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L.L.M., Fashion Law, 2017, Fordham University School of Law; J.D., 2012, Fordham University School of Law; B.A., 2009, College of the Holy Cross. This article is dedicated to my father, Lawrence B. Brennan, J.D., 1977, Fordham University School of Law and adjunct professor of the Admiralty and International Maritime Law course. I am eternally grateful for his unending encouragement, support, and patience. I would also like to thank Professor Susan Scafidi, Peter Arnold, Professor Joseph C. Sweeney, and Professor Jeff Trexler for their mentorship, friendship, invaluable assistance and input in the preparation of this Article.

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INTRODUCTION

> *Whoever commands the sea commands the trade; whosoever commands the trade of the world commands the riches of the world, and consequently the world itself.*[1]

Often an afterthought, the multi-trillion annual maritime transportation industry plays an essential role in driving fashion's global economic development.[2] Thoughts of ocean transportation in the fashion context should not just invoke images of iconic Louis Vuitton steamer trunks.[3] All stages of production—from transportation of raw materials to delivery of final products—require ocean freight transportation.[4]

The future of fashion is fraught with instability as seismic shifts in the global economy present a series of significant challenges. As consumer habits change, the industry's stakeholders are searching for innovation and growth potential. Statistical analysis makes clear that the industry must engage in omni-channel retail emphasizing e-commerce. Estimates suggest that luxury e-commerce sales will increase fourfold from 2010 to 2020.[5] Regardless of how goods are sold—whether at a flagship store on Fifth Avenue, a mall in middle America, or with the click of a keyboard—"over 90% of the world's trade is carried by sea."[6]

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1 As observed by Sir Walter Raleigh in 1616. *See* Sam J. Tangredi, *The Future of Maritime Power, in* THE POLITICS OF MARITIME POWER: A SURVEY 132 (Andrew T.H. Tan, ed., Routledge, 2007).

2 *See* Nanette Byrnes, *This $1 Trillion Industry Is Finally Going Digital*, MIT TECH. REV. (Oct. 24, 2016), https://www.technologyreview.com/s/602596/this-1-trillion-industry-is-finally-going-digital/ [https://perma.cc/7CSY-ZENR].

3 *See Legendary History,* LOUIS VUITTON, http://us.louisvuitton.com/eng-us/la-maison/a-legendary-history#how-it-all-began [https://perma.cc/LF8E-G9VA] (last visited Feb. 9, 2019); *see also Retracing The Trunk*, LOUIS VUITTON, http://us.louisvuitton.com/eng-us/articles/retracing-the-trunk [https://perma.cc/2KP4-QCRA] (last visited Feb. 9, 2019).

4 *See* Byrnes, *supra* note 3.

5 *See The State of Fashion*, BUS. OF FASHION (2017), https://www.businessoffashion.com/articles/news-analysis/the-state-of-fashion-2017 [https://perma.cc/V5QM-ZLLT].

6 *International Maritime Organization*, UNITED NATIONS, https://business.un.org/en/entities/13 [https://perma.cc/CQA6-HPWZ] (last visited Jan. 19, 2019).

In 2015, global seaborne trade surpassed ten billion tons.[7] Rather than only focusing on e-commerce development, fashion brands and retailers must analyze their relationships with the international transportation logistics industry.[8]

In addition to evaluating shipping risks, from insurance to recovery for lost, delayed, and damaged goods, the fashion industry must be wary of monopolistic pushes in the logistics sector which could impose a blockade between the industry and its consumers. Aware of the challenges it faces from a luxury retailer standpoint, Amazon looks to its expanding logistics empire to enter, disrupt, and ultimately control the luxury fashion market. While luxury and contemporary brands can rely on non-Amazon e-commerce platforms, they cannot obviate their needs for third-party shipping intermediaries unless they also develop logistics divisions. Due to expense, expertise, and distraction from core business, it is unlikely that luxury and contemporary fashion players will move directly into the logistics sector. Cognizant of these brands, and retailers' inabilities to deliver products from their places of production to warehouses, storefronts, and customers, Amazon seeks to dominate the international intermodal delivery business.[9] If successful, Amazon will control the flow of goods in transportation, thereby placing every brand and retailer at risk of losing access to the worldwide marketplace.

I. THE VOYAGE OF A DRESS

A. The Fashion Industry's Dependence on Ocean Transportation

Before arriving in a customer's closet, a dress likely traverses the globe via blue water seafaring vessels. Domestically, vessels

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7 United Nations Conference on Trade and Development, *Review of Maritime Transport 2016* at x, U.N. Doc. UNCTAD/RMT/2016 (Nov. 2016), http://unctad.org/en/PublicationsLibrary/rmt2016_en.pdf [https://perma.cc/4T3Z-PAFS] ("In addition in 2015, estimated world seaborne trade volumes surpassed 10 billion tons – the first time in the records of UNCTAD.") [hereinafter United Nations].

8 *See The State of Fashion*, *supra* note 6, at 52.

9 *See* Laura Stevens, *Amazon Expands into Ocean Freight*, WALL ST. J. (Jan. 25, 2017) https://www.wsj.com/articles/amazon-expands-into-ocean-freight-1485357884 [http://perma.cc/8KWL-WDL9].

carried $1.6 trillion in aggregate imports to and exports from the United States in 2015.[10] The U.S. Department of Transportation specifically indicates that "retailers are increasingly dependent on the U.S. transportation system, especially those that build up their inventories in October in anticipation of holiday sales in November and December."[11] Other options are available, however, methods such as air transportation are usually prohibitively expensive. Maritime shipping leads in both weight and value of total imports and exports. "Ships moved more than 71.1% of trade weight and 41.8 percent of trade value in 2015."[12] New York City and Los Angeles, anchoring the domestic fashion industry on both coasts, are close to the Atlantic and Pacific's leading container ports.[13]

At some point in production, most garments, shoes, and accessories rely on the trillion dollar ocean shipping market within the global supply chain.[14] As a matter of illustration, take the lifecycle of a cotton tee-shirt.[15] First, cotton is planted and harvested in locations such as China, India, and Pakistan.[16] Next, the raw material is woven into cloth, likely in China, India, Pakistan, Turkey, or Brazil.[17] Thereafter, the cloth is shipped for production elsewhere, probably China.[18] Once assembled, the

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10 *See* UNITED STATES DEP'T TRANSP., TRANSPORTATION STATISTICS ANNUAL REPORT 71 (2016).

11 *Id.*

12 *Id.* at 74.

13 *See id.* at 77.

14 *See* Galit A. Sarfaty, *Shining Light on Global Supply Chains*, 56 HARV. INT'L L.J. 419, 425 (2015).

15 *See The Life of a Garment, from Seed to Sale: 6 Steps in the Fashion Supply Chain*, APPAREL BUS. SYS. (Apr. 9, 2015), http://apparelbusiness.com/the-life-of-a-garment-from-seed-to-sale-6-steps-in-the-fashion-supply-chain/ [http://perma.cc/33Z6-6CWJ]; *see also The Lifecycle of a Cotton T-shirt*, CNN, http://www.cnn.com/specials/living/tshirt-lifecycle/2012/index.html [http://perma.cc/B3A2-JNAF] (last visited Jan. 19, 2019).

16 *See* CNN, *supra* note 16.

17 *See id.*

18 *See* Robb Young, *Can China Still Complete as the World's Fashion Factory?*, BUS. OF FASHION (Feb. 29, 2016), http://www.businessoffashion.com/community/voices/discussions/can-china-still-compete-as-the-worlds-fashion-factory/new-era-for-chinese-fashion-production-manufacturers [http://perma.cc/XU3V-5DCT]. While China currently produces "60 percent of the world's shoes and export[s] over 43 percent of the world's clothing," as the cost of labor increases in China, brands have begun to move production to Southeast Asia, the Middle East, and Africa. *Id.*

cotton tee-shirt makes its way stateside via a vessel for temporary storage in warehouses located at various domestic ports.[19] Lastly, the garment moves from the warehouse near the port to either a storefront or directly to the consumer. Luxury items, even haute couture gowns and bespoke suits, share an analogous dependency on maritime transportation, as it is "by far the most cost-effective way to move en masse goods and raw materials around the world,"[20] to deliver Italian silk to tailors not only in Milan, but also in Seoul, Hong Kong, Tokyo, Beijing, London, and beyond.

B. Admiralty Law: An Ancient but Still Significant System of Law

Admiralty and maritime laws are often labeled arcane, which is to be expected since "[s]hipping activity existed even in prehistoric times in the Persian Gulf and in the Arabian Sea."[21] Even "[t]he Code of Hammurapi (Hammurabi), which was written in Old Babylonian in cuneiform letters in about 1800 B.C., contains provisions dealing with marine collisions and ship leasing."[22] Subsequent seafaring cultures prospered. The ancient Egyptians used ports in the eastern Mediterranean Sea to import goods and the Phoenicians developed and maintained power through oceanic trade.[23] By 800 B.C., Greek maritime law developed "based upon constantly recurring customs and transactions between buyers, sellers, shipowners, crews, and bankers,"[24] proving that Classical influence is not limited to Gucci runway shows.[25]

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19 *See, e.g.*, *Warehouses*, S. CAROLINA PORTS, http://www.scspa.com/cargo/logistics/warehouses/ [https://perma.cc/ALA8-JTDU] (last visited Feb. 9, 2019).

20 United Nations, *supra* note 7.

21 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 3 (3d ed. 2001).

22 *Id.*

23 *See id.*

24 *Id.*

25 *See, e.g.*, Sarah Mover, *Fall 2016 Ready-To-Wear Gucci*, VOGUE (Feb. 24, 2016), http://www.vogue.com/fashion-shows/fall-2016-ready-to-wear/gucci [https://perma.cc/6LET-GSLA] (Gucci's creative director, Alessandro Michele, posted "snaps of Italian art, antiques, and antiquities since long before a wave of success carried him to the forefront of fashion influence."); *see also* Philip Chrysopoulos, *Athens Says 'No' to Gucci for Fashion Show on Acropolis Hill*, GREEKREPORTER (Feb. 15, 2017), http://greece.greekreporter.com/2017/02/15/athens-says-no-to-gucci-for-fashion-show-on-acropolis-hill/ [https://perma.cc/AK8G-VEB9].

Vessels have modernized, as "[t]ankers, bulk carriers and container ships are the most important means of transportation of our time."[26] Nevertheless, contemporary domestic and international maritime laws center on the same relationships that defined the laws of ancient Greece regarding the movement of cargo. "Cargo can be anything: manufactured articles or components or raw materials, liquids or solids or gases, live animals or frozen meat, smaller ships, and especially nowadays, containers of goods."[27] The party providing cargo is called the "shipper."[28] To actually transport cargo, whether it is five dollar flip flops or thousand Euro Italian leather loafers, the shipper must contract for space on a vessel. Although some shipowners work directly with shippers, most likely a "carrier" that "operates the ship and takes possession of the cargo" will serve as a third-party intermediary between the shipper and the shipowner.[29]

Intermodal or multimodal transportation of goods references door-to-door transportation using all modes of transportation from air to sea to land.[30] With the technological advance of containerization, cargo packed in containers can "move easily from one mode of transport to another, from a road vehicle to a ship, onto railway wagons (called piggy-back traffic), or aboard an airplane" without being disturbed during the journey.[31] Intermodal transportation, while efficient, poses unique challenges to the legal system especially regarding antitrust.[32]

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26 *Global Shipping – A Dynamic Market*, WORLD OCEAN REV., http://worldoceanreview.com/en/wor-1/transport/global-shipping/ [https://perma.cc/B96P-5Z54] (last visited Jan. 19, 2019).

27 NICHOLAS J. HEALY ET AL., CASES AND MATERIALS ON ADMIRALTY 344 (5th ed. 2012).

28 *See id.*

29 *Id.*

30 *See* SCHOENBAUM, *supra* note 22, at 28–29.

31 *Id.* at 29.

32 *See id.* at 30–31. Intermodal transportation creates tension between different regulatory bodies. The Federal Maritime Commission ("FMC"), discussed in detail below, governs maritime transportation. The Civil Aeronautics Board ("CAB") has jurisdiction over air carriers and the Interstate Commerce Commission ("ICC") regulates rail and motor carriage. Moreover, the antitrust laws and exemptions governing different elements of the intermodal transportation vary. While the ICC has specific exemptions, the scope of this paper covers those provided to marine transportation under the Shipping Act of 1984 and governed by the FMC.

C. *Fashionable Freight Concerns*

Before a fashion brand or retailer even considers shipping its goods, it most likely entered into a contract of sale between itself and a buyer. "A contract for the carriage of goods is never concluded in isolation. It is always part of an intimately linked system of contracts."[33] The initial contract—whether between a brand and a buyer or an e-commerce retailer and a customer—is governed by commercial law principles, not maritime law.[34] The next step—actual transportation of goods—requires a series of maritime contracts centered on a "bill of lading" or contract of carriage:

> In carriage by water, the contract of carriage is often embodied in a negotiable bill of lading and, although today there are other forms of shipping documents used in particular trades, many shipments are still made pursuant to negotiable bills of lading. A "bill of lading" is a multifunctional document: It embodies a contract of carriage and also serves as a receipt by the carrier that it has received the goods. The bill of lading is a document of delivery as well as a document of title.[35]

The concept of a bill of lading is not exclusive to ocean transportation. In simple terms, a bill of lading is the legal document which shippers rely upon to entrust their goods to a carrier to transport them from point A to point B.[36]

Most goods shipped in international common carriage—such as fashion products—are shipped under negotiable bills of lading.[37] As commercial instruments, bills of lading have serious

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33 SCHOENBAUM, *supra* note 22, at 2.

34 *See id.*

35 Robert Force, *Admiralty and Maritime Law,* FED. JUDICIAL CTR. 54 (2013), https://www.fjc.gov/sites/default/files/2014/Admiralty2d.pdf [https://perma.cc/D8YB-AHAZ]; *see also* HEALY ET AL., *supra* note 27, at 344. "'Bill' is a contraction of the French *billet*, a note; 'lading' is derived from the Old English 'hladen,' from which the word 'load' is traced." *Id.*

36 *See* Force, *supra* note 36, at 54.

37 *See* U.C.C. § 7-104.

implications for the financing of the fashion industry. The seller obtains the negotiable, clean on-board bill of lading when its goods are placed on-board the carrying vessel. In turn, the seller presents the bill of lading to its bank. That bank then makes payment to the seller from the letter of credit established, commonly at a different bank, by the buyer of the seller's goods. The commercial world relies on negotiable bills of lading.[38] For over a century, U.S. courts have repeatedly adhered to an explicit rule governing the sanctity of negotiable bills of lading:

> In the developments of commerce and commercial credits the bill of lading has come to represent the property, but with greater facility of negotiation, transfer, and delivery than the property itself . . . And it has become so universal and necessary a factor in mercantile credits that the law should make good what the bill of lading thus holds out. There is every reason found in the law of equitable estoppel and in sound public policy for holding, and no injustice is involved in holding, that, if one of two must suffer, it should be he who voluntarily puts out of his hands an assignable bill of lading, rather than he who innocently advances value thereon.[39]

Stated simply, the issuer of the bill of lading controls important financial aspects of most domestic and international transactions where the goods are financed and transported using these documents.

A shipper may contract with a variety of different legal entities in order to have its goods transported across the sea. As aforementioned and although uncommon, a shipowner may itself enter into a contract of carriage and issue a bill of lading.[40] More likely, shippers will work with intermediaries. The two most

38 *See generally* SCHOENBAUM, *supra* note 22, at 8. "Bills of lading is a creation of mercantile custom dating back at least to medieval times." *Id.* at 59.

39 Berisford Metals Corp. v. S/S Salvador, 779 F.2d 841, 845 (2d Cir. 1985) (citing Pollard v. Reardon, 65 F. 848, 852 (1st Cir. 1895)).

40 *See* Force*, supra* note 36, at 54–55.

common ocean shipping intermediaries are: 1) freight forwarders and 2) non-vessel operating common carriers ("NVOCC").[41] As transportation experts and agents of shippers, freight forwarders assist in arranging for the transportation of goods.[42] For example, FedEx[43] and UPS[44] offer international freight forwarding services. Like charters and freight forwarders, NVOCCs are not shipowners. Rather, they are "persons who undertake to transport goods of shippers as though they had their own vessels but who, in reality, contract with owners or charterers of vessels to actually perform the transportation function."[45] For example, Danmar Lines operates as DHL's NVOCC.[46]

The difference between freight forwarders and NVOCCs relates to bills of lading, which are issued either by the shipowner or someone else who receives the shipper's cargo for the shipowner.[47] Whereas a freight forwarder does not issue a bill of lading, a NVOCC does, often by contracting with a freight forwarder. While seemingly semantic, this difference has serious impacts on the third-parties' liability imposed under contract law and the United States Carriage of Goods by Sea Act ("COGSA").[48]

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41 *See id.* at 65.

42 *See id.*

43 *FedEx Trade Networks International Freight Forwarding*, FEDEX, http://ftn.fedex.com/us/services/transportation/freightforwarding.shtml [https://perma.cc/HAX4-MKZD] (last visited Jan. 22, 2019).

44 *UPS Transportation & Freight*, UPS, https://www.ups-scs.com/support/freight-forwarding.html [https://perma.cc/K6K7-ZK2G] (last visited Jan. 22, 2019).

45 *See* Force*, supra* note 36, at 43.

46 *DHL Ocean Freight*, DHL, https://www.logistics.dhl/iq-en/home/our-divisions/global-forwarding/ocean-freight.html [https://perma.cc/UG3R-B2QC] (last visited Jan. 22, 2019); *see also Customers Reduce Their Carbon Footprint with DHL's New Green Service Press Release*, DHL (Feb. 17, 2016), http://www.dhl.com/en/press/releases/releases_2016/all/logistics/customers_reduce_their_carbon_footprint_with_dhls_new_green_service.html [https://perma.cc/J63W-NJNJ].

47 *See* HEALY ET AL., *supra* note 28, at 346.

48 46 U.S.C. § 30701 note, introductory cmt., §§ 1–16 (2006). In 2006, Congress re-codified Title 46 that deals with Shipping. In doing so, it omitted the Carriage of Goods by Sea Act ("COGSA"). The solution was to include COGSA as a note to § 30701 which is the first section of the Harter Act. Thus, a reference to former 46 U.S.C. § 1301 will be cited hereinafter to the individual sections of COGSA within the note, *e.g.*, COGSA § 1.

The United States incorporated a modified version of the international law of the Hague Rules[49] by enacting COGSA in 1936.[50] "The provisions of COGSA apply as a matter of statutory mandate to '[e]very bill of lading or similar document of title which is evidence of a contract of carriage of goods by sea to or from ports of the United States, in foreign trade.'"[51] COGSA thus applies to shipowners and NVOCCs but not freight forwarders. Moreover, COGSA does not govern domestic voyages, for example movement from the Port of Savannah to the Port of Norfolk. Rather, it exclusively pertains to foreign trade.[52] COGSA, however, may be extended by contract to govern domestic trade, private carriage, and the period before loading and after discharge.[53]

Carriers covered by COGSA must exercise due diligence both before and at the commencement of the voyage to:

- provide a seaworthy ship;
- properly equip, man, and supply the ship; and
- make the holds, refrigeration and cooling chambers, and all other areas of the vessel where goods are carried, fit and safe for their reception, preservation, and carriage.[54]

Moreover, COGSA requires covered carriers to "properly and carefully load, handle, stow, care for, and discharge the goods

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49 *See generally* International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the Hague Rules), *opened for signature* Aug. 25, 1924, 51 Stat. 233; T.S. No. 931; 120 U.N.T.S. 155 (entered into force Dec. 29, 1937). The Hague Rules were a multilateral treaty.

50 *See generally* Protocol to Amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Visby Amendments), Brussels, February 1968; (U.N.) Register of Texts, ch. 2 (the Visby Amendments to the Hague Rules are also referred to as the Hague-Visby Rules).

51 *See* Force, *supra* note 36, at 62 (citing COGSA introductory comment.). If, however, a freight forwarder actually undertakes to transport the goods, despite the fact that the goods are carried on a vessel owners or operated by a third party (either NVOCC or shipowner), its legal status and exposure to liability may change. *See, e.g.*, J.C. Penney v. Am. Exp. Co., 102 F. Supp. 742 (S.D.N.Y. 1951), *aff'd*, 201 F.2d 846 (2d Cir. 1953).

52 *See* Force, *supra* note 36, at 61.

53 *See*, *e.g.*, In re Marine Sulphur Queen, 460 F.2d 89 (2d Cir. 1972).

54 COGSA § 3(1).

carried."[55] Generally under COGSA, a shipper may recover if its cargo is damaged or lost at sea. The statute of limitations under COGSA, however, is a mere twelve months from the date of delivery of goods.[56]

While COGSA places stringent responsibilities on carriers, it also provides protection. Foremost, carriers are not insurers of cargo under COGSA.[57] Moreover, COGSA does not impose strict liability as it only requires a carrier to exercise due diligence. It further provides carriers with five categories of immunities:[58]

- First, some immunities excuse a carrier notwithstanding the loss or damage to cargo resulting from the negligence of its employees. The defense based on errors in navigation of the vessel the defense based on errors in the management of the vessel, and the fire defense fall into this category.
- Second, there are defenses based on overwhelming outside forces, such as acts of war, acts of public enemies, arrest or restraint of princes (governments), quarantines, strikes or lockouts, and riots or civil commotions.
- The third category includes loss or damage caused by overwhelming natural forces, including perils of the sea and acts of God.
- The fourth group deals with loss or damage attributable to faults of the shipper, which include acts or omissions of the shipper or its agents, wastage in bulk or weight, losses resulting from inherent vice, and insufficiency of packaging or marking.
- Finally, the fifth category includes loss or damage that occurs despite a carrier's exercise of due care. This includes loss or damage

55 *Id.* § 3(2).
56 *Id.* § 3(6).
57 *See* Force*, supra* note 36, at 67.
58 *See id.*

> resulting from an unseaworthy condition not discoverable through the exercise of due care, from latent defects, and from situations where a carrier can establish that it and its servants and agents exercised due care and that loss or damage was occasioned through the conduct of others or circumstances for which it is not responsible.[59]

While a shipper cannot contract out the above immunities provided to a carrier under COGSA, it can and should protect itself against potential losses by clearly drafting the language of the bill of lading.

D. The Well-Packaged Suit

Shippers must beware of COGSA's "$500 per package limitation" in the event of a loss. Even when a claim for loss or damage of cargo is recoverable, the cargo owner may find its recovery limited by law. The COGSA package limitation provides that:

> 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 . . . *unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading*. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.
>
> By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: Provided, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

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59 *Id.*; *see also* 46 U.S.C. § 30706 (2012).

> Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading. (emphasis added)[60]

COGSA allows for freedom in agreement, "but only in the direction of *increasing* the shipowner's liabilities, and never in the direction of diminishing them."[61] Shippers should thus take advantage of contract negotiations. In the event of a dispute, it is better to rely upon meticulously crafted bill of lading language rather than leave uncertainties to be decided by the trier of fact in court.

In evaluating whether COGSA's $500 package limitation applies, courts first evaluate whether the goods in question were shipped in packages. The $500 limitation applies equally to packages and customary freight units ("CFU").[62] Almost all cargo will be deemed to be in a package if, "irrespective of its size, weight, or shape, is fitted into or on some packaging preparation that facilitates handling or stowage."[63] Case law has developed such that only unwrapped and fully exposed items are not considered packages.[64]

The second prong of the analysis—what is defined as a package specifically under COGSA—is a much more complex issue. A major problem with the $500 package limitation arose as shipping technology advanced. Unlike the vessels used when COGSA was enacted, today's dry cargo vessels routinely depend upon containers to transport goods carefully and safely.[65]

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60 COGSA § 4(5).

61 Marcraft Clothes, Inc. v. M/V Kurobe Maru, 575 F. Supp. 239, 242 (S.D.N.Y. 1983) (citing Gilmore & Black, § 3–25 at 145 (emphasis in original)).

62 *See* COGSA § 4(5). Because fashion goods would not constitute CFUs, no further discussion will be included in this paper.

63 *See* SCHOENBAUM, *supra* note 22, at 156.

64 *See id.*

65 The term "dry cargo" covers fashion goods, whereas "liquid cargo" refers to predominantly oil but may also include chemicals and liquefied gasses. *See generally* *Vessel Types Explained*, SHIPPING GUIDES, LTD.,

Containerization, the use of large metal boxes either twenty ("TEU") or forty feet ("FEU") long, allows for consolidation and protection of cargo.[66] When COGSA became law in 1936, however, "'[f]ew, if any . . . could have foreseen the change in the optimum size of shipping units."[67] Consequently, "neither the statute nor its legislative history provides any clue as to the meaning of 'package' in the Act."[68] Instead, courts look to the intent of the contracting parties to evaluate the meaning of package in the age of containerization. If not specified otherwise, a container holding millions of dollars' worth of cargo arguably may be subject to the $500 package limitation under COGSA.

Marcraft Clothes, Inc. v. M/V Kurobe Maru[69] illustrates why fashion companies must be particularly careful in avoiding litigation over the meaning of a "package" in light of COGSA's $500 package limitation. In this case, Marcraft, a commercial buyer of men's suits, sued the carrier for damages sustained to 4400 suits in transport to New York. Arguing that "the one shipping container furnished by the carrier is a single 'package,'" the carrier filed a motion for summary judgment seeking limitation of liability to $500 total for the 4400 damaged suits as a matter of law under COGSA.[70] In opposition, Marcraft argued that each individual suit should be considered a separate package and thus it was entitled up to $2.2 million in damages.[71]

In *Marcraft*, the bill of lading described the container of goods as "4,400 Sets of Men's Suits with Vest." This language alone did not solve the issue as to whether each suit was considered an

https://www.portinfo.co.uk/portinformation/ourmaritimeblog/vessel-types-explained [http://perma.cc/B6DP-YXKA] (last visited Jan. 23, 2019).

66 *See* Force*, supra* note 36, at 43. Generally, TEU means twenty foot equivalent and FEU means forty-foot equivalent. These terms define the amount of available container carriage space aboard a vessel.

67 Monica Textile Corp. v. S.S. Tana, 952 F.2d 636, 638 (2d Cir. 1991) (citing Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft, 375 F.2d 943, 945 (2d Cir. 1967)).

68 *See Monica Textile Corp.*, 952 F.2d at 638.

69 575 F. Supp. 239, 240 (S.D.N.Y. 1983).

70 *See id.* at 241.

71 *See id.*

individual package.[72] Instead, the Court looked to how the suits were packaged:

> Each suit in its raw condition may not be a section 4(5) "package," but here the shipper had placed the suits on a hanger and wrapped each in a plastic bag in such a way as to conform to the accepted definitions of package, such as "a small or moderate size pack, . . . a commodity in its container [the plastic bag], . . . [or] a protective unit for storing or shipping a commodity."[73]

The fact that the suits were placed on hangers and individually wrapped, in tandem with the bill of lading's cargo description, allowed the Court to hold that the carrier's liability limitation was $2.2 million, not $500.[74]

The application of the law, however, remains murky. Generally, a container will not be subject to the $500 package limitation, but the inquiry is fact-specific and in exceptional cases, the recovery container may be limited to $500. In *Monica Textile Corp. v. S.S. Tana*, while holding that each of the seventy-six bales of cloth stowed inside a shipping container were considered individual packages under COGSA and thus the textile shipper was entitled to recover up to $380,000 as opposed to merely $500, the Court made clear that "all 'packages' were not created equal."[75] Therefore, when shipping millions of dollars of clothes, shoes, or accessories across the ocean, fashion companies cannot leave the ramifications of COGSA's $500 package limitation up to chance.

E. The Necessity of Marine Insurance

Marine insurance is an essential and relatively inexpensive cost of doing business. Foremost, it prevents the risk of recovering only

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72 *Id.* at 242.

73 *Id.* at 243 (citing Smythgreyhound v. M/V Eurygenes, 666 F.2d 746, 814 (2d Cir. 1981)).

74 *See id.* at 243. In denying the carrier's motion for summary judgment, the Southern District of New York held that the liability limitation under COGSA was $2.2 million (4400 x 500 per package), however, Marcraft still had to prove its damages at trial. *Id.* Ultimately, the case settled. *Id.*

75 Monica Textile Corp. v. S.S. Tana, 952 F.2d 636, 640 (2d Cir. 1991).

a small fraction of the actual value of the goods, which could be the result under COGSA. It also shifts that risk—along with all other risks of cargo recovery litigation—to the subrogated cargo insurer.[76] The ocean marine cargo policy often extends coverage for the period while the goods are "in transit" from the place of origin through delivery, and while goods are in storage. "Marine insurance contracts are subject to the rules that generally govern contracts, except to the extent that legislation provides a specific rule to apply to insurance contracts."[77] While a variety of marine insurance exists, fashion companies as shippers will be most concerned with cargo insurance. Often written as an "all risks" policy, cargo insurance can cover the intermodal shipment of goods from the shipper's warehouse to the consignee's warehouse.[78] Alternatively, the parties to the cargo insurance policy can contract different, more individualized coverage terms depending on their needs.

Furthermore, cargo insurance is essential in cases of general average. The maritime law principle of the general average "is a means of equitable sharing, between shipowner and cargo interests, of certain losses and expenses that occur during a voyage."[79] The doctrine, "rooted in the notion that a voyage is a common adventure between the vessel owner and the cargo owners," provides that all parties to the venture, including all shippers, proportionately share any losses.[80] For example, if during a storm a shipowner sacrifices some cargo to protect the vessel, the surviving cargo is required to contribute along with the ship and its bunkers to the general average.[81] Thus, even if a shipper's goods are not

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[76] *See* Force*, supra* note 36, at 199; *see also* LESLIE J. BUGLASS, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES: AN AVERAGE ADJUSTER'S VIEWPOINT 441 (3d ed. 1991) ("Subrogation is 'the right by which an underwriter, having settled a loss, is entitled to place himself in the position of the assured, to the extent of acquiring all the rights and remedies in respect of the loss which the assured may have possessed.'").

[77] *See* Force*, supra* note 36, at 193.

[78] *See id.* at 198 (citing Brammer Corp. v. Holland-Am. Ins. Co., 228 N.Y.S.2d 512 (1962)).

[79] *See id.* at 207.

[80] *Id.*

[81] "Bunkers" refers to fuel in the maritime context. Initially, "bunkers" referred to the space in early steamships where coal, which was the fuel at the time, was stowed.

impacted and arrive soundly at the port, the shipper may be financially liable for the damaged goods. The marine cargo insurers post a general average bond which permits the release of the cargo. Therefore, cargo insurance plays a critical role in limiting this unique maritime exposure to the shipper.

Moreover, usually the insurers assist in making arrangements for on-shipment to final destination. Marine insurance also responds to transshipment and second freight costs in the unusual cases where cargo is not delivered at the intended destination.

F. Choice of Law and Jurisdictional Concerns

Additionally, shippers must carefully consider choice of law concerns when entering into maritime transportation contracts. Practically all ocean freight transportation involves international issues:

> The shipping industry operates worldwide. Vessels on a single voyage may call at one or more foreign ports. Vessels often are supplied and repaired in foreign ports. Cargo may be damaged or lost while at sea in the course of an international voyage or in a foreign port, and likewise seamen may be injured on the high seas or in the waters of foreign countries. Today, international shipping is a complex business, and its activities are conducted in a manner that often implicates the interests of several countries.[82]

Most choices of law in cargo cases result from contractual terms contained in the bills of lading or charter parties. The contracting parties agree, before the goods are shipped, to apply specific law to any litigation that may arise. Of course, COGSA mandates that, at a minimum, U.S. law governs the shipment of all cargo, in common carriage, to or from the United States. Even in the post-*Sky Reefer* era, where the contract of carriage may provide for foreign litigation or arbitration forums, COGSA remains the irreducible minimum standard governing liability and damages

82 *See* Force*, supra* note 36, at 23.

issues in cases of international common carriage.[83] The parties are free to agree to liability terms and limitation amounts that exceed the COGSA minimums. In the unusual case where COGSA or the Harter Act[84] would not apply as a matter of law or as a contractual term, and in the absence of contractual choice of law provisions, a U.S. admiralty court would have to turn to well-established admiralty choice of law rules. The Supreme Court created the *Laurizen-Rhoditis* test that considers a variety of factors when evaluating maritime choice of law disputes:

1. the place of the wrongful act,
2. the law of the flag,
3. the allegiance or domicile of the injured seaman,
4. the allegiance of the defendant shipowner,
5. the place where the contract of employment was made,
6. the inaccessibility of a foreign forum,
7. the law of the forum, and
8. the shipowner's base of operations.[85]

Rather than leave such an amorphous evaluation to the trier of fact when a litigated dispute arises, fashion companies should explicitly exclude foreign substantive law in their contracts.

In addition to choice of law, jurisdictional and *forum non conveniens* issues arise out of ocean transportation's innately international aspect.[86] These disputes also can be avoided through clear contract language. U.S. fashion brands must protect their interests and avoid foreign litigation. For example, China plays a major role in much ocean freight transportation.[87] The Chinese

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[83] Vimar Seguros y Reaseguros v. M/V Sky Reefer, 515 U.S. 528, 541 (1995) (The Supreme Court held bills of lading that include foreign arbitration clauses do not lessen a carrier's liability under COGSA and can be enforced).

[84] *See generally* The Harter Act, 46 U.S.C. § 30701 (2012).

[85] *See* Force, *supra* note 36, at 24–25.

[86] *See id.* at 23.

[87] *See* Steve Saxon & Matt Stone, *Container Shipping; The Next 50 Years*, MCKINSEY & CO. (Oct. 2017), https://www.safety4sea.com/wp-content/uploads/2017/10/McKinsey-Container-shipping-The-next-50-years-2017_10.pdf [https://perma.cc/3YB6-DBHM] ("China's integration into the global economy, during the 1990s and 2000s, contributed very significantly to the growth of trade as manufacturing value chains adapted to utilize the country's abundant labor and to serve new customers. China became the world's

legal system, however, should be avoided because there are some uncontrollable forces within it that cannot be avoided including uneven enforcement, procedural barriers, and local protectionism.[88] Thus, to the extent possible, shippers should avoid foreign courts and provide for exclusive U.S. jurisdiction in its contracts and seek to achieve realistic damage limitations, not the $500.00 package limit. Additionally, the service of process should be designated upon an agent in the U.S. While these safeguards still leave risk of actions by or against third-parties that may be forced into foreign courts, they are a proactive way to avoid the risks inherent within foreign legal systems. COGSA, as a matter of law, controls all common carriage shipments to and from the U.S. in international trade. Additionally, COGSA frequently is the contractual term governing liability in private international shipments, domestic trade, and custody of cargo before loading and after discharge.

Two major factual issues impacting choice of law and jurisdiction are the loading and delivery ports. Unless the parties expressly agree to arbitration, exclusive jurisdiction, and choice of law in the contracts of sale and carriage, the courts will have to determine those issues based upon the facts and law. The loading and discharge ports usually are determined by the economic desires of the seller and buyer. The buyer wants goods shipped to itself or a consignee at a port it designates. The seller wants to deliver the goods for shipment at the most economically convenient port that will satisfy its contractual obligations. While in the majority of cases the transactions proceed smoothly, legions of recorded cases demonstrate that the risks of ocean transportation remain and thus the parties need to be prepared for litigations and other issues when delivery is less than perfect.[89]

factory, producing ever-larger shares of global manufacturing output and absorbing enormous amounts of natural resources and intermediate goods. The container-shipping industry supported much of this trade: in 2015, China imported and exported 52 million 20-foot equivalent units, a fourfold increase on the 13 million twenty-foot equivalent units (TEUs) of 2000").

88 *See* Mo Zhang, *International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System*, 25 B.C. INT'L & COMP. L. REV. 59, 91 (2002).

89 *See generally* Thomas J. Schoenbaum, 456–656 *in* ADMIRALTY AND MARITIME LAW (West Academic, 6th ed. 2018) (discussing common and private carriage, respectively).

Even with experienced carriers, shipping and logistics can take longer than a month, an interminable amount of time in the modern fashion cycle.[90] Delays at any stage of production, including shipping, may disrupt an entire season.[91] In August 2016, Hanjin Shipping Co. filed for bankruptcy in South Korea, leaving vessels out to sea and retailers without product.[92] With Hanjin's assets frozen, millions of dollars' worth of merchandise being transported by dozens of vessels left floating in the ocean could not be obtained because the bankruptcy left Hanjin unable to pay the necessary tugboat, pilots, or stevedores.[93] Approximately ninety vessels belonging to the Seoul-based company were denied entry to ports or terminals, frustrating access to cargo held in 500,000 containers.[94] The cost of shipping from China to the U.S. "jumped up to 50 percent in a single day."[95] Even companies lucky enough to avoid the Hanjin crisis directly were impacted by the logistical nightmare.[96] Shippers of time sensitive cargos, such as fashion items, should be alert to the law governing recovery for delay-holiday goods have far less value the day after the event. Moreover, the same shippers need to work with their brokers and

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90 *See* Lauren Sherman, *The Secret Journey of a Fashion Piece — Part 3: Logistics and Supply Chain*, BUS. OF FASHION (Oct. 14, 2014, 10:00AM), https://www.businessoffashion.com/articles/intelligence/secret-journey-fashion-piece-part-3-logistics-supply-chain [https://perma.cc/Y6A8-SADY].

91 *See id.*

92 *See* Robert Jablon, *Hanjin Bankruptcy Causes Global Shipping Chaos, Retail Fears*, ASSOCIATED PRESS (Sep. 2, 2016), https://apnews.com/2dd792899f214e789c219914e030b379 [https://perma.cc/LFX4-P2JY].

93 *Id.*; *see also* Deborah Belgum, *2016 Newsmakers: Hanjin Bankruptcy Sinks a Lot of Importer's Revenue Goals*, CAL. APPAREL NEWS (Dec. 8, 2016), https://www.apparelnews.net/news/2016/dec/08/2016-newsmakers-hanjin-bankruptcy-sinks-lot-import/ [https://perma.cc/SGJ7-NXW4].

94 *See* Jackie Northam, *Container Ships Stranded at Sea After South Korean Company Goes Bankrupt*, NPR (Sept. 8, 2016), http://www.npr.org/sections/parallels/2016/09/08/493157924/container-ships-stranded-at-sea-after-south-korean-company-goes-bankrupt [https://perma.cc/W7VH-SJSL].

95 Jablon, *supra* note 93.

96 *See* Karl Plume, *The 'Ghost Fleet' of Cargo Ships with Nowhere to Go Is Causing Freight Costs to Spike as Much as 50%*, REUTERS (Sept. 9, 2016), http://www.businessinsider.com/r-from-steaks-to-furniture-hanjin-shipping-collapse-to-raise-freight-costs-2016-9 [https://perma.cc/8G35-CHJF] ("The American Apparel and Footwear Association said it expects gross margins to be pressured in the near term by the higher shipping prices and additional unloading fees.").

insurers to make sure that their marine cargo insurance coverage responds to claims for delay and loss of market value even in the absence of physical damage or loss.

Perhaps drones will solve the problem of drifting ships at sea, but that is unlikely soon. While the internet buzzed with excitement in December 2016 when Amazon released a video showing how it "made its first customer delivery by drone, carrying a package containing popcorn and a Fire TV video-streaming device several miles to a two-story farmhouse near Cambridge, U.K.,"[97] the Federal Aviation Administration ("FAA") halted Amazon's plan to use drones to complete Amazon Prime deliveries stateside.[98] Even if drone deliveries were approved, they would likely lack the capacity to deliver larger items and be limited by battery.[99]

Tradition air cargo, however, is another area of Amazon's expansion.[100] After establishing Amazon Air, the conglomerate claims that "one day seeing Prime Air vehicles will be as normal as seeing mail trucks on the road."[101] Amazon Air is a cargo freight delivery service with its $1.49 billion hub located in Hebron Kentucky, near Cincinnati.[102] In late 2018, Amazon announced

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[97] Georgia Wells & Laura Stevens, *Amazon Conducts First Commercial Drone Delivery*, WALL ST. J. (Dec. 14, 2016), https://www.wsj.com/articles/amazon-conducts-first-commercial-drone-delivery-1481725956 [https://perma.cc/KN82-BJAZ].

[98] *See* April Glaser, *Why Amazon is Testing Drone Delivery in the U.K. – and Not the U.S.*, RECODE (Dec. 14, 2016), https://www.recode.net/2016/12/14/13955818/amazon-drone-delivery-uk-us-faa-testing [https://perma.cc/BH8G-K38Y].

[99] *See* Jonathan Vanian, *Sorry, Drone Deliveries Aren't Coming Soon*, FORBES (Feb. 9, 2017), http://fortune.com/2017/02/09/drone-deliveries-gartner-amazon-google/ [https://perma.cc/3ZAZ-8CKL].

[100] *See generally Prime Air*, AMAZON, https://www.aboutamazon.com/innovation/prime-air [https://perma.cc/9B6F-92HV] (last visited Jan. 22, 2019).

[101] *See id.*

[102] *See Experts: Amazon Prime Air Could Bring up to 15K Jobs Over Time*, 9 WCPO CINCINNATI (Nov. 3, 2017), https://www.wcpo.com/news/transportation-development/development/experts-amazon-prime-air-could-bring-up-to-15k-jobs-over-time [https://perma.cc/V9V6-D9CJ]; Chris Mayhew, *CVG and Amazon Prime Air Growth Spurs Roads Construction*, CINCINNATI ENQUIRER (June 2, 2018), https://www.cincinnati.com/story/news/local/boone-county/2018/06/02/amazon-cvg-development-fuel-boone-county-road-construction/655604002/ [https://perma.cc/H9A2-RNNH].

that it would expand its fleet of forty planes to fifty.[103] Although the fashion industry utilizes traditional air cargo, "it's not only costly but also frowned upon by today's environmentally conscious and carbon-footprint-minded consumers."[104] Consequently, the industry typically relies upon air transportation for delivery of special, time-sensitive pieces such as Megan Markle's wedding dress or an overnight shipment from Italy of Marc Jacobs's collection for New York Fashion Week.[105] Thus, the old-fashioned method of ocean transportation does and will continue to be an unavoidable way of doing business. While it may lack the intrigue of drones and even more traditional air transportation, Amazon's entry into ocean freight shipping was momentous but the media attention around it intentionally quiet. Seeking financial rewards in a difficult economy, major ocean carriers such as Maersk and CMA CGM are capitalizing on the e-commerce expectation of end-to-end intermodal delivery solutions.[106] Amazon now endeavors to join and control the major carriers' ranks.

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[103] *See* Sarah Perez, *Amazon Air Expands With 10 More Cargo Aircraft, Bringing Fleet to 50 planes*, TECHCRUNCH (Dec. 21, 2018), https://techcrunch.com/2018/12/21/amazon-air-expands-with-10-more-cargo-aircraft-bringing-fleet-to-50-planes/ [https://perma.cc/FFD3-GQJH].

[104] Andria Chang, *Tariffs Should Hasten Apparel Manufacturing's Move Out of China and Back To U.S., Study Says*, FORBES (Oct. 12, 2018), https://www.forbes.com/sites/andriacheng/2018/10/12/the-threat-of-higher-tariffs-has-hastened-u-s-apparel-industrys-talk-on-nearshoring/#643a716b3efd [https://perma.cc/P8RK-HD57] ("While flying goods in from Asia is an option, it's not only costly but also frowned upon by today's environmentally conscious and carbon-footprint-minded consumers.").

[105] *See* Steven Kurutz, *Worldnet is FedEx for the Fashion Crowd*, N.Y. TIMES (Oct. 3, 2018), https://www.nytimes.com/2018/10/03/fashion/worldnet-fashion-shipping.html [https://perma.cc/E7N8-9Z7W].

[106] *See generally* Peter Tirschwell, *E-commerce offers carriers opening to serve smaller BCOs*, JOC (Apr. 6, 2017), http://www.joc.com/international-logistics/e-commerce-fits-small-shippers-carriers-growth-strategy_20170406.html [https://perma.cc/JG5N-KGGE].

II. THE ECONOMY OF E-COMMERCE AND THE WORLDWIDE MARKETPLACE

A. *Transitions in Traditional Retail*

Unsentimentally but with alarm, trend monitors—both of the runway and stock market—predict the swansong of retail as we know it.[107] In conjunction with an influx of millennial shoppers, consumers have adapted to and normalized online shopping. Simultaneously, traditional mall purchases continue to diminish. For example, Macy's announced its plan to cut more than 10,000 jobs and close sixty-eight stores in early January 2017.[108] Similarly, Lord & Taylor's flagship Fifth Avenue store was sold to WeWork and no longer operates as a department store.[109]

Nevertheless, "the [fashion] industry has grown at 5.5 percent annually . . . to now be worth an estimated $2.4 trillion."[110] Approximately 940 million online shoppers are expected to spend almost $1 trillion on cross-border e-commerce transactions by 2020.[111] In fact, luxury online sales are projected to grow from 3% of sales in 2010 to 12% in 2020.[112]

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107 *See The State of Fashion*, BUS. OF FASHION at 17, (2018), https://cdn.businessoffashion.com/reports/The_State_of_Fashion_2018_v2.pdf [https://perma.cc/4ZVZ-BGDR].

108 Associated Press, *Macy's to Cut More Than 10,000 Jobs and Close 68 Stores*, BUS. OF FASHION (Jan. 4, 2017, 9:54PM), https://www.businessoffashion.com/articles/news-analysis/macys-to-cut-more-than-10000-jobs-and-close-68-stores [https://perma.cc/P9UU-KUHB].

109 *See generally* Pamela N. Danziger, *Uptown/Downtown: The Changing Luxury Landscape of New York City*, FORBES (Sept. 23, 2018), https://www.forbes.com/sites/pamdanziger/2018/09/23/uptowndowntown-the-changing-landscape-of-luxury-in-new-york-city/#6dd5d8a56531 [https://perma.cc/WN7P-UZZV].

110 IMRAN AMED ET AL., MCKINSEY & CO., THE STATE OF FASHION 1 (2016).

111 *Id.* at 24.

112 *Id.* at 28; *see also* Chantal Fernandez, *Report: LVMH to Launch Multi-Brand E-Commerce Site*, BUSINESS OF FASHION (Mar. 8, 2017), https://www.businessoffashion.com/articles/news-analysis/report-lvmh-to-launch-multi-brand-e-commerce-site [https://perma.cc/FK7G-NZX9] ("While e-commerce still only makes up a small percentage of overall luxury goods sales, online sales grew four times faster than offline sales between 2009 and 2014. However, McKinsey & Company predicts it will triple to €70 billion by 2025 — representing 18 percent of total luxury sales.").

Moët Hennessy Louis Vuitton's ("LVMH") launch of a multi-brand e-commerce site signals a historic moment not only in the timeline of the international conglomerate but the entire industry.[113] Previously described as a "digital laggard,"[114] LVMH began offering all of its seventy brands on one e-commerce site in March 2017 under the umbrella of Le Bon Marché, a Parisian department store it has owned since 1984.[115] Despite tension and apprehension regarding e-commerce—particularly for heritage brands like Louis Vuitton—LVMH's announcement demonstrates insight into the luxury industry's movement towards digitalization.

Most luxury and contemporary brands understand the need to advance their e-commerce sales to complete with Amazon both now and in the future. Yet, fashion brands and retailers cannot depend exclusively on e-commerce to maintain and develop revenue streams. They must also focus on how their merchandise, whether sold in stores on online, moves throughout the global marketplace.

B. *The Amazonian E-Commerce Elephant in the Room*

Amazon began its foray into the luxury fashion market in 2012 with an advertisement "reminiscent of an American Vogue spread."[116] Attempting to appease the old guard, Amazon also sponsored the 2012 Met Gala. At that time, Amazon's founder and chief executive, Jeff Bezos, indicated that his "company was making a 'significant' investment in fashion to convince top

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[113] *See* Fernandez, *supra* note 112. In September 2015, LVHM hired Ian Rogers, a former Apple music executive, as its first chief digital office to invigorate its digital strategy. *See* Ben Sisario, *Former Apple Music Executive Ian Rogers Move to LVMH*, N.Y, TIMES (Sep. 1, 2015), https://www.nytimes.com/2015/09/02/business/media/former-apple-music-executive-ian-rogers-moves-to-lvmh.html [https://perma.cc/LM6E-RZMA].

[114] *Can LVMH Compete with Net-a-Porter?*, BUSINESS OF FASHION (Mar. 10, 2017), https://www.businessoffashion.com/articles/this-week-in-fashion/can-lvmh-compete-with-net-a-porter?utm_source=BoF+Professional+Members&utm_campaign =4a0f7130c9-&utm_medium=email&utm_term=0_ff3914e56a-4a0f7130c9-420584825 [https://perma.cc/3FAH-3EYP].

[115] *See* Fernandez, *supra* note 112.

[116] Richie Siegel, *Decoding Amazon's Fashion Ambitions*, BUS. OF FASHION (Sep. 7, 2016), https://www.businessoffashion.com/articles/fashion-tech/decoding-amazons-fashion-ambitions [https://perma.cc/CLV7-XZFZ].

brands that it wanted to work with them, not against them."[117] While the Met Gala provided Amazon with access to industry insiders that might otherwise shun it, the sponsorship came at a substantial price. While "the amount of Amazon's support was not disclosed, headline sponsorship of the Met Gala and exhibition is estimated to cost about $1 million, not a small sum, even for a giant like Amazon."[118]

Today, Amazon is lauded as the "biggest clothing seller online."[119] Dramatized headlines boldly state: "Amazon Eats the Department Store"[120] and "Amazon is getting closer to crushing America's biggest clothing stores."[121] Nevertheless, Amazon's current clothing sales are predominately in the functional basics category.[122] While certain contemporary brands agree to sell on Amazon, including Michael Kors, Vivienne Westwood, Catherine Malandrino, Tracy Reese, Kate Spade, French Connection, 7 for All Mankind, and Vince,[123] most luxury and contemporary brands refuse to sell on the e-commerce platform.

The chasm between Amazon and luxury is expansive. Amazon's business depends on below-cost pricing.[124] Today, off-

117 Stephanie Clifford, *Amazon Leaps into High End of the Fashion Pool*, N.Y. TIMES (May 7, 2012), http://www.nytimes.com/2012/05/08/business/amazon-plans-its-next-conquest-your-closet.html?_r=1 [https://perma.cc/K453-FHL5].

118 *See Is the Met Ball Becoming Fashion's Biggest PR Platform?*, BUSINESS OF FASHION (May 8, 2012), https://www.businessoffashion.com/articles/intelligence/is-the-met-ball-becoming-fashions-biggest-pr-platform [https://perma.cc/Z6GJ-MF3X].

119 Shelly Banjo, *Amazon is Now Eating All the Department Stores, Too*, BLOOMBERG OPINION: GADFLY (Sep. 20, 2016), https://www.bloomberg.com/gadfly/articles/2016-09-20/amazon-clothing-sales-could-soon-top-macy-s [https://perma.cc/VEP7-JJJV]. Walmart, with $24 billion in U.S. clothing sales, is America's largest apparel seller. *Id.*

120 *Id.*

121 Hayley Peterson, *Amazon is Getting Closer to Crushing America's Biggest Clothing Stores*, BUS. INSIDER (Jan. 14, 2017), http://www.businessinsider.com/amazon-becomes-the-biggest-clothing-retailer-in-the-us-2017-1 [https://perma.cc/R7LG-W2VA].

122 *See* Chavie Lieber, *Amazon Wants to Dress You*, RACKED (Apr. 4, 2017), http://www.racked.com/2017/4/4/14982426/amazon-fashion-clothes [https://perma.cc/35SJ-5WYE].

123 *See* Clifford, *supra* note 118; *see also* Banjo, *supra* note 120.

124 *See* Walter Loeb, *Amazon's Pricing Strategy Makes Life Miserable for the Competition*, FORBES (Nov. 20, 2014), https://www.forbes.com/sites/walterloeb/2014/11/20/amazons-pricing-strategy-makes-life-miserable-for-the-competition/#629536425c60 [https://perma.cc/9NFE-RJW3].

price retailing continues to expand, with an expected growth between six and eight percent by 2020.[125] Discounting, however, "turns off luxury brands."[126] Amazon's business thereby completely contradicts with luxury fashion's anathema to off-price.[127] Consider the following anecdote. When Amazon first sponsored the Met Gala, "Mr. Bezos, the event's honorary chairman, said that he was advised by Anna Wintour, Vogue's editor, to wear a pocket square with his Tom Ford tuxedo."[128] While that tuxedo is not available on Amazon Fashion,[129] there were approximately 8000 alternative options for sale on the site.[130]

Despite downturn in mall traffic, most luxury and contemporary fashion brands still refuse to work with Amazon. Even those that do sell on its e-commerce platform often limit merchandise to entry-level items.[131] LVMH, for example, stated that "[w]e believe the business of Amazon does not fit with LVMH full stop and it does not fit with our brands. . . . There is no way we can do business with them for the time being."[132] Nevertheless, Amazon persistently pursues the luxury and contemporary fashion market.[133]

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125 *See* Lauren Sherman, *After Decade of Growth, When Will Off-Price Hit Saturation Point?*, BUSINESS OF FASHION (Nov. 26, 2016), https://www.businessoffashion.com/articles/intelligence/after-decade-of-growth-when-will-off-price-hit-saturation-point [https://perma.cc/9FNW-EUE7].

126 Siegel, *supra* note 116.

127 That said, as the market continues to shift luxury brands are beginning to utilize off-price channels to "differentiate their offering based on different demand segments." *Global Fashion & Luxury market Private Equity and Investors Survey 2016*, DELOITTE 1, 8 (2016), https://www2.deloitte.com/content/dam/Deloitte/sg/Documents/consumer-business/sea-cip-global-fashion-luxury-pe-survey-2016.pdf [https://perma.cc/3SPV-MPMK].

128 Clifford, *supra* note 117.

129 *See id.*

130 As per a March 21, 2019 search of "tuxedo" under the men's category on Amazon Fashion, AMAZON, https://www.amazon.com/amazon-fashion/b?ie=UTF8&node=7141123011 [https://perma.cc/A393-USVY] (input "tuxedo" into search field).

131 *See* Lieber, *supra* note 122.

132 *LVMH Says No Way It Will Do Business with Amazon*, REUTERS (Oct. 11, 2016), http://fortune.com/2016/10/11/lvmh-no-business-amazon/ [https://perma.cc/44GK-KEAE].

133 *See* Lieber, *supra* note 122.

III. Ocean Transportation is the New Black

Most likely, fashion will become merely another box checked off in Amazon's quest for complete dominance across industries. A "titan of twenty-first century commerce," Amazon is not only "a retailer" but also "a marketing platform, a delivery and logistics network, a payment service, a credit lender, an auction house, a major book publisher, a producer of television and films, a fashion designer, a hardware manufacturer, and a leading host of cloud server space."[134] Simply put, Amazon's "structure and conduct pose anticompetitive concerns."[135]

Lina Khan, in a 2017 Yale Law Journal article that went as "viral as dense legal scholarship can go,"[136] discussed how current U.S. antitrust laws are "unequipped to capture the architecture of market power in the modern economy" specifically in light of Amazon's cross-industry dominance.[137] Khan posits that Amazon's behemoth business structure creates particular anticompetitive concerns involving predatory pricing and vertical integration.[138] While Khan notes that Amazon's expansion into delivery creates particular antitrust concerns involving vertical integration, she does not discuss the magnitude of Amazon's foray into ocean shipping and corollary antitrust exemption concerns.[139]

The aforementioned sensationalized conversation regarding whether Amazon's drone squadrons will ever take flight fails to consider the much less racy ocean carrier component of its global

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[134] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 710 (2017).

[135] *Id.*

[136] Robinson Meyer, *How to Fight Amazon (Before You Turn 29)*, THE ATLANTIC (July 2018), https://www.theatlantic.com/magazine/archive/2018/07/lina-khan-antitrust/561743 [https://perma.cc/T648-4ASE].

[137] *See* Khan, *supra* note 134, at 710.

[138] *See id.* As a solution, Khan recommends that the U.S. move away from consumer welfare focused antitrust laws and instead focus on maintaining competition.

[139] *Id.* at 778 ("Amazon now owns four thousand truck trailers and has also signed contracts for container ships, planes, and drones. As of October 2016, Amazon had leased at least forty jets. Former employees say Amazon's long-term goal is to circumvent UPS and FedEx altogether, though the company itself has said it is looking only to supplement its reliance on these firms, not supplant them . . . By overlooking structural factors like bargaining power, modern antitrust doctrine fails to address this type of threat to competitive markets.").

logistics business.[140] In 2015, Amazon generated combined revenues of $107 billion.[141] The year before, it spent $11.5 billion on shipping, an expense that has risen for the online retailer every year since 2009.[142] During the second quarter of 2016 alone, Amazon's shipping expenses rose 44% while sales only rose 31%.[143]

According to Citigroup Inc., Amazon "could save $1.1 billion annually if it stopped using UPS and FedEx."[144] Moreover, "[k]eeping packages under its own control just over longer distances could save Amazon around $3 or more on a typical delivery."[145] In June 2016, Deutsche Bank released a report regarding Amazon's logistics strategy.[146] Setting out steps for Amazon's proposed new supply chain, Deutsche Bank recommended that:

- Amazon charters ships to speed up the sourcing of goods from China,
- Amazon sets up a mega-fulfillment centers near several ports in China (or in other APAC regions where factories spring up in the future) that can manage sorting of goods into location-specific pallets — at a freight-consolidation facility,

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140 *See* Spencer Soper, *Amazon Building Global Delivery Business to Take On Alibaba*, BLOOMBERG (Feb. 9, 2016), https://www.bloomberg.com/news/articles/2016-02-09/amazon-is-building-global-delivery-business-to-take-on-alibaba-ikfhpyes [https://perma.cc/6TCC-9AUM].

141 *See* Siegel, *supra* note 116.

142 *See* Greg Bensinger & Laura Stevens, *Amazon's Newest Ambition: Competing Directly With UPS and FedEx*, WALL ST. J. (Sep. 27, 2016), https://www.wsj.com/articles/amazons-newest-ambitioncompeting-directly-with-ups-and-fedex-1474994758 [https://perma.cc/8TAU-CHSL].

143 *See* Greg Bensinger, *Amazon Reveals 'Prime Air' Cargo Jet*, WALL ST. J. (Aug. 5, 2017), https://www.wsj.com/articles/amazon-reveals-prime-air-cargo-jet-1470378818 [https://perma.cc/43WJ-F2EM].

144 *See* Bensinger and Stevens, *supra* note 142.

145 *Id.*

146 *See* Devin Leonard, *Will Amazon Kill FedEx?*, BLOOMBERG (Aug. 31, 2016), https://www.bloomberg.com/features/2016-amazon-delivery/ [https://perma.cc/QLJ6-T3X9].

- The ships serve as "active sortation centers" while moving product across the Pacific and Atlantic, potentially taking advantage of the "anticipatory package shipping" patent from 2013, but on boats (vs. trucks) whereby Amazon predicts demand in every coastal population center and has inventory-in-transit,
- As orders come in, Amazon sorts items on the ships and in smaller sortation centers on the other side of coasts — i.e., "freight deconsolidation" facilities, the orders are labeled and loaded directly into trailers eliminating intermediate storage, solving one of the biggest inefficiencies in today's logistics supply chain,

Orders are routed using self-driving trailers to local sortation centers or drop off points for Amazon's own carrier, USPS, UPS, and FedEx for last mile delivery.[147]

Since 2016, Amazon has gained "more control over its delivery chain from factories in China through U.S. ports to sprawling suburban warehouses and neighborhood package-sorting centers."[148] Stated differently, Amazon envisions and endeavors for complete vertical integration.

Amazon began using branded trailers for truck deliveries in late 2015.[149] At the time, the company indicated that "the new trucks will serve as additional delivery power and that it will not cancel, or for that matter compete with, its existing partnerships

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[147] Myles Udland, *Deutsche Bank Lays Out a Radical Vision for the Future of Amazon's Shipping Operations*, BUS. INSIDER DEUTSCHLAND (June 15, 2016), http://www.businessinsider.de/amazons-logistics-re-imagined-by-deutsche-bank-2016-6?platform=hootsuite&utm_content=32029983&utm_medium=social&utm_source=twitter?r=US&IR=T [https://perma.cc/8Y3Z-Z9UH].

[148] *See* Bensinger & Stevens, *supra* note 142.

[149] *See* Leena Rao, *Amazon To Roll Out A Fleet Of Branded Trailer Trucks*, FORTUNE (Dec. 4, 2015), http://fortune.com/2015/12/04/amazon-trucks/ [https://perma.cc/D3R3-ZEFA].

with traditional shippers like FedEx and UPS."[150] These initial trailers were first used to deliver goods between Amazon's warehouses, not to consumers, the "core business of FedEx and UPS."[151]

Showing successful savings, the company quickly thereafter entered the air transportation market, as mentioned above. In March 2016, Amazon leased twenty planes from Air Transport Services.[152] A few months later in May, it announced its deal to lease twenty Boeing planes from Atlas Air Worldwide Holdings Inc.[153] These acquisitions further position Amazon directly against its current logistics business partners, FedEx, UPS, and even the U.S. Postal Service.[154]

In its latest attempt to build-out its logistics effort, Amazon began providing ocean-freight services.[155] Although "[t]he company doesn't own or operate ships," Amazon "is openly acting as a global freight forwarder and third-party logistics provider, categories of companies that book space on ocean vessels and truck goods between ports and warehouses."[156] In November 2016, Beijing Century Joyo Courier Service Co, a Chinese affiliate of Amazon.com, registered with the Federal Maritime Commission ("FMC")[157] for the status of both freight forwarder and

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150 *See* Reem Nasr, *Amazon: Additional Deliveries with Our Own Truck Fleet*, CNBC (Dec. 4, 2015), http://www.cnbc.com/2015/12/04/amazon-additional-deliveries-with-our-own-truck-fleet.html [https://perma.cc/TG87-BU8W].

151 *Id.*

152 *See* Leslie Hook & Robert Writght, *Amazon Leases 20 Boeing 767 Freight Jets for Air Cargo Programme*, FIN. TIMES (Mar. 9, 2016), https://www.ft.com/content/6f3867e8-e617-11e5-a09b-1f8b0d268c39 [https://perma.cc/72YS-P97U].

153 *See* Bensinger, *supra* note 143.

154 *See* Alex Fitzpatrick, *See Amazon's Massive New 'Prime Air' Cargo Jet Plane*, TIME (Aug. 5, 2016), http://time.com/4440542/amazon-one-airplane-fedex-ups/ [https://perma.cc/VEX2-XNKY].

155 *See* Laura Stevens, *Amazon Expands into Ocean Freight*, WALL ST. J. (Jan. 25, 2017), https://www.wsj.com/articles/amazon-expands-into-ocean-freight-1485357884?mod=e2tw [https://perma.cc/5DJH-52BA].

156 *Id.*

157 The FMC carries out the regulatory process for the common carriage of goods by water in the foreign commerce of the U.S. established by the Shipping Act of 1984 (46 U.S.C. §§ 40101–41309), discussed *supra* note 49.

NVOCC.[158]Although the ocean transportation component has been active since October 2016, only in January 2017 did Amazon begin posting rates for services traditionally handled by global freight companies.[159] By mid-2017, Amazon was already importing between ten and fifteen containers per week on behalf of other customers and 350 containers per week for its own use from China.[160]

Publicly, Amazon states that expansion into logistics is necessary to supplement already existing third-party services so orders can be delivered more efficiently, especially during busy holiday seasons.[161] Yet, "[s]hipping has always been at the core of Amazon's strategic investments."[162] Furthermore, Amazon's business model focuses on wide expansion rather than substantial profits. In fact, Amazon was not even profitable in its first six years of existence.[163]

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158 Ryan Petersen, *Introducing Ocean Freight by Amazon; Ecommerce Giant Has Registered to Provide Ocean Freight Services*, FLEXPORT BLOG, https://www.flexport.com/blog/amazon-ocean-freight-forwarder/ [https://perma.cc/3ZZY-M95R] (last visited Jan. 19, 2019); *see also* Peter Buxbaum, *Amazon Now Moving into Ocean Shipping*, GLOBAL TRADE MAG. (Jan. 25, 2016), http://www.globaltrademag.com/global-trade-daily/news/amazon-now-moving-into-ocean-shipping [https://perma.cc/QZK8-AX6X].

159 *See* Stevens, *supra* note 9.

160 *See* Leslie Hook, *Amazon's China Logistics Push to Pile Pressure on Rival Shippers*, FIN. TIMES (Apr. 5, 2017), https://www.ft.com/content/71f989c6-14ec-11e7-80f4-13e067d5072c [https://perma.cc/H8E7-S8F7].

161 *See* Brad Stone, *Amazon's Grand Plan to Avoid Holiday Delivery Snafus Again*, BLOOMBERG (Sep. 26, 2014), https://www.bloomberg.com/news/articles/2014-09-26/amazons-grand-plan-to-avoid-holiday-delivery-snafus-again [https://perma.cc/76AJ-F7SV]; *see also* Adam Lashinsky, *How Alibaba's Jack Ma Is Building a Truly Global Retail Empire*, FORTUNE (Mar. 24, 2017), http://fortune.com/2017/03/24/jack-ma-alibaba-china-ecommerce-world-greatest-leaders/ [https://perma.cc/KD6A-K9P9] ("In China, this meant investing in a network of logistics companies called Cainiao—Alibaba owns 47%—that vastly improved on the meager capabilities of the government's postal delivery system.").

162 Farhad Manjoo, *Think Amazon's Drone Delivery Idea Is a Gimmick? Think Again*, N.Y. TIMES (Aug. 10, 2016), http://www.supplychain247.com/article/maersk_alibaba_roll_out_ocean_cargo_booking_partnership/yusen_logistics [https://perma.cc/KC2U-UTE8].

163 *See* Khan, *supra* note 134, at 712.

Maintaining an expansionist business model, Amazon rose to e-commerce dominance. It now seeks to control the logistics industry:

> Amazon has translated its dominance as an online retailer into significant bargaining power in the delivery sector, using it to secure favorable conditions from third-party delivery companies. This in turn has enabled Amazon to extend its dominance over other retailers by creating the Fulfillment-by-Amazon service and establishing its own physical delivery capacity. This illustrates how a company can leverage its dominant platform to successfully integrate into other sectors, creating anticompetitive dynamics. Retail competitors are left with two undesirable choices: either try to compete with Amazon at a disadvantage or become reliant on a competitor to handle delivery and logistics.[164]

Amazon does not want to supplement the logistics services currently provided by FedEx, UPS, and DHL. Rather:

> Amazon wants to bypass these brokers, amassing inventory from thousands of merchants around the world and then buying space on trucks, planes and ships at reduced rates. Merchants will be able to book cargo space online or via mobile devices, creating what Amazon described as a "one click-ship for seamless international trade and shipping."[165]

Entering the shipping industry was not a way for Amazon to reduce its exorbitant shipping costs and obtain a new revenue stream.[166] The ocean freight business, "a notoriously unautomated industry," allows Amazon to almost achieve complete vertical integration. In other words, Amazon's logistics division serves as a

164 *Id.* at 744.
165 Soper, *supra* note 140.
166 *See* Bensinger & Stevens, *supra* note 142.

way for the company to completely control access to and financing of the global marketplace.[167]

It remains to be seen how Amazon will take to the seas since risks arising from ocean transportation are inevitable. Amazon does not want to follow the public disasters suffered, as a matter of illustration, by the oil supermajors,[168] who long operated profitable tankers in international trade. Historically, oil majors controlled not only the production and distribution of their products, but also the international transportation of oil worldwide in easily identified seagoing tankers. The image of MT *Amoco Cadiz* in 1978,[169] MT *Exxon Valdez* in 1989,[170] and BP's *Deepwater Horizon* in 2010[171] are brutal reminders of the impact of disasters on brand names. After the crude oil from MT *Exxon Valdez* fouled the pristine Alaskan waters and shore, the oil majors finally decided to exit the oil transportation market. Analogously, Amazon must evaluate how much risk it will accept to brand its ships and containers in international ocean transportation. For example, would Amazon be willing to endure weeks or months of negative publicity while one of its ships was grounded outside a major port presenting an oil pollution risk or if another carrier's vessel was on fire with

167 Zvi Schreiber, *Is Logistics About To Get Amazon'ed?*, TECH CRUNCH (Jan. 29, 2016), https://techcrunch.com/2016/01/29/is-logistics-about-to-get-amazoned/ [https://perma.cc/CP6E-5WWM].

168 The "supermajors" are a group of multinational oil companies given the moniker due to their size, age, and market position. *See* Tom Bergin, *Oil Majors' Output Growth Hinges On Strategy Shift*, REUTERS (Aug. 1, 2008), https://www.reuters.com/article/us-oilmajors-production/oil-majors-output-growth-hinges-on-strategy-shift-idUSL169721220080801 [https://perma.cc/8URP-9REN].

169 *See Amoco Cadiz*, NOAA: INCIDENT NEWS, https://incidentnews.noaa.gov/incident/6241 [https://perma.cc/Q6CR-H8J3] (last accessed Jan. 19, 2019) (The Amoco Cadiz ran aground on March 16, 1978 off the coast of Brittany, France, spilling its entire cargo of 1,619,048 barrels of oil into the sea).

170 *See* Alan Taylor, *The Exxon Valdez Oil Spill: 25 Years Ago Today*, THE ATLANTIC (Mar. 24, 2014), https://www.theatlantic.com/photo/2014/03/the-exxon-valdez-oil-spill-25-years-ago-today/100703/ [https://perma.cc/Q5ML-ZT8E] (On March 24, 1989, the oil tanker Exxon Valdez, full of crude oil, struck a reef in Alaska's Prince William Sounds, releasing eleven million gallons of oil).

171 *See* David Barstow, David Rohde, & Stephanie Saul, *Deepwater Horizon's Final Hours*, N.Y. TIMES (Dec. 25, 2010), https://www.nytimes.com/2010/12/26/us/26spill.html [https://perma.cc/AP9T-LR7D] (An April 20, 2010 explosion on the Deepwater Horizon oil rig in the Gulf of Mexico, leased by BP, resulted in the largest marine oil spill in history).

Amazon branded ocean containers clearly visible on the main deck? Considering these potential risks, perhaps Amazon will elect to invest its capital in non-branded, leased ocean-containers and chartered containerships or will buy the containers and ships and charter them to other entities to operate.

IV. U.S. ANTITRUST LAWS

A. *Legal Monopolies*

As America's economy developed in the late 19th century, the government began implementing competition laws. Congress enacted the Sherman Act of 1890[172] to protect competitive markets.[173] In 1914, the U.S. enacted the Clayton Act[174] and the Federal Trade Commission Act.[175] Since then, U.S. competition laws "have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up."[176]

The Sherman Act "outlaws 'every contract, combination, or conspiracy in restraint of trade,' and any 'monopolization, attempted monopolization, or conspiracy or combination to monopolize.'"[177] It does not prohibit every restraint on trade, only those which are found unreasonable.[178] Certain actions such as horizontal price fixing are considered *per se* violations under the Sherman Act.[179] Nevertheless, vertical integration, which arises when "two or more successive stages of production and/or

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172 15 U.S.C. § 1 (2012).
173 *See* Albert A. Foer, *AAI Working Paper 06-04* (United States Antitrust Inst., Apr. 2006), http://www.antitrustinstitute.org/files/502.pdf [https://perma.cc/C3N3-JBT6]. Even before the passage of the Sherman Act, certain states had passed antitrust laws. *Id.*
174 15 U.S.C. § 12 (2012).
175 15 U.S.C. § 41 (2012).
176 *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/3YHV-ECXT].
177 *Id.*
178 *See generally* Standard Oil Co. of N.J. v. U.S., 221 U.S. 1 (1911).
179 15 U.S.C. § 1 (2012).

distribution of a product are combined under the same control," is subject to less stringent regulation.[180]

The Clayton Act was passed to address practices that the Sherman Act did not clearly prohibit, including mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly."[181] As amended by the Robinson-Patman Act of 1936,[182] the Clayton Act further prohibits certain discriminatory prices, services, and allowances in dealings between merchants.[183] In 1976, the Clayton Act was again amended by the Hart-Scott-Rodino Antitrust Improvements Act[184] which requires companies to notify the government of their plans in advance of large mergers or acquisitions.[185]

Additionally, the Federal Trade Commission Act bans "unfair methods of competition" and "unfair or deceptive acts or practices."[186] It also created an independent federal agency, the Federal Trade Commission ("FTC"). This FTC strives to protect consumers and ensure a strong competitive market by enforcing various consumer protection and antitrust laws. It specifically seeks to protect consumers and the market from harmful business and anticompetitive practices.

While the FTC protects consumer interests, citizen protectionism was not the sole impetus for antitrust law development in America. Instead, "Congress enacted antitrust laws to rein in the power of industrial trusts, the large business organizations that had emerged in the late nineteenth century. Responding to a fear of concentrated power, antitrust sought to distribute it."[187] Thus, monopolization is explicitly prohibited by Section 2 of the Sherman Act:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other

[180] Khan, *supra* note 134, at 731.
[181] 15 U.S.C. § 14 (2012).
[182] 15 U.S.C. § 13 (2012).
[183] *See* FED. TRADE COMM'N, *supra* note 176.
[184] 15 U.S.C. § 18(a) (2012).
[185] *See* FED. TRADE COMM'N, *supra* note 176.
[186] 15 U.S.C. § 45 (2012).
[187] Khan, *supra* note 134, at 739–40.

> person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.[188]

U.S. antitrust laws were designed and interpreted to reflect that the market would become anticompetitive if dominated by only a handful of large companies because:

- monopolistic and oligopolistic market structures enable dominant actors to coordinate with greater ease and subtlety, facilitating conduct like price-fixing, market division, and tacit collusion;
- monopolistic and oligopolistic firms can use their existing dominance to block new entrants; and
- monopolistic and oligopolistic firms have greater bargaining power against consumers, suppliers, and workers, which enables them to hike prices and degrade service and quality while maintaining profits.[189]

Over time, however, U.S. antitrust doctrine shifted to favor the Chicago School of Economics' price theory. Developed at the University of Chicago in the 1940s, this theory favors a free market with minimal government intervention. The economic scholars of the Chicago School argue that "rational economic actors working within the confines of the market seek to maximize profits by combining inputs in the most efficient manner. A failure to act in this fashion will be punished by the competitive forces of the market."[190] As academic economic theories about antitrust

188 15 U.S.C § 2 (2012).
189 Khan, *supra* note 134, at 718.
190 *Id.* at 719.

shifted toward the Chicago School's teachings, the government began to ignore monopolization concerns.[191]

Whereas U.S. antitrust laws were originally passed to prevent monopolization so as to thwart anticompetitive practices like vertical integration, adoption of the Chicago School theory led enforcers to "largely abandon section 2 monopolization claims."[192] "Over the eight years of the Bush Administration, the Justice Department filed no monopolization cases. [As of July 18, 2012], the Obama Administration [had] filed only one case, hardly evidencing a major shift in tactics."[193] It remains unclear how antitrust enforcement will continue to shift under the Trump administration. On the campaign trail, President Trump suggested a "very aggressive approach to antitrust."[194] Prior to politics, he was personally involved in a several antitrust matters.[195] Concurrently, his administration emphasizes decreased government regulation which has resulted in less antitrust enforcement.[196] Commentators have suggested, however, that the DOJ's antitrust division policy "has consistently promoted the interests of the biggest tech companies."[197]

B. The Current Legal Landscape of the Maritime Exemptions

Antitrust exemptions began with the maritime industry.[198] "The Shipping Act of 1916 is the oldest surviving U.S. statutory antitrust

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191 *Id.*

192 *Id.* at 738.

193 *Id.*

194 Steven C. Salop & Carl Shapiro, *Whither Antitrust Enforcement in the Trump Administration?*, ABA (Feb. 2017) http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/feb17_salop_2_16f.authcheckdam.pdf [https://perma.cc/7F9F-E3SD]; *see also* Sally Hubbard, *Amazon and Google May Face Antitrust Scrutiny Under Trump*, FORBES (Feb. 8, 2017), https://www.forbes.com/sites/washingtonbytes/2017/02/08/platform-privilege-amazon-and-google-may-face-antitrust-scrutiny-under-trump/#1701b5ea7730 [https://perma.cc/7US6-8DFG].

195 *See* Salop & Shapiro, *supra* note 194.

196 *See id.*

197 *See* Matthew Buck & Sandeep Vaheesan, *Trump's Big Tech Bluster*, N.Y. TIMES (Mar. 6, 2019), https://www.nytimes.com/2019/03/06/opinion/trump-antitrust-laws.html [https://perma.cc/5KHM-WUQN].

198 The other well-known antitrust exemption is for professional baseball. *See* Fed. Baseball Club v. National League, 259 U.S. 200 (1922); *see also* David Greenberg, *Baseball's Con Game*, SLATE (July 19, 2002) http://www.slate.com/articles

exemption."[199] The world's ocean liner trade did not exist when the Sherman Act was adopted in 1890. As steam ship technology advanced, ocean transportation quickly grew. To alleviate over-tonnage[200] issues, "which threatened liner operators' large investments in ships and facilities," the ocean "carriers began to cooperate among themselves."[201] The ocean carrier business, based upon these cooperative ventures, developed to form shipping cartels.[202] The Sherman Act did not clearly govern the shipping industry because: 1) ocean liners were not contemplated at the time of its enactment, and 2) maritime shipping is inherently international in nature.[203] Due to the lack of clarity in the law coupled with "the shipping business' vital importance and unique characteristics," the legislature deemed separate maritime antitrust regulation necessary.[204]

The Shipping Act of 1916, while outlawing specified monopolistic practices, also provided major exemptions for the maritime shipping industry:

> [The law] conferred an exemption from the antitrust laws for conference agreements on shipping rates, pooling arrangements, and shipping route allocations, so long as those agreements were first submitted to and approved by the newly created U.S. Shipping Board (the body that eventually became the FMC).[205]

/news_and_politics/history_lesson/2002/07/baseballs_con_game.html [https://perma.cc/9BVU-PWWZ].

199 *Competition Issues in Liner Shipping*, ORG. FOR ECON. COOPERATION AND DEV., at 2 (June 19, 2015), https://one.oecd.org/document/DAF/COMP/WP2/M(2015)1/ANN3/en/pdf [https://perma.cc/N4BM-C26C].

200 Tonnage refers to the capacity of space on an ocean freight ship. Thus, over tonnage refers to when there is too much empty space on a vessel. *See Overtonnaging*, GLOB. FORWARDING (Nov. 11, 2013), https://globalforwarding.com/blog/overtonnaging [https://perma.cc/9HPK-CZA9].

201 *See* Malgorzata Anna Nesterowicz, *The Mid-Atlantic View of the Antitrust Regulations of Ocean Shipping*, 17 U.S.F. MAR. L.J. 45 (2005).

202 *See id.*

203 *See id.*

204 *Id.*

205 *See* ORG. FOR ECON. COOPERATION AND DEV., *supra* note 200, at 2.

Since the enactment of the Shipping Act of 1916, maritime-specific antitrust exemptions continue to develop as the industry evolves.

As with the Sherman Act, the rise of the Chicago School of Economics substantially impacted the maritime exemptions.[206] In 1984, the Shipping Act was substantially altered. The Shipping Act of 1984,[207] in addition to revising the antitrust exemption for carrier agreements and streamlining regulatory processes for such agreement, "abolished the FMC's public interest standard for reviewing carrier agreements."[208] Thus, the only way an agreement can be challenged as anticompetitive is if the FMC compels a court to enjoin the agreement. Such legal enjoinment will occur if the proposed agreements will "by a reduction in competition . . . produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost."[209] In an effort to further catch up to technological advances in the ocean shipping sector, specifically containerization and increased preferences for intermodal transport,[210] the Shipping Act was further deregulated through the 1998 enactment of the Ocean Shipping Reform Act ("OSRA").[211]

Today, the Shipping Act serves to:

- Establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs;
- Provide an efficient and economic transportation system in the ocean commerce of

[206] *See* Khan, *supra* note 134, at 718–21.
[207] 46 U.S.C. § 1701 (2012).
[208] ORG. FOR ECON. COOPERATION AND DEV., *supra* note 200, at 3 ("The FMC construed the 'public interest' standard in the 1961 amendment to mean that agreements that would violate policies of the antitrust laws were prima facie contrary to the public interest, and proponents had the burden of showing that they were justified by transportation need or regulatory purposes.").
[209] *Id.*
[210] Nesterowicz, *supra* note 201, at 63.
[211] 46 U.S.C. §§ 1701–1719 (2012).

> the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices;
> - Encourage the development of an economically sound and efficient liner fleet of vessels of the United States capable of meeting national security needs; and
> - Promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.[212]

In an attempt to facilitate economical and efficient ocean commerce, "[t]he Act took a free market economy approach, opening up the market to free competition and turning away from the previous, regulatory approach."[213] While still subject to Department of Justice ("DOJ") prosecution for jointly fixing rate, under the exceptions, "container lines that belong to discussion agreement can meet to discuss and agree on voluntary rate guidelines."[214] Recently, however, the U.S. has become much more active in regulating anticompetitive action in the ocean shipping carrier sector.

C. Maritime Antitrust Exemption in Action

Li & Fung, "the world's biggest sourcing company, with turnover last year [2016] approaching $21bn," provides the fashion industry full service supply chain management.[215] According to the company, it "offer[s] deep expertise in designing and developing private label products from initial product design through development to final delivery, whether it is for fast fashion, ready

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212 46 U.S.C. § 40101 (2012).

213 Nesterowicz, *supra* note 201, at 64.

214 Mark Szakonyi, *US Congress Pressured to Forbid Alliances from Joint Contracting*, JOC (Apr. 10, 2017), http://www.joc.com/maritime-news/container-lines/us-congress-pressured-forbid-alliances-joint-contracting_20170410.html [https://perma.cc/FG5A-RS8K].

215 *See* Demetri Sevastopulo, *Li & Fung's Strategy to Make the Maths Work*, FIN. TIMES (Jun. 2, 2014), https://www.ft.com/content/201047da-e7ef-11e3-b923-00144feabdc0 [https://perma.cc/BU25-DCZ8].

to wear accessories or gifts."[216] In 2014, Li & Fung developed a business expansion plan involving the acquisition of China Container Line ("CCL"), an ocean freight forwarding business, "to generate more bargaining power via larger volumes, providing cost savings on shipping of 5 to 15 per cent."[217] Within six months of the acquisition of CCL, Li & Fung's logistic sector operating profit increased 31%.[218] William Fung, Li & Fung's group chairman, stated that "[t]he successful integration of the newly acquired freight forwarding business will accelerate the growth of the logistics business and provide synergies with the rest of our businesses."[219]

LF Logistics, a subsidiary of Li & Fung, now provides ocean freight forwarding services.[220] Based in Shanghai, it operates as a foreign-based NVOCC registered with the FMC along with a licensed NVOCC located in Jamaica, Queens, New York. LF Logistics created a profitable new revenue stream for its parent company.[221] Nevertheless, within the few years since its creation, it was subjected to U.S. antitrust regulation.

Through its own prosecutorial arm, the Bureau of Enforcement, the FMC investigates potential violations of the Shipping Act and FMC regulations.[222] After conducting a series of investigations into allegedly anticompetitive violations, the FMC announced that it collected $962,500.00 in civil penalty payments from compromise agreements on December 15, 2016.[223] Included

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216 *Miles: A Li & Fung Company*, MILES GMBH, https://milesgroup.eu/en/lifung/ [https://perma.cc/SUQ7-J9ZK] (last visited Feb. 9, 2019).

217 *See* Sevastopulo, *supra* note 216.

218 *See* Greg Knowler, *CCL Acquisition Drives Up Li & Fung Logistics Revenue*, JOC (Aug. 22, 2014), http://www.joc.com/international-logistics/logistics-providers/li-fung/ccl-acquisition-drives-li-fung-logistics-revenue_20140822.html [https://perma.cc/T428-AUQT].

219 Sevastopulo, *supra* note 215.

220 *LF Logistics Menu of Services*, LF LOGISTICS, https://www.lflogistics.com/services/freight-forwarding [https://perma.cc/GQC7-77VP] (last visited Jan. 20, 2019).

221 *Id.*

222 *See Bureau of Enforcement*, FED. MARITIME COMM'N, http://www.fmc.gov/bureaus_offices/bureau_of_enforcement.aspx [https://perma.cc/EC9Q-A7Q5] (last visited Jan. 20, 2019).

223 *See FMC Collects $962,500 In Penalty Payments*, FED. MARITIME COMM'N (Dec. 15, 2016), http://www.fmc.gov/NR16-28/ [https://perma.cc/DR52-JYTW].

among the ten settling parties were LF Logistics (China) Ltd. and LF Logistics USA, LLC, subsidiaries of Li & Fung.[224] Pursuant to the Compromise Agreement entered into by LF Logistics (China) Ltd. and LF Logistics USA, LLC with the FMC, Li & Fung's logistics subsidiaries agreed to settle for $180,000 rather than risk litigation.[225]

The Compromise Agreement states:

> Between May 1, 2014 and May 31, 2016, LF Logistics (China) Co., Ltd. and LF Logistics USA LLC knowingly and willfully obtained ocean transportation for property at less than the rates and charges that would otherwise be applicable by the device or means of improperly utilizing rates limited to certain "named accounts" in service contracts with United Arab Shipping Company (UASC), CMA CGM, and Hapag-Lloyd AG (Hapag), among other carriers; and
>
> During the same time period stated above, LF Logistics (China) Co., Ltd. and LF Logistics USA LLC knowingly and willfully improperly allowed other ocean transportation intermediaries (OTIs) to access certain service contracts with UASC, CMA CGM, and Hapag, among other carriers, to which such other OTIs were not signatories or affiliates and, pursuant to such device or means, said OTIs obtained ocean transportation for property from such ocean carriers at less than the rates or charges otherwise applicable.[226]

Although in entering the Compromise Agreement, LF Logistics China and USA did not admit to violations of the Shipping Act of 1984 or FMC Regulations, the Agreement suggests that the Li &

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224 *See id.*

225 *See* Fed. Maritime Comm'n, *Compromise Agreement*, FMC FILE NO. 17194 (last visited Mar. 20, 2019), http://www.fmc.gov/assets/1/Page/CompromiseAgreementLFUSALFChina.pdf [https://perma.cc/G7WA-MKCP].

226 *Id.*

Fung subsidiaries engaged in anticompetitive actions. The FMC uses compromise agreements not only to address past violations, but also to "deter similar conduct throughout the industry."[227]

Around the time that Li & Fung developed its freight forwarding business, the Organization for Economic Cooperation and Development ("OECD"), a forum for governments to discuss economic development, began investigating developments in the maritime industry and related antitrust impacts.[228] On November 22, 2015, the OECD hosted a roundtable discussion on competition issues in the ocean liner shipping industry. Acknowledging "the peculiarity of the regulatory history of the liner shipping sector, which has been governed by agreements among competitors for a very long time," the OECD discussion suggests that because of the cartel-like nature of the industry, there must be increased antitrust regulation.[229] Although there is no single monopoly within the liner shipping sector:

> Liner shipping services are nonetheless very concentrated on the hands of a few top carriers. The top five carriers in the market - Maersk, MSC (Mediterranean Shipping Company), the CMA-CGM Group, Hapag-Lloyd and Evergreen line - account for about half of the market capacity, with the remainder being dispersed among many smaller players . . . . In what concerns costs features, the industry is characterized by high fixed costs and economies of scale in vessel size. Economies of scale in vessel size drove one of the most important trends in the industry – a trend towards increasing vessel size . . . Between 2000 and 2014, the industry experienced a trend towards cost consolidation and increasing concentration, such that the capacity

227 FED. MARITIME COMM'N, *supra* note 223.

228 *See About the OECD*, OECD, http://www.oecd.org/about/ [https://perma.cc/372J-U7Y2] (last visited Jan. 20, 2019).

229 *See generally Competition Issues in Liner Shipping*, OECD (Nov. 25, 2015), https://one.oecd.org/document/DAF/COMP/WP2/M(2015)1/ANN2/FINAL/en/pdf [https://perma.cc/5DJJ-D6W3].

> share of the top 5, top 10, top 15 and top 20 carriers in the industry has been increasing.[230]

In sum and substance, the OECD reinforced that competition within the industry is vital for global transportation and expressed concern regarding lagging U.S. enforcement.

In 2017, a notable case regarding maritime antitrust exemptions reached the Third Circuit Court of Appeals. In *In re Vehicle Carrier Servs. Antitrust Litig.*, purchasers of vehicles alleged that ocean common carriers entered into "secret" agreements that were not filed with the FMC to fix transportation prices and reduce service capacity in violation of both federal and state antitrust laws.[231] After the defendant ocean common carriers moved to dismiss the complaint on the basis of immunity from federal antitrust liability pursuant to the Shipping Act, the District of New Jersey dismissed the action with prejudice.[232] On appeal, the Third Circuit examined the Shipping Act.[233] The Court held that the purpose of the Shipping Act is "to promote economically sound, evenhanded, and efficient ocean commerce that responds to international shipping practices," which is achieved in part by limited antitrust exemptions.[234] Accordingly, the Third Circuit, quoting the Report of the House Committee on Merchant Marine and Fisheries, held that Shipping Act expressly immunized agreements that were filed, or which should have been filed, with the FMC from federal antitrust laws.[235] The Third Circuit held that

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[230] *Id.* at 3.

[231] In re Vehicle Carrier Servs. Antitrust Litig., 846 F.3d 71, 78 (3d Cir.), *as amended* (Jan. 25, 2017), *cert. denied sub nom.* Alban v. Nippon Yusen Kabushiki Kaisha, 138 S. Ct. 114, 199 L. Ed. 2d 31 (2017).

[232] *See id.* at 78.

[233] *See id.* at 79.

[234] *Id.*

[235] *See id.* at 80 ("One way the Act sought to achieve these goals was to broaden the provisions of the prior law that provided very limited antitrust immunity. The House Committee on Merchant Marine and Fisheries, which reported on the bill, noted '[t]he perception . . . that the threat of U.S. antitrust prosecution weighs much more heavily on U.S. operators than their foreign-flag competition' and recognized 'the need to foster a regulatory environment in which U.S.-flag liner operators are not placed at a competitive disadvantage vis-a-vis their foreign-flag competitors.' . . . To address this disadvantage, the Shipping Act 'exempt[ed] from the antitrust laws those agreements and activities subject to regulation by the' FMC.").

although "[t]here is no dispute that operating under unfiled price fixing and/or market allocation agreements is prohibited under §§ 40301 and 40302 of the Shipping Act," the Shipping Act nevertheless barred the plaintiffs from obtaining relief against the defendant ocean carriers.[236] In other words, the Third Circuit held that although the defendant carriers' actions could be actionable by or before the FMC, they were immunized from Clayton Act regulation by the Shipping Act.[237]

A few months later, in March 2017, DOJ antitrust investigators raided a biannual "Box Club" meeting, more formally known as the meeting of the International Council of Containership Operators, in San Francisco.[238] DOJ served subpoenas on Maersk and Hapag-Lloyd, two major industry players, among others.[239] The subpoenas, all issued on foreign entities, demanded "documents ranging from the activities of the Box Club to how capacity is shared within the alliances and how pricing is set for world-wide trades."[240] This investigation is considered to be "one of the most wide-ranging inquiries regarding competition and compliance in the maritime industry."[241]

Significantly, the raid came a few days before new European and Asian carrier alliances were set to become effective.[242] Early reports regarding the DOJ investigation suggest that the raids occurred because of applications to the FMC seeking permission to allow new European and Asian carrier alliances to collectively negotiate with tug boat operators, fuel suppliers, and other service providers.[243] In fact, on November 22, 2016, the DOJ's Antitrust

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236 *Id.* at 82.

237 *See id.*

238 *See* Costas Paris and Paul Page, *Maersk Line, Hapag-Lloyd Among Carriers Subpoenaed in U.S. Price-Fixing Probe*, WALL ST. J. (Mar. 21, 2017), https://www.wsj.com/articles/maersk-line-hapag-lloyd-among-shippers-subpoenaed-in-u-s-price-fixing-probe-1490117818 [https://perma.cc/WL6A-PA7B].

239 *See id.*

240 *Id.*

241 *Id.*

242 *See* Sam Chambers, *FBI Raids Box Club Meeting*, SPLASH 24/7 (Mar. 22, 2017), http://splash247.com/fbi-raids-box-club-meeting/ [https://perma.cc/W488-AYBA].

243 *See* Costas Paris and Paul Page, *Tug Boats, Barges at Center of U.S. Probe into Shipping Alliances*, WALL ST. J. (Apr. 7, 2017), https://www.wsj.com/articles/tug-boats-

Division wrote a letter to the FMC providing comments to the filling of an alliance agreement.[244] The Antitrust Division expressed concerns regarding the creation of new alliances:

> The Alliance Agreement raises a number of significant competitive concerns, particularly as it comes on the heels of the recently approved OCEAN Alliance. The creation of these two new alliances will result in a significant increase in concentration in the industry as the existing four major shipping alliances are replaced by only three. This increase in concentration and reduction in the number of shipping alliances will likely facilitate coordination in an industry that is already prone to collusion.[245]

Moreover, the DOJ Antitrust Division urged the FMC to carefully consider the anticompetitive effects of alliance formation in light of the immunity the agreement could enjoy under the Shipping Act exemptions.[246]

V. CHARTING THE COURSE FORWARD

The Shipping Act's antitrust immunities and procedural complexities have recently been debated. In the spring of 2017, Congressman Peter DeFazio, D-Ore., the ranking member of the Transportation and Infrastructure Committee and Congressman Duncan Hunter, R-Calif., chairman of the Subcommittee on Coast Guard and Maritime Transportation, began expressing concern about antitrust exceptions for the maritime industry in light of industry consolidation[247] Although the carriers, especially the top

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barges-at-center-of-u-s-probe-into-shipping-alliances-1491516737 [https://perma.cc/EY9Z-FANM].

244 *See* Letter from Renata B. Hesse, Acting Assistant Attorney General to Federal Maritime Commission Secretary (Nov. 22, 2016), https://www.justice.gov/atr/page/file/913521/download [https://perma.cc/RFA5-QA5Z].

245 *Id.*

246 *See id.*

247 *See* Mark Szakonyi, *US Legislators; Carriers' Antitrust Immunity Needs Review*, JOC (Apr. 4, 2017), http://www.joc.com/regulation-policy/transportation-regulations/us-

three in U.S. trade (CMA CGM, Mediterranean Shipping Co., and Maersk Line), want to continue to benefit from U.S. antitrust exceptions, "marine terminals, tugboat operators, and stevedores are lobbying Congress to bar alliances from being able to jointly contract with them."[248] These third-party service providers believe that the carrier alliances allow the exchange of sensitive information, coordination, and collusion while contracting for their services.[249]

On May 3, 2017, a hearing was held before the Subcommittee on Coast Guard and Maritime Transportation of the Committee on Transportation and Infrastructure regarding, in part, the Shipping Act of 1984.[250] The testimony of the Hon. Michael A. Khouri, FMC Acting Chairman, highlights the fear that as the industry consolidates—the number of major shipping lines has fallen to 13 and the number of major carrier alliances serving U.S. trades is only three—the anticompetitive effects of the alliances increases.[251] U.S. Rep. John Garamendi, a Democrat from California, stated that "there has been a very significant change in the nature of the industry since the last amendment to the Ocean Shipping Act . . . The emergence of all of the alliances and the significant power they have as a result of those alliances raises a question of antitrust, anticompetitive activity."[252] He continued:

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transportation-regulations/us-legislators-carriers%E2%80%99-antitrust-immunity-should-be-reviewed_20170404.html [https://perma.cc/V5HE-2PLS].

248 *Id.*

249 *See id.*

250 *See Testimony of Hon. Michael A. Khouri, Acting Chairman, FMC, Before the House Committee on Transportation & Infrastructure Subcommittee on Coast Guard & Maritime Transportation*, 115th Cong. (2017), https://www.fmc.gov/khouri_testimony_sub-committee_on_coast_guard_and_marine_transportation/ [https://perma.cc/XKC5-FNU5].

251 *See id*; *see also* Mark Szakonyi, *US Congress Pressured to Forbid Alliances from Joint Contracting*, JOC (Apr. 10, 2017), http://www.joc.com/maritime-news/container-lines/us-congress-pressured-forbid-alliances-joint-contracting_20170410.html [https://perma.cc/72AJ-ULRC].

252 *See Statement of U.S. Rep. John Garamendi Before the House Committee on Transportation & Infrastructure Subcommittee on Coast Guard & Maritime Transportation*, 115th Cong. (2017), https://www.govinfo.gov/content/pkg/CHRG-115hhrg25312/html/CHRG-115hhrg25312.htm [https://perma.cc/A8WL-GX5D].

> It is clear to me—and I think to many members of this committee—that we have a situation evolving in which oligarchic power is in existence and can be used to the detriment of competition, pricing, and a competitive environment. It seems to me that we need to modify the law, which is now almost 30 years old so that we recognize the realities of the industry as it exists today. I am particularly troubled by the language . . . that allows the alliances to provide amongst themselves all the information they need to collude—independently, but nonetheless, collude, prior to independent negotiations. I think that is wrong. I think we need to change the law.[253]

He concluded, "[t]he bottom line in all of this is the law is not up to date with the realities of the industry, as it exists today."[254]

On December 4, 2018, the Frank LoBiondo Coast Guard Authorization Act of 2018 ("2018 Coast Guard Act") was signed into law, amending, *inter alia*, certain Shipping Act prohibitions on anticompetitive behavior.[255] Specifically concerning antitrust, the amendments to the Shipping Act were crafted to prohibit anticompetitive actions that would negatively impact U.S. maritime business in light of the overall consolidation of the industry and specifically the emergence of alliances.[256] Significantly, the FMC now is required to conduct an annual analysis into to competitive impacts of ocean common carrier alliances.[257] The amendments further focus on the alliances' impacts on certain covered services obtained at U.S. maritime terminals.[258] Alliances cannot engage in collective negotiation that would result cause anticompetitive results, such as, as a matter of

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253 *See id.*
254 *See id.*
255 *See* Frank LoBiondo Coast Guard Authorization Act of 2018, S. 140, 115th Cong. § 701 (2018).
256 *See id.*
257 *See id.* at § 703.
258 *See id.* at §§ 703 and 709.

illustration, reduction in capacity.[259] Moreover, a common carrier is prohibited from participating simultaneously in a rate discussion agreement and an agreement to share vessels in the same trade if that is likely by a reduction in competition to unreasonably reduce transportation service or increase transportation cost.[260] Regarding enforcement, while the 2018 Coast Guard Act expanded the FMC's enforcement powers, the legislation expressly provides that nothing "shall be construed to limit the authority of the Department of Justice regarding antitrust matters."[261]

Unfortunately, the 2018 Coast Guard Act's changes are but "a modest course correction, rather than a sea change, in the current regulatory regime."[262] The U.S. clearly is a trading and financing nation and no longer owns or operates many merchant ships in international trade.[263] As Mr. Thomas A. Allegretti, President and Chief Executive Officer of American Waterways Operators testified on May 3, 2017, "[i]t is fundamentally unfair, anticompetitive, and detrimental to the U.S. maritime industry to skew the playing field in favor of massive international shipping conglomerates, which include foreign, State-owned enterprises" at the expense of U.S. businesses.[264]

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259 *See id.*

260 *See id.* at § 708.

261 *Id.* at § 709(b)(1) (adding 46 U.S.C. § 41105(A) (2012)). *See also* Donald J. Trump, *Statement by the President,* THE WHITE HOUSE (Dec. 4, 2018), https://www.whitehouse.gov/briefings-statements/st[;atement-by-the-president-11/ [https://perma.cc/482Z-L8YR] ("Finally, the reference in section 709(a)(2) of the Act to the 'antitrust laws' should not be interpreted to give the Federal Maritime Commission (FMC) the authority to construe the antitrust laws in the first instance, which is a responsibility traditionally within the province of the Antitrust Division of the Department of Justice. Importantly, section 709(b)(1) provides that nothing in section 709(a)(2) 'shall be construed to limit the authority of the Department of Justice regarding antitrust matters.' I will interpret section 709(b)(1) to indicate that the FMC should defer to the Department of Justice regarding interpretations of the Federal antitrust laws, including when the FMC applies its section 709(a)(2) authority.").

262 John Longstreth & Michael F. Scanlon, *Recent Amendments to the Shipping Act*, K&L GATES (Dec. 20, 2018), http://www.klgates.com/recent-amendments-to-the-shipping-act-a-course-correction-not-a-sea-change-12-20-2018/ [https://perma.cc/2JM6-CC34].

263 *See id.*

264 *See American Waterways Operations Before the House Committee on Transportation & Infrastructure Subcommittee on Coast Guard & Maritime Transportation*, 115th Cong. (2017), (testimony of Thomas A. Allegretti, President and

U.S. policy must develop to support efficient and inexpensive transportation of commodities and finished goods by sea to and from the U.S. including private investments in foreign flag vessels by U.S. businesses, such as Amazon and its competitors. This is essential to the long-term economic well-being of many aspects of the U.S. and global economies.[265] To effectively support this crucial national objective, it is necessary that the U.S. continue to consider its legislative and judicial priorities, and encourage the use of U.S. forums to support and enforce fair, efficient, and cost-effective proceedings that protect the rights and responsibilities of all the parties engaged in worldwide trade by sea.

To function in the contemporary era of international e-commerce, the U.S. and its major trading partners must revisit the laws governing sale of goods, international transportation, financing, ocean shipping, loss allocation, marine insurance, and liability of the carriers for damage, loss, and delay of goods in transit and storage. While the enactment of the Shipowners' Limitation of Liability Act[266] may have been appropriate in the mid-19th century, as was the enactment of the Harter Act[267] four decades later and COGSA another four decades later, this

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Chief Executive Officer) https://transportation.house.gov/uploadedfiles/2017-05-03_-_thomas_testimony.pdf [https://perma.cc/72YX-VGBJ].

265 *See World Shipping Council Before the H. Comm. on Transportation & Infrastructure Subcommittee on Coast Guard & Maritime Transportation*, 115th Cong. (2017), (testimony of John W. Butler, President and Chief Executive Officer) ("The first point is that the liner shipping industry is a critical link in our Nation's international trade, and it is a major driver of the economic vitality of this country. Whether our members are carrying consumer goods to retailers in the United States, supplying parts to automobile manufacturers, or carrying U.S. agricultural goods to foreign markets, liner shipping touches almost every part of the U.S. economy.").

266 46 U.S.C. §§ 30501–30512 (2012); *see also* In re Complaint of Dammers & Vanderheide & Scheepvaart Maats Christina B.V., 836 F.2d 750, 753 (2d Cir. 1988) ("The Act provides that the liability of a shipowner incurred as a result of a maritime accident 'without the privity or knowledge of such owner . . . shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.'").

267 46 U.S.C. § 30702–30707 (2012); *see also* Martin v. Southwark, 191 U.S. 1, 6 (1903) ("The Harter Act expressly prohibits the insertion in bills of lading of any covenant or agreement lessening, weakening or avoiding the obligation of the owner to use due diligence to make the vessel seaworthy and capable of performing her intended voyage.").

hodgepodge of governing laws has become unworkable in the modern age. The industries and the legislative branch need to rebuild a functional system that encourages economic progress and recognizes the competing interests of each segment. "All of the bargaining and all of the debate has but one goal – to make the law better and more responsive to the needs of international commerce."[268]

Currently, most claims involving waterborne cargo loss and damage are resolved outside of the country even where the cargo is bound "to or from" the U.S. This was the direct result of the Supreme Court's *Sky Reefer* decision two decades ago, which allowed foreign arbitration of cargo claims where there was an agreement in the bill of lading.[269] Now the scope of judicial review of arbitration awards is quite limited.[270] Prime among the required actions to govern and protect the multi-trillion dollar global trade by sea are the needs to revitalize the role of the US federal courts in admiralty and maritime litigation which was established more than 225 years ago in Article III of the US Constitution. Also, the United States and other sovereigns and international governmental bodies, such as the European Union, should explore a comprehensive plan to govern and manage the growingly interdependent international trade by sea.

A quarter of a century ago, Professor Joseph C. Sweeney issued a clarion call for comprehensive revision of international law governing ocean transportation of goods. He also the emphasized the need to revisit the entirety of domestic legislation governing ocean shipment and the carriage of goods by sea. These should remain the objective for the U.S. as well as and the international community.[271] The importance of international trade

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[268] Joseph Sweeney, *UNCITRAL and The Hamburg Rules – The Risk Allocation and Problem in Maritime Transport of Goods*, 22 J. MAR. L. & COM. 511, 538 (1991).

[269] Vimar Seguros Y Reaseguros v. M/V Sky Reefer, 515 U.S. 528, 530 (1995).

[270] THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 909 (6th ed. 2018) ("Arbitration awards are not subject to review on the merits, regardless of how well a party argues for another result. It is also not the function of the court to review the record of the arbitration proceedings for errors of fact and law. Even under the statutory exceptions, only the most egregious conduct will provide cause to vacate an award.").

[271] Sweeney, *supra* note 268, at 538.

in the fashion sector highlights the greater need for prompt and urgent attention to this multitrillion dollar issue.

CONCLUSION

In the first four months of 2017, American retailers announced they were shuttering 2880 storefronts, more than double the amount that closed in 2016.[272] Capitalizing on the economic realities of failing brick-and-mortar-based business models, Amazon's ascendancy in the fashion sector continues.[273] Born out of the e-book, Amazon seeks to "do to apparel companies what it had already done to booksellers: sap profits and eliminate what little pricing power these chains commanded."[274] The numbers are staggering. Controlling 46% of all American e-commerce, Amazon "is expected to triple its share of the U.S. apparel market over the next five years."[275] In 2017, Amazon's clothing sales were greater than the combined online sales of Macy's, Nordstrom, Kohl's, Gap, and Victoria's Secret.[276] Its market share of the U.S. apparel business is expected to increase from $16 billion in 2015 to $52 billion in 2020.[277]

Nevertheless, certain challenging hurdles prevent Amazon from dominating the fashion sector because most luxury and many contemporary brands still refuse to partner with it. First, Amazon's platform is unpolished. For example, when an online shopper clicks on the Amazon page for Stella McCartney's $908 platform Oxford shoes, a similar $32.99 pair is listed as a "Customers who viewed this item also bought" recommendation right below the

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[272] *See* Suzanne Kapner, *Brick-and-Mortar Stores Are Shuttering at a Record Pace*, WALL ST. J. (Apr. 21, 2017), https://www.wsj.com/articles/brick-and-mortar-stores-are-shuttering-at-a-record-pace-1492818818 [https://perma.cc/AU4A-AG3E].

[273] *See* Suzanne Kapner, *Amazon Struts its Fashion Sense*, WALL ST. J. (Apr. 6, 2017), https://www.wsj.com/articles/amazon-struts-its-fashion-sense-challenging-traditional-stores-1459965440 [https://perma.cc/4RFT-FMTR].

[274] Kapner, *supra* note 272 (discussing that Amazon's conduct in creating e-books raised serious questions about its respect for the law, particularly intellectual property rights).

[275] Khan, *supra* note 134, at 755.

[276] *See id.* at 756.

[277] Kapner, *supra* note 273.

product description.[278] Just as luxury lives with luxury at malls, higher end fashion brands do not want e-commerce platforms conflating their products with lower-priced knockoffs. Second, Amazon's counterfeit culture conflicts with the luxury industry. Whereas Net-a-Porter, Moda Operandi, and Farfetch do not sell counterfeit goods, Amazon's third-party market place notoriously does at low prices.[279] To unsophisticated shoppers, counterfeit goods sold by third-party sellers on Amazon appear legitimate because of the e-commerce platform's reputation. Third, luxury brands have no incentive to deal with Amazon. As an anonymous fashion executive stated, "[w]hy would [a brand] undercut [its] own distribution channels by selling to them?"[280]

Amazon's inherently anticompetitive business model attempts to force brands that refuse to sell on its e-commerce platform to work with the company for transportation and distribution purposes. In further developing its ocean freight services, Amazon comes closer to complete vertical integration. Amazon's expansion into ocean freight transportation positions the company to control "the flow of goods from factories in China and India, all the way to customers' doorsteps in New York, Atlanta and London."[281] Circumnavigation of middlemen allows Amazon to offer extremely low shipping costs for its customers.[282] If Amazon succeeds as intended, "thousands of retailers and independent businesses that must ride Amazon's rails to reach market are increasingly dependent on their biggest competitor."[283]

Amazon's attempt at shipping dominance presents a predatory threat to worldwide commerce. Historically, ocean transportation seeks to avoid "choke points" that can damage or destroy

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[278] Lieber, *supra* note 122.

[279] *See* Ari Levy, *Amazon's Chinese Counterfeit Problem is Getting Worse*, CNBC (July 8, 2016), http://www.cnbc.com/2016/07/08/amazons-chinese-counterfeit-problem-is-getting-worse.html [https://perma.cc/A9CF-3D6W].

[280] Kapner, *supra* note 273.

[281] Soper, *supra* note 140.

[282] Robin Lewis, *Amazon's Shipping Ambitions are Larger than it's Letting on*, FORBES (Apr. 1, 2016), https://www.forbes.com/sites/robinlewis/2016/04/01/planes-trains-trucks-and-ships/#2071bb4c6d39 [https://perma.cc/T52M-EMRJ].

[283] Khan, *supra* note 134, at 780.

movement of goods.[284] Whether intentionally or as the result of fortuitous incidents, international trade could be curtailed by Amazon's vertical integration. Moreover, if Amazon has monopolistic control over transportation decisions, this may have unintended consequences on customs, duties, and related tax concerns.

If Amazon or a few other entities dominate the ocean transportation of goods, they could control financing essential to the entire fashion industry. The ability to issue and deliver bills of lading is essential to the commercial transactions of international trade. If a single source—Amazon—has absolute control over the essential commercial paper that is the key to domestic and international commerce, that source would have unprecedented monopolistic power to impact the financial wherewithal of the worldwide fashion industry. This reason alone compels deep analysis of what is necessary to ensure the economic viability and survival of independent and competitive entities that are essential for a balanced global marketplace.

Perhaps Amazon's main competitor, Alibaba, will temper its anticompetitive ambitions. The Chinese company also heavily invested in transportation. While Alibaba did not create its own logistics structure,[285] it owns 47% of Cainiao, a Chinese logistics network.[286] Moreover, like Amazon, Alibaba.com Logistics provides freight forwarding services from China.[287] In December 22, 2016, Alibaba introduced One Touch, "an import and export service provider and an Alibaba affiliate."[288] Thereafter, in January 2017, Alibaba partnered with Maersk Line, the world's largest

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[284] A choke point can refer to a geographical natural point of congestion along navigable water. *Maritime Chokepoints: The Backbone of International Trade,* SHIP TECH. (Oct. 3, 2017), https://www.ship-technology.com/features/featuremaritime-chokepoints-the-backbone-of-international-trade-5939317/ [https://perma.cc/G2BM-6XY2]. For the purposes of this paper, a choke point refers to the point in a stream of commerce where a single entity can control the flow of goods in transportation.

[285] *See* Hook, *supra* note 160.

[286] *See* Lashinsky, *supra* note 161.

[287] *Logistics*, ALIBABA, https://service.alibaba.com/buyer/faq_detail/14426972.htm?tracelog=20160926loglp1 [https://perma.cc/Q4M2-ENJT] (last visited Jan. 19, 2019).

[288] *One Touch*, ALIBABA, https://service.alibaba.com/buyer/faq_detail/13887155.htm [https://perma.cc/XC5E-UPDM] (last visited Jan. 19, 2019).

ocean shipping line, to allow Alibaba's customers to directly reserve space on Maersk vessels with online bookings.[289] While Maersk representatives stated that the deal "was not about bypassing the industry's traditional middleman freight forwarders,"[290] the arrangement effectively eliminates third party intermediaries. This scheme will most likely allow Alibaba to obtain a significant market share. Moreover, such practice is permissible pursuant to the current U.S. maritime antitrust exemptions.

A market dominated by two companies still offers little choice for fashion brands and retailers. Consumers want to buy what they want, how they want, and have it delivered when and where they deem most convenient. Thus, it is imperative that brands and retailers have delivery options. Moreover, the global economy benefits from a logistics business environment where there are multiple ocean carriers, freight forwarders, NVOCCs, and the like. Competition is good for business and essential for all transactions. If, however, Amazon succeeds in complete vertical integration through its logistics division, even with Alibaba as a potential competitor, fashion brands will be at the mercy of one or two companies to move their products around the globe.

During the 2016 campaign, President Trump stated that Amazon "has a huge antitrust problem . . . [Bezos] thinks I would go after him for antitrust."[291] Nevertheless, current law and lawmakers do not fully contemplate Amazon's monopolistic goals. While Amazon undoubtedly should be evaluated under Section 2

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[289] *See* Brenda Goh, *Maersk, Alibaba Team up to Offer Online Booking of Ship Places*, REUTERS (Jan. 4, 2017), http://www.reuters.com/article/us-alibaba-maersk-idUSKBN14O0S7 [https://perma.cc/Q8YJ-5PUB].

[290] *Id.*

[291] Callum Borchers, *Donald Trump's Antitrust Attack on Jeff Bezos Doesn't Make Much Sense*, WASHINGTON POST (May 13, 2016), https://www.washingtonpost.com /news/the-fix/wp/2016/05/13/donald-trumps-antitrust-attack-on-jeff-bezos-doesnt-make-much-sense/?utm_term=.2f6b630c40fb [https://perma.cc/XGW9-REYG] (alluding to the suggestion that President Trump's alleged antitrust concerns about Amazon are connected to accusations of Bezos using *The Washington Post*, which Bezos bought in 2013, as a tool to prevent Trump's election). *See also* Emily Stewart, *Does Amazon Really have Antitrust Issues,* THE SHEET (May 13, 2016), https://www.thestreet.com/story/13570770/1/trump-accuses-bezos-of-using-washington-post-to-protect-amazon-from-antitrust-issues.html [https://perma.cc/QS7N-B5TL].

of the Sherman Act, prosecution is unlikely. Makan Delrahim, Assistant Attorney General for the Antitrust Division, while he was President Trump's nominee to lead DOJ's review of mergers and acquisitions, stated that "antitrust is intended to support free markets and that the government should intervene only when necessary."[292] Approximately one year later, while acting as Assistant Attorney General for the Antitrust Division and in response to Ms. Khan's critique[293] of the current U.S. antitrust regime, Mr. Delrahim stated that "we should encourage fresh thinking on how our legal tools apply to new digital platforms. We need more thinking—diverse thinking—about these questions. And, we need a civil discourse on this topic."[294] While the 2018 Coast Guard Act and its amendments to the Shipping Act aim to conform the current U.S. maritime antitrust regime to contemporary realities, it does not set forth the policy to be implemented by either DOJ's antitrust division or the FMC. In other words, the enforcement decisions will be based upon the policy established by the Executive Branch alone.

Technological advances and a globalized economy created a new type of monopoly that, as exemplified by Amazon, seeks to control a product throughout its lifecycle. Amazon wants to control the method of manufacture, sale, transportation, financing, and final delivery. This is not an issue limited to the U.S. or any single country. It is an international threat to worldwide commerce that needs to be addressed comprehensively and on a multilateral basis. Much will depend on Amazon's business decisions. Will it limit its transportation businesses solely to serving its own domestic and global requirements or will Amazon elect to expand to be a common or private carrier? The decisions to investigate and prosecute criminal and civil antitrust actions frequently are based on changing views of national governments, elected politicians,

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292 Cecilia King, *How Trump's Pick for Top Antitrust Cop May Shape Competition*, N.Y. TIMES (Apr. 25, 2017), https://www.nytimes.com/2017/04/25/technology/how-trumps-pick-for-top-antitrust-cop-may-shape-competition.html?_r=0 [https://perma.cc/HE7K-G8D4].

293 *See* Khan, *supra* note 134, at 712.

294 David McLaughlin, *U.S. Antitrust Boss Calls for Vigilance on Big Tech Platforms*, BLOOMBERG (Apr. 19, 2018), https://www.bloomberg.com/news/articles/2018-04-19/u-s-antitrust-boss-calls-for-vigilance-on-big-tech-platforms [https://perma.cc/9ZVY-PCUS].

legislators, regulators, and law enforcement officials and their international colleagues. Clearly, myriad antitrust issues in numerous fora will need to be considered as the result of the widespread and worldwide growth of Amazon as not only the ultimate provider of goods but now a player in the international transportation markets.

In the meantime, when evaluating their logistics operations, fashion brands must develop and maintain relationships that provide them with maximum flexibility in obtaining and delivering products. Luxury and contemporary fashion brands need logistics operations that are responsive to the unique requirements of satisfying the needs of their most demanding clients. While it may necessitate some additional costs to avoid a monopoly that would ultimately control access to the markets and restrict the brands' abilities to satisfy their customers, fashion brands should consider these current expenses as long-term investments in their futures.