddles shippers with risks that should belong to carriers. See Bonney, Congress Bid Update Act on Liability, J. Com., Nov. 29, 1985, at 1B, col. 2.

28. It is somewhat difficult, as a matter of logic, to understand why the shipowner is required to furnish a properly trained crew but is not responsible for errors made by the crew in the course of the voyage. As is true of so many of COGSA's provisions, the explanation is historical. In the early days of shipping, when shore-to-ship communications were non-existent (and, until fairly recently, quite crude), the shipowner lost the ability to control the ship's crew once the ship left port. Thus, it was felt that if the shipowner hired a capable crew, the shipowner had done all that could be reasonably asked of him. Although communications have now advanced to the point where the shipowner can stay in touch with the crew throughout the voyage, COGSA has not been amended to increase the responsibility of the shipowner. Although this matter is largely of academic interest, it could become an issue in the future in the following way. In the last few years, the size of ships have increased dramatically, yet the number of crewmen has decreased as more and more of the ship's functions are run by computer and shipowners look for ways to decrease operating expenses. See L. Kendall, supra note 19, at 413. Thus, it is not unusual to find supertankers of unprecedented size being manned by crews of two dozen. It is possible that a court may find that a carrier has not met its duty to provide a crew of sufficient size by sending out such a small crew to run such a large ship, especially if cargo damage were to occur which could have been prevented by a larger crew. Such a situation could occur, for example, if a fire were to break out which could have been tamed by a larger crew but which was uncontrollable by the smaller crew. Cf. Sunkist Growers, Inc. v. Adelaide Shipping Lines, Ltd., 603 F.2d 1327, 1334-35 (9th Cir. 1979), cert. denied, 444 U.S. 1012 (1980), where the court held the shipowner liable for failing to man the vessel with a crew properly trained in firefighting techniques. Thus, it would not be difficult for a future court to hold a shipowner liable for having a crew of insufficient size. But cf. Ta Chi Navigation Corp., 677 F.2d 225, 228-29 (2d Cir. 1982)(criticizing Sunkist's placement of the burden of proof of the carrier's negligence with respect to fire damage on the carrier). See also Asbestos Corp. v. Compagnie de Navigation Frais-Sinet et Cyprien Fabre, 480 F.2d 669 (2d Cir. 1973)(shipper sustained...
Although their main concern was with cargo damage during the voyage, the drafters of COGSA also recognized and attempted to deal with the issue of the negotiability of bills of lading. They began by making it obligatory for a carrier to issue a bill of lading after it received the cargo, if the shipper demanded a bill.29 The bill is required to identify the goods,30 list the weight and quantity of the cargo,31 and attest to the apparent good order and condition of the goods.32 Each of these descriptions is to be provided to the carrier in writing by the shipper,33 although the carrier is not required to state or show in the bill any representations made by the shipper for which the carrier either has reasonable grounds to suspect are false or has no reasonable means to verify.34 Once the carrier issues a bill of lading, the bill is considered prima facie evidence of receipt by the carrier of the goods as described in the bill of lading.35

IV. THE GUARANTY CLAUSE

As stated above, once the carrier issues a bill of lading, it cannot contest, as against any subsequent holder of the bill, the accuracy of the statements contained in the bill. It should be noted, however, that there are two exceptions to this rule. First, the holder must have relied on the statements contained in the bill of lading.36 Second, if the cargo is a bulk cargo37 and was loaded by someone other than the carrier, the carrier is again not estopped.38

The exceptions to the estoppel bar are rarely, if ever, successfully invoked by the carrier.39 Instead, the remedy which COGSA gives to the carrier is a right of indemnity from the shipper. This

burden of proof that fire was caused by an inexcusable condition of unseaworthiness of a vessel, inadequate fire fighting equipment).

29. 46 U.S.C. § 1303(3).
30. Id. at § 1303(3)(a).
31. Id. at § 1303(3)(b).
32. Id. at § 1303(3)(c).
33. Id. at § 1303(3)(a),(b),(c).
37. A bulk cargo is cargo which is stowed loose in the hold, such as coal or grain. R. DE KERCHOVE, INTERNATIONAL MARITIME DICTIONARY 103 (2d ed. 1961).
right is embodied in section 3(5), which provides:

The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper. 40

The guaranty clause makes the carrier liable for any damages that any holder of the bill of lading may suffer as a result of inaccuracies in the bill of lading. Liability could occur, for example, if a bill of lading described the goods as being 1,000 tons of steel. If the shipper of the steel had in fact provided only 800 tons to the carrier, but received a bill of lading for 1,000 tons, it could then sell the bill of lading to an unsuspecting party as 1,000 tons of steel. When the ship arrived and the purchaser of the steel claimed its cargo, it would learn of the deception. 41 In such circumstances, the last sentence of the guaranty clause would allow the holder to sue

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40. 46 U.S.C. § 1303(5). Throughout the 1970's, delegates from around the world, meeting under the aegis of the United Nations Conference on Trade and Development and the United Nations Commission on International Trade Law, worked on drafting a replacement for the Hague Rules. It was felt that a new set of rules was necessary because of: (1) the technological changes which had taken place in shipping since the 1920's; and (2) the emerging role of lesser developed countries in world trade, many of whom felt that the Hague Rules contained a pro-Western bias. In March, 1978 the delegates convened in Hamburg, West Germany and promulgated the United Nations Convention on Carriage of Goods by Sea ("the Hamburg Rules"). The Convention is reported at U.N. Doc. A/CONF.89/13 (1978) and is reprinted in 17 INT'L LEG. MAT. 603 (1978) and in 1978 Am. Mar. Cas. 1036. Although the Hamburg Rules differ substantially from COGSA, section 3(5) of COGSA appears, in near verbatim form, as Article 17(1) of the Hamburg Rules. Thus, the discussion and suggestions contained in this article are applicable regardless of whether the United States opts to enact the Hamburg Rules or stay with COGSA. For general discussions of the Hamburg Rules, see Moore, The Hamburg Rules, 10 J. MAR. L. & COM. 1 (1978); Sweeney, The UNCITRAL Draft Convention on Carriage of Goods By Sea, 7 J. MAR. L. & COM. 69 (Part I) (1975) and 327 (Part II), 487 (Part III) and 615 (Part IV) (1976); and Yancey, The Carriage of Goods: Hague, COGSA, Visby and Hamburg, 57 TUL. L. REV. 1238 (1983).

41. One of the protections which maritime law gives to carriers is a lien on the cargo they transport. This lien provides the carrier with security for the unpaid freight and for any expenses which it may have suffered during the voyage and for which the cargo is legally obligated to pay (such as General Average expenses). This lien disappears, however, when the cargo is discharged by the carrier unless it is expressly agreed that the lien shall continue after discharge. See Bulkley v. The Naumkeag Steam Cotton Co., 65 U.S. (24 How.) 386, 394 (1860). Since the purchaser of the bill will not learn of the shipper's deception and bring a section 3(5) suit against the carrier until it has collected the cargo and has had an opportunity to inspect the goods, the cargo lien in most instances will provide no protection, for purposes of section 3(5), to the carrier. Thus, a larger remedy for the carrier under section 3(5) is appropriate.
the carrier, who would be bound to the representation of 1,000 tons contained in the bill.

This may seem unfair, since, as will be recalled, the carrier received the weight information that it put in the bill from the shipper. By making the carrier liable, however, COGSA insures that the innocent purchaser will have a cause of action.\textsuperscript{42} COGSA balances the hardship on the carrier by giving the carrier a right to claim indemnity from the shipper under section 3(5).\textsuperscript{43} The question which arises is who is a "shipper" for purposes of the COGSA indemnity action?

COGSA does not define the term "shipper," although it does define the term "carrier."\textsuperscript{44} Interestingly enough, the term shipper was as defined in any major piece of American maritime legislation until 1984.\textsuperscript{45} The lack of a statutory definition of "shipper" has led

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\item {42} Why the purchaser of the bill of lading is not adequately protected by being able to sue the shipper (or the party from whom it brought the bill, if the bill has been negotiated more than once) is something of a mystery. Research reveals no definitive answer to why the drafters of either the Hague Rules or COGSA believed it necessary to allow the purchaser to have a cause of action against both the shipper and the carrier. It is probable that the drafters felt that the carrier would be in the best position to explain what happened during the voyage and, if the cargo damage was not the carrier's fault, it could easily prove that by producing such supporting documents as the stow plan, deck and engine logs, and weather records. Furthermore, making the carrier liable was probably felt to be fair because the carrier is not required to include information in the bill of lading when the accuracy of the information is questionable or unverifiable. \textit{See supra} note 34 and accompanying text.

\item {43} It has been suggested to the author that while a carrier could attempt to increase its freight rates to cover the cost of having to defend and pay on actions brought by bill holders and that the need to pursue the indemnity action would then be unnecessary, the ability of carriers to actually raise their freight rates to meet this contingency is doubtful. First, raising freight rates might put both domestic shippers and carriers into a competitively disadvantageous position. Second, increasing freight rates might run afoul of FMC guidelines. \textit{See supra} note 13.

\item {44} Section 1(a) of COGSA, part of the "Definitions" paragraph of COGSA, states that, "The term 'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper." 46 U.S.C. § 1301(a). In recent years, a number of courts have been called upon to determine who is a COGSA carrier, and have turned to the definition provided in section 1(a) for guidance. \textit{See}, \textit{e.g.}, Pacific Employers Ins. Co. v. M/V GLORIA, 767 F.2d 229 (5th Cir. 1985); Assicurazioni Generali v. D'Amico, 766 F.2d 485 (11th Cir. 1985). Other terms defined in section 1 include "contract of carriage," "goods," "ship," and "carriage of goods."

\item {45} The term "shipper" was defined for the first time in a maritime statute when Congress passed the Shipping Act of 1984, discussed \textit{supra} note 13. The Act defines shipper as "an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made." 46 U.S.C. § 1702(23) (1985). Even if the Act's definition were not limited to shipping conferences, the definition is of little help because it is unclear. Indeed, two shipping conferences have already petitioned the Federal Maritime Commission to comment on and expand the Act's definition. \textit{See} Morrison, \textit{FMC Asked to Clarify Definition of "Shipper,"} J. Com. Feb. 5, 1986, at 1B, col. 3. Because the Shipping
maritime courts to develop a common law definition of the term. The leading modern case in this area is *Norman G. Jensen, Inc. v. Federal Maritime Commission*,\(^{46}\) which involved the question of whether the Federal Maritime Commission had properly interpreted the federal Freight Forwarder Law.\(^{47}\) In the course of its review of the Commission’s decision, it became necessary for the Eighth Circuit to define the term “shipper” for purposes of the Shipping Act of 1916. The court wrote, “The term ‘shipper,’ as used in the Act, is not defined but is commonly understood to mean the owner or person for whose account the carriage of goods is undertaken.”\(^{48}\)

The *Jensen* court defined the term “shipper” by looking to the party which owned the goods at the time the contract of carriage was entered into with the carrier. In the normal course of things, such a definition would be perfectly acceptable for purposes of the Act of 1984.\(^{49}\) Even after several more years pass, however, it is likely that the Act’s definition will not change maritime law because of the Act’s limited applicability. See supra note 13. This is especially true with respect to COGSA, since COGSA seeks to define the rights and obligations between carriers and shippers while the 1984 Act seeks to define the rights and obligations among carriers.


Problems caused by Congress’ use of a key word which is not defined have surfaced in other parts of maritime law. Thus, statutes relating to a shipowner’s right to limit his liability following a marine disaster have been difficult to interpret because no definition is provided of the term “owner.” For a recent article which discusses this problem, see Pelaez, *Ownership at Sea: Identifying Those Entitled to Limit Liability in the Admiralty*, 22 Duq. L. Rev. 397 (1984).

46. 497 F.2d 1053 (8th Cir. 1974).

47. *Id.* at 1056. The Freight Forwarder Law is codified at 46 U.S.C. § 1718 (1985) (replacing 46 U.S.C. § 841b (1982)). One of the effects of the law is that freight forwarders are specifically prohibited from acting as shippers. Nonetheless, carriers often try to argue that a freight forwarder should in this case be deemed the shipper. The argument has never succeeded with the courts. See *Jensen*, 497 F.2d at 1057; *Feder*, 452 F. Supp. at 351.

COGSA guaranty clause. In a situation in which someone other than the shipper of the goods provides the information which appears on the bill of lading, however, adoption of the *Jensen* definition would lead to serious inequities.

Under such circumstances, the first question which arises is whether the shipper may be held liable under the guaranty clause for the inaccurate information which was supplied by the third party. Although an argument could be made for holding the shipper liable by applying agency principles, it is the author's opinion that the shipper would not be liable. The first sentence of the guaranty clause states that, "The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him. . . ." The italicized portion of the sentence seems to require that the shipper, and not a third party, must have provided the information in order for the carrier to maintain a cause of action against the shipper under section 3(5). Even if a court would disagree with the author and hold that a shipper can be held liable for inaccurate information provided by a third party, the second situation in which the *Jensen* definition is problematic arises when the inaccurate information is provided by a third party and the shipper turns out to be judgment proof. In such a case, the carrier's right to sue the shipper under the guaranty clause is, from a practical standpoint, worthless. What is needed in this instance is for the carrier to be able to sue the third party which supplied the

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49. See *supra* note 5.

50. Federal maritime law, after a period of some indecision, has now embraced the principle of agency. See, e.g., *West India Indus., Inc. v. Vance & Sons AMC-Jeep*, 671 F.2d 1384 (5th Cir. 1982); *Kirno Hill Corp. v. Holt*, 618 F.2d 982, 985 (2d Cir. 1980). Thus, a court faced with the issue might decide to hold the shipper liable despite the language used by COGSA.


52. The possibility that a shipper will prove to be judgment proof is particularly high in industries where the buyer and seller are geographically distant from one another and the origin of the product is easy to disguise. In such industries, middle men flourish because the buyer and the seller rarely make direct contact. Even if the buyer and seller want to make contact, the middle man is able to thwart their efforts by keeping the origin of the product secret (as in the case of raw products, which have no features that indicate which factory produced the product). Thus, since the buyer doesn't know which factory it is purchasing from, the buyer is forced to continue using the middle men. Many persons act as middle men between American manufacturers and foreign buyers, in large part because almost no capital is required to enter the field. In order to maintain their clients, the middle men hide the identities of their suppliers by listing themselves as the shipper, rather than the manufacturer. Many of these middle men are undercapitalized, and therefore turn out to be judgment proof when sued by a carrier.
information. The question which arises is whether such an action is maintainable under the guaranty clause. To date, this question has been passed upon only in *Atlantic Overseas Corporation v. Feder*.  

In *Feder*, the plaintiff, Atlantic Overseas Corporation ("AOC"), brought suit on behalf of the operators of the M/V DUMURRA to recover $66,520 which the carrier had been forced to pay in customs fines because of an underdeclaration of the weight of a cargo of used clothing. The weight given by the carrier to the customs officials had been furnished to the carrier by Paulssen & Guice, Ltd. ("P & G"), a freight forwarder. P & G had been retained by the shipper, Pioneer Institutional Trading Company ("PITC"), the party which had actually weighed the clothing. Named as defendants in the suit were P & G, PITC and PITC's president, Louis H. Feder.

AOC sought recovery of the fine by relying on section 3(5) of COGSA. In the course of its opinion, the Southern District, per Judge Bonsal, denied AOC's attempt to claim indemnity from P & G by writing:

Since both COGSA and the contract of carriage set forth in the bill of lading speak only in terms of the responsibilities and liabilities of the "shipper" it appears that if AOC is entitled to indemnity, on the facts of this case, it is limited by the express language of these provisions to recovery from defendant PITC, which alone qualifies as the shipper of the cargo in the instant case . . . . [U]nder these provisions recovery may [not] properly be had against defendant P & G. As the freight forwarder for PITC, P & G was merely acting as an agent for the shipper PITC. Since P & G was not the "shipper" of the cargo, there is no basis under the above provisions for allowing AOC to recover indemnity against it.  

AOC also attempted to recover indemnity from P & G under a negligence theory; this effort was similarly rebuffed by the court. Judge Bonsal explained that:

Although AOC also seeks to recover indemnity from P & G on the alternative theory of negligence, it is readily apparent that this theory is likewise unavailing here. Under principles of negligence law, AOC would have to establish that P & G owed a duty to AOC to provide shipping documents which accurately stated the particulars as to the weight of the cargo. While P & G may have owed such a duty to PITC based on the agency relationship between them, it is clear that P & G owed no such duty to AOC. [citations omitted] Moreover, under both COGSA and the contract of carriage

contained in the bill of lading, the duty to provide the carrier with accurate particulars as to the weight of the cargo is expressly placed upon the shipper alone.55

**Feder**, therefore, stands for the proposition that a third party owes no duty to the carrier to provide accurate information. The court in *Feder* reached this conclusion gratuitously, however, for it was the shipper, and not the third party, which had weighed the cargo. Thus, *Feder*'s holding with regard to the duty owed by a third party to the carrier is *dicta*. Moreover, the court in *Feder* did not need to look to the third party in order to make the carrier whole. Since the shipper was solvent, it was able to indemnify the carrier. Thus, what a court would do in the situation where a third party actually weighed the cargo and was the only party which could indemnify the carrier (because the shipper was insolvent) is an open question.56

55. *Id.* at 351. Other courts have also concluded that the information supplier has no duty to provide accurate information to the carrier. In *Oxford Shipping Co.* the First Circuit wrote: “Oxford [the carrier] also attempted to recover from Gendron and NHT [the information suppliers] on a negligence count. The district court held that NHT, as a supplier to a shipper, owed no duty of care to Oxford, the carrier whose services the shipper hired. The district court's holding is supported by precedent. [citing *Feder*.]” 697 F.2d at 5. The courts in *Feder* and *Oxford Shipping Co.* reached the conclusion that the information supplier had no duty to the carrier by relying on tort principles.

Another possible basis for holding the information supplier liable to the carrier would be a contract action. But since the carrier does not have a contract with the information supplier, there does not appear to be any contract remedy open to the carrier. Although a third party beneficiary argument could be raised by the carrier with regard to the contract between the shipper and the information supplier, this would probably fail because the carrier would be unable to prove that the shipper and the information supplier intended to confer any benefit upon the carrier. See *Restatement (Second) of Contracts* § 315 (1981).

56. At various times between 1982 and 1985 the author had the opportunity to participate in Y.P. Narula v. Signo Trading Int'l Ltd., No. 80-6241 (S.D.N.Y. filed Oct. 23, 1980), a case which, had it not been settled in the fall of 1985, might have raised the issue. In that case, the shipowner, Black Sea Shipping Company, had received a cargo of polyvinyl chloride (PVC) for carriage from Newark, New Jersey to Bombay, India. When the PVC was delivered in Bombay, it was discovered that there was a cargo shortage worth about $40,000. Y.P. Narula, the assignee of the purchaser of the PVC, then sued Black Sea as well as the shipper, Signo. As the facts developed, it became apparent that the carrier had not been provided with sufficient PVC by Signo. Signo, which turned out to be judgment proof, claimed that it had not provided the PVC but that another company had provided the PVC and that that company had defrauded Black Sea as well as Signo. At the time of settlement, Black Sea was considering bringing an action against this company. Had it done so, the court would then have had to decide whether Black Sea could assert a section 3(5) claim against the PVC supplier, since there was no contractual relationship between Black Sea and the PVC supplier. For a further discussion, see the court's decision denying Black Sea's motion for summary judgment. Y.P. Narula v. Signo Trading Int'l Ltd., No. 80-6241 (S.D.N.Y. Aug. 7, 1984) (available on LEXIS, Admrty library, US Cts file).
V. The Need to Amend Section 3(5)

No amount of reading or rereading the guaranty clause answers the question of who may be sued under the guaranty clause. The reason for this is that the word "shipper" is not a self-defining term.

If COGSA is truly to work as it was intended, the obligation to indemnify must be applied more broadly. As explained earlier, COGSA was designed to provide a balanced system of rights and duties between carriers and shippers. Initially, COGSA achieves this by making various trade-offs between the carrier and the shipper. But because COGSA's drafters recognized that parties other than the shipper and the carrier could become involved in the relationship because of the negotiability of bills of lading, they expanded the duty of the carrier to include a guarantee of accuracy to all who might come into contact with, and rely upon, the bill of lading. What COGSA's drafters did not do, however, was make clear that they were expanding the reciprocal obligation on the shipper's side. Instead of making all parties who might play a role in providing the information incorporated into the bill of lading answerable to the carrier, COGSA makes only the "shipper" liable.

This failure to balance the shipper's and the carrier's burdens should be corrected by amending section 3(5) to read as follows:

The accuracy of the marks, number, quantity and weight of the goods, as stated in the bill of lading, shall be guaranteed by the carrier to all other persons who claim a right in, and who have relied upon, the statements in the bill. If the inaccuracies in the bill have not been caused by the carrier, then the carrier shall be indemnified by the party or parties who have caused the inaccuracies. The carrier shall be entitled to recover for any loss, damage or expense, including attorneys' fees, which it has suffered as a result of the inaccuracies.57

57. One interesting problem is the extent to which the carrier must prove that the damages which it has suffered are the result of the inaccuracies contained in the bill of lading. In *Feder*, for example, the underdeclaration of weight subjected the carrier to fines. What if, instead of a fine, the vessel had been barred from leaving the port for two weeks? Assume further that as a result of this detention, the vessel's schedule was disrupted, causing it to lose customers and miss discharge dates. Would the carrier be able to recover all of its consequential losses? Put another way, at what point would the damages become so unforeseeable as to become unrecoverable from the information supplier? This question of foreseeability often arises when trying to compute damages. See, e.g., W. PROSSER & W. KEETON, THE LAW OF TORTS § 43, at 280 (5th ed. 1984). It is submitted, however, that the damages which a carrier can collect under this version of section 3(5) should not be unduly restricted or limited, lest COGSA's goal of treating carriers and shippers alike be defeated. For a general discussion of the damages which may be recovered under COGSA in cargo cases, see Edelman, Recent Cargo Cases, N.Y.L.J., Dec. 6, 1985, at 1, col. 1. The article
This proposed version of section 3(5) would continue to make the carrier liable to all third parties who rely on the statements contained in the bill of lading, but it would also make clear that the carrier may sue any party who provides information which finds its way into the bill of lading.

There are two aspects of this proposed amendment that should be kept in mind regardless of the precise language which is finally adopted. First, a general definition of the term "shipper" should not be added to section 1, the definitions clause of COGSA. A general definition would affect all of COGSA, perhaps with striking consequences, since the term "shipper" is used throughout the Act. Second, new guaranty clause language should specifically state that the carrier is entitled to recover reasonable attorneys' fees. Despite the broad language in the current clause, courts have held that the carrier is not entitled to attorneys' fees under section 3(5). Because the legal expense which a carrier may incur in proving that it is entitled to indemnity can be quite large, courts must be given the discretion to award attorneys' fees. Otherwise, even if the carrier wins the indemnity suit, it may still suffer a loss at the hands of the party which provided the inaccurate information.

**Conclusion**

COGSA was enacted to provide a system of checks and balances in the relationship between carriers and shippers, trading off duties and rights equally. Although the carrier-shipper relationship begins as a two-party relationship, it often becomes a three-party relationship when the bill of lading is negotiated. COGSA makes sufficient provision for the problems which can arise when the relationship involves either two parties or three parties. What COGSA does not do, however, is address the problems which can arise when the relationship becomes a *menage a quatre*—that is, when the shipper introduces an additional actor who provides the information which is used by the carrier to create the bill of lading.

contains an especially useful analysis of the availability of punitive damages and interest under COGSA. *Id.* at 32, cols. 2-4.


The answer to this problem is to rewrite section 3(5) of COGSA, restoring the balance which is the goal of the Act. This can be accomplished by having COGSA state, in explicit language, that the carrier can look beyond the shipper and sue any other party which provides information.

Of course, carriers have not perished because they have not had the expanded rights urged here. But as COGSA enters its second half-century of service, Congress should take up the statute again and rewrite the guaranty section so that carriers will receive the benefits to which they are entitled.

60. Carriers have, however, become more vulnerable to section 3(5) suits as the amount of fraud involving cargoes and bills of lading has increased. See G. MUELLER & F. ADLER, OUTFIWS OF THE OCEAN 203-05 (1985), who rightly call this type of fraud "documentary fraud."

61. As part of a project to clarify existing American statutory maritime law, Congress is already making changes to COGSA. These efforts are described in Edelman, Maritime Legislation and the Maritime Scene, N.Y.L.J., Jan. 3, 1986, at 1, col. 1. Some commentators, especially Professor Joseph C. Sweeney of Fordham University School of Law, contend that rather than merely clarifying existing law Congress is actually changing maritime law. Address by Professor Sweeney, Society of Maritime Arbitrators Monthly Luncheon (Oct. 9, 1985).

62. While the expanded definition urged here should ideally be adopted through an act of Congress, it is likely that the issue will first be raised before a court. If this occurs, a court should not use Congress' failure to act as justification for denying the carrier the right to sue the information supplier. As is well known, Congress has often been slow to act on shipping problems and admiralty courts have traditionally had to fill in gaps in the maritime law. See Jarvis, Rethinking the Meaning of the Phrase "Surviving Widow" in the Jones Act: Has the Time Come for Admiralty Courts to Fashion A Federal Law of Domestic Relations?, 21 CAL. W.L. REV. 463, 500 n.133 (1985). Still, a legislative solution would be preferable because of Congress' significant past involvement in this area. Not only did Congress decide not to adopt the Hague Rules as presented, but it drafted COGSA following years of extensive debate. See supra notes 22 & 40. Thus, unlike other areas of maritime law, where Congress has been relatively inactive, Congress has been very active in this area and should take the lead in amending section 3(5). Moreover, because the delineation of the respective rights and duties of carriers and shippers requires international coordination and planning, to the extent that the United States chooses to depart from worldwide standards, it should be Congress, acting on behalf of the American people, which makes the decision to depart from such standards. This was done when it was decided that the United States would follow COGSA rather than the Hague Rules, and also when it was decided that the United States would not become a party to the 1968 Visby Amendments to the Hague Rules. More recently, Congress appears to have decided not to adopt the Hamburg Rules. See Yancey, supra note 40 at 1259.