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Happy Birthday, Harter: A Reappraisal of the Harter Act on its 100th Anniversary

JOSEPH C. SWEENEY*

I. INTRODUCTION

One hundred years ago, the United States Congress broke with existing legal theory by forbidding carrier exculpatory clauses, thereby intervening in the contractual relations between cargo-owning interests and ship-owning interests. The 1893 Harter Act,¹ applicable to domestic as well as international ocean voyages, has never been repealed or even amended. It was virtually displaced as to *ocean* shipments by the 1936 Carriage of Goods by Sea Act ("COGSA"),² a statute that also specifically preserved it,³ and the relationship between the Harter Act and COGSA remains a puzzle for both the courts and the bar. The Harter Act has been called one of the first consumer protection acts.⁴ The question for 1993 is whether it is time to repeal it.

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¹Act of Feb. 13, 1893, ch. 105, §§ 81-196; 27 Stat. 445-46, codified as 46 U.S.C. Appx. §§ 190-96 (1988).

²46 U.S.C. Appx. §§ 1300-15 (1988).

³Id. at § 1311 provides that:

Nothing in this chapter shall be construed as superseding any part of sections 190-196 of this title, or of any other law which would be applicable in the absence of this chapter, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

See further *infra* notes 174-79.

⁴W. Tetley, *Marine Cargo Claims* 573 (3d ed. 1988).

II. HISTORICAL OVERVIEW

A. *Legislative Provisions*

Today, the Harter Act would not be considered well drafted because it has a major inconsistency.⁵ It is not a code governing shipping problems.⁶ However, it is free of the policy-based definitions that plague other statutes and it succinctly deals with a few vital problems of interest to the international trading community. Unfortunately, the premise on which it is built is the carrier's issuance of a paper bill of lading, a circumstance that makes it unsuitable for electronic data information exchange in the same way that COGSA is unsuitable for modern business.⁷

Section One⁸ of the Harter Act forbids bill of lading clauses that *relieve* the carrier from negligence liability in the "proper loading,

⁵Sections One and Two apply to bills of lading "from" the United States, while Section Three applies to bills of lading "to or from" the United States.

⁶Modern transport conventions customarily begin with definitions of terms, geographic scope of application, documentary scope, period of responsibility, basis of carrier liability, limits of carrier liability, loss of right to limit liability, liability of the shipper, documentary contents, notice of loss, time bar, and jurisdiction of courts. See, e.g., The Hamburg Rules, 1978 United Nations Convention on Carriage of Goods by Sea, 17 Int'l Legal Materials 608 (1978), 6 Benedict on Admiralty Doc. No. 1-3 (7th ed. 1992), as well as the 1980 Multimodal Convention, UN Doc. TD/MT/CONF/16 (not in force). See Driscoll & Larsen, The Convention on the International Multimodal Transport of Goods, 57 Tul. L. Rev. 193 (1982), and the 1991 Convention on the Liability of Terminal Operators in International Trade, UN Doc. A/CONF.152/13. See Sweeney, New U.N. Convention on Liability of Terminal Operators in International Trade, 14 Fordham Int'l L.J. 1115 (1991).

Missing from the Harter Act are policy-based "definitions" as well as provisions on the documentary scope (whether charter parties in private carriage as well as bills of lading in common carriage are covered); time bar (whether the doctrine of laches or some statute of limitations applies); notice of loss; unit limitation of liability (such as the provision in COGSA for limitation of the carrier's liability at \$500 per package, 46 U.S.C. Appx. § 1304(a)(5) (1988)); basis of liability (plaintiff's burden of proof of fault or defendant's burden of proof of non-fault); and provisions respecting jurisdiction (competence) and venue.

⁷Sweeney, The Uniform Regime Governing the Liability of Maritime Carriers, 1992 II Diritto Marittimo _____. See Moore, Bills of Lading—From Clippers to Containers, 7 Lloyd's Mar. L. Newsl.—N. Am. Ed. 3-6 (Apr. 15, 1990).

⁸46 U.S.C. Appx. § 190 (1988), entitled Stipulations Relieving From Liability for Negligence, provides:

It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

stowage, custody, care, or proper delivery” of cargo. Section Two⁹ forbids bill of lading clauses that *lessen* the carrier’s obligation to use due diligence to “equip, man, provision and outfit” and to make the vessel “seaworthy and capable of performing her intended voyage” and “to carefully handle and stow her cargo and properly deliver” it. These provisions are applicable “*from* or between ports of the United States and foreign ports.” [emphasis added] The restriction to export bills of lading in Sections One and Two conforms to the then-prevalent conflict of laws viewpoint that the law of the port where the bill was issued governed legal issues concerning the making of the bill.¹⁰

Section Three,¹¹ the most enigmatic, contains the bargain between shippers and carriers.¹² It is even more obscurely drafted. To begin with, the statute applies to vessels carrying cargo “*to or from* any port in the United States of America.” The legal nexus to the United States, however, is the *performance* of the voyage rather than the

⁹46 U.S.C. Appx. § 191 (1988), entitled Stipulations Relieving From Exercise of Due Diligence in Equipping Vessels, provides:

It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence [to] properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

The seaworthiness obligation under the Harter Act is non-delegable, as it is under COGSA. See *Bethlehem Shipbuilding Corp. v. Joseph Gudract Co.*, 10 F.2d 769, 1926 AMC 347 (9th Cir. 1926).

¹⁰See *Bank of California v. International Mercantile Marine Co.*, 64 F.2d 100 (2d Cir.), cert. denied, 290 U.S. 649 (1933). See also G. Gilmore & C. Black, *The Law of Admiralty* 130–39 (2d ed. 1975).

¹¹46 U.S.C. Appx. § 192 (1988), entitled Limitation of Liability for Errors of Navigation, Dangers of the Sea and Acts of God, provides:

If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

¹²See Gilmore & Black, *supra* note 10, at 142–44; A. Knauth, *The American Law of Ocean Bills of Lading* 121–22 (4th ed. 1953); and G. Robinson, *Handbook of Admiralty Law in the United States* 495–500 (1939).

issuance of bills of lading. This section deals with the effects of negligence and the efforts of carriers *not* "to become or be held responsible for damage or loss" or "to be held liable for losses." Its single sentence grammatical construction is ambiguous as the word "*nor*" may have been used to connect different thoughts. In the first portion of the sentence the carrier interests (described as "the vessel, her owner or owners, agent, or charterers")¹³ shall *not* be liable under two new statutory defenses: "faults or errors in navigation or in the management" of the ship *if* the owner shall have exercised "due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied."

A debate exists whether the introductory condition (due diligence) applies to both the negligent navigation and management defense in the "neither" clause as well as the older traditional defenses in the "nor" clause. It appears that the "neither-nor" construction was used because of the absence of the word "master" in the clause stating the defense of negligent navigation but its presence in the list of those to be exonerated by the older defenses. The sentence then describes a series of traditional carrier defenses without clarifying whether the seaworthiness due diligence must be proved by the carrier *before* these defenses may be raised.¹⁴

Section Four¹⁵ states the carrier's obligation to issue a bill of lading or shipping document, the mandatory contents¹⁶ of the bill, and the

¹³See *supra* note 11.

¹⁴While there is no direct interpretation of the grammatical structure, in *The Delaware*, 161 U.S. 459 (1896), discussed *infra* note 61, the Court looked to the intent of Congress in governing the shipper-carrier relation with new defenses and a *restatement* of older case law. There were no conditions precedent to these older defenses in earlier statements of the law, thus "nor" becomes a disjunctive conjunction dividing the sentence into two distinct parts.

For a contrary view, see the opinion of Judge Levet in *Blanchard Lumber Co. v. S.S. Anthony II*, 259 F. Supp. 857, 867, 1967 AMC 103 (S.D.N.Y. 1966): "Under section 3 of the Harter Act owners . . . may not" be held liable for losses arising from dangers of the sea "if due diligence has been exercised to make the ship seaworthy." In this view, "nor" is a correlative coordinating conjunction so that the "if" clause modifies *both* the new defenses and the older ones. See *Robinson*, *supra* note 12, at 525-26.

¹⁵46 U.S.C. Appx. § 193 (1988), entitled *Bills of Lading to be Issued; Contents*, provides:

It shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be *prima facie* evidence of the receipt of the merchandise therein described.

¹⁶Compare the mandatory contents of bills of lading in COGSA, 46 U.S.C. Appx. § 1303(3) (1988):

legal consequence of the issue.¹⁷ Section Five¹⁸ provides a personal criminal penalty for failure to issue the bill of lading on demand and creates a statutory maritime lien on the vessel.

Section Six¹⁹ preserves the 1851 Fire Statute and the owner's right to limit liability. Section Seven²⁰ excludes the transport of live animals from the prohibition of clauses relieving the carrier from negligence liability and the obligation to issue a bill of lading with mandatory contents.

-
- a. Marks necessary for identification
 - b. Number of packages or quantity or weight
 - c. Apparent good order and condition

and the Hamburg Rules, Art. 15(1):

- a. General nature, marks, dangerous character, number of packages and weight or quantity
- b. Apparent good order and condition
- c. Name and principal place of business of carrier
- d. Name of shipper
- e. Consignee, if named
- f. Port of loading, and date goods taken over
- g. Port of discharge
- h. Number of originals
- i. Place of issue of bill of lading
- j. Signature of carrier
- k. Freight payable by consignee
- l. Clause Paramount
- m. Deck carriage
- n. Agreed date of delivery
- o. Agreed increased limit of liability.

¹⁷46 U.S.C. Appx. § 193 (1988) reads: "prima facie evidence of the receipt of the merchandise therein described." Cf. COGSA, 46 U.S.C. Appx. § 1303(4) (1988), which reads: "prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs 3(a), (b), and (c), of this section." Cf. also Hamburg Rules, Art. 16.

¹⁸46 U.S.C. Appx. § 194 (1988), entitled Penalties; Lien; Recovery, provides:

For a violation of any of the provisions of sections 190–193 of this title the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading provided for, shall be liable to a fine not exceeding \$2,000. The amount of the fine and costs for such violations shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the government of the United States.

¹⁹46 U.S.C. Appx. § 196 (1988), entitled Certain Laws Unaffected, provides:

Sections 190–195 of this title shall not be held to modify or repeal sections 181, 182, and 183 of this title, or any other statute defining the liability of vessels, their owners, or representatives.

²⁰46 U.S.C. Appx. § 195 (1988), entitled Certain Provisions Inapplicable to Transportation of Live Animals, provides:

Sections 190 and 193 of this title shall not apply to the transportation of live animals.

B. *The Situation in the Courts*

The immediate need for the statute was a decision of the Supreme Court²¹ that dramatically altered the shipper-carrier relationship that was in the process of being developed by British shipping interests.²² Cargo carried aboard the British ship *Montana* from New York to Liverpool was lost when the vessel went aground near Holyhead, Wales. The subrogee cargo insurer sued the carrier to recover the damages allegedly caused by the carrier's servants' negligence.

The carrier defended on the basis of a bill of lading clause exculpating the carrier from liability for its own negligence.²³ The startling decision of the Supreme Court was that the exculpatory clause was void as against public policy.²⁴ In explaining its decision, the Court referred to its earlier decisions on railroad bills of lading in which similar exculpatory clauses were held invalid.²⁵ Thus, the effect of railroad precedent overcame the theory that parties have an absolute right to freedom of contract based on the "Due Process" clause of the Fourteenth Amendment.²⁶

²¹Liverpool & Great Western Steam Co. v. Phenix Insurance Co., 129 U.S. 397 (1889).

²²British shipowning interests were organizing defensively and aggressively in the second half of the nineteenth century. The first modern P&I club—the Steamship Owners' Mutual Protection and Indemnity Association—was formed in 1874, and the first conference for liner shipping service—The Calcutta Steam Traffic Conference—was created in 1875. See generally N. Singh & R. Colinvaux, *Shipowners* 96–112, 208–28 (1967). The English courts also appeared to be protective of owners in upholding exculpatory clauses. See *Tattersall v. National Steamship Co.*, 12 Q.B. Div. 297 (1884), and *In re Missouri S.S. Co.*, 42 Ch. D. 321 (1889).

²³Liverpool & Great Western, 129 U.S. at 400. Before listing a series of excepted perils, the clause provided: ". . . (whether arising from the negligence, default or error in judgment of the masters, mariners, engineers or others of the crew, or otherwise howsoever)."

²⁴*Id.* at 441–42.

²⁵*Id.* at 443 (citing *Railroad Co. v. Lockwood*, 84 U.S. 357, 384 (1873)). The background of the railroad cases is greatly different, however, since farmer discontent with the pricing practices of the railroads led to political agitation in the Grangers' Movement (after 1865) and a political third party when the two major parties ignored the problem. See generally S. Buck, *The Granger Movement* (1913).

²⁶The Fourteenth Amendment's Due Process Clause as the protector of property rights including "freedom of contract" is usually traced from the dissent of Justice Field in the *Granger Cases*, see *Munn v. Illinois*, 94 U.S. 113 (1877), to the majority opinion in *Wabash, St. Louis & Pacific R.R. Co. v. Illinois*, 118 U.S. 557 (1886) (holding state regulation of railroad contracts unconstitutional); *Chicago, Milwaukee & St. Paul R.R. v. Minnesota*, 134 U.S. 418 (1890) (requiring judicial review of state rate setting commissions); *Pollock v. Farmer's Loan & Trust Co.*, 158 U.S. 601 (1895) (finding the federal income tax unconstitutional); *Smyth v. Ames*, 169 U.S. 366 (1898) (applying substantive due process to state fixing of rates); and finally, *Lochner v. New York*, 198 U.S. 45 (1905) (holding a state law setting maximum hours for bakers to be unconstitutional as an interference with freedom of contract).

The intellectual foundations of this Social-Darwinist philosophy usually are traced from Herbert Spencer's *Principles of Sociology* (1875), William Graham Sumner's *What Social Classes Owe to Each Other* (1883), and Thomas M. Cooley's *The Constitutional Limitations*

The necessity for federal action was reenforced by a decision of the New York State Court of Appeals that, adhering to earlier precedent in the face of the Supreme Court's decision, upheld the exculpatory clauses in an ocean bill of lading as part of the freedom of contract.²⁷ Seven states had enacted differing forms of legislation dealing in part with transportation under bills of lading.²⁸

C. Supreme Court Cases on Cargo Damage

Despite its use of railroad precedent in *Liverpool and Great Western v. Phenix Insurance Co.*,²⁹ the Supreme Court's decision was not out of line with earlier decisions that dealt with the relations of shippers and carriers over the seventy-year period while the business of shipping became more confrontational.

In *The Lexington*,³⁰ the owners of a steamboat were held fully liable, despite an exculpatory clause and a unit limitation clause, for the loss of a chest of gold and silver coins worth about \$18,000 when their unseaworthy vessel sank following a fire. *Clark v. Barnwell*³¹ concerned negligence rather than unseaworthiness. There, the Supreme Court approved the right of shippers to defeat general exculpatory clauses with proof of carrier negligence.³²

In *Propeller Niagra v. Cordes*,³³ the Supreme Court applied elements of the bailee's strict liability in common law to establish the

which Rest Upon the Legislative Power (1868), as well as his *General Principles of Constitutional Law in the United States* (1880). See generally R. McCloskey, *American Conservatism in the Age of Enterprise: A Study of William Graham Sumner*, Stephen J. Field and Andrew Carnegie (1951), and McCloskey, *Economic Due Process and The Supreme Court: An Exhumation and a Reburial*, in *American Constitutional Law: Historical Essays* (L. Levy ed. 1966). See also B. Twiss, *Lawyers and the Constitution: How Laissez-Faire Came to the Supreme Court* (1942).

²⁷*Robertson v. National Steamship Co.*, 139 N.Y. 416, 34 N.E. 1053 (1893). See also *Glendell v. Thompson*, 56 N.Y. 194 (1874); *Spinetti v. Atlas S.S. Co.*, 80 N.Y. 71 (1880); and *Rubens v. The Ludgate Hill S.S. Co.*, 20 N.Y.S. 481 (First Dep't 1892), *aff'd mem.*, 143 N.Y. 629, 37 N.E. 825 (1894).

²⁸Wheeler, *The Harter Act: Recent Legislation in the United States Respecting Bills of Lading*, 33 *Am. L. Rev.* 801 (1899).

²⁹See *supra* note 21 at 443.

³⁰*New Jersey Steam Nav. Co. v. Merchants' Bank (The Lexington)*, 47 U.S. 344 (1848).

³¹53 U.S. 272 (1851).

³²"Notwithstanding, therefore, the proof was clear that the damage was occasioned by the effect of the humidity and dampness of the vessel, which is one of the dangers of navigation, it was competent for the libelants to show that the respondents might have prevented it by proper skill and diligence in the discharge of their duties[.]" *Id.* at 282.

³³62 U.S. 7 (1858). The general maritime law defenses of the common carrier were restated in the same way in *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 1959 AMC 1631 (1959).

defenses available to carriers under the general maritime law. It also enforced the carrier's continuing obligation to care for the cargo even after the occurrence of a cause of loss excepted in the bill of lading. In *Bulkeley v. Naumkeag Steam Cotton Co.*,³⁴ the shipper's right to arrest the vessel for cargo damage was created by the recognition of a maritime lien against the cargo-carrying vessel under the general maritime law. Lastly, the two cases of *The Alabama*³⁵ and *The Atlas*³⁶ eased shippers' recovery of damages where cargo was lost or damaged in a collision by imposing joint and several liability on both the carrier and non-carrier vessels involved in the collision.

The foregoing decisions put the American courts on a path greatly different from that being followed in the United Kingdom.³⁷ We can therefore speculate that the Supreme Court may have been well aware of the decline of the American merchant marine, our reliance on the British merchant fleet to carry our foreign trade, and the need for American courts to protect American shippers.³⁸ The response of British carriers to the decisions was the forum selection clause (London) and the law selection clause (English law) to avoid the effect of American courts invalidating carrier negligence clauses. Before the American courts could invalidate these new clauses in turn, Congress acted to protect American public policy.³⁹

³⁴65 U.S. 386 (1860).

³⁵92 U.S. 695 (1876).

³⁶93 U.S. 302 (1876).

³⁷*Missouri S.S. Co.*, supra note 22, ignored the traditional conflicts rule to apply British law upholding an exculpatory clause where the law of the port of loading would have held the clause invalid. The rationale was that the parties only intended the clause to be litigated in a forum that would uphold it. Respecting several (as opposed to joint and several) liability of the colliding vessels to damaged cargo, see *The Milan*, 167 Eng. Rpt. 167 (1861). See Yiannopoulos, *Bills of Lading and the Conflict of Laws: Validity of Negligence Clauses in England*, 37 Det. L.J. 199 (1959).

³⁸Prior to the Civil War, the proportion of foreign flag carriage of United States foreign trade was about 33% for the years 1855-59, but the effect of the Northern blockade of the South and the destruction of northern shipping by Confederate commerce raiders was to increase foreign participation to 56%. As British steam-driven iron ships replaced wooden sailing ships, foreign participation (chiefly British), measured by values of cargoes, increased from 64% in 1870 to 83% in 1880 and 87% in 1890. Gross tonnage of the United States ocean-going fleet declined from 38% in 1870 to 19% in 1880. See J. Hutchins, *The American Maritime Industries and Public Policy, 1789-1914*, 254-55, 324, 540 (1941).

³⁹Demands for congressional action by United States cargo interests because of British choice of law and forum clauses can be found in H.R. Report No. 1988, 52nd Cong., 1st Sess. (1892), cited in *The Delaware*, infra note 61.

Discussion on the floor of the House by Congressman Lind cited choice of forum and choice of law clauses favoring England as a reason for the proposed bill. See 24 Cong. Rec. 148 (1892). Congressmen Coombs and Harter also referred to the clauses favoring English carriers as making American shippers helpless and in need of the protection of the bill. *Id.* at 171-72. It has

D. Legislative History

To summarize the Harter Act simply, it legislates a compromise or package deal between conflicting economic interests. The shippers achieved the prohibition of broad exculpatory clauses in adhesion agreements evidenced by bills of lading, while the carriers obtained two new defenses: negligent navigation and negligent management, as well as the elimination of the strict warranty of seaworthiness. Undoubtedly, the reason for the poor drafting was the shaky nature of a compromise that was patched together in haste at the end of a legislative session.

The Harter Act began with a bill by Congressman Michael D. Harter, a Democrat from Ohio,⁴⁰ in the Second Session of the Fifty-second Congress. That bill dealt with carrier exculpatory clauses. The Congress had been elected in November 1890 during the administration of President Benjamin Harrison.⁴¹ Harter's bill, H.R.

been estimated that the British merchant marine in 1900 was 52% of world shipping. D. Howarth, *Sovereign of the Seas* 332 (1974).

The vehicle for invalidating forum selection and law selection clauses under COGSA is 46 U.S.C. Appx. § 1303(8) (1988). See *Indussa Corp. v. The Ranborg*, 377 F.2d 200, 1967 AMC 589 (2d Cir. 1967), and *Hughes Drilling Fluids v. The Luo Fu Shan*, 852 F.2d 840, 1988 AMC 2848 (5th Cir. 1988), cert. denied, 489 U.S. 1033 (1989).

⁴⁰Michael Daniel Harter (1846–96) was born in Canton, Ohio, where he attended the public schools. He subsequently moved to Mansfield, Ohio, where he became the treasurer and manager of Aultman & Taylor Co. His career before election to Congress in 1890 was that of a small town businessman and banker. He had previously campaigned, unsuccessfully, for the state senate on a free-trade, low tariff platform, which assisted his success in the 1890 mid-term election. He was reelected to Congress in 1892, but as a gold Democrat he stuck with President Cleveland in the battle between gold and silver which tore his party apart. He left Congress in 1895 to follow a banking career in Philadelphia. He died, by his own hand, on February 22, 1896. *N.Y. Times*, Feb. 23, 1896, at 1, col. 5; Feb. 24, 1896, at 5, col. 4.

Harter's bill was supposedly directed at a proposal to insert this exculpatory clause in the 1892 New York Produce Exchange Bill of Lading: "The carrier shall not be liable for losses occasioned by negligence, default or error in judgment of the pilot, master, mariners or other servants of the shipowners, not resulting, however, in any case from want of due diligence by the owners of the ship or any of them, or by the ship's husband or manager." Wheeler, *supra* note 28, at 805–06.

⁴¹In the election of November 1890, a divided Congress was returned by the voters. The Senate was organized by Republicans (47 Republicans, 39 Democrats, and 2 Populists), while the House was organized by Democrats (231 Democrats, 88 Republicans, 9 Populists, and 5 Independents). Political analysts blamed the defeat of Republicans in the House and Senate on the high tariff legislation contained in the 1890 McKinley Tariff Act. See generally Rhodes, *History of the United States from Hayes to McKinley, 1919*, in VIII J. F. Rhodes, *History of the United States from the Compromise of 1850* (1928); A. Nevins, *Grover Cleveland, A Study in Courage* 463–510 (1932); L. White, *Republican Era (1869–1901)* 20–67, 93–109 (1958); and M. Josephson, *The Politicos* 454–517 (1938).

9176, was passed by the House after debate on December 15, 1892.⁴² The essence of Harter's bill now can be found in the first two sections of the present statute.⁴³ The legislation was strongly supported by Congressman John Lind, a Democrat from Minnesota.⁴⁴

The election of November 1892 took place during the legislative session and returned Grover Cleveland to the presidency and Democratic control to both houses of Congress. Yet since the new president would not be in office until March 4, 1893, and the new congress was not scheduled to meet until December 1893,⁴⁵ the Harter Act cannot be considered in any way a party measure, especially since both parties may have been part of the unrecorded majority.⁴⁶

The House bill was reported to the Senate on December 20, 1892, and was promptly referred to the Committee on Commerce. Amendments were proposed and hearings were held on January 26-27, 1893.⁴⁷ The final form of the compromise was agreed to and the

⁴²See 24 Cong. Rec. 147-49 and 171-73 (1892). The Report of the House Committee on Interstate and Foreign Commerce is reproduced at 24 Cong. Rec. 148-49. The Report begins with a statement of the value of United States grain exports in the fiscal year to June 30, 1892 (\$296,877,418), and emphasizes the imperative duty to remove all unnecessary burdens from the grain trade. Mr. Lind, while introducing the bill on the first day of debate, stressed that it "... seeks to give our citizens some protection as against foreign shipowners, so long as we have not vessels of our own to carry on this traffic." *Id.* at 148. On the second day, both Congressman Lind and Congressman Harter stressed that American sailing vessels would not be affected and that only foreign vessels (presumably British steam vessels) would suffer. *Id.* at 171-72.

⁴³46 U.S.C. Appx. §§ 190 and 191 (1988).

⁴⁴John Lind (1854-1930) was born in Smaland, Sweden, and came to Minnesota with his parents at age 14. He then went to public schools and the University of Minnesota. Admitted to the Minnesota bar in 1876, he practiced in Minneapolis, then served three terms in Congress (1887-93), then served as Governor (1899-1901), and finally returned to Congress (1903-05). See G. Stephenson, *John Lind, Minnesota Governor* (1935).

⁴⁵See "Election of 1892" in 2 *History of American Presidential Elections (1789-1968)* (A. Schlesinger, Jr. & F. Israel eds. 1971). The dates for assuming office were altered by the Twentieth Amendment to the Constitution, ratified in 1933.

⁴⁶That the Harter Act was intended to protect American interests against the domination of the British merchant marine in the Atlantic is noted in *Sunkist Growers, Inc. v. Adelaide Shipping Lines, Ltd.*, 603 F.2d 1327, 1979 AMC 2787 (9th Cir. 1979), cert. denied, 444 U.S. 1012 (1980).

Two earlier congressional reports had examined the parlous state of the American ocean-going merchant marine. See Report of the House Committee on Commerce on the Causes of the Decadence of our Merchant Marine, Means for its Restoration, and the Extension of Foreign Commerce (1881), House Rep. 342, 46th Cong., 3d Sess., and Report of the House Committee on Merchant Marine and Fisheries on the American Merchant Marine in Foreign Trade (1890), House Rep. 1210, 51st Cong., 1st Sess. (popularly known as The Farquhar Report). See also House Reports No. 1665, 48th Cong., 1st Sess. 1 (1884), and No. 1988, 52nd Cong., 1st Sess. 2 (1892).

⁴⁷The Senate Commerce Committee's Hearings are reported in *The New York Times*, Jan. 27, 1893, at 3, cols. 4 and 5, and Jan. 28, 1893, at 2, col. 6. Representatives of shippers,

redrafting of Section Three took place in committee, transforming the warranty of seaworthiness into a duty to use due diligence. Because these proceedings were officially unreported, a veil has been drawn over the most crucial part of the legislative process.

On February 4, 1893, the Commerce Committee reported favorably to the full Senate, which passed an amended form of the bill on the same day.⁴⁸ An unreported conference committee meeting was then held and on February 7, 1893, the House passed the Senate's

insurance underwriters, and the Chamber of Commerce alternately praised and attacked the House bill. The newspaper described the bill as in the interest of shippers to increase the responsibilities of carriers. Congressman Harter defended the bill along with C. A. Pillsbury of Minneapolis. After two hours, the Chairman, Senator Frye (R-Maine), suggested that opponents of the bill were too divided in their comments and offered them a chance to talk it over and agree among themselves as to their comments. This recess also offered an opportunity to negotiate with shippers and on the second day of hearings the newspaper reported that both sides had conferred with Senator Frye. Without describing the changes, the report said that they had "amended the measure to the satisfaction of all parties concerned," including the absent Congressman Harter. Knauth notes in his text the "legend" that the author of the revised form of Section Three was Stephen Loines; J. Parker Kirlin of the New York Bar presented the draft. Knauth, *supra* note 12, at 122.

If the foregoing is true, the drafting of Section Three was the responsibility of two New Yorkers: Joseph Parker Kirlin and Stephen Loines. J. Parker Kirlin (1861-1927) was a leader of the admiralty bar in the United States for thirty-five years. He argued a number of the Harter Act appeal cases before the Supreme Court: *The Delaware*, discussed *infra* note 61; *The Carib Prince*, *infra* note 64; *The Silvia*, *infra* note 74; *The Wildcroft*, *infra* note 75; *Knott v. Botany Mills*, *infra* note 90; and *The Folmina*, *infra* note 101. His arguments were successful in *The Silvia* and *The Wildcroft*. One of his great victories was *The Paquete Habana*, 175 U.S. 677 (1900). He represented the owner of the *Titanic*, 204 F. 298, 206 F. 500, and 209 F. 501 (S.D.N.Y. 1913), and the owner of the *Lusitania*, 251 F. 715 (S.D.N.Y. 1918). During the First World War he served as General Counsel of the Shipping Control Committee. Mr. Kirlin was the attorney of record in 430 reported cases in the federal courts from 1891 to 1922 dealing with all aspects of admiralty law.

Stephen Loines was an average adjuster and a member of the firm of Wrecks & Loines, average adjusters in New York.

A hostile view of the Harter Act, especially Section Three, can be found in a letter to the editor of *The New York Times* denouncing its provisions as "a bad measure in every way as the shipowners were liable for nothing whatever." See letter of Robert D. Benedict, *N.Y. Times*, May 3, 1893, at 12, col. 1. Mr. Benedict was the nephew of Erastus Benedict and prepared the third edition (1894) of Benedict on Admiralty.

At the second day of hearings, the contending parties were present "to ratify the agreement," after which the Committee unanimously agreed to report favorably the bill as amended.

The Chairman of the Committee, William Pierce Frye (1831-1911), was a former Maine Attorney General (1867-69) and member of Congress (1871-81). He served as a Senator from 1881-1911, and was the president pro tempore of the Senate when there was a Republican majority.

⁴⁸The Senate's consideration is found in 24 Cong. Rec. Part 2, at 1180. The entire record is the Commerce Committee Report of amendments to H.R. 9176, read by Senator Frye. The conferees on the part of the Senate were Senator Frye, Senator Washburn (R-Minnesota), and Senator Gorman (D-Maryland).

amended version⁴⁹ after debate that did not reveal the reasoning for the House's acceptance of the Senate's amendments.⁵⁰ President

⁴⁹The Conference Committee Report was made to the House by Congressman Lind, who explained that the Senate amendments made certain that foreign shipowners would not have an advantage over American shipowners in the prohibition of exculpatory clauses. The Congressman also painted a grim picture of the circumstances in which the negligent navigation defense could be used:

Now, after a master, owner, or charterer has taken every precaution that human ingenuity can suggest in equipping, manning, and in furnishing his vessel, nevertheless, if out on the high seas in stress of weather or in storms, when every man is worn out with watching, if a man falls asleep on the watch or commits any fault of navigation whereby injury results, the master, owner, or charterer is held responsible under the law.

To this extent the bill relieves domestic shipping from those burdens . . . they shall not be liable for faults or errors of navigation, solely. Now, this is absolutely the only new feature in the bill, except one other [the live animal exception].

24 Cong. Rec. Part 2, at 1291-2. Thereafter, the Senate amendments were concurred in by the House without a recorded vote on the assurances of Congressman Lind that the bill was satisfactory to shippers, underwriters, and "honest steamboat interests."

An early commentator has suggested that the favorable congressional action on the bill was due to the fact that it was seen as another version of shipowners' limitation of liability. Such limitation previously had been enacted in 1851 (9 Stat. 635), and more recently in 1884 (23 Stat. 57) and 1886 (24 Stat. 80). See Evans, *The Harter Act and its Limitations*, 8 Mich. L. Rev. 637 (1910).

⁵⁰24 Cong. Rec. Part 2, at 1291. The obvious changes can be discerned by comparing the House version of H.R. 9176 with the changes made by the Senate:

1. The unenacted description of the original House version was:

An act relating to *contracts of common carriage* and to certain obligations, duties, and rights in connection with the carriage of property.

The Senate removed the reference to common carriage, as follows:

An act relating to navigation of vessels, bills of lading" . . . (House language follows).

Also, the original House version of Section One had begun:

It shall not be lawful for any *common carrier* or the manager, agent, master, or owner . . ." The expression "common carrier" was deleted by the House.

2. In the list of duties, Section One of the House version provided:

. . . proper loading, stowage, custody, care *in transport*, or proper delivery

The Senate version deleted "in transport." The penultimate conclusion of Section One had a prohibition of limitation of liability clauses, as follows:

Nor shall it be lawful to limit its or their liability to less than a full indemnity to the legal claimant for any loss or damage therefrom.

The Senate version deleted this completely. (Language deleted by the Senate is emphasized.)

3. Section Three of the House version provided:

If any vessel transporting merchandise or property between ports in the United States of America and foreign ports shall, *on starting her voyage*, be in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or master, shall become or be held responsible for damage or loss resulting from *error of judgment* in navigation or in the management of said vessel *if navigated with ordinary skill and care, from the time of her leaving her usual place of loading on her*

Harrison signed the bill on February 13, 1893, to be effective July 1, 1893.⁵¹

Public opinion was not greatly concerned with the maritime policies discussed during the House's debate over the Harter Act. The issues dividing the voters in 1892 were the high protective tariff,⁵² the organization of labor,⁵³ railroad operations,⁵⁴ and the effect of com-

intended voyage until her arrival at the usual place of discharge at her port of delivery, nor shall the owner or owners, the vessel, or master be held liable for losses arising from dangers of the sea, acts of God, or public enemies or in saving life, and it may be stipulated in bills of lading and shipping receipts that the vessel may render services to property in distress afloat and tow same to the nearest and most convenient port of safety without incurring penalties from deviation in rendering such services.

(Language deleted by the Senate is emphasized.) The Senate version completely rewrote the sentence. Significant changes are the deletion of the voyage concept and the attempt to specify its commencement and termination. The geographical reach "between ports . . . and foreign ports" was rephrased as "to or from any port in the United States." The obligation to make the vessel seaworthy in all respects and properly manned, equipped, and supplied was retained but was preceded by the overriding obligation in the Senate version to "exercise due diligence." The House's "error of judgment in navigation" became "faults or error of judgment in navigation" in the Senate version and the House's precondition "if navigated with ordinary skill and care" was entirely deleted. The House's list of the defenses was greatly enlarged by the Senate, which added "other navigable waters" to "dangers of the sea" plus "inherent defect, quality or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from attempting to save life or property at sea or from any deviation in rendering such services." The clumsy language of the House version permitting salvage and tow also was deleted. See *supra* note 8.

4. The House's Section Five imposing impossible obligations on collectors of ports to review bills of lading was replaced, at the insistence of the Treasury Department, by the existing section providing maritime lien and penalties.

⁵¹24 Cong. Rec. Part 2, at 1603 (1893).

⁵²Tariff rates became a hot political issue after 1816 when the tariff began to be used to protect infant industries. Indeed, Southerners threatened secession as early as 1828 over the "Tariff of Abominations." The protectionist trend resumed after the Civil War in legislation passed in 1870, 1872, 1875, and 1883. Finally, in 1890, Congress enacted the McKinley Tariff. Fulfilling the Republican platform's promise of high protective tariffs, the average level of duties reached 49.5%, together with penalties imposed on the products of foreign nations that discriminated against American products. F. Taussig, *Tariff History of the United States* 251-288 (1931).

⁵³Labor unrest followed the 1866 collapse of the National Labor Union and soon turned to violence. The acts of the Molly Maguires (1862-76) and other terrorist groups led to clashes with both the police and troops, most notably in the battle of Pittsburgh on July 21, 1877, the Haymarket Riot/Massacre of May 4, 1886, and the Homestead Riot/Massacre of July 6, 1892. Peaceful organization of skilled workers proceeded under Samuel Gompers' American Federation of Labor after 1886, but there was a further outbreak of violence during the Pullman strike of June-July 1894. J. Commons, ed., *2 History of Labour in the United States* 356-95 (1918).

⁵⁴Land grants in excess of 155 million acres of public lands had been made by Congress and state legislatures to encourage the building of railroads in the period 1862-95. Fraudulent stock

binations on American industrial life in such products as oil, steel, sugar, glass, copper, tobacco, rubber, farm machinery, leather, matches, and more than three hundred other essential items.⁵⁵ Thus, the Harter Act can be viewed as part of the effort to protect the free market by removing unfair advantages, along with the 1887 Interstate Commerce Commission Act,⁵⁶ and the 1890 Sherman Antitrust Act.⁵⁷

III. INTERPRETATION OF THE HARTER ACT

A. *Supreme Court Cases*

The consistent interpretation by the courts has been that the purpose of the Harter Act is remedial.⁵⁸ As such, they have held that

manipulations and bankruptcy followed, so that by 1890 consolidation and reorganization was occurring in the Eastern railroad system and was beginning to spread south and west. See generally *Railroads: Nation's First Businesses* (A. Chandler ed. 1965).

⁵⁵Concentration of economic power in relatively few hands through devices such as "trusts," holding companies, and pools was the feature of the period 1875-1900. Business unrest during this time was demonstrated by the great financial panics of 1873 and 1893. The panic of 1893 was precipitated by a drop in United States gold reserves in April, followed by a stock market crash in June. See I. Tarbell, *Nationalizing of Business 1878-1898*, 220-48 (1936).

⁵⁶The Interstate Commerce Commission Act of Feb. 4, 1887, 24 Stat. 379 (applicable to railroads passing through more than one state), responded to increasing public criticism of railroad financial malpractices and customer complaints of overcharging. Initial efforts to control railroads at the state level were frustrated by the Supreme Court's decision in *Wabash, St. Louis & Pacific R.R. Co. v. Illinois*, 118 U.S. 557 (1886). The new Commission could investigate the industry by requiring production of company records. The legislation also required that all railroad freight rates be reasonable, although it did not give the Commission the power to fix the rates. Other provisions prohibited discriminatory rates, drawbacks, rebates, and pooling, and outlawed higher charges for short haul as opposed to long haul on the same railroad. See generally Jones, Thomas M. Cooley and *Laissez-Faire Constitutionalism: A Reconsideration*, 53 J. Am. Hist. 751 (1959), and Jones, Thomas M. Cooley and *The Interstate Commerce Commission*, 81 Pol. Sci. Q. 602 (1966).

⁵⁷15 U.S.C. §§ 1-2 (1988). See generally W. Letwin, *Law and Economic Policy in America: Evolution of the Sherman Antitrust Act 71-99* (1965), and Letwin, *First Decade of the Sherman Act*, 68 Yale L.J. 464, 900 (1959). Individual state responses to the concentration of economic power in trusts were frustrated by federal preemption under the federal commerce power, hence the necessity for uniform federal legislation.

⁵⁸The Supreme Court early described the statutory purpose to relax the strict shipowner obligation of seaworthiness to an obligation to use due diligence to make the vessel seaworthy. See *The Delaware*, *infra* note 61. The Court also commented on the political and economic background of the Harter Act:

The Act was an outgrowth of attempts, made in recent years, to limit, as far as possible, the liability of the vessel and her owners, by inserting in bills of lading stipulations against losses arising from unseaworthiness, bad stowage and negligence in navigation, and other forms of liability which had been held by the courts of England, if not of this country, to be valid as contracts and to be respected even when they exempted the ship from the consequences of her own negligence.

the Harter Act should be read strictly rather than loosely and that carriers should not be exculpated any further than the exact language mandates.⁵⁹ While the lower courts usually have endorsed the carriers' viewpoint of the Act's provisions, the cargo interests consistently have prevailed in disputes resolved by the Supreme Court in this century.

The following review is not merely historical. Harter Act cases still are cited as authoritative interpretations of those provisions of COGSA that are similar to the Harter Act.⁶⁰ There is no doubt that some of its wisdom also may be applied to more modern regimes, such as the Hamburg Rules.

1. Harter Act Limited to the Shipper-Carrier Relation

In *The Delaware*,⁶¹ a both-to-blame collision between a steamship (in sole fault for violation of the crossing rules) and a tug that sank, the steamship's defense to an action by the tug was a literal reading

161 U.S. at 471. The Court foresaw that the consequence of unlimited exculpatory clauses would be that the bill of lading would become "unfit for negotiation." *Id.* at 473.

After enactment of the Harter Act, the Supreme Court provided a clear example of the change from the absolute warranty of seaworthiness to the due diligence obligation in *The Caledonia*, 157 U.S. 124 (1895), a pre-Harter case involving cattle transported under a bill of lading. Due to the unseaworthiness of the vessel—a broken propeller shaft—the planned fifteen day voyage became a twenty-five day ordeal. The exceptions in the carrier's bill of lading were invalid against the seaworthiness warranty, the Court noted, because a warranty of seaworthiness exists in every contract of carriage at the beginning of the voyage so that neither the carrier's knowledge nor ignorance of unseaworthiness, nor its best efforts to make the ship seaworthy, can defeat the absolute warranty. *Id.* at 130. See also *The Southwark*, 191 U.S. 1, 7 (1903), and *The Carib Prince*, *infra* note 64.

The Third Circuit once described the purpose of the legislation as the protection of shippers from unseaworthiness, bad stowage, and negligence, as well as an attempt to stop the "frittering away" of common law responsibilities. *The Willdomino*, 300 F. 5, 9 (3d Cir. 1924), cert. dismissed, 270 U.S. 641 (1926).

Modern support for the Harter Act has come from the Ninth Circuit, which stresses its purpose to avoid the persistent efforts of carriers to insert all-embracing exceptions to liability. *Isthmian Steamship Corp. v. California Spray Chemical Corp.*, 300 F.2d 41, 1962 AMC 1474 (9th Cir. 1962); *Pan American World Airways, Inc. v. California Stevedore & Ballast Co.*, 559 F.2d 1173, 1978 AMC 1834 (9th Cir. 1977); and *Sunkist Growers*, *supra* note 46.

The Supreme Court has described the function of the Harter Act as altering the public policy against broad exculpatory clauses in a decision that struck down the "Both to Blame Collision Clause" as a violation of public policy. *United States v. Atlantic Mutual Ins. Co.*, 343 U.S. 236, 239-242, 1952 AMC 659 (1952). See *infra* notes 81-89.

⁵⁹*The Germanic*, 124 F. 1, 5 (2d Cir.), *aff'd*, 196 U.S. 589 (1903).

⁶⁰See *The Bill*, 47 F. Supp. 969, 1942 AMC 1607 (D. Md. 1942), *aff'd*, 145 F.2d 470, 1944 AMC 883 (4th Cir. 1943). See also *Wirth v. S.S. Arcadia Forest*, 537 F.2d 1272, 1282, 1976 AMC 2178 (5th Cir. 1976).

⁶¹161 U.S. 459 (1896).

of the Harter Act: if the vessel owner proves due diligence, there is *no* liability for negligent navigation. The Supreme Court properly ignored the literal reading of Section Three of the Harter Act and read the statute in light of congressional intent to have no effect on the liability of colliding vessels.⁶²

2. *Exculpatory Clauses Dealing with Latent Defects*

Prior to the Harter Act compromise, the Court had described the shipowner's obligation to cargo (and passengers) as a continuing duty to make the ship seaworthy from the beginning of the voyage.⁶³ Exculpatory clauses, however, freed the carrier from the consequences of negligence during the voyage. In *The Carib Prince*,⁶⁴ cargo was damaged by ballast seawater entering the cargo hold from a rivet hole (without a rivet) in the ballast tank. The carrier's defense was a bill of lading clause exculpating the carrier from "latent defects in hull, tackle, boilers and machinery." While the Harter Act forbade clauses lessening the due diligence of the carrier in making the vessel seaworthy, it did not specify the time of testing the obligation, although a fair reading of the sequence of the duties and the expression "intended voyage" implies a time period before the cargo has been loaded. The carrier was held liable because the unplugged rivet hole made the vessel unseaworthy when the voyage began.⁶⁵ The Court refused to apply the latent defect clause to the pre-sailing condition of the ship, although it indicated that it was prepared to apply the clause to future defects occurring on the voyage.⁶⁶ The inference of the Court's language was that the carrier could provide a time limit on its due diligence so that for incidents arising thereafter, the carrier could be exculpated by a carefully drawn clause.⁶⁷

⁶²Id. at 474.

⁶³See *The Edwin I. Morrison*, 153 U.S. 199 (1894).

⁶⁴170 U.S. 655 (1898). On latent defect clauses, see *The Cameronia*, 38 F.2d 522 (2d Cir. 1930), and *The Citta di Palermo*, 226 F. 522 (S.D.N.Y. 1914), *aff'd*, 226 F. 529 (2d Cir. 1915).

⁶⁵*The Carib Prince*, 170 U.S. at 658.

⁶⁶Id. at 660.

⁶⁷Id. at 660-61. The Supreme Court later described its holding by saying: "The Harter Act has not released the owner of a ship from the duty of making her seaworthy at the beginning of her voyage." *The Silvia*, *infra* note 74, at 464. A later case, *The Willdomino*, *supra* note 58, described *The Carib Prince* as permitting a carrier that exercises due diligence to make its ship seaworthy to contract against liability for damage which may result from unseaworthiness. 300 F. at 10.

3. Unit Limitation Clause Prohibited

In *Calderon v. Atlas*,⁶⁸ goods had been lost in the sinking of a vessel different from the one on which the goods had been shipped. The carrier's defense was a clause in the bill limiting the shipper's recovery to "\$100 per package" and requiring that for recovery beyond that amount the value therein had to be expressed and a special agreement made. Plaintiff demanded the full value (\$5,143), while the carrier offered \$100 for each of twenty-six bales and three crates of uniforms (\$2,900). The Supreme Court saw this as an attempt at exoneration prohibited by the Harter Act.⁶⁹ Later cases modified this outright prohibition of unit limitation.⁷⁰

4. Harter Act Does Not Affect General Average

In *The Irrawaddy*,⁷¹ a British vessel en route from Trinidad to New York stranded on the New Jersey shore due to negligent navigation. Some cargo was jettisoned and a general average bond was required of cargo at delivery. The question for the Supreme Court was whether the Harter Act had changed the owner-shipper relation in general average. The Court decided that the Harter Act had *not* changed the old rule that the shipowner could not recover general average contribution from cargo for losses caused by the negligent navigation of the vessel by the owner's servants.⁷² The consequence of this decision was the "Jason clause," which tracks the provisions of Section Three of the Harter Act so that an owner that has exercised due diligence to make the vessel seaworthy can recover general average contributions from cargo even where the cause of the loss is negligent navigation.⁷³

5. Carrier's Defenses During the Voyage

In *The Silvia*,⁷⁴ a British ship carried a cargo of sugar from Cuba to Philadelphia. Its port holes were covered on the outside with an eight-inch glass cover that was 5/8 of an inch thick and on the inside with

⁶⁸170 U.S. 272 (1898).

⁶⁹*Id.* at 282.

⁷⁰See *infra* notes 133-35.

⁷¹171 U.S. 187 (1898).

⁷²*Id.* at 193-94.

⁷³*The Jason*, 225 U.S. 32 (1912). For a further discussion, see *infra* notes 101-10.

⁷⁴171 U.S. 462 (1898).

a cover of iron. When sailing in good weather, the glass port holes were closed but the inner iron covers were not in place (the glass port holes being used to light the hold). During heavy weather, a glass port hole broke, water entered, and the sugar was damaged.

The issue was the vessel's reasonable seaworthiness at the beginning of the voyage. It was held that the glass port holes were not unseaworthy since they could be closed in a fairly short time. Thus, the failure of the ship's personnel to close the iron port hole covers in heavy weather became negligent management and the carrier had a valid defense to the shipper's claim.⁷⁵ This was the most important case favoring shipowner viewpoints. Unfortunately, the apparent ease with which the defense was made out led shipowners in later cases to argue mechanically that pre-sailing inspections qualified them for the negligent navigation and management defenses. This required the Court to develop burden of proof rules in much greater detail in such subsequent cases as *Knott v. Botany Mills*,⁷⁶ *International Navigation v. Farr*,⁷⁷ *The Southwark*,⁷⁸ *The Germanic*,⁷⁹ and *The Folmina*.⁸⁰

6. *Indirect Liability of Carriers to Cargo: Joint and Several Liability Preserved*

In *The Chattahoochee*,⁸¹ following a collision between a steamer and a schooner, the schooner sank with her cargo. Cargo sued the steamer to recover 100% of its loss. When the collision action was heard, the cargo liability claim was part of the steamer's claim against the schooner and would be divided. The schooner argued that a literal reading of the defense of negligent navigation (that the vessel interest shall not "become or be held responsible for damage or loss resulting from faults or errors in navigation") included not only direct liability to its own cargo but also indirect liability to the cargo by the operation

⁷⁵Id. at 465. See also *The Wildcroft*, 201 U.S. 378 (1906), a case in which river water was admitted into a cargo of sugar at the port of discharge because of valves that had been opened either by accident or design. The Supreme Court affirmed the negligent management defense but denounced an alleged *presumption* of seaworthiness at the beginning of the voyage as being contra to the terms and policy of the Harter Act.

⁷⁶See infra note 90.

⁷⁷See infra note 95.

⁷⁸See infra note 97.

⁷⁹See infra note 99.

⁸⁰See infra note 101.

⁸¹173 U.S. 540 (1899).

of the maritime tort rules on joint and several liability in collisions.⁸² This logical consequence of the statutory exculpation was rejected by the Supreme Court because Congress had not indicated an intention to overrule joint and several liability, as established in the earlier cases of *The Alabama*⁸³ and *The Atlas*.⁸⁴

The consequence of *The Chattahoochee* is that cargo damaged in a collision will recover 100% of its damages from the non-carrying shipowner, who will then include these third party payments in its collision damage claim. Under the old rule of equally divided damages for mutual fault,⁸⁵ this meant that these payments to cargo would be considered in the calculation for the single judgment customary in collision litigation.⁸⁶ Efforts of carriers to circumvent the indirect liability to cargo by means of a bill of lading clause requiring cargo to reimburse the carrier for any amounts received from the other colliding vessel have been rejected by the Supreme Court as a violation of public policy.⁸⁷ It should be noted that the elimination of the equally divided damages rule in 1975⁸⁸ has not changed the indirect liability to a ship's own cargo caused by joint and several liability.⁸⁹

7. Care and Custody of Cargo Obligation Overrides Carrier Negligent Navigation Defense

*Knott v. Botany Worsted Mills*⁹⁰ has tormented generations of law students. It concerned the change of trim of a vessel for navigational purposes. When the plaintiff's cargo of bales of wool was loaded in 'tween deck spaces at Buenos Aires on board the British ship *Portugése Prince* for transport to New York, the vessel was trimmed down by the stern. After loading wet sugar at Pernambuco in the

⁸²Id. at 550-51.

⁸³See supra note 35.

⁸⁴See supra note 36.

⁸⁵See *The Schooner Catharine v. Dickinson*, 58 U.S. 170 (1855).

⁸⁶*The North Star*, 106 U.S. 17 (1882).

⁸⁷*United States v. Atlantic Mutual Ins. Co. (The Esso Belgium)*, 343 U.S. 236, 1952 AMC 659 (1952). In 1937, the Report of the Senate Foreign Relations Committee on the Ratification of the 1910 Collision Convention (still unratified) indicated the belief that the indirect recovery by cargo was contrary to congressional intent in both the Harter Act and the recently enacted COGSA. See Senate Report, Maritime Collision Convention, Exec. Rpt. No. 4, reprinted at 1939 AMC 1051.

⁸⁸*United States v. Reliable Transfer Co.*, 421 U.S. 397, 1975 AMC 541 (1975).

⁸⁹*Vana Trading Co. v. The Mette Skou*, 556 F.2d 100, 1977 AMC 702 (2d Cir.), cert. denied, 434 U.S. 892 (1977).

⁹⁰179 U.S. 69 (1899).

adjoining space, separated only by a wooden non-watertight bulkhead (watertight bulkheads not being permitted or required in these spaces), however, the vessel was trimmed down by the bow. With the new trim the wet sugar drained onto the wool.

The carrier's defense was negligent navigation or management of the vessel, while the cargo claimed the damage was caused by carrier negligence in stowing the wet sugar next to the wool cargo, a failure to care for the cargo. The Supreme Court agreed that negligent stowage rather than negligent navigation or management was responsible. In so holding, it adopted the reasoning of the district court, affirmed by the court of appeals, to the effect that the essential cause of the damage was the negligent stowage, while the change of trim was "merely incidental, the mere negligent result of the changes in the loading, no attention being given to the effect on the ship's trim."⁹¹ Thus, the drawing of fine lines would in the future depend on whether an act of seamanship was essential to the navigation or *merely incidental* thereto.⁹²

Having rested the decision on Section One of the Harter Act ("from a port in the United States"), the Court then was confronted with the fact that the bill of lading in question was issued in Buenos Aires for carriage to New York. Despite this wrinkle, the Court held that the Harter Act did apply. After noting the use of the phrase "to or from" in Section Three, it found "from a port" to be the "precise equivalent" of "to or from"⁹³ and reasoned that the power of Congress to legislate in this manner could not be denied in a court of the United States.⁹⁴

8. *Non-Delegable Duty of Seaworthiness Overrides Negligent Management*

In *International Navigation Co. v. Farr & Bailey Co.*,⁹⁵ salt water damage occurred to the plaintiff's cargo in a hold of the vessel where

⁹¹Id. at 74.

⁹²The *Germanic*, supra note 59; *U.S. Industrial Alcohol Co. v. Calmar S.S. Corp.*, 53 F.2d 1023 (S.D.N.Y. 1931); *Hampton Roads Carriers, Inc. v. Allied Chemical Corp.*, 329 F.2d 387 (4th Cir.), cert. denied, 379 U.S. 839 (1964); and *United States v. Ultramar Shipping Co.*, 685 F. Supp. 887, 1988 AMC 527 (S.D.N.Y. 1987), aff'd without opinion, 854 F.2d 1315, 1988 AMC 2408 (2d Cir. 1988).

⁹³*Knott*, supra note 90, at 75: "But the two phrases, as applied to the subject matter, are precisely equivalent, and are both equally applicable to a foreign voyage that ends, and to one that begins, in this country."

⁹⁴Id. at 74, 77.

⁹⁵181 U.S. 218 (1901).

a porthole's cover had been left open at the loading port (Liverpool), probably because of the stevedores' mistake or even the mistake of the ship's officers at the time of pre-voyage inspection. The defendant raised negligent management in defense, but plaintiff alleged the vessel's unseaworthiness at sailing. To counter this allegation, the defendant asserted the seaworthiness of the vessel's structure and equipment and its due diligence to make the ship seaworthy. The Supreme Court rejected the defense of negligent management before sailing, since the statute required that the ship be made seaworthy "*in all respects,*" which included the *use* of the seaworthy equipment by the carrier's servants, agents, or independent contractors. Thus, the carrier had not met the very heavy burden of proof to show the seaworthiness of the vessel on sailing, a pre-condition for the management defense. Due diligence, in this situation, meant "due diligence on the part of all the owners' servants in the use of the equipment before the commencement of the voyage and until it is actually commenced."⁹⁶

9. Carrier's Heavy Burden of Proof to Establish Due Diligence

In *The Southwark*,⁹⁷ owners of a refrigerated ship sought to escape the consequences of the breakdown of the refrigeration system on a cargo of dressed meat by proving that there had been an inspection of the refrigeration before sailing from Philadelphia for Liverpool. Nevertheless, the refrigeration equipment broke down within three hours of leaving port and the condition of the unrefrigerated meat on arrival was mouldy and slimy. In the view of the Supreme Court, the lower courts that had dismissed the libel had erred because they had looked at the problem solely as a breakdown of machinery after the voyage had commenced, rather than the obligation to use due diligence to provide a seaworthy vessel. The carrier's burden of proof to show that the vessel was in all respects seaworthy could not be met by the slight evidence produced⁹⁸—a superficial examination before sailing followed three hours after sailing by a breakdown of the refrigeration. Highly significant was the failure to keep a constant

⁹⁶Id. at 225. Failure to have radio receivers to learn of storm warnings when such radios were not required by statute, regulation, or trade usage resulted in an unseaworthy condition in the *T. J. Hooper*, 60 F.2d 737, 1932 AMC 1169 (2d Cir.), cert. denied, 287 U.S. 662 (1932).

⁹⁷191 U.S. 1 (1903).

⁹⁸Id. at 13. See generally Villareal, *The Concept of Due Diligence in Maritime Law*, 2 J. Mar. L. & Com. 763 (1971).

record of the temperatures in the refrigerated spaces instead of the partial record that was offered.

10. *Carrier's Heavy Burden of Proof to Establish Primary Object of Action*

*The Germanic*⁹⁹ again raised the conflict between carrier defenses in Section Three and the shipper's expectation under Section One. After arrival of the vessel at a pier in New York following a voyage from Liverpool, already heavily coated with ice, a heavy snowfall occurred. In order to meet the ship's sailing schedule, discharge from all five hatches simultaneously took place along with the loading of coal bunkers. Swift action was taken to correct one listing of the vessel, but five hours later a second list developed and the ship rolled over at the pier so that her coal ports were below the waterline. The ship then sank at the pier, causing water damage to the plaintiff's cargo.

The carrier's defense was negligent management of the ship, and it asserted that any action dealing with the ship or cargo that affects the fitness of the ship to carry her cargo is *management* under Section Three. In an opinion by Justice Holmes, the Court ruled that "the primary nature and object of the acts which cause the loss" must govern the conflict between Section One (duty to cargo) and Section Three (defense of negligent management).¹⁰⁰ Here, unloading cargo was the primary object, not ballasting the vessel. Thus, "hurried and imprudent" unloading caused the sinking so that Section One's obligation rather than Section Three's defenses governed the outcome.

11. *Burden of Proof to Establish Peril of the Sea Defense Does Not Permit Inference of Non-Negligence*

In *The Folmina*,¹⁰¹ a cargo of rice being shipped from Japan to New York was damaged by the unexplained entry of salt water. The defendant alleged that the damage must have been caused by a peril of the sea, but the Supreme Court rejected the defense because the carrier had not sustained its burden of proof to show a connection between the damaged cargo and a specific peril of the sea. The Court

⁹⁹See supra note 59.

¹⁰⁰Id. at 598.

¹⁰¹212 U.S. 354 (1909).

dismissed as “mere conjecture” the defendant’s suggestion that a peril of the sea must have been involved. In the Court’s view, the defense required precise proof of how the salt water came inside the ship without defendant’s negligence.¹⁰²

12. *Non-Causal Unseaworthiness*

Perhaps the most radical interpretation of the Harter Act came from Justice Cardozo in *The Isis*,¹⁰³ decided by the Supreme Court while the Hague Rules convention was being debated in the United States.¹⁰⁴ The case involved cargo’s attempt to recover a general average deposit required by a carrier that had demanded contribution in general average before discharge of the cargo. The carrier’s demand was based on the language of a Jason clause¹⁰⁵ in the bill of lading. Because Jason clauses track the language of Section Three of the Harter Act, the Supreme Court’s resolution of the necessity for seaworthiness as a condition precedent to the defense of negligent navigation was the same in this general average context as it would have been in a cargo damage case.¹⁰⁶

Cargo from the United States West Coast was being carried on a German vessel that put in at Bremen on the Weser River before calling at its home port of Hamburg on the Elbe River. The vessel grounded in the Weser River while approaching Bremen due to negligent navigation, thereby damaging the steering mechanism (rudder stock and blade). Since the vessel was allegedly seaworthy at the time of the negligent navigation, cargo was required to contribute in general average pursuant to the Jason clause.

The owner’s Marine Superintendent came from Hamburg, seventy-two land miles away, made a superficial inspection, and ordered the vessel to proceed to Hamburg for repairs. The ship then grounded a second time shortly after leaving Bremen due to negligent navigation *and* the damaged steering mechanism.

Cargo’s refusal to pay general average for the second grounding was based on the unseaworthiness of the vessel after the first grounding. Owner’s direct management of the vessel had resumed at

¹⁰²Id. at 363.

¹⁰³May v. Hamburg-Amerikanische Packetfahrt A.G. (*The Isis*), 290 U.S. 333 (1933).

¹⁰⁴See generally Sturley, *The History of COGSA and The Hague Rules*, 22 J. Mar. L. & Com. 1 (1991) (hereinafter *History of COGSA*).

¹⁰⁵The clause approved in *The Jason*, supra note 73, undid the result in *The Irrawaddy*, supra note 71.

¹⁰⁶*The Isis*, supra note 103, at 343–44.

Bremen with the presence of the owner's Marine Superintendent, who made the decision to resume the voyage to Hamburg. Thus, there was a new period during which the owner had to exercise due diligence to make the vessel seaworthy. As the Court put it: "If the term of management is over and the ship is in his hands again, the duty is renewed."¹⁰⁷ Thus, attempting the Bremen to Hamburg voyage with faulty steering gear was "a needless enlargement of the perils of navigation" that imposed on the shipper an additional risk not imposed on it by the Harter Act.¹⁰⁸

Having determined that due diligence was not exercised at Bremen, the question then turned on whether the cargo owners had the burden of proving a causal relation between the defect and the loss. The Court decided that no relation of cause and effect was necessary because the Court valued "a uniform rule that will put an end to controversy where the causal relation is uncertain or disputed."¹⁰⁹

The very clear consequence of this decision is that the carrier will be denied the negligent navigation and management defenses where the cargo can show lack of due diligence in an unseaworthy condition existing when the bill of lading voyage of its cargo began, regardless of the fact that the unseaworthy condition did not cause the damage.¹¹⁰

13. *Carrier's Burden of Apportionment in Multiple Causation*

The last case in the series of cases in which the Supreme Court expanded the rights of shippers against the carrier's Harter Act defenses is *Schnell v. The Vallescura*.¹¹¹ A cargo of onions was shipped from Spain to New York but on arrival was found to be spoiled. The cargo holds had not been ventilated during the twenty-three day voyage.

The carrier defended on the basis of peril of the sea because the ship had experienced heavy weather on several days. There were a number of days of fair weather, however, when the cargo might have been ventilated but was not, for which the carrier claimed the

¹⁰⁷Id. at 345.

¹⁰⁸Id. at 348.

¹⁰⁹Id. at 352.

¹¹⁰See *The W. W. Bruce*, 94 F.2d 834, 1938 AMC 232 (2d Cir.), cert. denied, 304 U.S. 567 (1938); *Horn v. Compania de Navegacion Fruco*, 404 F.2d 422, 1968 AMC 2548 (5th Cir. 1968); and *C. Itoh & Co. (America) v. M/V Hans Leonhardt*, 719 F. Supp. 479, 1990 AMC 733 (E.D. La. 1989).

¹¹¹293 U.S. 296 (1934).

negligent management defense. The Supreme Court rejected the negligent management argument, noting that the statutory defense is negligent management of the vessel, not negligent management of the cargo.¹¹² Thus, the question became one of the burden of proof of the peril of the sea.

The Second Circuit had held that the cargo interest had to prove what portion of the goods was spoiled by the failure to ventilate on good days.¹¹³ This difficult burden—to show “onion by onion” which onion spoiled during good weather and which onion spoiled during heavy weather—was turned around by the Supreme Court and became the carrier’s burden of apportionment. The explanation for reversing the Second Circuit was public policy, as in *The Isis*.¹¹⁴ The public policy is not described but is presumed to be that underlying the Harter Act. The language of the Court comes after a lengthy review of Harter Act cases:

In each of these cases the carrier is charged with the responsibility for loss which, in fact, may not be due to his fault, merely because the law, in pursuance of a wise policy, casts on him the burden of showing facts relieving him from liability.¹¹⁵

The exact holding of *Schnell v. The Vallescura* has been preserved in the Hamburg Rules.¹¹⁶

B. Filling in the Gaps in Harter Act Coverage

A number of problems, for which solutions have been given in more modern conventions, were not covered in the Harter Act. Nevertheless, as is discussed below, solutions were developed by the courts on the basis of the policy and general language of the Harter Act and carrier clauses in bills of lading.

¹¹²Id. at 303.

¹¹³70 F.2d 261, 1934 AMC 573 (2d Cir. 1934).

¹¹⁴*The Isis*, supra note 103. The rationale for the bailee status is that discharge of the duty is “peculiarly within his control, and all facts upon which he may rely to relieve him of that duty are peculiarly within his knowledge, and unknown to the shipper.” *Schnell*, 293 U.S. at 304.

¹¹⁵Id. at 307.

¹¹⁶Art. 5(7) of the Hamburg Rules provides:

Where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the carrier proves the amount of the loss, damage or delay in delivery not attributable thereto.

1. *The Charter Party Exclusion*

The Senate version of the Harter Act eliminated two references to "common carriers" contained in the House version. Thus, the statute does not distinguish common carriage from private carriage. In the first sentence of Sections One and Two, the statutory language is "any bill of lading or shipping document."¹¹⁷ This would appear to make the Harter Act apply to both private and common carriage, since "bills of lading" can be issued by owners or charterers and a charter party is certainly a "shipping document." Furthermore, Section Three immunizes the "vessel, her owner or owners, agent, or charterers."¹¹⁸ On the other hand, the end of Section One speaks of "bills of lading or shipping receipts," from which it might be argued that bills of lading issued under charter parties were intended to be excluded unless serving as a receipt for the goods.

Thus, a literal reading does not determine whether the Harter Act is to apply to charter parties in private carriage. At best, the language is ambiguous. To the Second Circuit, however, it seemed clear that Congress was legislating only with respect to common carriers and their bills of lading since charterers of the "whole reach" of an entire ship could be presumed to be bargaining at arms' length with the owners.¹¹⁹ Other circuits have followed this view.¹²⁰

COGSA excludes charter parties, but not bills of lading issued under charter parties, both in a direct exclusion¹²¹ and indirectly in the definition of contract of carriage.¹²² The effect of COGSA decisions, therefore, is to conform both statutes as inapplicable to private carriage under charter parties.¹²³

2. *The Time Bar*

Since there is no statutory time bar in the Harter Act, it can be assumed that the admiralty doctrine of laches applies. Thus, the

¹¹⁷46 U.S.C. Appx. §§ 190, 191 (1988).

¹¹⁸*Id.* at § 192.

¹¹⁹*The Fri*, 154 F. 333 (2d Cir.), cert. denied, 210 U.S. 431 (1907); *The G.R. Crowe*, 294 F. 506 (2d Cir.), cert. denied, 264 U.S. 586 (1923); *Koppers Connecticut Coke Co. v. James McWilliams Blue Line*, 89 F.2d 865, 1937 AMC 719 (2d Cir.), cert. denied, 302 U.S. 706 (1937); and *In re Marine Sulphur Queen*, 460 F.2d 89, 1972 AMC 1122 (2d Cir.), cert. denied, 409 U.S. 982 (1972). See also *Golcar Steamship Co., Ltd. v. Tweedie Trading Co.*, 146 F. 573 (S.D.N.Y. 1906).

¹²⁰See *Kerr McGee Corp. v. Law*, 479 F.2d 61, 1973 AMC 1667 (4th Cir. 1973), and *The Monarch of Nassau*, 155 F.2d 48, 1946 AMC 853 (5th Cir. 1946).

¹²¹46 U.S.C. Appx. § 1305 (1988).

¹²²*Id.* at § 1301(4).

¹²³See *Marine Sulphur Queen*, *supra* note 119, and *Kerr McGee*, *supra* note 120.

claimant loses the right to bring a stale claim when the passage of time has prejudiced the defendant's ability to defend the claim because of missing witnesses or documents.¹²⁴ Shipowners, however, attempted to resolve the problem of stale claims by clauses in the bill of lading fixing a time bar absolutely¹²⁵ or after notice of damage had been given.¹²⁶

The issue for the courts is the *reasonableness* of the time bar under the circumstances. Both thirty days¹²⁷ and six months¹²⁸ have been found to be unreasonable, as has a fifteen-day notice precondition to suit.¹²⁹ A one-year time bar clause is inherently reasonable, however, since it is the same as the time bar in COGSA.¹³⁰

3. *The Unit Limitation of Liability: Agreed Valuation Clauses*

Since the House bill's language forbidding limitation of liability was dropped by the Senate, there is no statutory limit in the Harter Act similar to the \$500 per package limit of COGSA. Unit limitation concepts were well-known in the shipping industry, however, since a unit limitation of £100 per package was used in the 1882 Liverpool Conference form bill of lading.¹³¹ The initial view of the Supreme

¹²⁴See generally *Gardner v. Panama Railroad Co.*, 342 U.S. 29, 1951 AMC 2048 (1951). See also *Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223 (5th Cir. 1984).

¹²⁵*J. Aron & Co. v. Askvin*, 267 F.2d 276, 1960 AMC 314 (2d Cir. 1959). See also *J. Aron & Co. v. Panama Railroad Co.*, 255 N.Y. 513, 175 N.E. 273, cert. denied, 284 U.S. 635 (1932).

¹²⁶*Lagerloef Trading Co. v. United States*, 43 F.2d 871, 1930 AMC 1163 (2d Cir. 1930) (one year time for suit clause upheld).

¹²⁷*Gelderman v. Dollar Steamship Line*, 41 F.2d 398, 1923 AMC 983 (S.D.N.Y. 1923).

¹²⁸*Armour & Co. A/S v. Gjeruldsen*, 15 F.2d 53, 1926 AMC 1614 (4th Cir. 1926).

¹²⁹*Delaware Steel Co. v. Calmar Steamship Co.*, 378 F.2d 386, 1968 AMC 1527 (3d Cir. 1967).

¹³⁰The one year time bar in COGSA is found at 46 U.S.C. Appx. § 1303(6) (fifth sentence). Dissatisfaction with the one year period in the conditions of modern containerized transport has caused a change to a two-year time bar in the Hamburg Rules (Art. 20), the Multimodal Convention (Art. 25), and the O.T.T. Convention (Art. 12).

Despite vigorous British opposition to the two-year time bar in these conventions, it should be noted that in 1950, in the British Hague Rules Agreement between cargo insurers and P&I clubs, the time bar was extended to two years and the unit limitation to £200. See Knauth, *supra* note 12, at 471-75. The 1977 version contains a two-year time bar and a unit limitation of £400. See Tetley, *supra* note 4, at 1235.

¹³¹Knauth, *supra* note 12, at 119. The 1882 Liverpool Conference form bill of lading is reprinted in 2 *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules* 61-64 (M. Sturley ed. 1990) (hereinafter *Legislative History*). For a discussion of the Liverpool Conference and the Conference form, see *History of COGSA*, *supra* note 104, at 6-8. For a discussion of earlier antecedents to the unit limitation concept, see Sturley, *The Fair Opportunity Requirement Under COGSA Section 4(5): A Case Study in the Misinterpretation of the Carriage of Goods by Sea Act*, 19 *J. Mar. L. & Com.* 1, 28-29 (1988) (hereinafter *Fair Opportunity*).

Court was that unit limitation clauses were flatly prohibited by the Harter Act.¹³² Subsequently, however, the Court reconsidered the question in light of the practice in the railroad industry.¹³³

The issue then became one of the reasonableness of the amount of the limitation. Later cases introduced the requirement for a negotiation whereby each side gave up a "consideration," as, for example, the carrier collecting higher freight for greater liability.¹³⁴ Still later

¹³²In *Calderon*, supra note 68, a clause limiting shipper recovery to \$100 per package was found to be invalid on the ground that it was in direct contravention of the language of Section One.

¹³³The *Kensington*, 183 U.S. 263 (1902), dealt with *passenger* luggage. Although the Harter Act does not directly cover luggage, it can be made to apply by means of a provision in the ticket by which a shipowner would be responsible according to the terms of the shipowner's bill of lading.

In *The Kensington*, the passage ticket had exculpatory provisions, which were held to be void as against public policy, and a limitation of liability clause for injury to the passenger's baggage "beyond the sum of 250 francs at which such baggage is hereby valued." In the view of the Court, the passenger had no recourse beyond 250 francs (about US \$50) for damaged baggage *unless* he agreed to have the baggage treated as cargo and subject to a bill of lading under the Harter Act with its defenses of negligent navigation and management. The Court's conclusion was "the arbitrary limitation of 250 francs to each passenger, unaccompanied by a right to increase the amount by an adequate and reasonable proportional payment, was void." *Id.* at 277.

In the railroad industry, *Hart v. Pennsylvania R.R.*, 112 U.S. 331 (1884), had upheld a limit of liability of \$200 per horse applied to a claim of \$19,800 for the death of a race horse and injury to four others. See *Goddard, The Liability of the Common Carrier as Determined by Recent Decisions of the Supreme Court*, 15 Colum. L. Rev. 399 (1915). Thus, unit limitation, otherwise void for arbitrarily relieving carrier liability, could be valid in maritime law, as in railroad law, where a higher valuation of the cargo was possible in exchange for a proportionately higher ad valorem freight rate. Subsequent cases upheld the railroad figure of \$100 per package unit limitation. See *Hohl v. Norddeutscher Lloyd*, 175 F. 544 (2d Cir.), cert. denied, 216 U.S. 621 (1910); *Reid v. Fargo*, 241 U.S. 544 (1916); *The Caledonia*, 31 F.2d 257, 1929 AMC 725 (2d Cir. 1929); and *The Ansaldo San Giorgio I*, 294 U.S. 494, 1935 AMC 419 (1935) (clause unreasonable which exonerated carrier if undamaged portion of shipment is worth more at destination than whole cargo's value at shipment; invalid clause contrasted with "true" limitation agreements where higher freight rate applies to higher valuations). In addition, limits calculated in a foreign currency also have been upheld. See, e.g., *Kuhnhold v. Cie. Generale Transatlantique*, 251 F. 384 (S.D.N.Y. 1917) (1000 francs per package, pro rata); *Koan Maru*, 252 F. 384 (S.D.N.Y. 1917) (£50 per freight ton); and *Miller Yacht Co. v. M/V Vishva Shobha*, 1981 AMC 2479 (S.D.N.Y. 1980) (£100 under the Indian version of the Hague Rules). Approval also has been given to a clause limiting recovery to net invoice cost plus disbursements. *The Ferncliff*, 306 U.S. 444, 1939 AMC 403 (1939).

¹³⁴See *Reid v. Fargo*, 241 U.S. 544 (1916), and *Union Pacific R.R. Co. v. Burke*, 255 U.S. 317 (1921). See also *Stevens v. Cunard S.S. Co.*, 271 F. 306 (2d Cir. 1921); *Toyo Kisen Kabushiki Kaisha v. Willits & Co.*, 17 F.2d 762, 1927 AMC 511 (9th Cir. 1927); *Transmarine Corp. v. Charles H. Levitt & Co.*, 25 F.2d 275, 1928 AMC 682 (2d Cir. 1928); *Caribbean Produce Exchange, Inc. v. Sea Land Service, Inc.*, 415 F. Supp. 88 (D.P.R. 1976); and *Antilles Ins. Co. v. Transconex, Inc.*, 862 F.2d 391, 1989 AMC 984 (1st Cir. 1988), overturning 672 F. Supp. 61, 1988 AMC 1250 (D.P.R. 1987).

cases introduced the "fair opportunity" doctrine, under which the carrier must notify the shipper of the alternate rates in order to take advantage of the unit limitation in the bill of lading.¹³⁵

IV. THE EFFECT OF COGSA ON THE HARTER ACT

A. Background of COGSA

1. The International Consequences of the Harter Act

During the first quarter of this century the International Law Association ("ILA"),¹³⁶ and its unofficial descendant, the Comité Maritime International ("CMI"),¹³⁷ continued to be interested in the

Clauses also have been held invalid because there was no provision for a rate reduction for decreased liability. See *A. C. Lawrence Leather Co. v. Cie. Generale Transatlantique*, 12 F.2d 83, 1926 AMC 379 (S.D.N.Y. 1926), *aff'd*, 18 F.2d 930, 1927 AMC 773 (2d Cir. 1927), cert. denied, 274 U.S. 761 (1927); *Transmarine Corp. v. Charles H. Levitt & Co.*, 25 F.2d 275, 1928 AMC 682 (2d Cir. 1928). Similarly, clauses that do not have a provision for increasing the freight rate to achieve higher unit valuation have been struck down. See *Venezuelan Meat Export Co. v. United States*, 12 F. Supp. 379, 1935 AMC 1481 (D. Md. 1935).

¹³⁵*Gold Medal Trading Corp. v. Atlantic Overseas Corp.*, 580 F. Supp. 610, 1984 AMC 2052 (S.D.N.Y. 1984). See also *Federal Insurance Co. v. Transconex, Inc.*, 430 F. Supp. 290 (D.P.R. 1976), and *Nemcik v. Olympo Transport Co. of Puerto Rico, Inc.*, 785 F. Supp. 20 (D.P.R. 1991).

In this regard, one also should review *Fair Opportunity*, *supra* note 131, wherein the author criticizes the courts' failure to research the international background and legislative history before promulgating such legislative-type decisions as *Tessler Bros. (B.C.) v. Itaipacific Line*, 494 F.2d 438, 1974 AMC 937 (9th Cir. 1974); *Pan Am World Airways v. California Stevedore & Ballast Co.*, 559 F.2d 1173 (9th Cir. 1977); *Brown & Root, Inc. v. M/V Peisander*, 648 F.2d 415, 1982 AMC 929 (5th Cir. 1981); and *General Electric Co. v. M/V Nedlloyd*, 817 F.2d 1022, 1987 AMC 1817 (2d Cir. 1987).

¹³⁶The ILA was founded in Brussels in October 1873. Created in the aftermath of the American Civil War (1861-65) and the Franco-Prussian War (1870-71), it was intended to reform and codify the law of nations. Its legal expertise came from David Dudley Field (1805-94), who codified New York's common law and who, through his brother, Stephen J. Field (1816-99), exerted a powerful influence on California's codes. The younger Field served as the Chief Justice of the California Supreme Court (1859-63) and as an Associate Justice of the United States Supreme Court (1863-97). The ILA conducts studies and makes reports at its biennial conferences on all aspects of public and private international law. In maritime law, the ILA produced the York-Antwerp Rules on General Average in 1877 and the Hague Rules on Bills of Lading in 1921. See generally Olmstead, *The International Law Association: A Worldwide Organization for Development and Promotion of International Law*, in *The Present State of International Law 1* (M. Bos. ed. 1973).

¹³⁷The CMI grew out of the ILA in 1896. Organized by national groups of lawyers and insurers specializing in maritime affairs, it has devoted special efforts to harmonizing Anglo-American common law thinking with the civil law principles of codified law on the European continent. A Belgian lawyer, Louis Franck (1868-1937), was most instrumental in its early development. The organization is today made up of some four dozen national associations. Its

question of uniform bill of lading clauses with uniform interpretation. These efforts eventually produced, in September 1921, the voluntary Hague Rules,¹³⁸ and later, the 1924 Brussels international convention.¹³⁹

In the early years, the example of the Harter Act was followed in the legislation of certain British dominions that were large exporters of raw materials. These countries believed shippers were not being fairly treated by carrier interests in the mother country. New Zealand, then a colony, enacted in 1903 the first statute modeled on the Harter Act.¹⁴⁰ The new nation of Australia¹⁴¹ enacted its own Sea Carriage of Goods Act in 1904,¹⁴² followed by Canada in the Water

principal work is the study of maritime problems of a commercial nature and the production of reports with agreed solutions thereto. In an earlier time, the organization was concerned exclusively with the preparation of international conventions for diplomatic conferences convened by the Belgian government. Thirteen of these diplomatic conferences were held from 1910 to 1979, producing international conventions on Collision (1910), Salvage (1910), Limitation of Shipowners' Liability (1924), Bills of Lading (1924), Maritime Liens and Mortgages (1926), Immunity of State-Owned Ships (1926), Civil Jurisdiction in Matters of Collision (1952), Penal Jurisdiction in Matters of Collision (1952), Arrest of Sea-Going Ships (1952), Limitation of Liability of Shipowners (1957), Stowaways (1957), Passengers (1961), Nuclear Ship Operators (1962), Vessels Under Construction (1967), Passenger Luggage (1967), The Visby Amendments to the Hague Rules (1968), and The SDR Protocol to the Hague Rules (1979). (The author represented the United States at the 1979 Diplomatic Conference.) Since 1972, the organization has worked closely with the International Maritime Organization, the International Labour Organization, and the United Nations Conference on Trade and Development. It also has prepared commercial solutions to problems that do not require intergovernmental agreements to be effective. In 1992, its purposes were changed to permit the organization to extend its activities to those maritime activities traditionally regarded as parts of public law. See generally A. Lilar & C. Van Den Bosch, *Le Comité Maritime International* (1972); Sweeney, *Proportional Fault in Both to Blame Collisions*, in *Studi in Onore di Giorgio Berlingieri* 549 (spec. ed. *Il Diritto Marittimo* 1964); Chauveau, *L'Unification du Droit Maritime et le C.M.I.*, 1963 *Rev. Trim. de Droit Commercial* 737; and E. Gold, *Maritime Transport: The Evolution of International Marine Policy and Shipping Law* 128 (1981).

¹³⁸The Hague Rules of 1921, 1923 AMC 63, reprinted in 1 *Legislative History*, supra note 131, at 335-41. See generally *History of COGSA*, supra note 104, at 18-25.

¹³⁹International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, T.S. No. 931, 120 L.N.T.S. 157 (the original text is in French only). See English translation at 51 Stat. 247, 1 *Legislative History*, supra note 131, at 573-81. See generally *History of COGSA*, supra note 104, at 25-32.

¹⁴⁰(1903) Acts No. 96. The 1903 legislation was superseded by the New Zealand Shipping and Seamen Act, 1908, Acts No. 178. The 1908 Act was superseded by (1940) Acts No. 31 (enacting Hague Rules). New Zealand had advanced from the status of "colony" to "dominion" in 1907.

¹⁴¹The Commonwealth of Australia, comprising the British colonies of New South Wales, Tasmania, Victoria, Western Australia, South Australia, and Queensland, came into existence on January 1, 1901, following twenty years of discussion of federation. See generally *History of COGSA*, supra note 104, at 15, 35-36 (discussing the history of the Australian acts).

¹⁴²3 Commonwealth Acts, 37. The 1904 legislation was superseded in 1924 by domestic legislation adopting the Hague Rules. See *Sea Carriage of Goods Act*, Acts of 1924, No. 22. A significant provision in the 1904 statute rendered invalid all bill of lading clauses that ousted the

Carriage of Goods Act of 1910.¹⁴³ Since arguments based on freedom of contract in the imperial setting had been unable to contain legislation similar to the Harter Act in the British Empire, it was clear that from a global viewpoint uniformity might be attained only through international legislation in the treaty process.

The ILA considered a resolution at a conference in Oslo (then Christiania) in 1905 that would have applied to the shipowner-charterer relation the Harter Act method of invalidating clauses relieving shipowners from negligence liabilities or lessening the duties respecting seaworthiness.¹⁴⁴ The resolution was defeated by a vote of 13 to 12 in 1905 and reconsidered inconclusively in Berlin in 1906.¹⁴⁵ In the background of these discussions were the efforts of cargo insurers to avoid coverage of shipper claims for shipowner negligence¹⁴⁶ and the efforts of the carriers' P&I clubs¹⁴⁷ similarly to avoid coverage of shipowner negligence by failing to reimburse members who did not use the prescribed exculpatory clauses to defeat shippers' claims of negligence.

The subject of "international regulation of foreign bills of lading" was raised ineffectively in the CMI by the Maritime Law Association of the United States ("MLA") in 1912. It would not resurface until after the "voluntary" clauses for bills of lading had been prepared in 1921 by the ILA and the British Maritime Law Association. The

jurisdiction of Australian courts both as to import and export bills (Sec. 6). Section 9, Acts of 1924, No. 22, preserves this provision in the Hague Rules context. Cf. 46 U.S.C. Appx. § 1303(8) (1988), and see *supra* note 39. See generally History of COGSA, *supra* note 104, at 15-16 (discussing the history of the New Zealand and Australian acts).

¹⁴³9 & 10 Edw. 7, c. 61, R.S. Canada ch. 207 (1927). The abolition of the continuing warranty of seaworthiness, implied in the Harter Act, is made clear in § 3 of this Act: "There shall not be implied in any contract for the carriage of goods by water to which the Rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship." Section 5 rendered invalid bill of lading clauses that ousted the jurisdiction of Canadian courts at the port of loading, in addition to the requirement of a Canadian clause paramount at such port. Section 8 added a unit limitation of carrier liability fixed at \$100 per package, unless a higher value was stated.

The 1910 legislation was superseded by the 1936 Water Carriage of Goods Act, 1 Edw. 8 ch. 49 (effective Aug. 1, 1936), which adopted, as a schedule, the English translation of the French original of the Hague Rules from the 1924 British Carriage of Goods by Sea Act. See Tetley, *supra* note 4, at 4-6, 1016-18. See generally History of COGSA, *supra* note 104, at 16-17, 56 (discussing the history of the Canadian acts).

¹⁴⁴Knauth, *supra* note 12, at 122-25. See also Sieveking, *The Harter Act and Bills of Lading Legislation*, 16 Yale L.J. 25, 26 (1906).

¹⁴⁵The casting vote of the chair broke the 12-12 tie. *Id.* at 26. See also History of COGSA, *supra* note 104, at 8-9 n.52.

¹⁴⁶Knauth, *supra* note 12, at 123.

¹⁴⁷Sieveking, *supra* note 144, at 27.

international legislation called the Hague Rules was then promoted by the International Chamber of Commerce and the CMI.¹⁴⁸

2. *The Spirit of the Harter Act in the Hague Rules*

The diplomatic conferences that transformed the voluntary Hague Rules of 1921 into mandatory form were concluded in August 1924 in Brussels in a conference attended by twenty-six nations.¹⁴⁹ The part played by the Harter Act in these negotiations proved to be indirect, as the influence of shippers proved to be slight—merely the idea of the compromise that the carriers would have the policy-based defenses of negligent navigation and management¹⁵⁰ in exchange for the carriers' obligation to exercise due diligence in making the ship seaworthy.¹⁵¹ Shippers' control over the invention of new clauses exculpating carriers in bills of lading remained in Article III(8), but without the spotlight given by Sections One and Two of the Harter Act.

Aside from this spirit of the Harter Act, the Hague Rules are different in form and interpretation from the Harter Act, in that much of the new language comes from bill of lading exculpatory clauses that provide the carrier with seventeen defenses that are applicable where something other than the unseaworthy condition of the ship causes the damage.¹⁵²

How much this new concept in the Hague Rules differed from the American viewpoint is clearly shown by the long list of changes made by the United States Congress to the Hague Rules under the guise of a "*clarification*" in 1936 at the time of the enactment of COGSA.¹⁵³

¹⁴⁸Knauth, *supra* note 12, at 123. See generally History of COGSA, *supra* note 104, at 18–25.

¹⁴⁹For a thorough review of the drafting history see History of COGSA, *supra* note 104. See also R. Colinvaux, *The Carriage of Goods by Sea Act, 1924, 1–9* (1954), and Knauth, *supra* note 12, at 124–27.

¹⁵⁰Knauth, *supra* note 12, at 127–28.

¹⁵¹46 U.S.C. Appx. § 192 (1988), contrasted with 46 U.S.C. Appx. §§ 190 and 191 (1988). See *supra* notes 11–14.

¹⁵²Hague Rules, Art. IV(2)(a)–(q), where unseaworthiness is raised by the plaintiff, Art. IV(1) provides "the burden of proving the exercise of due diligence shall be on the carrier"

¹⁵³Differences between the United States statute and the treaty are as follows:

1. Article 3, § 2, U.S. COGSA *omits* "Subject to the provision of Art. 4."
2. Article 3, § 4, U.S. COGSA *adds* "Provided that nothing in this chapter shall be construed as repealing or limiting the application of any part [of the Pomerene Act on Bills of Lading]."
3. Article 3, § 6, U.S. COGSA *adds* "Provided that if a notice of loss or damage; either apparent or concealed, is not given as provided for in this section, that fact shall not

The meaning of that clarification is most vividly seen in the United States' deletion of the reference to the list of defenses in the statement of the carrier's Article III(2) obligation to "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods."¹⁵⁴ While the congressional record may be sparse, it is certainly arguable that Congress thereby reaffirmed the language and spirit of the Harter Act where Section One speaks of "proper loading, stowage, custody, care, or proper delivery" of the goods.¹⁵⁵ Congress

affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered."

4. Article 4, § 2(j), "Strikes," U.S. COGSA *adds* "Provided, that nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts."
5. Article 4, § 4, "Deviations," U.S. COGSA *adds* "Provided, however, that if the deviation is for the purpose of loading or unloading cargo or passengers, it shall, *prima facie*, be regarded as unreasonable."
6. Article 4, § 5, "Amount of liability," U.S. COGSA *rephrases* the treaty provision *deleting* the phrase "per package or unit" and *replaces* it with "per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit." The treaty figure "100 pounds sterling" is *replaced* by "\$500" and the expression "transportation of" is *inserted* between "in connexion with . . . goods" at the beginning and again in the third paragraph at the same place. U.S. COGSA also *adds* the sentence "In no event shall the carrier be liable for more than the amount of damage actually sustained."
7. Article 8, U.S. COGSA *substitutes* citation of the U.S. Limitation of Liability Act, 46 U.S.C., §§ 175, 181-183, 183b-188 and the Shipping Act of 1916.
8. U.S. COGSA § 1309 *adds* provision prohibiting discrimination between competing shippers.
9. Article 9 has been *deleted* in its entirety [Gold Value and Pounds Sterling and Rate of Exchange].
10. Article 10, applying the treaty provision to bills of lading issued in any of the contracting states, is entirely *deleted* and *replaced* by U.S. COGSA § 1312 applying the statute to "all contracts of carriage of goods by sea to or from ports of the United States in foreign trade"
11. U.S. COGSA § 1311 specifically *preserves* the Harter Act for the "before" and "after" periods in international trade and permits U.S. COGSA as contractual provision in domestic trade.
12. Articles 11-16 (The Final Clauses concerning ratification, adhesion, and denunciation) are *deleted* from U.S. COGSA, but a provision for suspension in retaliation for discriminatory application is *added*.

¹⁵⁴In the treaty, Article III(2) of the Hague Rules provides: "Le transporteur, sous réserve des dispositions de l' article 4, procédera de façon appropriée et soigneuse au chargement, à la manutention, à l'arrimage, au transport, à la garde, aux soins et du déchargement des marchandises transportées." The English statutory formula provides: "Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried." COGSA simply provides: "The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." 46 U.S.C. Appx. § 1303(2) (1988).

¹⁵⁵46 U.S.C. Appx. § 190 (1988).

would not permit this clear obligation to be "frittered away" by the catalogue of seventeen defenses in Article IV(2)(a)-(q).

The foregoing is not meant to disparage the work of Judge Charles M. Hough¹⁵⁶ of the Court of Appeals for the Second Circuit, who presided over the penultimate drafting of the mandatory rules in Brussels in 1922. As president of the MLA, Judge Hough was well-known in CMI circles and clearly understood what was necessary to achieve an international agreement.

The text of the mandatory Hague Rules in its French original was adopted on August 25, 1924, and signed,¹⁵⁷ subject to ratification, by fourteen nations, including the United States.¹⁵⁸ Thereafter, the international convention came into force on June 2, 1931, one year after the deposit of four ratifications (Belgium, Hungary, Spain, and the United Kingdom), with the Belgian government acting as depositary.¹⁵⁹ The British government had enacted domestic legislation putting the Hague Rules in force even before the conclusion of the diplomatic conference,¹⁶⁰ a clear precedent for what the United States would do in 1936 to formulate the treaty language in its own image.

B. *The Hague Rules and COGSA*

Opposition in the United States to the new international agreement from cargo-owning interests surfaced prior to its final conclusion by a proposal in 1923 to amend the Harter Act to restore the continuing nature of the shipowner's warranty of seaworthiness by striking out the requirement to exercise due diligence to make the ship seaworthy.¹⁶¹ This proposed reform of the Harter Act was hurt by the

¹⁵⁶Charles M. Hough (1858-1927) practiced in Philadelphia and New York before his appointment as a federal district judge. After serving on the Southern District of New York for ten years (1906-16), he was appointed to the Second Circuit Court of Appeals (1916-27). See History of COGSA, *supra* note 104, at 29-30.

¹⁵⁷See Knauth, *supra* note 12, at 127-28, and History of COGSA, *supra* note 104, at 32.

¹⁵⁸International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 120 L.N.T.S. 155. The English language text is in 51 Stat. 233, and 1 Legislative History, *supra* note 131, at 573-81.

¹⁵⁹CMI Documentation, 1989-90 Y.B. at 88-94.

¹⁶⁰Carriage of Goods by Sea Act, 14 & 15 Geo. 5, c. 22 (1924). See generally History of COGSA, *supra* note 104, at 32-35.

¹⁶¹See History of COGSA, *supra* note 104, at 38-42, and Knauth, *supra* note 12, at 128. S. 427, 68th Cong., 1st Sess., was introduced by Senator Kenneth D. McKellar (D-Tennessee) on December 6, 1923. Senator McKellar regularly reintroduced this legislation and was to continue his opposition to what he regarded as pro-carrier changes in the law in 1935.

Supreme Court's decision in *The Isis*¹⁶² in 1933, which endorsed carrier liability for cargo damage based on non-causal unseaworthiness, and it is arguable that the uncertainties created by that decision may have led to United States' acceptance of the Hague Rules, although with substantial differences.¹⁶³

The Hague Rules treaty was referred by President Calvin Coolidge to the Senate for advice and consent on February 26, 1927.¹⁶⁴ Although hearings were held by the Foreign Relations Committee in December 1927, action by the full Senate did not occur for eight years. Finally, in March 1935, the Foreign Relations Committee reported favorably on the treaty.¹⁶⁵ A short time later, on April 1, 1935, the Senate gave its advice and consent.¹⁶⁶ Four months later, the Senate passed domestic legislation and referred it to the House of Representatives, where hearings were held in January 1936.¹⁶⁷ The basis of this domestic legislation was the 1924 treaty with amendments favored by shipper interests in the Chamber of Commerce of the United States.¹⁶⁸

The "clarified" text, based on the Hague Rules, was approved by the House of Representatives on April 6, 1936. As in the Senate, there was no recorded vote.¹⁶⁹ President Franklin D. Roosevelt signed the United States Carriage of Goods by Sea Act on April 16, 1936. It

¹⁶²The *Isis*, supra note 103.

¹⁶³See supra note 153. See History of COGSA, supra note 104, at 52, and Knauth, supra note 12, at 129, 138.

¹⁶⁴See Knauth, supra note 12, at 128-31. See also Executive E, 69th Cong. Second Sess. (1927), and Transmittal Letter from Pres. Calvin Coolidge to the Senate, 69 Cong. Rec. 5175-76 (1928), reprinted in 1 Legislative History, supra note 131, at 561.

¹⁶⁵History of COGSA, supra note 104, at 54-55. See Ex. Rep. No. 2, 74th Cong., 1st Sess. (1935), reprinted in 3 Legislative History, supra note 131, at 508-21. The 1927 hearing is reprinted id. at 323-64.

¹⁶⁶79 Cong. Rec. 4758 (1935), reprinted in 1 Legislative History, supra note 131, at 586. See also History of COGSA, supra note 104, at 54-55.

¹⁶⁷The 1935 Senate hearing on the domestic legislation is reprinted in 3 Legislative History, supra note 131, at 499-593. See also S. Rep. No. 742, 74th Cong., 1st Sess. (1935), reprinted in 1 Legislative History, supra note 131, at 531-35. For the Senate passage of the bill, see 79 Cong. Rec. 13343 (1935), reprinted in 1 Legislative History, supra note 131, at 594. The 1936 House hearings are reprinted in 3 Legislative History, supra note 131, at 595-743, and the House committee report (H.R. Rep. No. 2218, 74th Cong., 2d Sess. (1936)) is reprinted in 1 Legislative History, supra note 131, at 521-29. See generally History of COGSA, supra note 104, at 53-55.

¹⁶⁸See History of COGSA, supra note 104, at 48-51, and Knauth, supra note 12, at 128-29. See also Uniform Ocean Bills of Lading Act, Chamber of Commerce of the United States, Apr. 1931.

¹⁶⁹80 Cong. Rec. 5026 (1936), reprinted in 1 Legislative History, supra note 131, at 600. The Senate's approval of a technical House amendment is in 80 Cong. Rec. 5070 (1936), reprinted in 1 Legislative History, supra note 131, at 600.

became effective three months later.¹⁷⁰ Like the Harter Act, this statute has not been amended in any way. Because of the many differences between the legislative text and the treaty, resubmission of the treaty for advice and consent was considered necessary. The treaty text, subject to two understandings (or reservations), was given Senate advice and consent on May 6, 1937, and was ratified by a presidential proclamation on May 25, 1937.¹⁷¹ The United States' ratification was deposited with the Belgian government on June 29, 1937, to be effective as a treaty instrument six months later on December 29, 1937.¹⁷²

At this time, international law doctrine on the subject of reservations to treaties was in the process of change due to the development of multilateral conventions. The general view, however, was that ratifications subject to reservations were not effective if signatories to the treaty objected to the reservation, but positive acceptance of the reservation was not necessary.¹⁷³ In fact, no objections to the United States' reservations were made.

V. VITALITY OF THE HARTER ACT: ITS INTERACTION WITH COGSA

COGSA specifically preserves the Harter Act in general terms, as well as more specifically in its applicability "prior to the time when the goods are loaded on or after the time they are discharged from the ship."¹⁷⁴ Nevertheless, COGSA applies to "all contracts for carriage of goods by sea to or from ports of the United States in *foreign trade*,"¹⁷⁵ but it does *not* apply in United States domestic trade unless there is "an express statement that it shall be subject to the provision of this Act,"¹⁷⁶ in which case the bill of lading will be "subjected

¹⁷⁰Pub. L. No. 521, 74th Cong. (S. 1152), 49 Stat. 1207-13, codified at 46 U.S.C. Appx. §§ 1300-15 (1988).

¹⁷¹49 Stat. 1207. For Senate consideration of the additional understanding, see 81 Cong. Rec. 4254-55 (1937), reprinted in 1 Legislative History, *supra* note 131, at 602-03.

¹⁷²Deposit of Ratification, 51 Stat. 260 (1937). See also CMI Y.B., *supra* note 159, at 91-92, for ratifications and accessions.

¹⁷³See generally K. Holloway, *Modern Trends in Treaty Law: Constitutional Law, Reservation and the Three Modes of Legislation* (1967).

¹⁷⁴46 U.S.C. Appx. § 1311 (1988). See *Allstate Insurance Co. v. International Shipping Corp.*, 703 F.2d 497, 1985 AMC 760 (11th Cir. 1983) (the incorporation of COGSA by reference cannot bring the COGSA one-year time bar into force for the Harter Act period because 46 U.S.C. Appx. § 1311 (1988) preserves the Harter Act for the before and after periods).

¹⁷⁵46 U.S.C. Appx. § 1312 (1988) (first three sentences).

¹⁷⁶*Id.* (fourth sentence).

hereto as fully as if subject hereto by the express provisions of this Act.”¹⁷⁷ Lastly, while both acts exclude live animals, only COGSA excludes deck cargo.¹⁷⁸ In cases where there may be a difference in the standard of liability between the Harter Act period of coverage and the COGSA period of coverage, the burden of apportioning the damage between the two statutes, usually an impossible burden, is placed on the carrier.¹⁷⁹

A. Application of COGSA “*Ex Proprio Vigore*” in the Harter Period

1. International Trade

The Harter Act applies from the moment that the goods are taken in charge by the carrier—wherever that may be¹⁸⁰—until the goods are properly delivered.¹⁸¹ Out of that total period, COGSA will apply to the period from loading until unloading on the international voyage, *unless* COGSA itself says it does not apply because the goods have been loaded *on deck*¹⁸² or the goods have been damaged *before* the COGSA period or *after* the COGSA period.¹⁸³ The

¹⁷⁷Id.

¹⁷⁸Id. at § 1301(1)(c).

¹⁷⁹Philip Morris v. American Shipping Co., 748 F.2d 563, 1986 AMC 276 (11th Cir. 1984). See also Armco International Corp. v. Rederi A/B Disa (The Astri), 151 F.2d 5, 1945 AMC 1064 (2d Cir. 1945).

¹⁸⁰See Baker Oil Tools, Inc. v. Delta Steamship Lines, Inc., 562 F.2d 938, 1978 AMC 370 (5th Cir. 1977).

¹⁸¹The Monte Iciar, 167 F.2d 334, 1948 AMC 615 (3d Cir. 1947); Allstate Insurance, *supra* note 174; and R.L. Pritchard & Co. v. S.S. Hellenic Laurel, 342 F. Supp. 388, 1972 AMC 1534 (S.D.N.Y. 1972).

The Harter Act’s duty to care for cargo at the time of proper delivery can be illustrated by two cases involving cargoes unloaded in the Port of New York. In *Monsieur Henri Wines v. S.S. Covadonga*, 1965 AMC 740 (D.N.J. 1964), wine and cider were stored by the carrier in an unheated warehouse in January, causing the carrier to be found liable. In contrast, in *Italusa Corp. v. M/V Thalassini Kyra*, 733 F. Supp. 209, 1990 AMC 1356 (S.D.N.Y. 1990), cheese was stored in an unrefrigerated warehouse during a June heatwave. The carrier was found not to be liable, however, because no information had been made available to it with respect to the need for refrigeration.

¹⁸²Levatino Co. v. S.S. Hellenic Hero, 1969 AMC 695 (S.D.N.Y. 1965). See also *Z.K. Marine, Inc. v. M/V Archigeti*, 1991 AMC 1434 (S.D. Fla. 1991) (where COGSA was applied to the Harter Act on deck cargo by a clause incorporating the Hague Rules), and *Blanchard Lumber Co. v. S.S. Anthony II*, *supra* note 14. The *Z.K. Marine* case is commented upon in *Jarvis, Admiralty*, 16 *Nova L. Rev.* 127, 136–38 (1991).

¹⁸³*Armco International Corp. v. Rederi A/B Disa*, 151 F.2d 5, 1945 AMC 1064 (2d Cir. 1945); *Norjac Trading Corp. v. M/V Mathilda Thorden*, 173 F. Supp. 23, 1959 AMC 1831 (E.D. Pa. 1959); and *Tapco Nigeria, Ltd. v. M/V Westwind*, 702 F.2d 1252 (5th Cir. 1983).

differences between COGSA and the Harter Act as to time bar¹⁸⁴ and unit limitation are obvious.¹⁸⁵ Respecting exculpatory clauses, however, the problem is more complex. Under Article 3(8) of COGSA, exculpatory clauses that lessen the carrier's liability under COGSA are null and void,¹⁸⁶ whereas the Harter Act makes null and void clauses that relieve the carrier's negligence liability¹⁸⁷ or lessen its due diligence obligation to make the vessel seaworthy.¹⁸⁸ Thus, clauses that might survive COGSA scrutiny could fail the stricter scrutiny of the Harter Act.¹⁸⁹

The attitude of the courts is that the parties are unable to stipulate the application of COGSA *generally* to a period or method of Harter Act coverage when COGSA specifically excludes it.¹⁹⁰ Thus, some-

¹⁸⁴One year in COGSA, 46 U.S.C. Appx. § 1303(6) (1988) (fourth paragraph); no limit in the Harter Act (presumably laches will apply).

¹⁸⁵\$500 per package for packageable goods, 46 U.S.C. Appx. § 1304(5) (1988) (first paragraph in COGSA); no unit limitation in the Harter Act. But see supra notes 131-35.

¹⁸⁶David Crystal, Inc. v. Cunard Steamship Co., 339 F.2d 295, 1965 AMC 39 (2d Cir. 1964), and Encyclopedia Britannica v. S.S. Hong Kong Producer, 422 F.2d 7, 1969 AMC 174 (2d Cir. 1969).

¹⁸⁷The Orcadian, 116 F. 930 (E.D. Pa. 1902); Stockton Milling Co. v. California Nav. & Imp. Co., 184 F. 369 (9th Cir. 1908); The Isla de Panay, 292 F. 723 (2d Cir.), aff'd, 267 U.S. 260 (1923); Mackey v. United States, 197 F.2d 241, 1952 AMC 1094 (2d Cir. 1952); Isthmian S.S. Co. v. California Spray Chemical Co., 300 F.2d 41, 1962 AMC 1474 (9th Cir. 1962); Caterpillar Overseas, S.A. v. S.S. Expeditor, 318 F.2d 720, 1963 AMC 1662 (2d Cir.), cert. denied, 375 U.S. 942 (1963); and Allied Chemical International Corp. v. Companhia de Navegacao Lloyd Brasileiro, 775 F.2d 476, 1986 AMC 827 (2d Cir. 1985).

¹⁸⁸Carib Prince, supra note 64. See supra notes 64-69. Cf. The Caledonia, supra note 58 (facts occurred before enactment of the Harter Act and the Court relied on an implied warranty of seaworthiness).

¹⁸⁹Remington Rand Inc. v. American Export Lines (The Examiner), 132 F. Supp. 129, 1955 AMC 1789 (S.D.N.Y. 1955) (discharge into lighters at Bombay; neither COGSA nor the fire statute applicable); David Crystal, supra note 186; R.L. Pritchard, supra note 181; Seald-Sweet Sales v. Finnlines Oy, 1974 AMC 2006 (E.D.N.Y. 1974); B. Elliott (Canada) Ltd. v. John T. Clark & Son, 542 F. Supp. 1367, 1983 AMC 1392 (D. Md. 1982), aff'd, 704 F.2d 1305, 1983 AMC 1743 (4th Cir. 1983); Allstate Insurance, supra note 174; Sklut Hide & Furs v. Prudential Lines, 537 F. Supp. 266, 1986 AMC 960 (D. Del. 1982); Vistar, S.A. v. M/V Sea Land Express, 792 F.2d 469, 1986 AMC 2382 (5th Cir. 1986); and C. Itoh, supra note 110.

¹⁹⁰Respecting "on deck" carriage, see Blanchard Lumber, supra note 14. In that case, a shipment of lumber was carried on deck from Victoria, British Columbia, to Providence, Rhode Island. The cargo was lost overboard due to the placement of forklift trucks on top of the piles of lumber for the convenience of stevedores prior to the cargo being lashed and chained. Subsequently, the ship encountered bad weather, the forklift trucks moved, the chains parted, and the lumber was lost. The bad weather, however, was expectable for that season and geographic area. Because of the shipment from a Canadian port, there initially was a conflict of laws between the Canadian Water Carriage of Goods Act (and its exculpatory interpretation), and the Harter Act (applicable to or from ports in the United States). Judge Levet chose to apply the Harter Act because of "the strong American policy of protection to shippers . . .," noting that the Harter Act does not exclude deck cargo. The court said: "In the absence of an affirmative legislative expression to the contrary, however, I see no reason for holding that the

thing beyond an incorporation by reference is necessary; the bill of lading must be specifically "tailored" to apply to the period before and after the ocean voyage¹⁹¹ or to the carriage of cargo on deck.¹⁹²

2. Domestic Waterborne Transport—The Coastwise Option

Since COGSA does not apply to cabotage or domestic transport¹⁹³—whether internal or coastwise—from one United States port to another, the courts have had to review the clauses applying COGSA as *contractual* provisions rather than provisions mandated by Congress. This use of COGSA is referred to as the coastwise option,¹⁹⁴ applying COGSA to domestic transport. While the courts

Harter Act is superseded in all cases by the Carriage of Goods by Sea Act as to deck cargo in the 'tackle to tackle' period." On the effect of the bill of lading language that deck cargo is "carried only at Merchant's risk," the court found that "a carrier is not permitted to utilize clauses relieving itself from a duty to properly stow the cargo or to exercise due diligence to make the vessel seaworthy." Support for the proposition in cases dealing with cargo carried on deck was found in *Compania de Navigacion La Flecha v. Brauer*, 168 U.S. 104 (1897); *The Royal Sceptre*, 187 F. 224 (S.D.N.Y. 1911); *The Ponce*, 67 F. Supp. 725, 1946 AMC 1124 (D.N.J. 1946), *aff'd*, 160 F.2d 107, 1947 AMC 685 (3rd Cir. 1947); and *Pioneer Import Corp. v. Lafcomo*, 49 F. Supp. 559, 1943 AMC 572 (S.D.N.Y.), *aff'd*, 138 F.2d 907, 1943 AMC 1349 (2d Cir. 1943). See also *Globe Solvents Co. v. S.S. California*, 67 F. Supp. 719, 1946 AMC 674 (E.D. Pa. 1946). Respecting the "before" and "after" periods, see *The Monte Iciar*, *supra* note 181 (shipment of sherry wine in casks from Spain to Philadelphia, leaking on pier after discharge; no stipulation extending COGSA; clause exculpating carrier for leakage, breakage, or "spigoting" held invalid under the Harter Act). See also *California Spray*, *supra* note 187 (shipment of petroleum from the United States to Alexandria, cargo sank while on lighter to wharf; carrier liable under the Harter Act despite clause that in use of lighters the carrier shall not be responsible for any loss or damage to goods while on such lighter or in the custody of lightermen).

¹⁹¹*Davis Elliott International Co. v. Pan American Container*, 705 F.2d 705 (3rd Cir. 1983), and *Miller Export Corp. v. Hellenic Lines, Ltd.*, 534 F. Supp. 707, 1982 AMC 1890 (S.D.N.Y. 1982).

¹⁹²In *Diethelm & Co. v. S.S. Flying Trader*, 141 F. Supp. 271, 1956 AMC 1550 (S.D.N.Y. 1956), a case involving on deck carriage for a voyage from New York to Saigon, the carrier's clause read as follows: "In respect of goods carried on deck, all risks of loss or damage by perils inherent in such carriage shall be borne by the shipper or the consignee but in all other respects the custody and carriage of such goods shall be governed by the terms of this bill of lading and the provisions stated in said Carriage of Goods by Sea Act, notwithstanding sec. 1(c) thereof . . . (emphasis added)"

¹⁹³46 U.S.C. Appx. § 1312 (1988) states that "Nothing in this Act shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions"

¹⁹⁴46 U.S.C. Appx. § 1312 (1988) (first proviso) ("Provided, however, that any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter, shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter" [The clause paramount then follows]) See also *The Agwimoon*, 31 F.2d

favor coastwise option clauses, the statutory language requires that disputed clauses be measured by the standards of COGSA.¹⁹⁵

B. Application of COGSA to the Harter Act Period "ex contractu"

The application of COGSA to Harter Act periods where there is no corresponding COGSA coverage has brought forth, arguably, a stricter scrutiny by the courts than in the periods of simultaneous coverage.¹⁹⁶ This scrutiny may involve weighing the clauses by the precedents evolved under the Harter Act¹⁹⁷ and, in a reverse twist, has produced the doctrine of non-revivability of COGSA clauses in the Harter Act period.¹⁹⁸

1006, 1929 AMC 570 (4th Cir.), cert. denied, 279 U.S. 874 (1929), and *The Cornelia*, 15 F.2d 245, 1926 AMC 1337 (S.D.N.Y. 1926).

¹⁹⁵*The West Kyska*, 62 F. Supp. 511, 1945 AMC 1215 (E.D. La. 1945), aff'd, 155 F.2d 687, 1946 AMC 997 (5th Cir. 1949) (carriage of steel on deck from Baltimore to Seattle; carrier held not to have met COGSA burden of proof on peril of the sea). See also *Globe Solvents*, supra note 190; *Pannell v. S.S. American Flyer*, 157 F. Supp. 422, 1958 AMC 1428 (S.D.N.Y. 1957); *General Motors Corp. v. S.S. Mormacoak*, 327 F. Supp. 666, 1971 AMC 1647 (S.D.N.Y. 1971); and *Home Insurance Co. v. Puerto Rico Maritime Shipping Authority*, 524 F. Supp. 541, 1982 AMC 1897 (D.P.R. 1981).

¹⁹⁶See, e.g., *Colgate Palmolive Co. v. S.S. Dart Canada*, 724 F.2d 313, 1984 AMC 305 (2d Cir. 1983). In that case, the bill of lading provided that COGSA shall "govern before the goods are loaded on and after they are discharged from the ship and throughout the entire time the goods are in custody of the carrier." Although the terminal operator raised in defense the COGSA \$500 per package limit of liability, the court applied New Jersey's strict and unlimited liability of a bailee warehouseman for conversion. This case is cited with hesitation, however, because of the intense criticism it has provoked. See also *Moonwalk International v. Seatrain Italy*, 1985 AMC 1270 (S.D.N.Y. 1984). (COGSA rejected during contractual COGSA period).

Cf. *North River Ins. Co. v. Fed Sea/Fed Pac Line*, 647 F.2d 985, 1982 AMC 2963 (9th Cir. 1981), cert. denied, 455 U.S. 948 (1982), which holds that the Harter Act continues to apply in domestic trade but does not apply in international trade when COGSA is displaced. The court there approved a bill of lading forum selection clause under contractual COGSA in the case of a shipment of yachts from Hong Kong to Milwaukee and Toronto. The forum and law clause selected the maritime law of the port of destination and, respecting the Toronto destination, selected the "Exchequer Court of Canada, Quebec Admiralty District, Montreal Registry." The precise language of the Ninth Circuit follows:

Because the language of COGSA is not inconsistent with foreign jurisdiction clauses, we reject the view that COGSA preempts all contract terms when its sole force is by incorporation into a contract for foreign transportation. When international parties contractually provide for COGSA to govern disputes, they need not be barred from determining where they want the disputes to be heard. We hold, therefore, that *Bremen* [*Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 1972 AMC 1407 (1972)] controls this case, in which COGSA is incorporated into a contract for foreign carriage, outside of the *ex proprio vigore* coverage of either the Harter Act or COGSA."

647 F.2d at 990.

¹⁹⁷See supra note 189.

¹⁹⁸See David Crystal, supra note 186, where the concept of "non-revivability" of a clause void under COGSA is introduced because of the justifiable reliance of the shipper. Leather's

VI. CONCLUSION

The Harter Act has served its purposes for the past one hundred years. For the first forty-three years, it served as the brake upon the creation of exculpatory clauses in bills of lading that would deprive cargo interests of their legal rights and even impede international trade by affecting the negotiability of the bill of lading. For the past fifty-seven years, the Harter Act, in cooperation with COGSA, has reinforced an equitable allocation of risks even though the conditions of the shipping industry have changed radically.

The Harter Act changed the shipping business in a positive way. Restraints on new exculpatory clauses may have had the salutary effect of imparting more caution to an industry dependent on foresight, but we can never prove this.

Despite the understanding of its drafters, it has not proven to be chauvinistic in actual practice. Rather, the compromise introduced in the Harter Act moved into worldwide shipping through its influence on the Hague Rules, the Visby Amendments, and even the Hamburg Rules. For seventy of the past one hundred years, maritime transport has had at least a sharing of risks instead of the previously unbalanced assignment of all risks to shippers through bill of lading clauses by carriers with total control of the goods and total knowledge of the circumstances of damage to the cargo.

The concepts of due diligence and seaworthiness have never been clearly defined and the defenses of negligent navigation and management can only continue to exacerbate the relation between the carrier interests and the cargo-owning interests. In actuality, these defenses are not very important and are only retained to demonstrate that cargo must share the risks common to both interests.

The Supreme Court has interpreted the Harter Act ever more strictly until, seeking perfection, it undermined the statute with

Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 1971 AMC 2383 (2d Cir. 1971), however, is the leading authority. A container of leather goods in bales was carried from Hamburg to New York, where the container was unloaded into a terminal area from which it was stolen. The Hague Rules period having expired, the court was confronted with the issue of the validity under the Harter Act of a stamped clause with the carrier's interpretation of the COGSA unit limitation of liability to the effect that carrier liability for loss or damage to the entire container and its contents was limited to \$500. The court had no trouble finding that the clause violated COGSA, 46 U.S.C. Appx. § 1303(8) (1988), by lessening carrier liability, but failed to reach a similar conclusion under the Harter Act, relying instead on the doctrine of non-revivability which brought forth a vigorous dissent from Judge Mulligan on the absence of any basis for the non-revivability doctrine.

non-causal unseaworthiness. Accordingly, it is time to replace the special concepts appropriate to an earlier age and bring maritime transport in line with road, rail, and air transport.

A misguided effort to codify maritime law in 1985 would have repealed the Harter Act while at the same time altering the traditional expressions of the Hague Rules as found in COGSA.¹⁹⁹ In that context, the Harter Act had to be preserved.

Now, with the Hamburg Rules having come into force internationally on November 1, 1992,²⁰⁰ it is time to consider the future of the Harter Act.

Turning to the Hamburg Rules, we see the period of carrier responsibility to be similar to Harter, from the taking in charge at the port of loading until delivery at the port of discharge.²⁰¹ We see, however, that the obligation to use due diligence to make the vessel seaworthy is gone, but in its place is a duty, more closely resembling the absolute warranty of seaworthiness,²⁰² that requires the carrier to take all measures to avoid damage to the cargo and its consequences.²⁰³

As the Hamburg Rules have a new time bar,²⁰⁴ a unit limitation amount acceptable to all parts of the maritime industry,²⁰⁵ and a provision making null and void those exculpatory clauses that lessen carrier liability,²⁰⁶ the time has come to conclude that the Harter Act has done its work. Accordingly, when the Hamburg Rules replace COGSA, the Harter Act should be repealed.

¹⁹⁹See H.R. 3157, 99th Cong., 1st Sess. This was a draft prepared by the Law Revision Counsel of the House of Representatives in conjunction with the Committee on Merchant Marine and Fisheries. The goal was "simplification" of statutory language.

²⁰⁰Art. 30, Hamburg Rules.

²⁰¹Art. 4, Hamburg Rules.

²⁰²See *supra* note 63.

²⁰³Art. 5, Hamburg Rules ("unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences").

²⁰⁴Art. 20(1), Hamburg Rules (two years).

²⁰⁵Art. 6, Hamburg Rules (2.5 SDR per kilo or 835 SDR per package, whichever is greater).

²⁰⁶Art. 23, Hamburg Rules.