Modernizing and Reforming U.S. Maritime Law: The Impact of the Rotterdam Rules in the United States

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SUMMARY

I. INTRODUCTION

After seven years of work by the U.N. Commission on International Trade Law (UNCITRAL)[1] and its Working Group III on Transport Law, which followed almost

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1. *See generally* Jose Angelo Estrella Faria, *Uniform Law for International Transport at UNCITRAL:*

four years of preparatory work by the Comité Maritime International (CMI),[2] the United Nations last December adopted its "Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea"[3] (referred to here as "the Convention" or "the Rotterdam Rules"). The Convention, which will supersede the Hague,[4] Hague-Visby,[5] and Hamburg Rules,[6] will be signed at a formal ceremony in Rotterdam on September 23, 2009[7] and will enter into force when twenty countries have ratified it.[8] As this process goes forward, it will be helpful to compare the new Convention with existing law and consider the broader impact that the changes are likely to have. Other participants in this symposium address some of the most important aspects of the Convention and compare those proposals to existing legal regimes.[9] In this article, I therefore focus on aspects that others do not address in

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New Times, New Players, and New Rules, *supra* pp. 303–17 (discussing the UNCITRAL methodology in the context of this project); Mary Helen Carlson, *U.S. Participation in Private International Law Negotiations: Why the New UNCITRAL Carriage of Goods Convention Is Important to the United States*, *supra* pp. 269–76 (discussing the U.S. participation in this project).

2. *See* Michael F. Sturley, *The United Nations Commission on International Trade Law's Transport Law Project: An Interim View of a Work in Progress*, 39 TEX. INT'L L.J. 65, 68–75 (2003) [hereinafter Sturley, *Interim View*] (discussing the background of this project, including the CMI's preparatory work).

Before the CMI began its preparatory work, the MLA coordinated a domestic effort to achieve a commercial compromise to amend the U.S. Carriage of Goods by Sea Act (COGSA). *See generally* Michael F. Sturley, *Proposed Amendments to the Carriage of Goods by Sea Act*, 18 HOUS. J. INT'L L. 609 (1995) [hereinafter Sturley, *Proposed Amendments*] (describing the proposed amendments and the process by which the MLA drafted them). The MLA proposal went as far as a Senate hearing until it was tabled to await the outcome of the UNCITRAL efforts. *See generally* Michael F. Sturley, *The Fate of the MLA's Proposed Amendments to the Carriage of Goods by Sea Act*, 1 BENEDICT'S MAR. BULL. 105 (2003) (discussing how the proposed amendments stalled in the Senate and the subsequent developments in the international community); Michael F. Sturley, *The Proposed Amendments to the Carriage of Goods by Sea Act: An Update*, 13 U.S.F. MAR. L.J. 1 (2000–01) (discussing Congressional consideration of the amendments). The MLA project was one of several domestic efforts around the world that helped to provide the impetus for a new international agreement; thus it is in some sense part of the background to the Rotterdam Rules. Moreover, the substance of the MLA compromise also provides strong evidence of the U.S. commercial position going into the international negotiations.

3. G.A. Res. 63/122, U.N. Doc. A/RES/63/122 (Dec. 11, 2008) [hereinafter Rotterdam Rules]. The UNCITRAL web site (www.uncitral.org) contains—in the six official U.N. languages—the final text of the Convention, each draft as it was negotiated, the reports of each meeting of Working Group III, the formal proposals made by each delegation, and all of the other documents that were filed with UNCITRAL.

4. Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155 [hereinafter Hague Rules].

5. The Hague-Visby Rules are simply the Hague Rules as amended by the Visby Protocol. Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, 1412 U.N.T.S. 128. The Hague-Visby Rules were further amended by the Special Drawing Right (SDR) Protocol. Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Dec. 21, 1979, 1984 Gr. Brit. T.S. No. 28 [hereinafter Hague-Visby Rules].

6. United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 1695 U.N.T.S. 3 [hereinafter Hamburg Rules].

7. G.A. Res. 63/122, para. 3, U.N. Doc. A/RES/63/122 (Dec. 11, 2008).

8. Rotterdam Rules, *supra* note 3, art. 94(1).

9. *See*, *e.g.*, Tomotaka Fujita, *The Comprehensive Coverage of the New Convention: Performing Parties and the Multimodal Implications*, *supra* pp. 366–67 (discussing the proposed treatment of the carrier's subcontractors and the wider geographic scope of the Convention); Chester D. Hooper, *Forum Selection and Arbitration in the Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, *supra* pp. 422–26 (discussing the proposed jurisdiction and arbitration chapters and comparing them to existing regimes). Some of the papers compare provisions of the Convention to the absence of any governing law at present. *See*, *e.g.*, Manuel Alba, *Electronic Commerce Provisions in the UNCITRAL Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly*

relevant detail and discuss how those proposed changes would impact the law of the United States in particular.[10]

If we focus on the big picture, the Convention's proposed changes to U.S. law will not be earth-shattering. The new convention is deliberately evolutionary, not revolutionary. The focus is on updating and modernizing the existing legal regimes that govern the carriage of goods,[11] filling in some of the gaps that have been identified in practice over the years,[12] and harmonizing the governing law when possible.[13] Indeed, several proposals to deal with more revolutionary subjects, or at least subjects in which harmonization would have been difficult, were abandoned precisely so that the Working Group could in fact complete the project and address the core issues.[14]

In the United States today, the governing legal regime is the 1936 Carriage of Goods by Sea Act (COGSA),[15] which is, for the most part, simply the domestic enact-

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*by Sea***,** *supra* pp. 393–415 (discussing provisions of the Convention intended to facilitate electronic commerce); Gertjan van der Ziel, *Chapter 10 of the New UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: The Right of Control and the Controlling Party*, *supra* pp. 377–86 (discussing provisions of the Convention's innovative treatment of the person with the right to control the goods).

10. Because I do not focus on issues that others discuss in more detail, I mention some of the most important changes to U.S. law only in passing. For a more detailed discussion of these changes, readers should refer to other contributions to this symposium. *See*, *e.g.*, Fujita, *supra* note 9 (discussing multimodal implications); Hooper, *supra* note 9 (discussing jurisdiction and arbitration); David Short, Gen. Counsel, FedEx Corp., How Far Can You Dream?, Address at the Texas International Law Journal Symposium: Transport Law for the 21st Century: The New UNCITRAL Convention (Mar. 28, 2008) (discussing freedom of contract).

11. For example, none of the existing regimes facilitate electronic commerce, which did not exist when they were negotiated. The Convention addresses this modern trend not only in the separate chapter devoted to the subject but throughout the text. *See generally* Alba, *supra* note 9 (discussing provisions of the Convention that facilitate electronic commerce).

12. For example, none of the existing regimes address the rights and responsibilities of the person with the right to control the goods. The Convention includes a separate chapter to fill this gap. *See generally* van der Ziel, *supra* note 9 (discussing the Convention's treatment of the right of control and the controlling party).

13. To the extent that the Convention succeeds, nations that currently adhere to different regimes will replace those old laws with this single new convention. The Convention seeks to facilitate this process by proposing compromise solutions that meet the needs addressed by each of the existing legal regimes. *See, e.g.*, Rotterdam Rules, *supra* note 3, art. 17 (codifying the delicately balanced compromise on the carrier's basis of liability); *see generally* Alexander von Ziegler, *The Liability of the Contracting Carrier*, *supra* pp. 339–48 (discussing article 17).

14. *See*, *e.g.*, U.N. Comm'n on Int'l Trade Law, Working Group III (Transport Law), *Report of Working Group III (Transport Law) on the Work of Its Fifteenth Session*, paras. 154–155, U.N. Doc. A/CN.9/576 (May 13, 2005) [hereinafter *Fifteenth Session Report*] (deciding to delete draft article addressing *lis pendens* because "a rule on *lis pendens* would be extremely difficult to agree upon, given the complexity of the subject matter and the existence of diverse approaches . . . in the various jurisdictions").

Deleting controversial proposals continued throughout the UNCITRAL process. During its June 2008 session, the Commission deleted two articles proposed by the Working Group. *See* U.N. Comm'n on Int'l Trade Law [UNCITRAL], *Report of the United Nations Commission on International Trade Law,* paras. 45–53, U.N. Doc. A/63/17 (June 16–July 3, 2008) (reporting on the debate leading to the decision to delete the proposed article governing transport beyond the scope of the contract of carriage); *id.* paras. 109–10 (reporting on the debate leading to the decision to delete the proposed article governing cessation of shipper's liability).

15. Ch. 229, 49 Stat. 1207 (1936), *reprinted in statutory note following* 46 U.S.C. § 30701 (2006) [hereinafter COGSA]. COGSA was previously codified at 46 U.S.C. §§ 1300–1315 (from 1936 to 1983) and 46 U.S.C. app. §§ 1300–1315 (from 1983 to 2006). When Congress recently completed the recodification of

ment of the 1924 Hague Rules.[16] Updating and modernizing are particularly necessary when a law drafted over 85 years ago still regulates an industry that has changed remarkably in the meantime.[17] The draftsmen of the early 1920s did not anticipate the container revolution,[18] let alone electronic commerce,[19] so COGSA is even more outdated than the more modern international regimes that most of the world's commercial powers and most U.S. trading partners have already adopted.[20] The benefits of international uniformity in this field are well known and widely accepted,[21] but the need to harmonize U.S. law with the rest of the world's is particularly acute. Unique U.S. doctrines have developed over the years with the result that COGSA as applied by the U.S. courts not only differs from the more modern international regimes, but is also out of step even with the international understanding of the Hague Rules.[22]

Despite the heavy focus on modernization and harmonization, some of the Convention's evolutionary changes include modest reforms in legal doctrine. Perhaps the most visible of these changes is the elimination of the heavily criticized "navigational fault" exception,[23] which currently permits a carrier to escape liability for cargo damage caused by the crew's negligence in the navigation or management of the vessel.[24] But a number of other provisions in the Convention, some of which

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Title 46, *see* Act of Oct. 6, 2006, Pub. L. No. 109-304, 120 Stat. 1485 (recodifying Title 46), COGSA was not included in the recodification. *See generally* Michael F. Sturley, *Reflections on the Recodification of Title 46*, 2 BENEDICT'S MAR. BULL. 209, 213–16 (2004) (explaining that "the most important improvements [to COGSA] would [have been] substantive . . . and thus beyond the reach of a codification statute" and elaborating that it would have been "a particularly bad time for the United States to rewrite COGSA"). As a result, it simply dropped out of Title 46 and became an uncodified statute. Although it remains in force, COGSA appears in the U.S. Code only as a note within the recodified Harter Act, 46 U.S.C. §§ 30701–30707 (2006) (previously codified at 46 U.S.C. app. §§ 190–196).

16. Hague Rules, *supra* note 4. The U.S. courts have long recognized the relationship between COGSA and the Hague Rules. *See, e.g.*, Vimar Sequros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 536 (1995) (describing COGSA as "modeled" on the Hague Rules); Robert C. Herd & Co. v. Krawill Mach. Corp., 359 U.S. 297, 301 (1959) (recognizing that COGSA "was lifted almost bodily from the Hague Rules").

17. *See generally* Carlson**,** *supra* note 1, at 270 (noting that the current regimes for the carriage of goods, including the Hague Rules, are outdated because they "fail to address the astonishing changes brought about by containerization, multimodal transport, and e-commerce" and offer "no possibility for party autonomy").

18. *See generally* BRIAN J. CUDAHY, BOX BOATS: HOW CONTAINER SHIPS CHANGED THE WORLD (2006) (discussing the impact of the container revolution); MARC LEVINSON, THE BOX: HOW THE SHIPPING CONTAINER MADE THE WORLD SMALLER AND THE WORLD ECONOMY BIGGER (2006) (same).

19. Alba, *supra* note 9, at 389–91.

20. *See, e.g.*, Michael F. Sturley, *Uniformity in the Law Governing the Carriage of Goods by Sea*, 26 J. MAR. L. & COM. 553, 553–54 (1995) [hereinafter Sturley, *Uniformity*] (describing how other countries have moved forward).

21. *See, e.g.*, *id.* at 556–59 (noting that the Supreme Court, Congress, and foreign courts and legislatures have all recognized the benefits of international uniformity).

22. *Id.* at 564–67.

23. *See* Sturley, *Interim View*, *supra* note 2, at 95 (discussing the UNCITRAL Working Group's early decision to eliminate the navigational fault exception). Although this was one of the Working Group's high-profile decisions, it is unlikely to have much practical impact in the United States, where COGSA § 4(2)(a) codifies the navigational fault exception. *See* Sturley, *Uniformity*, *supra* note 21, at 577 (noting that "the navigational fault defense is rarely, if ever, successful in the United States").

24. To the extent that the Hamburg Rules, *supra* note 6, already eliminate the navigational fault exception, this reform could also be viewed as an example of the Convention's effort to harmonize the law. Most observers, however, would describe this as a long-overdue reform.

are of key importance,[25] will also change the law to make it better suited to meet the needs of the industry as it enters the 21st century.

II. SCOPE OF APPLICATION

Although COGSA as a whole is primarily the U.S. enactment of the Hague Rules,[26] its scope of application differs from other nations' regimes in several key respects. Some of these differences arise from differing interpretations of a uniform text. Both COGSA and the Hague Rules, for example, are limited in their application "only to contracts of carriage covered by a bill of lading or any similar document of title."[27] The U.S. courts, however, guided in part by broad statutory definitions of a bill of lading,[28] have construed COGSA section 1(b)'s "bill of lading or any similar document of title" very broadly.[29] Some other countries, in contrast, strictly limit the phrase, holding that nonnegotiable documents such as sea waybills do not qualify.[30]

The Convention largely abandons the old reliance on bills of lading,[31] with the result that otherwise-qualifying shipments are generally covered without regard to the type of documentation issued.[32] Indeed, the Convention applies to otherwise-qualifying transactions even if no documentation at all is issued.[33] This new approach

25. Perhaps the most important reform is the Convention's revised treatment of the parties' freedom of contract. This change is still evolutionary rather than revolutionary, given that the Hague Rules already permitted freedom of contract between the immediate parties to a transaction in certain situations. *See* Hague Rules, *supra* note 4, art. 5 (creating the so-called "charterparty exclusion"). The Convention extends this freedom of contract to volume contracts. *See* Short, *supra* note 10.

26. *See supra* note 16 and accompanying text.

27. COGSA, *supra* note 15, § 1(b) (previously codified at 46 U.S.C. app. § 1301(b)); Hague Rules, *supra* note 4, art. 1(b).

28. *See, e.g.*, 49 U.S.C. § 80103(b) (2006) (recognizing nonnegotiable bills of lading); U.C.C. § 7-104(b) (1999) (recognizing the same).

29. Staarag v. Maersk, Inc., 486 F.3d 607, 610–11 (9th Cir. 2007) (applying COGSA to a transaction in which the carrier issued "a Non-Negotiable Seaway Bill").

30. *See, e.g.*, CHARLES DEBATTISTA, SALE OF GOODS CARRIED BY SEA 189–99 (1990) (discussing English law).

31. Although the Convention does not generally rely on the issuance of a bill of lading to define its scope of application, one provision ensures that carriage under a bill of lading that satisfies the other requirements, such as the internationality of the shipment and a connection with a contracting State, will be covered. *See* Rotterdam Rules, *supra* note 3, art. 6(2) (providing coverage in the non-liner, non-charterparty context when a bill of lading or other transport document is issued). This provision was designed to ensure that the Convention does not narrow the current scope of the Hague and Hague-Visby Rules. *See generally* Michael F. Sturley, *Solving the Scope-of-Application Puzzle: Contracts, Trades, and Documents in the UNCITRAL Transport Law Project*, 11 J. INT'L MAR. L. 22, 39 (2005) (tracing the development and drafting of this provision).

32. *See* Rotterdam Rules, *supra* note 3, art. 5(1) (generally applying the Convention to all qualifying "contracts of carriage" without regard for the form of the contract). The general rule is subject to some exceptions, including the traditional "charterparty exception," *id*. art. 6(1), which was a feature of the Hague, Hague-Visby, and Hamburg Rules. Hague Rules, *supra* note 4, art. 5; Hague-Visby Rules, *supra* note 5, art. 5; Hamburg Rules, *supra* note 6, art. 2(3).

33. U.S. courts regularly apply COGSA when no bill of lading was issued because the goods were damaged before loading but a bill of lading would have been issued if the transaction had gone according to plan. *See, e.g.*, Interflow Ltd. v. Burlington N. Santa Fe Ry., 2005 AMC 2894, 2900 (S.D. Tex. 2005) (holding that the "standard bill of lading applies, even though no bill of lading issued because the goods were never loaded"). The Rotterdam Rules, however, go beyond this situation to govern transactions in which there was never any intent to issue a bill of lading or other transport document. Rotterdam Rules,

would have changed the result in those rare U.S. cases in which a shipment was held to be outside the scope of COGSA because the requirements of section 1(b) were not satisfied.[34] But for the most part, the Convention's new approach will produce the same results in the United States while expanding coverage in other countries.[35]

The 1936 Congress also explicitly altered the Hague Rules' scope-of-application provisions in some respects. Most obviously, the international regime by its terms governs "all bills of lading issued in any of the contracting States,"[36] thus applying the Hague Rules, as a practical matter, to outbound shipments *from* a contracting State. COGSA's enacting clause, in contrast, declares that the Act applies to bills of lading for shipments "*to or from* ports of the United States,"[37] thus applying COGSA to both inbound and outbound shipments to or from this particular contracting State.[38] On this issue, the new Convention essentially brings the international regime into line with current U.S. law. The general scope-of-application provision makes the new convention applicable to shipments either to[39] or from[40] a contracting State.

A practical effect of this change may be to increase the number of cases in which conflicting laws apply. As a result of Congress's decision to apply COGSA to both inbound and outbound shipments, under current law two regimes will typically be compulsorily applicable on shipments *to* the United States: that of the country of origin (under the international rule) and the U.S. COGSA (under the U.S. rule).[41] But as a general matter, only the U.S. COGSA is compulsorily applicable on

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supra note 3, art. 5. European short seas shipments, for example, are often conducted without bills of lading or comparable transport documents. That approach is less common in the United States. *See generally* U.S. DEPT. OF TRANSP., MARITIME ADMIN., FOUR CORRIDOR CASE STUDIES OF SHORT-SEA SHIPPING SERVICES 1–3 (2006) (evaluating the viability of increasing short-sea shipping in the U.S. and comparing U.S. and European efforts in short-sea shipping); MARK YONGE, U.S. DEP'T OF TRANSP., MARITIME ADMIN., EUROPEAN UNION SHORT SEA SHIPPING 9 (2004), http://advancedmaritimetechnology.aticorp.org/short-sea-shipping/create3s-european-commission-initiative/EUSSS_04-2004.pdf (describing the European Union's simplifications of documentary and administrative procedures for short sea shipping).

34. Such cases are unusual, but examples do exist. *See, e.g.,* Starrag v. Maersk, Inc., 486 F.3d 607, 612 n.5 (9th Cir. 2007) ("COGSA does not apply . . . by its own force" when a "Non-Negotiable Seaway Bill" is issued that does not qualify as "'a bill of lading or any similar document of title'"); PPG Indus., Inc. v. Ashland Oil Co., 527 F.2d 502, 505–06 (3d Cir. 1975) (COGSA does not apply when the "Transportation Agreement" is neither a bill of lading nor a similar document of title).

35. The compromise that U.S. commercial interests accepted before the CMI and UNCITRAL efforts began, *see supra* note 2, also abandoned the old reliance on bills of lading. Moreover, the U.S. delegation supported the change throughout the UNCITRAL negotiations.

36. Hague Rules, *supra* note 4, art. 10.

37. COGSA, *supra* note 15, enacting clause (emphasis added) (previously codified at 46 U.S.C. app. § 1300). COGSA § 13 (previously codified at 46 U.S.C. app. § 1312) includes the same language.

38. The United States is one of the few countries to make Hague-based legislation applicable to both inbound and outbound shipments. *See* Michael F. Sturley, *Bills of Lading for Cargo Carried in Foreign Trade*, *in* 2A BENEDICT ON ADMIRALTY § 41, at 5-3 & nn.9–13 (7th rev. ed. 2007) [hereinafter Sturley, *Bills of Lading in Foreign Trade*] (noting that Belgium and possibly the Philippines are the only other countries to apply their domestic, Hague-based legislation to both inbound and outbound shipments). The Hamburg Rules, however, also apply to both inbound and outbound shipments. *See* Hamburg Rules, *supra* note 6, art. 2(1) ("The provisions of this Convention are applicable to all contracts of carriage by sea between two different States . . . .").

39. *See* Rotterdam Rules, *supra* note 3, art. 5(1)(c)–(d) (making the Convention applicable when the place of delivery or the port of discharge is in a contracting State).

40. *See* Rotterdam Rules, *supra* note 3, art. 5(1)(a)–(b) (making the Convention applicable when the place of receipt or the port of loading is in a contracting State).

41. *See* Sturley, *Bills of Lading in Foreign Trade*, *supra* note 38, 5-3 n.21 (collecting cases).

shipments *from* the United States, since the international rule[42] and the U.S. rule both point to the U.S. statute. When other countries ratify the Convention, more cases will arise in which the country of origin and the country of destination both apply their own law to both inbound and outbound shipments. Thus for a shipment from the United States to a convention country—which would now be subject to U.S. COGSA in either country's courts—a U.S. court would be obliged to apply U.S. law while the foreign country would be required to apply the Convention.[43] If the United States adheres to COGSA, this change could cause serious problems. When the U.S. ratifies the Convention, however, the two "conflicting" laws will both be the convention, and no true conflict should arise.

The 1936 Congress made another scope-of-application choice that the international community has not adopted. The Hague Rules were generally understood to apply only to shipments in foreign trade, and that understanding was made explicit in the Hague-Visby Rules.[44] As a general principle, Congress agreed with this view when it enacted COGSA and limited its scope to shipments "in foreign trade."[45] But Congress also added a provision known as the "coastwise option,"[46] which permits the parties by contract to agree that COGSA will apply even to domestic shipments.[47] Under the coastwise option, this contractual agreement applies with the force of law.[48] The Convention, continuing the current international rule, is strictly limited to international shipments. Indeed, for the new convention to apply to a particular contract, both the sea voyage and the overall contractual carriage[49] must be international.[50] If Congress wishes to continue the current coastwise option, therefore, it would need to include a comparable provision in supplemental or enacting legislation.[51]

III. PERIOD OF RESPONSIBILITY

On the closely related issue of the carrier's period of responsibility, the Hague Rules and COGSA both followed the limited tackle-to-tackle approach, meaning

42. *See, e.g.*, Chapman Marine Pty. Ltd. v. Wilhelmsen Lines A/S (1999), 1999 AMC 1221, 1228 (Austl. Fed. Ct.) (Australian case applying U.S. COGSA to a shipment from the United States to Australia).

43. *See supra* notes 39–40 and accompanying text.

44. Hague-Visby Rules, *supra* note 5, art. 10.

45. COGSA, *supra* note 15, enacting clause (previously codified at 46 U.S.C. app. § 1300). COGSA § 13 (previously codified at 46 U.S.C. app. § 1312) includes the same language.

46. *See generally* Michael F. Sturley, *Bills of Lading in Domestic Trade that Incorporate COGSA; The Coastwise Option*, *in* 2A BENEDICT ON ADMIRALTY § 42 (7th rev. ed. 2007) [hereinafter Sturley, *Coastwise Option*] (explaining the operation of such contractual agreements).

47. COGSA, *supra* note 15, § 13 (previously codified at 46 U.S.C. app. § 1312).

48. Sturley, *Coastwise Option*, *supra* note 46, at 5–6.

49. In the multimodal context, the overall contractual carriage includes more than the sea voyage. *See generally* Fujita, *supra* note 9 (describing the Convention's abandonment of the "tackle to tackle" or "port to port" approach and adoption of the broader "door to door" approach).

50. Rotterdam Rules, *supra* note 3, art. 5(1).

51. In view of the Supreme Court's recent decision in *Medellín v. Texas*, 128 S. Ct. 1346 (2008), it seems likely that some additional effort will be made to ensure that the new convention will be fully effective when the United States ratifies it. This might involve some explicit recognition that the Convention qualifies as a self-executing treaty, or it might involve supplemental or enacting legislation in conjunction with the United States' ratification of the Convention.

that the carrier is responsible under the relevant regime only during "the period from the time when the goods are loaded on to the time when they are discharged from the ship."[52] With respect to the periods before loading or after discharge, the parties are free to agree on other rules,[53] subject to any mandatory national law that might otherwise apply.[54] The Hague-Visby Rules did not change the tackle-to-tackle approach.[55] The Hamburg Rules expanded it only slightly, adopting a port-to-port approach.[56]

The Convention, in one of its most significant innovations, adopts a door-to-door approach.[57] The carrier is responsible under the new regime for the entire contractual period of carriage,[58] which in a multimodal shipment will often be from the carrier's receipt of the goods at an inland location in the country of origin all the way to the carrier's delivery of the goods at an inland location in the country of destination. This fundamental change in the law was initially controversial,[59] but it is the only way to accomplish the most basic goal of a uniform international legal regime in this field; to obtain certainty, predictability, and uniformity, one legal regime must govern the entire performance of the contract.[60] In practice today, the parties often agree in their contract to extend the maritime regime inland,[61] but such a contractual extension takes effect only with the force of a contract.[62] The Convention will apply a uniform[63] legal regime with the force of law.

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52. COGSA, *supra* note 15, § 1(e) (previously codified at 46 U.S.C. app. § 1301(e)); *accord* Hague Rules, *supra* note 4, art. 1(e).

53. *See* COGSA, *supra* note 15, § 7 (previously codified at 46 U.S.C. app. § 1307) (stating that nothing in COGSA prohibits an agreement "as to the responsibility and liability of the carrier" for cargo loss or damage "prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea"); *accord* Hague Rules, *supra* note 4, art. 7.

54. In the United States, for example, the Harter Act, 46 U.S.C. §§ 30701–30707 (2006), and the Carmack Amendment, 49 U.S.C. § 11706 (2006) (rail carriage) and 49 U.S.C. § 14706 (2006) (motor carriage), impose mandatory limits on some aspects of the parties' ability to agree on other rules. *See also* COGSA, *supra* note 15, § 12 (previously codified at 46 U.S.C. app. § 1311) (clarifying that COGSA does not override other laws that would apply in the absence of COGSA); *see generally* Michael F. Sturley, *Freedom of Contract and the Ironic Story of Section 7 of the Carriage of Goods by Sea Act*, 4 BENEDICT'S MAR. BULL. 201, 202–08 (2006) [hereinafter Sturley, *Ironic Story*] (explaining that COGSA was not intended to affect otherwise applicable law before landing or after discharge).

55. Hague-Visby Rules, *supra* note 5, art. 1(e), 7.

56. Hamburg Rules, *supra* note 6, art. 4(1).

57. Rotterdam Rules, *supra* note 3, art. 12(1).

58. *See generally* Fujita, *supra* note 9, at 352–53 (explaining that the "door to door" approach adopted by the Convention means that the "carrier's period of responsibility extend[s] from the place of receipt to the place of delivery of the goods for carriage," subject to the terms of the carrier's contract).

59. *See* Sturley, *Interim View*, *supra* note 2, at 76–79 (discussing the UNCITRAL Working Group's initial consideration of the door-to-door provision).

60. The Supreme Court made this point forcefully in its recent *Kirby* decision: "Confusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning." Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 29 (2004).

61. *See, e.g.*, Michael F. Sturley, *The Application of COGSA as a Matter of Contract*, *in* 2A BENEDICT ON ADMIRALTY § 43, at 5–9 n.4 (7th rev. ed. 2007) (collecting cases).

62. Sturley, *Ironic Story*, *supra* note 54, at 201 & n.5.

63. The Convention's limited-network approach does make the regime somewhat less uniform in this context. *See* Fujita, *supra* note 9, at 358 ("[The] [n]etwork system divides the carriage into different modes of transport and imposes liability on the carrier based on the liability regime which would be mandatorily applicable if the parties entered into a separate contract of carriage corresponding to each transport mode."). But the Convention will still be more uniform than any available alternative.

In the United States, the shift from COGSA's tackle-to-tackle regime to the new door-to-door regime will be a welcome change,[64] but it will not have the huge practical impact that it would have had just a few years ago. Because bills of lading routinely include a clause to extend the maritime regime to govern the inland portion of the carriage in any event,[65] the significant issue in practice is generally whether the maritime regime governs the inland portion of a multimodal shipment *ex proprio vigore* (with the force of law) or merely with the force of contract.

Whether the maritime regime applies *ex proprio vigore* or contractually is important as a practical matter only if an inconsistent alternative exists that the parties could not displace by contract.[66] When state law was understood to govern the inland portion of a multimodal shipment,[67] and when at least some aspects of state law could not be displaced by contract,[68] having the maritime regime apply with the force of law would more often be dispositive. Now that the Supreme Court has held that the general maritime law generally displaces state law in multimodal contract cases anyway,[69] the issue should matter only in cases that would otherwise have been governed by a mandatory federal statute that is inconsistent with the Convention.

It is hard to envision a plausible case in which the Harter Act[70] would create a conflict with the Convention on an issue that the parties could not address by contract.[71] The Carmack Amendment[72] will presumably conflict with the Convention from time to time, just as it occasionally conflicts with the contractual extension of COGSA today,[73] but those conflicts are likely to be less common and less serious

64. Many commentators have been justifiably critical of the tackle-to-tackle approach. *See, e.g.*, John O. Honnold, *Ocean Carriers and Cargo; Clarity and Fairness—Hague or Hamburg?*, 24 J. MAR. L. & COM. 75, 81–83 (1993) (criticizing the tackle-to-tackle approach). In practice, commercial parties have sought to avoid it by contract, typically extending COGSA to govern the inland portion of the multimodal shipment. Thus the compromise that U.S. commercial interests accepted before the CMI and UNCITRAL efforts began, *see supra* note 2, also took a door-to-door approach. *See* Sturley, *Proposed Amendments*, *supra* note 2, at 622–25 (describing the proposed amendment). Also, the U.S. delegation supported the new approach throughout the UNCITRAL negotiations.

65. *See supra* note 61 and accompanying text.

66. If otherwise applicable law could be displaced by contract, then the parties' contractual incorporation of the maritime regime will be adequate.

67. *See, e.g.*, Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 808 (2d Cir. 1971) (holding that the inland loss of a container was governed by state law).

68. *See, e.g.*, Colgate Palmolive Co. v. S/S Dart Can., 724 F.2d 313, 315–16 (2d Cir. 1983) (holding that New Jersey bailment law was mandatory and therefore governed the carrier's liability for goods lost from a warehouse, notwithstanding the extension of COGSA to the inland portions of the contract). Some aspects of state law, however, could be displaced by contract. *See, e.g.*, Indemnity Ins. Co. of N. Am. v. Hanjin Shipping Co., 348 F.3d 628, 635–36 (7th Cir. 2003) (holding that the parties could elect to be governed by COGSA rather than Illinois or Indiana law for goods lost during the inland portion of a multimodal shipment).

69. *Kirby*, 543 U.S. at 22–29.

70. 46 U.S.C. §§ 30701–30707 (previously codified at 46 U.S.C. app. §§ 190–196).

71. Indeed, the Harter Act might even be repealed when the Convention is ratified. When COGSA was enacted, section 12 explicitly preserved the Harter Act from implied repeal with respect to the periods before loading and after discharge. COGSA, *supra* note 15, § 12 (previously codified at 46 U.S.C. app. § 1311). In view of the Convention's door-to-door application, it is less obvious why preserving the Harter Act would be necessary once the Convention is in force.

72. 49 U.S.C. § 11706 (2006) (with respect to rail carriage); 49 U.S.C. § 14706 (2006) (with respect to motor carriage).

73. *See, e.g.*, Sompo Japan Ins. Co. of Am. v. Union Pacific R.R. Co., 456 F.3d 54 (2d Cir. 2006)

than today's. In view of the Convention's significant increase in the limitation amounts,[74] fewer package limitation disputes are likely to arise; in view of the Convention's doubling of the current time-for-suit period,[75] the Carmack Amendment's time-for-suit provision is less likely to conflict with the Convention's.

IV. LIMITATION AMOUNT

The U.S. COGSA is out-of-date in many ways because it has not been changed in any substantive way since it was enacted in 1936. Perhaps the most visible example of COGSA's advanced age has been the package limitation,[76] which provides that a carrier's liability will generally not exceed "$500 per package . . . or in case of goods not shipped in packages, per customary freight unit . . . ."[77] When the Hague Rules were negotiated in the early 1920s, and when COGSA was enacted in 1936, $500 per package was considered a major improvement for cargo interests.[78] Not only was this limitation figure five times as high as the $100 per package amount that was commonly included in bills of lading at the time,[79] $500 per package was also thought to be high enough to cover all but the most valuable cargo.[80] In the intervening years, of course, the value of the dollar has fallen considerably. In 1936, $500 was worth well over an order of magnitude more than $500 is worth today.[81] This disparity has led many to call for the United States to update the limitation amount.[82]

(resolving a conflict between an inland extension of COGSA and the Carmack Amendment with respect to the package limitation); Altadis USA, Inc. v. Sea Star Line, LLC, 458 F.3d 1288 (11th Cir. 2006) (resolving a conflict between a modification of COGSA that had been extended inland by contract and the Carmack Amendment with respect to the time-for-suit provision).

74. *See infra* notes 99–104 and accompanying text; *cf. Sompo Japan,* 456 F.3d at 54 (applying the Caramack Amendment to the domestic rail portion of a continuous intermodal shipment rather than COGSA, which would have limited liability).

75. *See infra* notes 225–231 and accompanying text; *cf. Altadis*, 458 F.3d at 1288 (applying a COGSA-based one-year statute of limitations, rather than the Caramack Amendment's two-year statute of limitations, to a claim involving lost cargo shipped under a multimodal bill of lading incorporating COGSA).

76. Although the amount of the package limitation is a highly visible aspect of a liability regime, it is not necessarily the most important. For packaged goods in containers, which represent a high proportion of U.S. trade, even the $500 COGSA limitation is adequate to provide full compensation for many shipments. *See infra* notes 83–85 and accompanying text.

77. COGSA, *supra* note 15, § 4(5) (previously codified at 46 U.S.C. app. § 1304(5)). A shipper may increase the limitation amount by declaring a higher value at the time of shipment. *Id*.

78. *See, e.g.*, Michael F. Sturley, *The History of COGSA and the Hague Rules*, 22 J. MAR. L. & COM. 1, 23 (1991) [hereinafter Sturley, *History*] ("In view of the limitation and agreed valuation clauses with much lower amounts that courts had previously upheld, . . . [the] package limitation was considered a major improvement . . . .").

79. *See, e.g.*, Reid v. Fargo, 241 U.S. 544 (1916) (upholding $100 per package limitation amount in bill of lading); *see also* Michael F. Sturley, *The Package Limitation and the Fair Opportunity Requirement*, *in* 2A BENEDICT ON ADMIRALTY § 166, at 16-29 & nn.6–10 (7th rev. ed. 2007) [hereinafter Sturley, *Package Limitation*] (collecting cases).

80. Sturley, *Package Limitation*, *supra* note 79, at 16–32.

81. From April 1936, when COGSA was enacted, to November 2008, for example, the consumer price index increased by 1450% (from 13.7 to 212.425). U.S. Dep't of Labor, Bureau of Labor Statistics, Consumer Price Index (Jan. 16, 2009), ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt. The consumer price index may not be the most relevant measure for these purposes, but it illustrates the general point.

82. *See, e.g.*, *Cargo Liability and the Carriage of Goods by Sea Act (COGSA): Oversight Hearing before the Subcomm. on Merchant Marine of the H. Comm. on Merchant Marine & Fisheries*, 102d Cong., 66 (1992) [hereinafter *COGSA Oversight Hearing*] (statement of Roger W. Wigen, Manager,

As it happens, however, the effects of inflation have been offset to some extent by two consequences of the container revolution. Containerization has permitted carriers to transport containerized cargo in much smaller packages than would have been possible under the 1936 break-bulk practices, with the result that the package limitation is less likely to apply.[83] Moreover, the efficiencies of containerization[84] have made it economically feasible to ship less valuable cargo than would otherwise have been possible. As a result, the average value of cargoes in general has not increased at the same pace as inflation generally and the average value of a package has been held down by the shrinking size of each package.[85]

The bigger problem has been with non-containerized cargo. U.S. courts have interpreted the COGSA package definition to include even large pieces of machinery,[86] and the alternative "customary freight unit" limitation has been interpreted to permit a carrier to limit its liability to $500 for an entire shipment.[87] As a result of these interpretations, it is easy to find cases in which shippers have recovered only a few pennies on the dollar when their cargo has been lost or damaged. For example, in *Norfolk Southern Railway Co. v. Kirby*, the Supreme

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Transportation Policy and Industry Affairs, 3M, National Industrial Transportation League) ("[An] increase [in] the per package liability limit for the first time in more than 50 years . . . would be an improvement over the current system."); *id*. at 82 (statement of Gloria E. M. Bartholomew, Marketing Manager, Tire Division, Rubber Manufacturers Association, American Shippers for Hamburg Alliance) (illustrating the inadequacy of the $500 liability limitation "in today's economy and [with] the advent of containerized shipping"); *id*. at 100 (statement of William J. Augello, Executive Director and General Counsel, Transportation Claims and Prevention Council, Inc.) (discussing favorably an increase in the per package liability limitation); *cf*. John O. Honnold, *supra* note 64, at 90–92 (criticizing the United States' failure to update the package limitation on clarity grounds).

83. Consider, for example, a shipment of television sets (a fairly common high-value cargo). If television sets had existed in 1936, or if the industry had still used 1936 methods to ship television sets this century, shipment would have required the consolidation of a number of sets in a large packing crate. In case of damage, the package limitation would have applied to everything in that packing crate. Thus $500 would have been the total compensation for perhaps a dozen television sets. Containerization, however, permits each set (packaged in the cardboard box that the ultimate consumer sees) to be loaded into the container. The law then treats these individual boxes as "packages" for limitation purposes. *See* Mitsui & Co. v. Am. Exp. Lines, 636 F.2d 807, 817–21 (2d Cir. 1981) ("[W]hen what would ordinarily be considered packages are shipped in a container supplied by the carrier and the number of such units is disclosed in the shipping documents, each of those units and not the container constitutes the 'package' . . . ."). Thus $500 would be the maximum compensation for each television set.

84. *See* James V. Selna, *Containerization and Intermodal Service in Ocean Shipping*, 21 STAN. L. REV. 1077, 1087–88 (1969) (discussing how containerization reduces shipping costs).

85. According to data collected by the U.S. delegation to Working Group III, the $500 COGSA limitation amount is still adequate to provide full compensation to the overwhelming majority of the packages carried in U.S. trade. *See generally* Michael F. Sturley, *Setting the Limitation Amounts for the UNCITRAL Transport Law Convention: The Fall 2007 Session of Working Group III*, 5 BENEDICT'S MAR. BULL. 147, 162–63 (2007) [hereinafter Sturley, *Limitation Amounts*] (explaining why proponents of the Hague-Visby limits suggest the limit is sufficient to cover 85–90% of maritime shipments).

86. *See* Fireman's Fund Ins. Co. v. Tropical Shipping & Constr. Co., 254 F.3d 987, 997–99 (11th Cir. 2001) (holding that a "fully mobile, preassembled, hydraulically operated staging unit" constitutes one COGSA package).

87. *See* Craddock Int'l Inc. v. W.K.P. Wilson & Son, 116 F.3d 1095, 1108–09 (5th Cir. 1997) (upholding the district court's finding that a $1.7 million fish meal processing plant shipped on a lump-sum basis was a "customary freight unit" to which the $500 limitation applied); Ulrich Ammann Bldg. Equip. Ltd. v. M/V Monsun, 609 F. Supp. 87, 90–91 (S.D.N.Y. 1985) (treating thirty unpackaged Caterpillar tractors shipped on a lump-sum basis as a single "customary freight unit" and limiting recovery for them to $500).

Court's most recent cargo case, the shipper of cargo worth $1.5 million was permitted to recover only $5,000 (1/3 of 1% of the cargo's value).[88]

Most of the world recognized the need to revise the package limitation when the Hague-Visby Rules were negotiated.[89] The Visby Protocol increased the package limitation and, even more significantly, added an independent limitation based on the weight of the goods.[90] The Hague-Visby package limitation is not based on the U.S. dollar but on the International Monetary Fund's Special Drawing Right (SDR),[91] which means that the dollar value of the package limitation fluctuates on a daily basis.[92] At the exchange rates in force in June 2008, when the final text of the Convention was agreed, the Hague-Visby package limitation—666.67 SDRs per package[93]—was just over twice as high as the COGSA package limitation.[94] The weight-based limitation is two SDRs per kilogram,[95] which was about $1.45 per pound. The Hamburg Rules increased both of these figures by 25%, up to 835 SDRs per package and 2.5 SDRs per kilogram.[96]

Although only a very small proportion of the world's maritime trade is governed by the Hamburg Rules, a disproportionately large number of the countries participating in Working Group III had adopted that regime.[97] Moreover, many of these countries felt very strongly that the new convention should represent significant "progress" over the Hamburg Rules (with "progress" being defined as increasing the limitation amounts).[98] It was therefore necessary for the major maritime nations (which generally favored keeping the limits at Hague-Visby levels but were willing to go up to Hamburg limits) to compromise with countries seeking much higher limits.[99] In the end, the Working Group agreed that the Convention would increase the package limitation to 875 SDRs (almost a 5% increase above the Hamburg limit) and the weight-based limitation to 3 SDRs per kilogram (a 20% increase above the Hamburg limit).[100]

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88. 543 U.S. at 20 n.1, 21.

89. *COGSA Oversight Hearing*, *supra* note 82, at 30 (statement of William J. Augello, Executive Director and General Counsel, Transportation Claims and Prevention Council, Inc.) ("International dissatisfaction with the per-package limitation and the problems of determining exactly what constitutes a package led to negotiation of . . . the Hague-Visby Rules").

90. Hague-Visby Rules, *supra* note 5, art. 4(5)(a).

91. The SDR was introduced by the SDR Protocol, *supra* note 5. As initially promulgated, the Hague-Visby limitation amounts were gold-based. Visby Protocol, *supra* note 5, art. 2.

92. Int'l Monetary Fund, *Factsheet: Special Drawing Rights (SDRs)*, Sept. 17, 2008, http://www.imf.org/external/np/exr/facts/sdr.HTM [hereinafter IMF, *Factsheet*].

93. Hague-Visby Rules, *supra* note 5, art. 4(5)(a).

94. *See infra* note 101.

95. Hague-Visby Rules, *supra* note 4, art. 4(5)(a). In practical terms, this means that packages weighing less than 333.33 kilograms (approximately 735 pounds) would recover under the package limitation while heavier packages would recover under the weight limitation.

96. Hamburg Rules, *supra* note 6, art. 6(1)(a).

97. *See* U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group III (Transport Law), *Status of Conventions and Model Laws*, at 6–7, U.N. Doc. A/CN.9/651 (May 30, 2008) (listing the parties to the Hamburg Rules).

98. U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group III (Transport Law), *Report of Working Group III (Transport Law) on the Work of Its Twenty-first Session*, para. 185, U.N. Doc. A/CN.9/645 (Jan. 30, 2008) [hereinafter *Twenty-first Session Report*].

99. *See* Sturley, *Limitation Amounts*, *supra* note 85 (recounting the first part of the compromise story); *Twenty-first Session Report*, supra note 98, paras. 183–88, 196–203 (chronicling the final compromise).

100. Rotterdam Rules, *supra* note 3, art. 59(1).

In dollar terms, this means that Convention limits are approximately $1,440 per package (a 188% increase above the COGSA limit) and almost $2.20 per pound (an innovation that does not exist in COGSA).[101] These increases would have no effect on the majority of cases in which the COGSA limit is already high enough to provide full recovery,[102] but it will provide significantly higher recoveries in those extreme cases that expose COGSA to the strongest criticism. In *Kirby*,[103] for example, the shipper's recovery under the Convention would have been over $417,000 (instead of $5,000).[104] More importantly, having a more reasonable limitation amount will eliminate much of the wasteful litigation designed solely to "break" the limitation.[105]

V. THE PACKAGE DEFINITION

Although limitation of liability under COGSA is based primarily on a "package"—without the weight-based alternative that exists in other international regimes[106]—the statute did not define the key term "package."[107] Courts have

101. The figures throughout this section of the text assume that the SDR is worth approximately $1.60, as it was during the UNCITRAL Commission meeting in June 2008, when the final text of the Convention was agreed. IMF, *Factsheet*, *supra* note 92. As this article goes to press, however, the SDR is worth just under $1.50, *id.*, which is about 7% less than that. As a result, the Hague-Visby package limitation, for example, has dropped (in dollar terms) to just under twice as much as COGSA's (rather than just over twice as much, *see supra* text at note 93). SDR exchange rate archives are available online at http://www.imf.org/external/np/fin/data/param_rms_mth.aspx.

The value of the package and weight limits under the Rotterdam Rules can readily be calculated in dollar terms once the value of the SDR is known. The following table lists limitation amounts at various values:

Value of SDR	Package limitation	Weight Limit per Kilogram	Weight Limit per Pound
$1.30	$1,137.50	$3.90	$1.77
$1.35	$1,181.25	$1.00	$0.45
$1.40	$1,225.00	$4.20	$1.91
$1.45	$1,268.75	$4.35	$1.97
$1.50	$1,312.50	$4.50	$2.04
$1.55	$1,356.25	$4.65	$2.11
$1.60	$1,400.00	$4.80	$2.18
$1.65	$1,443.75	$4.95	$2.25
$1.70	$1,487.50	$5.10	$2.31

Of course, similar tables could be constructed to show the value of the package and weight limits in dollar terms for the Hague-Visby and Hamburg Rules at various SDR values.

102. *See supra* note 85.

103. 543 U.S. 14. *See supra* note 88 and accompanying text (discussing the relevance of *Kirby*).

104. The increase is explained primarily by the addition of a weight-based limitation. The damaged cargo in *Kirby*, 543 U.S. 14, weighed 86,970 kilograms. Even under the Hague-Visby Rules, the recovery would have been over $278,000.

105. *See infra* notes 135–170 and accompanying text (discussing the deviation and fair opportunity doctrines).

106. *See supra* notes 90–96 and accompanying text (discussing the weight-based limitations in the Hague-Visby and Hamburg Rules).

107. Courts have frequently complained about the lack of a statutory definition. *See*, *e.g.*, Aluminios

therefore been required to fill in the gap, and their decisions have sometimes been conflicting.[108] In a series of decisions beginning with Judge Friendly's seminal opinion in *Mitsui & Co. v. American Export Lines*,[109] and later refined by the Second Circuit in *Binladen BSB Landscaping v. M/V Nedlloyd Rotterdam*,[110] however, the U.S. courts have widely agreed on the proper analysis for packages inside a shipping container.[111] Under the *Mitsui-Binladen* approach, the individual packages in the container are the "packages" for limitation purposes, rather than the container itself, when the bill of lading enumerates the contents of the container and the enumerated items would themselves qualify as "packages."[112]

The judicial *Mitsui-Binladen* rule is very similar to the international community's approach in the Hague-Visby and Hamburg Rules. With the so-called "container clause," the Hague-Visby Rules declare that the "packages or units enumerated in the bill of lading" are "deemed" to be the packages or units for limitation purposes when "a container, pallet or similar article of transport is used to consolidate goods," but that "such article of transport" is otherwise "considered the package or unit."[113] The Hamburg Rules include a substantially identical "container clause."[114]

The one substantial difference between the container clauses of the Hague-Visby and Hamburg Rules and the U.S. judicial interpretation of the COGSA "package" is the treatment of individual items on pallets and other "articles of transport" that are smaller than a container. Although U.S. jurisprudence looks to the bill of lading to see the number of packages within a container,[115] it treats a palletized unit as a single "package," even when the individual items on the pallet have been enumerated on the bill of lading.[116] To take a simple example, suppose that the bill of lading and supporting evidence show that a container carries 2268 cardboard cartons shrink-wrapped on 42 pallets. Applying COGSA, a U.S. court

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Pozuelo, Ltd. v. S.S. Navigator, 407 F.2d 152, 154 (2d. Cir. 1968) ("Unfortunately, no definition of 'package' or 'customary freight unit' is included in the statute. Due to the absence of any guides . . . as to these terms, the decisions reveal little consistency."); Orient Overseas Container Line, Ltd. v. Sea-Land Serv., Inc., 122 F. Supp. 2d 481, 485 (S.D.N.Y. 2000) ("COGSA does not define the crucial nouns that lie at the heart of § 4(5); nor does the legislative history furnish any assistance."). Of course, COGSA does not define "package" because the Hague Rules did not define "package," and Congress simply followed the international text.

108. *Compare*, *e.g.*, *Aluminios Pozuelo*, 407 F.2d at 155 (holding that a three-ton toggle press bolted to a skid was a "package") *with* Hartford Fire Ins. Co. v. Pac. Far E. Line, 491 F.2d 960, 965 (9th Cir. 1974) (rejecting *Aluminios Pozuelo* and holding that an eighteen-ton electrical transformer bolted to a skid was not a "package").

109. 636 F.2d 807 (2d Cir. 1981).

110. 759 F.2d 1006 (2d Cir. 1985).

111. *See also* Universal Leaf Tobacco Co. v. Companhia de Navegacao Maritima Netumar, 993 F.2d 414, 417 n.1 (4th Cir. 1993) (adopting "the Second Circuit's rule in its entirety"); Hayes-Leger Assocs., Inc. v. M/V Oriental Knight, 765 F.2d 1076, 1080 (11th Cir. 1985) (following *Binladen*).

112. *Binladin*, 759 F.2d at 1015–16; *Mitsui*, 636 F.2d at 821–22. *See also* Michael F. Sturley, *Packages*, *in* 2A BENEDICT ON ADMIRALTY § 167, at 16-55 to 16-58 (7th rev. ed. 2007) [hereinafter Sturley, *Packages*].

113. Hague-Visby Rules, *supra* note 5, art. 4(5)(c).

114. Hamburg Rules, *supra* note 6, art. 6(2)(a).

115. *See, e.g.*, *Universal Leaf*, 993 F.2d at 416; *Hayes-Leger*, 765 F.2d at 1080.

116. *See, e.g.*, Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft, 375 F.2d 943, 943–46 (2d Cir. 1967) (finding that a pallet containing six cardboard cartons was a single "package").

would find 42 "packages," each of which consisted of 54 cardboard cartons.[117] But under the Hague-Visby or Hamburg Rules, there would be 2268 packages (and thus a much higher limitation amount).[118]

The Convention is directly based on the container clauses of the Hague-Visby and Hamburg Rules, but it expands the scope to include not only pallets but also goods carried "in or on a vehicle."[119] A "vehicle" is defined (somewhat circularly) as "a road or railroad cargo vehicle."[120] Thus the Convention will look, for limitation purposes, to the smallest "package" accurately listed on the bill of lading as being carried in a container, on a pallet, in a truck, or in a railroad car that is shipped by sea.

VI. THE CUSTOMARY FREIGHT UNIT

When Congress enacted COGSA in 1936, it made some modest efforts to "clarify" the meaning of the underlying Hague Rules.[121] One of these clarifications relates to limitation of liability. Under the Hague Rules, the carrier may limit its liability to a fixed sum "per package or unit."[122] But under COGSA, the $500 limitation amount is "per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit."[123] In other words, Congress took the ambiguous term "unit," which might mean a shipping unit or a freight unit,[124] and determined that it was to mean a "customary freight unit."[125]

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117. *See* Groupe Chegaray/V. De Chalus v. P & O Containers, 251 F.3d 1359, 1367–70 (11th Cir. 2001) (finding that 42 pallets containing 2268 cardboard cartons were 42 "packages").

118. Essentially the same change was part of the compromise that U.S. commercial interests (for the sake of achieving greater uniformity) accepted before the CMI and UNCITRAL efforts began. *See* Sturley, *Proposed Amendments*, *supra* note 2, at 679–80 (reprinting "container clause" from proposed amendments to COGSA accepted by U.S. commercial interests). Moreover, the U.S. delegation supported this change throughout the UNCITRAL negotiations.

119. Rotterdam Rules, *supra* note 3, art. 59(2).

120. *Id.* art. 1(27).

121. Some of the other clarifications were more clearly consistent with the Hague Rules. For example, the proviso to the fourth paragraph of section 3(6), which Congress added to the Hague Rules text, clarifies that failure to give the notice of loss or damage specified in the first paragraph does not prejudice a shipper's ability to bring a timely lawsuit. COGSA, *supra* note 15, § 3(6) (previously codified at 46 U.S.C. app. § 1303(6)).

122. Hague Rules, *supra* note 4, art. 4(5).

123. COGSA, *supra* note 15, § 4(5) (previously codified at 46 U.S.C. app. § 1304(5)).

124. "Shipping" and "freight" units also have their ambiguities, but it is generally thought that a shipping unit has some connection with the physical attributes of the goods (and thus with how they are shipped) while the freight unit relates solely to how the carrier collects money for the shipment. *See* Michael F. Sturley, *Customary Freight Units*, 2A BENEDICT ON ADMIRALTY §168, at 16-62 to 16-64 (7th rev. ed. 2007) [hereinafter *Customary Freight Units*] (distinguishing the legal significance of a customary freight unit from that of the shipping unit). In *Waterman S.S. Corp. v. U.S. Smelting, Ref. & Mining Co.*, 155 F.2d 687, 693–94 (5th Cir. 1946), for example, freight on a cargo of structural steel had been calculated at a set rate per hundred pounds. The customary freight unit was not a steel plate (which weighed well over one hundred pounds) but the one hundred pounds on which the freight was calculated. *Id.*

125. *See, e.g.*, *Relating to the Carriage of Goods by Sea: Hearings Before the House Comm. on the Merchant Marine and Fisheries*, 68th Cong., 2d Sess. 84–85 (1925) (testimony of John Nicolson), *reprinted in* 3 THE LEGISLATIVE HISTORY OF THE CARRIAGE OF GOODS BY SEA ACT AND THE *TRAVAUX PRÉPARATOIRES* OF THE HAGUE RULES 208–09 (Michael F. Sturley ed., 1990) [hereinafter LEGISLATIVE HISTORY] (containing testimony suggesting that the unit be that of ordinary sale of the commodity); *id*. at 115–17 (testimony of Norman Draper), *reprinted in* 3 LEGISLATIVE HISTORY at 239–41; *id*. at 178–80

Courts and commentators have suggested that this was not a clarification of the Hague Rules but an alteration. The Canadian Supreme Court, for example, held that the Hague Rules' "unit" is a unit of goods, which is legally distinct from the U.S. "customary freight unit."[126] The U.S. courts applying the new Congressional term altered the original meaning of the Hague Rules even further. Although earlier cases seemed to take "customary" seriously,[127] recent cases accept any "freight unit" that is listed in the bill of lading, with no regard for whether that unit is customary in the industry.[128] Thus if a shipment is made on a "lump sum" basis, meaning that the shipper agrees to pay the carrier a set price for the entire shipment,[129] the courts have been willing to treat the entire shipment as a customary freight unit.[130]

The Convention rejects the U.S. "clarification" and reaffirms the traditional language with a different clarification.[131] Under article 59(1), the carrier may limit its liability to "875 [SDRs] per package or other shipping unit,"[132] thus implicitly (but nevertheless deliberately) rejecting the U.S. customary freight unit. The choice is unlikely to have any practical effect on the cases that find a large piece of equipment to be a single unit,[133] in part because the piece of equipment would often qualify as either a freight unit or a shipping unit, but more importantly because the new weight-based limitation[134] would make the package or unit limitation irrelevant whenever the purported package or unit weighs more than 291.67 kg. (approximately 643 pounds).

VII. THE FAIR OPPORTUNITY DOCTRINE AND THE LOSS OF THE RIGHT TO LIMIT LIABILITY

Despite prominent examples to the contrary,[135] the U.S. courts have traditionally been suspicious of package limitations, particularly when a carrier claims the right to

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(testimony of William H. Chandler), *reprinted in* 3 LEGISLATIVE HISTORY at 302–04.

126. *See* Falconbridge Nickel Mines, Ltd. v. Chimo Shipping Ltd., 1974 S.C.R. 933, 946–47, [1973] 2 Lloyd's Rep. 469, 475 (Can. 1973) (explaining that a "shipping unit" is a "unit of goods"). *See also, e.g.*, Groupe Chegaray/V. De Chalus v. P & O Containers, 251 F.3d 1359, 1362–63 (11th Cir. 2001) (explaining that Congress altered the Hague Rules "in one significant respect" when it added the "customary freight unit" language).

127. *See, e.g.*, Braz. Oiticica, Ltd. v. The Bill, 55 F. Supp. 780, 783 (D. Md. 1944) (considering the deposition evidence of an expert witness on the freight unit that was customarily used in the relevant trade), *aff'd sub nom.*, Lorentzen v. Braz. Oiticica, Ltd., 145 F.2d 470 (4th Cir. 1944) (per curiam).

128. *See* Sturley, *Customary Freight Units*, *supra* note 124, at 16-62 to 16-64 (stating that "courts have dropped the requirement that a freight unit be customary").

129. Craddock Int'l Inc. v. W.K.P. Wilson & Son, Inc., 116 F.3d 1095, 1109 (5th Cir. 1997).

130. *See, e.g.*, *id.* at 1108–10 (finding that a $1.7 million fish meal processing plant shipped on a lump sum basis was a "customary freight unit").

131. This should not be a controversial change in the United States. As part of the compromise that U.S. commercial interests accepted before the CMI and UNCITRAL efforts began, *see supra* note 2, the "customary freight unit" was simply dropped from the text. *See* Sturley, *Proposed Amendments*, *supra* note 2, at 679 (reprinting statutory proposal). Under that proposal, a "shipping unit" would have been treated as a "package" under U.S. jurisprudence. The Rotterdam Rules have simply reached the same result with greater clarity. *Id.* Moreover, the U.S. delegation supported the UNCITRAL clarification throughout the negotiations.

132. Rotterdam Rules, *supra* note 3, art. 59(1).

133. *See, e.g.*, Caterpillar Overseas, S.A. v. Marine Transp., Inc., 900 F.2d 714 (4th Cir. 1990) (finding that a tractor is a single unit regardless of its size or weight).

134. *See supra* notes 90–104 and accompanying text (discussing the weight-based limitations in the Hague-Visby and Hamburg Rules).

135. *See, e.g.*, Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14 (2004) (finding that the package limitation

limit its liability to a small proportion of the shipper's actual loss.[136] Over the years, therefore, the courts have created several judicial doctrines to deprive the carrier of the benefit of COGSA's package limitation, sometimes for faults that are considered particularly egregious and sometimes for minor faults that have little to do with the loss suffered. Two of these creations continue to be important today. The deviation doctrine, which pre-dates COGSA by at least a century, will be discussed below. The so-called "fair opportunity" doctrine will be addressed here.[137]

Building on a somewhat analogous line of railway cases,[138] U.S. courts have generally held that a carrier may not rely on the package limitation unless it has offered the shipper a "fair opportunity" to avoid the limitation by declaring a higher value (and paying a higher freight rate).[139] The precise definition of "fair opportunity" varies among the circuits, but it generally requires the carrier to give some sort of notice, which can generally be in a boilerplate clause on the back of a bill of lading. In those circuits that have adopted the doctrine,[140] the penalty for failing to satisfy its requirements is always the loss of the right to rely on the package limitation.

The international community, recognizing that the benefits of the package limitation will be lost unless its enforcement is generally certain and predictable, have taken steps to ensure that the limitation is "unbreakable" under ordinary circumstances. Exceptions must be made for a carrier's truly egregious personal faults. It would be difficult even to imagine that any court would be willing to enforce a package limitation to protect a carrier that had established a deliberate policy of stealing the cargo and reselling it at a substantial profit. But breaking the package limitation should be limited to such extreme faults, and not upset the agreed risk allocation when a carrier is merely negligent, or even grossly negligent. Recognizing this principle, the Visby Protocol introduced a new provision to define the limited circumstances in which a carrier would lose the right to limit its liability:

> Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability . . . if it is proved that the damage resulted from an

clause was binding on cargo owner).

136. *See* Sturley, *Packages*, *supra* note 112, at 16-58 & nn.57–58 (discussing the likelihood that courts will "remain highly reluctant to limit a carrier's liability for the loss of an entire container to only $500").

137. Other such doctrines reappear occasionally, sometimes described as a form of deviation. *See, e.g.*, Beresford Metals Corp. v. S/S Salvador, 779 F.2d 841 (2d Cir. 1985) (denying the benefit of the package limitation to a carrier that had issued a "false bill of lading").

138. For a detailed history (and critique) of the "fair opportunity" doctrine, *see* Michael F. Sturley, *The Fair Opportunity Requirement Under COGSA Section 4(5): A Case Study in the Misinterpretation of the Carriage of Goods by Sea Act*, 19 J. MAR. L. & COM. 1 (1988). For an update of more recent developments, *see* Sturley, *Package Limitation*, *supra* note 79, at 16-34 to 16-45.

139. *E.g.*, Nemeth v. Gen. S.S. Corp., 694 F.2d 609 (9th Cir. 1982); Pan Am. World Airways, Inc. v. Cal. Stevedore & Ballast Co., 559 F.2d 1173 (9th Cir. 1977).

140. Only the Third Circuit has expressly rejected the fair opportunity doctrine. *See* Ferrostaal, Inc. v. M/V Sea Phoenix, 447 F.3d 212, 219–28 (3d Cir. 2006) (discussing why the fair opportunity doctrine is inconsistent with COGSA). The First Circuit has addressed the doctrine without deciding whether to adopt it. *See generally* Henley Drilling Co. v. McGee, 36 F.3d 143 (1st Cir. 1994) (holding that the bill of lading met fair opportunity notice requirements without embracing the fair opportunity doctrine). Most other circuits have adopted some version of the doctrine. *See* Sturley, *Package Limitation*, *supra* note 79, at 16-35 to 16-43 (collecting cases).

> act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.[141]

A carrier's liability for its negligent, even grossly negligent, conduct is thus subject to limitation, but the carrier is liable without limitation for its intentional conduct (or conduct that is so reckless as to rise to the level of intentional). The Hamburg Rules adopt a similar rule that is, if anything, slightly stronger.[142]

In the negotiations leading to the Rotterdam Rules, it was again clear that the package limitation should be essentially unbreakable. Indeed, part of the compromise that produced such a significant increase in the limitation amount[143] was that the language of the Hamburg Rules would be made even stronger to make it even clearer that the package limitation should not be broken except in the most extreme circumstances. Thus article 61(1) specifies that the right to limitation is lost

> if the claimant proves that the loss . . . was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.[144]

This strengthens the comparable provision of the Hamburg Rules by imposing the requirement that the fault justifying the loss of limitation must be "personal" to the carrier (or other party claiming a right to limit).[145] For corporate owners, only the fault of a sufficiently senior shore-based manager will be imputed to the owner. Thus if a seaman recklessly disposes of a lighted cigarette in the hold of a vessel loaded with explosives, the carrier will still be entitled to limit its liability for the resulting damage unless the claimant can show that senior management actively encouraged smoking on board (with the intent to cause such damage) or recklessly failed to

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141. Hague-Visby Rules, *supra* note 5, art. 4(5)(e).

142. *See* Hamburg Rules, *supra* note 6, art. 8(1) (stating that a carrier is not entitled to the benefit of limited liability when loss, damage, or delay in delivery is caused by acts or omissions done intentionally or recklessly with knowledge). The Hamburg language largely follows the Visby language, but under the Hamburg Rules the cargo claimant must show that the carrier intended to cause "such" damage (or had knowledge that "such" damage would probably result). *Id.* In other words, a carrier must intend (or know the risk of) the particular damage at issue. Under the Hague-Visby Rules, it is enough for the carrier to intend (or know the risk of) some damage (which is not necessarily the damage that in fact occurred). Hague-Visby Rules, *supra* note 5, art. 4(5)(e).

143. *See supra* notes 99–105 and accompanying text (discussing the compromise on limitation amounts in the negotiation of the Rotterdam Rules).

144. Rotterdam Rules, *supra* note 3, art. 61(1). Article 61(2) provides a parallel provision for breaking limitation in the context of damages for delay. *Id.* art. 61(2).

145. The concept of "personal" fault in the maritime context is most familiar in the United States under the somewhat-analogous Limitation Act. 46 U.S.C. §§ 30501–11. The Limitation Act provides for what is sometimes described as "global limitation" of all the claims against a shipowner, as opposed to the unit limitation at issue here. *See, e.g.*, XIA CHEN, LIMITATION OF LIABILITY FOR MARITIME CLAIMS 35 (2001) ("Limitation of liability in cargo claims may be a governed by global limitation regime as well as specific liability regimes for carriage of goods by sea."). Section 30505(b) requires that claims subject to limitation must arise "without the privity or knowledge of the owner." 46 U.S.C. 30505(b). A section of the Limitation Act known as the "Fire Statute," now codified as 46 U.S.C. § 30504, similarly excuses the carrier from liability for losses caused by fire "unless the fire resulted from the design or neglect of the owner." *Id.* § 30504. This provision was essentially reenacted (with the same meaning) as COGSA's fire defense, but the phrase "fault or privity" replaced "design or neglect," *see* COGSA, *supra* note 15, § 4(2)(b) (previously codified at 46 U.S.C. app. § 1304(2)(b)). Despite the verbal variations, all of these provisions have been construed to require the personal fault of the owner as described in the text.

enforce a no-smoking policy (with knowledge that such damage would probably result). Senior management's negligence, even if gross negligence, will not suffice.[146]

Article 61 is the sole avenue for breaking limitation, preempting all inconsistent alternatives.[147] Article 59, which imposes the limits of liability,[148] expressly declares that it is "[s]ubject to" article 61(1) and it is not subject to any other method of breaking limitation.[149] Moreover, article 4 declares that the Convention's limitation provisions apply in any action regardless of the form of the proceeding or the theory on which the claim is advanced.[150] If this were not enough, article 2 instructs courts interpreting the Convention to have regard "to its international character and to the need to promote uniformity in its application,"[151] a clear direction to ignore unique doctrines of national law that have been omitted from the Convention.[152]

VIII. DEVIATION

Long before COGSA or the Hague Rules were even considered, the common-law courts developed the deviation doctrine.[153] If the carrier committed an unjustifiable "deviation" (a term whose meaning varied over time)[154] then it would lose the benefit of any exculpatory clauses in the bill of lading.[155] After the enactment of COGSA, most U.S. courts held that an unjustifiable deviation similarly ousted the statutory protections of the new statute,[156] particularly the package limitation.[157] This is somewhat surprising, since the COGSA package limitation by its

146. *See* Rotterdam Rules, *supra* note 3, art. 61(1) (setting out the required mental state as "intent to cause such loss or recklessly and with knowledge that such loss would probably result").

147. *Id.* art. 61.

148. *Id.* art. 59.

149. *d.* art. 59. Article 60 creates the rules for limiting liability for damages due to delay. *Id.* at art. 60. It is "[s]ubject to" article 61(2), the parallel provision for breaking limitation in the context of damages for delay. *Id.*

150. Rotterdam Rules, *supra* note 3, art. 4(1). Article 4(1) specifically applies to "[a]ny provision of this Convention that may . . . limit the liability of . . . the carrier." *Id.*

151. *Id.* art. 2.

152. The elimination of the fair opportunity doctrine should not be a controversial change in the United States. U.S. commercial interests agreed to its elimination as part of the compromise that they accepted before the CMI and UNCITRAL efforts began. *See* Sturley, *Proposed Amendments*, *supra* note 2, at 637–38 (discussing the proposed bill eliminating the doctrine). Moreover, the U.S. delegation supported this change throughout the UNCITRAL negotiations. In any event, U.S. courts have been moving in the same direction since the Ninth Circuit's decision in *Carmen Tool & Abrasives, Inc. v. Evergreen Lines*, 871 F.2d 897 (9th Cir. 1989). *See generally* Sturley, *Package Limitation*, *supra* note 79, at 16-44 to 16-45 (describing recent developments in the fair opportunity doctrine).

153. *See generally* F.M.B. Reynolds, *The Implementation of Private Law Conventions in English Law: The Example of the Hague Rules* (1990), *in* BUTTERWORTH LECTURES 1990–91 1, 30–45 (1992) (discussing the development of the English doctrine); Michael F. Sturley, *Deviation*, 2A BENEDICT ON ADMIRALTY, chapter XII (7th rev. ed. 2007) [hereinafter Sturley, *Deviation*] (summarizing the development of the deviation doctrine); Steven F. Friedell, *The Deviating Ship*, 32 HASTINGS L.J. 1535, 1537–58 (1981) (discussing the development of the U.S. doctrine).

154. Sturley, *Deviation*, *supra* note 153, § 122.

155. *See, e.g.*, St. Johns N.F. Shipping Corp. v. S.A. Companhia Geral Commercial do Rio de Janeiro, 263 U.S. 119, 124 (1923) (noting that the carrier "became liable as for a deviation, [and] cannot escape by reason of the relieving clauses inserted in the bill of lading").

156. *See, e.g.*, Sturley, *Deviation*, *supra* note 153, at 12-44 to 12-47 & nn.18–31 (collecting cases).

157. As a practical matter, only the package limitation is significant here. The carrier loses the benefit of most of the "excepted perils" in COGSA § 4(2) for almost any fault. COGSA, *supra* note 15,

terms applies "in any event."[158] In his seminal opinion in *Jones v. The Flying Clipper*,[159] however, Judge Weinfeld explained that "in any event" did not include in the event of a deviation.[160] This conclusion has been strenuously criticized in the secondary literature,[161] but it has undoubtedly become the majority rule in the United States.[162]

For most of the world, the deviation doctrine is a non-issue. But for the United States, and perhaps some other common-law countries,[163] the doctrine in effect gives a random windfall to a few cargo owners (or their underwriters) for reasons that are difficult to reconcile with other established doctrines.[164] Even more significantly, the possibility of obtaining this random windfall produces a great deal of wasteful litigation, even when the effort to claim the windfall seems unlikely to succeed.[165] The Convention's large increase in the limitation amount[166] would no doubt moot much of this litigation anyway. Cargo claimants will not need to break limitation if the limitation amount is already adequate to cover the full loss, and that will be true in most cases under the new convention.

The Convention takes the further step of clarifying that a deviation, in and of itself, does not deprive the carrier of any of its rights under the convention. Article 24 explicitly provides:

> When pursuant to applicable law a deviation constitutes a breach of the carrier's obligations, such deviation of itself shall not deprive the carrier or a maritime performing party of any defence or limitation of this Convention, except to the extent provided in article 61.[167]

In other words, the convention has an explicit provision—article 61—under which a carrier can lose its limitation rights. That provision is the exclusive remedy for

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§ 4(2) (previously codified at 46 U.S.C. app. § 1304(2)(a) & (b)). It is not surprising that a fault qualifying as a "deviation" would have the same result. Under current law, the carrier retains the benefit of the navigational fault and fire exceptions despite employee fault, *see* COGSA, *supra* note 15, § 4(2)(a) & (b) (previously codified at 46 U.S.C. app. § 1304(2)(a) & (b)), but the Convention eliminates the former exception and significantly modifies the latter. *See generally* von Ziegler, *supra* note 13, at 339–48.

158. COGSA, *supra* note 15, § 5 (previously codified at 46 U.S.C. app. § 1304(2)(a) & (b)).

159. 116 F. Supp. 386 (S.D.N.Y. 1953).

160. *Id.* 388–91.

161. *See*, *e.g.*, GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 177, 183 (2d ed. 1975) (describing deviation as "a doctrine of doubtful justice under modern conditions, of questionable status under [COGSA], and of highly penal effect").

162. *See, e.g.*, Sturley, *Deviation*, *supra* note 153, at 12–45 to 12–47 & nn. 26–31 (collecting cases).

163. *See, e.g.*, Martin Davies, *Deviation is Alive and Well and Living in New South Wales*, 19 AUSTL. BUS. L. REV. 379 (1991) (describing a case in which the old deviation principles still applied); *but see, e.g.*, Simon Baughen, *Does Deviation Still Matter?*, 1991 LLOYD'S MAR. & COM. L.Q. 70 (1991) (arguing that the traditional deviation doctrine should no longer apply in light of recent developments).

164. The courts are clear that a carrier guilty of gross negligence, for example, still retains the benefit of the package limitation. *See, e.g.*, Sea-Land Serv., Inc. v. Lozen Int'l, LLC, 285 F.3d 808, 818 (9th Cir. 2002) (explaining that "[e]ven when a carrier has engaged in 'gross negligence or recklessness,' such behavior does not constitute an unreasonable deviation"). But a minor fault qualifying as a deviation can deprive the relatively innocent carrier of this statutory benefit. *See, e.g.*, World Wide Steamship Co. v. India Supply Mission, 316 F. Supp. 190, 192 (S.D.N.Y. 1970) (describing how a detour adding 184 miles to voyage from Louisiana to India is treated as deviation).

165. *See, e.g.*, Sturley, *Deviation*, *supra* note 153, at 12-44 to 12–48 & nn. 1–12 (collecting cases).

166. *See supra* notes 76–104 and accompanying text (discussing the increase in the limitation amount under Rotterdam Rules art. 59(1)).

167. Rotterdam Rules, *supra* note 3, art. 24.

claimants seeking to break limitation.[168] If a carrier's breach, including a breach that qualifies as a deviation, falls within the terms of article 61, then the carrier loses its limitation rights under article 61.[169] There is no place in the Convention for a supplemental remedy created by the courts that would give claimants an additional ground to break limitation. This clarifying provision will be a welcome change in U.S. law.[170]

IX. THE VALLESCURA RULE

The courts have created a complex scheme of shifting burdens of proof in COGSA cases.[171] The cargo claimant bears the initial burden of establishing a *prima facie* case—generally by showing that the goods were delivered to the carrier in good condition and subsequently delivered by the carrier in damaged condition.[172] If the claimant carries this burden, the carrier then has the burden of proving that one of the "excepted perils" enumerated in section 4(2) of COGSA[173] caused the loss or damage.[174] If the carrier can do so, the burden then shifts back to the claimant to show that the carrier's negligence (or the unseaworthiness of the vessel) was also a contributing cause.[175]

If the case reaches the stage in which the carrier has established at least a partial defense (by showing that an excepted peril was at least a partial cause of the loss) and the cargo claimant has established that the carrier is at least partially responsible (by showing, for example, that the carrier's negligence was at least a partial cause of the loss), the burden then falls on the carrier to segregate the damages for which it is responsible from those for which it is not. Although the Supreme Court established this rule in *Schnell v. Vallescura*,[176] a case that arose under the Harter Act,[177] the courts have carried the same principle forward to COGSA.[178] In practice, this has proven to be a near-impossible burden for carriers to meet, with the result that carriers generally bear the entire loss whenever the court determines that concurrent causes contributed to it.[179]

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168. *Id.* art. 61.

169. *Id.*

170. Essentially the same change was part of the compromise that U.S. commercial interests accepted before the CMI and UNCITRAL efforts began. *See* Sturley, *Proposed Amendments*, *supra* note 2, at 654–55 (describing the compromise). Moreover, the U.S. delegation supported this change throughout the UNCITRAL negotiations.

171. *See generally* DAVID W. ROBERTSON, STEVEN F. FRIEDELL & MICHAEL F. STURLEY, ADMIRALTY AND MARITIME LAW IN THE UNITED STATES 302–03 (2d ed. 2008).

172. *See, e.g.*, Nitram, Inc. v. Cretan Life, 599 F.2d 1359, 1373 (5th Cir. 1979) (discussing the burden shifting process that occurs in enforcing litigants' rights under COGSA).

173. COGSA, *supra* note 15, § 4(2) (previously codified at 46 U.S.C. app. § 1304(2)).

174. *See, e.g.*, *Nitram*, 599 F.2d at 1373 (finding that the carrier has the burden of proving the cause of the damage).

175. *See, e.g.*, *id*. (negligence); *In re* Tecomar, S.A., 765 F. Supp. 1150, 1173–74 (S.D.N.Y. 1991) (discussing unseaworthiness).

176. 293 U.S. 296, 304 (1934).

177. 46 U.S.C. §§ 30701–07 (previously codified at 46 U.S.C. app. §§ 190–196).

178. *See*, *e.g.*, *Nitram*, 599 F.2d at 1373 (applying the *Vallescura* Rule); Vana Trading Co. v. S.S. "Mette Skou," 556 F.2d 100, 105 (2d Cir. 1977) (same).

179. *See, e.g.*, M. Golodetz Exp. Corp. v. S/S Lake Anja, 751 F.2d 1103, 1111–12 (2d Cir. 1985); *Vana Trading*, 556 F.2d at 105–06; Thyssen, Inc. v. S/S Euorunity, 1994 AMC 393, 399 (S.D.N.Y. 1993), *aff'd*, 21

The Rotterdam Rules largely codify the U.S. burden-shifting scheme,[180] which is consistent with the approach taken in many countries. The one exception is the final step of the process—the *Vallescura* Rule. Although the Hamburg Rules adopted the *Vallescura* Rule,[181] the Rotterdam Rules implicitly reject this approach. Article 17(6) of the Convention instead provides:

> When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article.[182]

This provision gives courts the flexibility to apportion liability between the carrier and cargo interests when concurrent causes exist, one or more of which is the carrier's responsibility and one or more of which are causes for which the carrier is not liable. The apportionment should be in proportion to the degree of causation, as determined under the previous paragraphs in the article.[183] The carrier, for example, has the burden of proving the extent to which the excepted perils caused the loss or damage (thus partially excusing it from liability) while the cargo claimant has the burden of proving the extent to which the carrier's fault caused the loss or damage (thus partially imposing liability on the carrier).[184]

X. HIMALAYA CLAUSES

Under COGSA, the carrier is entitled to certain exonerations and limitations of liability.[185] As a practical matter, however, the person directly responsible for cargo loss or damage is often not the carrier but one of the carrier's employees or subcontractors.[186] Do the carrier's defenses protect negligent third parties, or may a cargo claimant avoid COGSA's defenses by suing a responsible subcontractor directly in tort? This has turned out to be a remarkably complicated question.

F.3d 533 (2d Cir. 1994) (all holding that the carrier failed to meet the *Vallescura* burden); *but see* Trade Arbed, Inc. v. M/V Swallow, 688 F. Supp. 1095, 1106–07 (E.D. La. 1988) (holding that the carrier had satisfied the *Vallescura* burden).

180. *See* Rotterdam Rules, *supra* note 3, art. 17(1)–(5) (following the first steps of the U.S. burden-shifting scheme).

181. Hamburg Rules, *supra* note 6, art. 5(7).

182. Rotterdam Rules, *supra* note 3, art. 17(6).

183. U.N. Comm'n on Int'l Trade Law [UNCITRAL], *Report of the Working Group on Transport Law on the Work of its Fourteenth Session,* paras. 67–80, U.N. Doc. A/CN.9/572 (Dec. 21, 2004) (discussing the intention of the Convention to grant courts the responsibility to allocate liability where there exists multiple causes of loss, damage or delay, based on apportionment of causation).

184. *Id.* Essentially the same change was part of the compromise that U.S. commercial interests accepted before the CMI and UNCITRAL efforts began. *See* Sturley, *Proposed Amendments*, *supra* note 2, at 630–32 (describing pending proposals to COGSA). Moreover, the U.S. delegation supported this change throughout the UNCITRAL negotiations.

185. *See, e.g.*, COGSA § 3(6) (previously codified at 46 U.S.C. app. § 1303(6)) (stating that a carrier is "discharged from all liability" unless suit is brought within one year); *Id.* § 4(5) (previously codified at 46 U.S.C. app. § 1304(5)) (limiting carrier's liability to $500 per package).

186. *See generally, e.g.*, *Kirby*, 543 U.S. 14 (discussing cargo destroyed not by carrier but by railroad performing inland carriage under subcontract); Robert C. Herd & Co. v. Krawill Mach. Corp., 359 U.S. 297 (1959) (discussing cargo destroyed not by carrier but by a stevedore loading the vessel under subcontract).

Fifty years ago, the Supreme Court held that COGSA itself does not protect negligent subcontractors,[187] but left open the possibility that an appropriate clause in the bill of lading could extend the carrier's defenses to third parties.[188] Carriers accordingly included such clauses, which came to be known as "Himalaya clauses,"[189] in their bills of lading, and U.S. courts spent the next forty-five years deciding which Himalaya clauses were adequate to protect which third parties.[190] The issue produced considerable litigation but surprisingly little clarity. Then, in the middle of the UNCITRAL negotiations, the Supreme Court largely ignored forty-five years of accumulated jurisprudence to hold that a broadly drawn Himalaya clause would be broadly construed to protect just about anyone imaginable.[191]

For maritime performing parties (the carrier's subcontractors who fulfill their duties on the sea or in the port area),[192] the Rotterdam Rules essentially preempt the entire subject. Article 4(1) extends all of the carrier's defenses and limitations to every maritime performing party and its employees (explicitly including the master and crew of the carrying vessel), regardless of the forum or the basis for the suit.[193] In short, the new regime gives automatic Himalaya clause protection to every maritime performing party without regard for whether the relevant contract includes a Himalaya clause.[194]

For non-maritime performing parties (performing parties such as inland carriers that do not qualify as maritime performing parties),[195] in contrast, the Rotterdam Rules are irrelevant. Non-maritime performing parties assume none of the carrier's obligations under the convention[196] and thus do not benefit from the carrier's defenses and limitations under the convention. For them, the current law will

187. *See Herd*, 359 U.S. at 301–02 (concluding that nothing in the legislative history, language, or environment of the act indicates Congress's intention to regulate subcontractors).

188. *See id.* at 302 (stating that, if the contracting parties had desired to limit the liability of subcontractors, they would have expressed that intention in the contract).

189. The "Himalaya clause" derives its name from an English case popularly known as *The Himalaya* (because it involved an accident on the cruise ship *Himalaya*) and reported as Adler v. Dickson, [1955] 1 Q.B. 158 (C.A. 1954). The contract at issue did not contain a Himalaya clause but the case demonstrated to carriers why such a clause was necessary. *Id.*

190. *See* Michael F. Sturley, *Third Party Rights and the Himalaya Clause*, 2A BENEDICT ON ADMIRALTY § 169, at 16-67 to 16-71 (7th rev. ed. 2007) (collecting cases).

191. *See Kirby*, 543 U.S. at 31–32 (following a criminal decision to hold that the plain language of the Himalaya clause extends the liability limitation broadly, to *any* person whose services contribute to performing the contract).

192. *See* Rotterdam Rules, *supra* note 3, art. 1(7) (defining "maritime performing party").

193. *Id.* art. 4(1).

194. *See generally* Sturley, *Interim View*, *supra* note 2, at 98–99 (discussing the background of the "automatic Himalaya clause" provision). Essentially the same change was part of the compromise that U.S. commercial interests accepted before the CMI and UNCITRAL efforts began. *See* Sturley, *Proposed Amendments*, *supra* note 2, at 640–41 (describing the proposed amendments to COGSA). Moreover, the U.S. delegation supported this change throughout the UNCITRAL negotiations.

195. The Convention does not explicitly define non-maritime performing parties because the term does not appear in the text. But the definition of "performing party," Rotterdam Rules, *supra* note 3, art. 1(6), is broader than the definition of "maritime performing party," *id*. art. 1(7). Those performing parties that do not satisfy the maritime performing party definition may conveniently be described as non-maritime performing parties.

196. *Cf. id.* art. 19(1) (subjecting maritime performing parties to the carrier's obligations and liabilities).

continue to apply, and the courts will continue to determine whether a Himalaya clause protects them.[197]

XI. QUALIFYING CLAUSES

If the shipper demands one, COGSA section 3(3)[198] requires the carrier to issue a bill of lading showing (among other things) "[e]ither the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper."[199] A proviso to the provision permits the omission of this information when the carrier "has reasonable ground for suspecting" that the shipper's information does "not accurately . . . represent the goods actually received," or if it "has had no reasonable means of checking" the information.[200] But the carrier's right to omit the unverified information is rarely a realistic option in practice. The shipper needs documentation showing this information for independent commercial reasons. Thus carriers often include the information with a qualifying clause—such as "shipper's load and count" or "weight unknown"—to indicate that they do not assume responsibility for the information's accuracy.[201] Whether a carrier will be permitted to rely on these qualifying clauses has been a contentious issue in the United States.[202]

The Rotterdam Rules clarify both the information that the carrier must include in a bill of lading or other transport document and the circumstances in which a carrier may (or must) qualify that information. Article 36, essentially codifying the existing practice (based on commercial needs), declares that the carrier must describe the goods in the terms furnished by the shipper.[203] Even when the carrier actually knows the shipper's description is inaccurate—which typically means that the carrier and the shipper dispute the correct description—the carrier must still include the shipper's information in the transport document, but with a qualifying

197. The compromise that U.S. commercial interests accepted before the CMI and UNCITRAL efforts began was subject to essentially the same exception. *See* Sturley, *Proposed Amendments*, *supra* note 2, at 641–43 (illustrating that the proposed amendments to COGSA would not apply to inland carriers unless they are contracting carriers). Moreover, the U.S. delegation supported this exception throughout the UNCITRAL negotiations.

198. COGSA, *supra* note 15, § 3(3) (previously codified at 46 U.S.C. app. § 1303(3)). The Hague Rules, *supra* note 4, and Hague-Visby Rules, *supra* note 5, include the same provision as article 3(3). The Hamburg Rules, *supra* note 6, include substantially the same requirement in article 14(1).

199. COGSA, *supra* note 15, § 3(3)(b) (previously codified at 46 U.S.C. app. § 1303(3)(b)). The Hague Rules, *supra* note 4, and Hague-Visby Rules, *supra* note 5, include the same provision as article 3(3)(b). The Hamburg Rules, *supra* note 6, include substantially the same requirement in article 15(1)(a).

200. COGSA, *supra* note 15, § 3(3) (previously codified at 46 U.S.C. app. § 1303(3)). The Hague Rules, *supra* note 4, and Hague-Visby Rules, *supra* note 5, include the same provision as article 3(3). *Cf.* Hamburg Rules, *supra* note 6, art. 16(1) (authorizing a "reservation" with respect to unverified information).

201. *See* Sturley, *Proposed Amendments*, *supra* note 2, at 646 (explaining the use of qualifying statements by carriers).

202. *Compare, e.g.*, Westway Coffee Corp. v. M.V. Netuno, 675 F.2d 30, 32–33 (2d Cir. 1982) (declining to enforce qualifying clauses), *with*, *e.g.*, Bally, Inc. v. M.V. Zim Am., 22 F.3d 65, 69 (2d Cir. 1994) (recognizing qualifying clauses and as a result requiring cargo claimant to produce evidence other than the bill of lading). Because of this confusion in the U.S. jurisprudence, U.S. commercial interests began seeking some clarification before the CMI and UNCITRAL efforts began. *See* Sturley, *Proposed Amendments*, *supra* note 2, at 645–53 (discussing proposed amendments to COGSA regarding qualifying statements). Indeed, the Rotterdam Rules' clarification is part of the convention primarily because the U.S. delegation sought it throughout the UNCITRAL negotiations.

203. Rotterdam Rules, *supra* note 3, art. 36.

statement.[204] The shipper is entitled to a transport document giving its version of the description of the goods, which it may need to satisfy its contract with its buyer, even if the carrier will not assume responsibility for that description.[205]

The Rotterdam Rules' more significant innovation is in clarifying the circumstances in which a carrier may (or must) qualify the shipper's description. Unlike current law, which always leaves the matter to the carrier's discretion, article 40(1) requires a carrier to qualify the shipper's description when it has actual knowledge or reasonable grounds to believe that a material statement is false or misleading.[206] In addition, the remainder of article 40 permits a carrier to qualify the shipper's description in specified circumstances.[207] Article 40(4) specifies the carrier's rights in cases involving containerized cargo that the carrier does not actually inspect, and it creates slightly different rules for the description of the goods[208] and statements of weight.[209] Article 40(3) specifies the carrier's rights in all other cases, which primarily means non-containerized cargo.[210]

Perhaps the biggest change in U.S. practice involving the use of qualifying clauses will be the Rotterdam Rules' correction of the judicial error first made by the Ninth Circuit in *Tokio Marine & Fire Insurance Co. v. Retla Steamship Co.*[211] and then followed[212] and expanded[213] in subsequent cases.[214] These decisions have permitted carriers to rely on boilerplate clauses in bills of lading that essentially disclaim liability for "the apparent [good] order and condition of the goods," which the carrier is required to state on the bill of lading under COGSA section 3(3)(c).[215] Perhaps some courts have been confused into believing that the proviso to section

204. *See infra* note 206 and accompanying text (discussing art. 40(1), which requires the carrier to qualify the description of the goods when it has actual knowledge or reasonable grounds to believe that a material statement is false or misleading).

205. *See* Rotterdam Rules, *supra* note 3, art. 35 (entitling the shipper to obtain transport document from the carrier).

206. *Id*. art. 40(1).

207. *See id.*, art. 40(2)–(4) (specifying permissible circumstances under which a carrier may qualify the shipper's description).

208. *See id.* art. 40 (4)(a) (modifying the rules for description of goods in uninspected containerized cargo).

209. *See id.* art. 40(4)(b) (modifying the rules for statements of weight of uninspected containerized cargo). The most significant difference is that the contract can require the carrier to include the weight of the cargo (without qualification) in the contract particulars. *Id*. art. 40(4)(b)(i). With such an agreement, the carrier bears the risk of having "no physically practicable or commercially reasonable means of checking the weight of the container or vehicle." *Id*. art. 40(4)(b)(ii). This protects shippers in situations in which a statement of weight is commercially significant.

210. *See* Rotterdam Rules, *supra* note 3, art. 40(3), which also covers those (rare) cases in which the carrier or a performing party actually inspects containerized goods.

211. *See* 426 F.2d 1372 (9th Cir. 1970) (holding that carrier was not estopped to deny liability for rust damage).

212. *See, e.g.*, Acwoo Int'l Steel Corp. v. Toko Kaiun Kaish, Ltd., 840 F.2d 1284, 1287–88 (6th Cir. 1988) (following *Retla*).

213. *See, e.g.*, G.F. Co. v. Pan Ocean Shipping Co., 23 F.3d 1498, 1504–07 (9th Cir. 1994) (extending *Retla* to the context of wood products).

214. For a detailed discussion of the issue and an explanation of why the Ninth Circuit's analysis is erroneous, *see* Michael F. Sturley, *The Future of Maritime Law in the Federal Courts: Carriage of Goods by Sea*, 31 J. MAR. L. & COM. 241, 244–48 (2000) [hereinafter Sturley, *Future of Maritime Law*].

215. COGSA, *supra* note 15, § 3(3)(c) (previously codified at 46 U.S.C. app. § 1303(3)(c)). The Hague Rules, *supra* note 4, and Hague-Visby Rules, *supra* note 5, include the same provision as article 3(3)(c). The Hamburg Rules, *supra* note 6, include substantially the same requirement in article 15(1)(b).

3(3),[216] which by its terms applies only to paragraphs (a) and (b), excuses the carrier from complying with paragraph (c).[217] Courts upholding a "*Retla* rust clause," or one of its variations, are certainly confused about the statutory goals and the legislative intent behind section 3(3).[218]

Whatever the source of the mistake, the Rotterdam Rules correct the misunderstanding. Article 40 details which information in a transport document a carrier will be allowed to qualify and the circumstances in which a qualification will be permitted. Under article 40(1), for example, the carrier must qualify the information that it is required by article 36(1) to include in the contract particulars when the carrier knows or has reasonable grounds to believe that the information is false or misleading.[219] The remaining paragraphs of article 40 similarly refer only to the article 36(1) information.[220] Article 36(1), in turn, covers only the sort of information that COGSA requires in section 3(3)(a)–(b).[221] "A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for carriage"[222] is instead required under article 36(2)(a), and nothing in the Convention permits a carrier to qualify that information. Thus a *Retla* rust clause would be void under the Rotterdam Rules[223] unless it satisfies the special rule permitting greater freedom of contract under volume contracts.[224]

XII. THE TIME-FOR-SUIT PERIOD

Under the fourth paragraph of section 3(6) of COGSA, the carrier is "discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."[225] The Hamburg Rules doubled that time-for-suit period, permitting cargo claims to be instituted within two years of delivery.[226] U.S. cargo interests saw no particular benefit in obtaining a longer time-for-suit period.[227] In other countries however, cargo interests argued that two years was necessary to ensure that

216. *See supra* note 200 and accompanying text (discussing the provisio).

217. *See* ROBERTSON ET AL., *supra* note 171, at 297 (suggesting that the confusion about the scope of the proviso may stem from the proviso's appearing directly after paragraph (c) in the statute).

218. *See* Sturley, *Future of Maritime Law*, *supra* note 214, at 245–48 (explaining that the legislative intent for COGSA §3(3) was actually to prevent clauses similar to the "*Retla* rust clauses").

219. Rotterdam Rules, *supra* note 3, art. 40(1).

220. *See id.* art. 40(2)-(4) (referencing only article 36(1)).

221. *See id.* art. 36(1) (referring only to a description of goods and weight).

222. *Id.* art. 36(2)(a).

223. *Id.* art. 79(1).

224. *See id.* art. 80 (permitting carriers to assume "greater or lesser rights, obligations and liabilities" under volume contracts).

225. COGSA, *supra* note 15, § 3(6) (previously codified at 46 U.S.C. app. § 1303(6)). Article 3(6) of the Hague and Hague-Visby Rules similarly provide a one-year time-for-suit period. Hague Rules, *supra* note 4, art. 3(b); Hague-Visby Rules, *supra* note 5, art. 3(b).

226. Hamburg Rules, *supra* note 6, art. 20(1).

227. Most of the major commercial nations were comfortable with the one-year time-for-suit period. *See, e.g.*, U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group III (Transport Law), *Transport Law: Preparation of a Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]: Right of Suit and Time for Suit: Documents Presented for Information by the Government of Japan*, para. 32, U.N. Doc. A/CN.9/WG/III.WP.76 (Sept. 11, 2006).

claimants could obtain the information necessary to file suit.[228] Thus the Working Group agreed to accept the Hamburg Rules' longer time limit.[229]

Increasing the time-for-suit period to two years is not expected to have much practical impact in the United States. Although a few U.S. cases hold cargo claims to be time-barred,[230] most claimants and their counsel recognize the need to file suit before the expiration of COGSA's one-year time-for-suit period.[231] Thus the longer period is unlikely to result in any significant increase in the number of cases filed (although cases may be filed a year later than they would have been under COGSA).

XIII. MAJOR CHANGES ADDRESSED IN OTHER PAPERS

As noted in the Introduction,[232] several important changes to existing U.S. law are discussed by other participants in this symposium. Thus it is unnecessary for me to address them in detail here. Freedom of contract, for example, was one of the most controversial issues during the negotiations, but U.S. industry felt so strongly that it should be addressed that the U.S. delegation made it one of the highest priorities. Reforming the jurisdiction and arbitration rules was another priority for various segments of the U.S. industry, and thus it became another priority for the U.S. delegation.[233] It is entirely possible that neither of these subjects would have been addressed in the final Convention if the U.S. delegation had not taken such a strong position.

Other issues were not of unique interest to the United States in particular, but they will result in noteworthy changes for every country. The Convention's new provisions to deal with electronic commerce[234] and rights of control,[235] for example, will modernize the law for every country, including the United States.

XIV. CONCLUSION

Ratifying the Rotterdam Rules will be an important step for the United States on multiple levels. On a domestic level, it will modernize and clarify U.S. law on a number of pressing issues. The Convention implements a number of new substantive provisions on which U.S. industry groups have agreed as a part of a larger commercial compromise that will fuel economic development by making shipping

228. *See, e.g.*, U.N. Comm'n on Int'l Trade Law [UNCITRAL], *Report of the Working Group on Transport Law on the Work of its Ninth Session*, para. 60, U.N. Doc. A/CN.9/510 (May 7, 2002) (stating that some delegates were in favor of extending the time period to two years).

229. *See* Rotterdam Rules, *supra* note 3, art. 62(1) (establishing a two-year time-for-suit period).

230. *E.g.*, Altadis USA, Inc. v. Sea Star Line, LLC, 458 F.3d 1288 (11th Cir. 2006) *cert. dismissed*, 127 S. Ct. 1209 (2007); Servicios Expoarma, C.A. v. Indus. Mar. Carriers, 135 F.3d 984 (5th Cir. 1998).

231. To avoid ambiguities about when "delivery" occurs, experienced counsel will generally choose an unambiguous date that necessarily preceded delivery (such as the date on which the bill of lading was issued) and ensure that suit is filed within a year of that date. As a result, the rare time-barred claims are generally those that the client fails to refer to counsel soon enough.

232. *See supra* notes 9–10 and accompanying text (mentioning other contributors' discussions of other subjects).

233. *See generally* Hooper, *supra* note 9.

234. *See generally* Alba, *supra* note 9.

235. *See generally* van der Ziel, *supra* note 9.

more efficient. It will promote greater certainty, predictability, and uniformity not only within the United States but between the United States and other countries.

On an international level, the U.S. ratification of the Rotterdam Rules will be an important and essential step in regaining a leadership role in international maritime matters. The U.S. delegation played a particularly active role in the negotiation and drafting process, with the result that the Convention reflects most of the delegation's priorities.[236] But all of that success will be meaningless if the United States does not ratify the final product. The rest of the world is justifiably watching carefully to see what the United States will do. If the United States does not ratify this agreement, when it was so active—and successful—during the negotiations, it will be much more difficult for future delegations to have such influence when negotiating future agreements.

Fortunately, ratifying the Rotterdam Rules should be an easy decision. Critics will undoubtedly see aspects that could be improved.[237] Interest groups will similarly see issues on which their segment of the industry could have received more generous treatment. But none of that is at issue today. The negotiation and drafting are finished. If this effort does not succeed, it is likely to be at least another generation before the international community is prepared to undertake a similar effort again. The question now is simply whether the United States would be in a better position with this Convention or without it. That should be an easy choice.

With the Convention, the United States will clarify and modernize its law in an incremental fashion, building on the long experience of COGSA and implementing changes that are broadly acceptable to U.S. industry. It will bring "the most important and most frequently litigated statute in American international trade"[238] into the twenty-first century. Without the Convention, the United States would be burdened with a statute passed almost three-quarters of a century ago, the enactment of an 85-year-old treaty that most of the world has left in its wake. The nation would still be bound by a treaty that was itself based on a late-nineteenth century statute drafted to address mid-nineteenth century needs. Although the nation could then resume the long and difficult process of achieving a domestic solution,[239] that effort—

236. This is not to say that the Rotterdam Rules are written exactly as the U.S. delegation would have drafted them. Compromises are essential in any negotiation. Indeed, the United States had to reach significant compromises within its own delegation because U.S. industry covers such a wide range of different interests. *See generally* Sturley, *History*, supra note 78, at 36–55 (discussing years of debates over COGSA provisions by representatives of various U.S. constituents). But at the end of the day, every compromise was one that the United States could accept.

237. Some may complain, for example, that the Convention is too complex. *See, e.g.*, U.N. Econ. & Soc. Council [ECOSOC], Subcomm. on Inland Transp., Working Party on Intermodal Transp. and Logistics, *Reconciliation and Harmonization of Civil Liability Regimes in Intermodal Transport: Excerpts of Considerations by the Working Party, Note by the Secretariat*, para. 2, U.N. Doc. ECE/TRANS/WP.24/2009/3 (Jan. 8, 2009) (noting that the UNCITRAL Convention's complexity may obstruct its entry into force); U.N. Comm'n on Int'l Trade Law [UNCITRAL], *Draft Convention on Contract for the International Carriage of Goods Wholly or Partly by Sea: Compilation of Comments by Governments and Intergovernmental Organization*, para. 7, U.N. Doc. A/CN.9/658 (Apr. 15, 2008) (critiquing the first draft of the convention as too complicated). It is undoubtedly longer and more detailed than the Hague-Visby or Hamburg Rules. But the industry has itself become more complex, and the Convention addresses its issues more comprehensively than prior regimes. In any event, a less complex version of the Rotterdam Rules is not an available option at this stage of the discussion.

238. Joseph C. Sweeney, *The Prism of COGSA*, 30 J. MAR. L. & COM. 543, 545 (1999).

239. *See generally* Sturley, *Proposed Amendments, supra* note 2 (discussing the Maritime Law Association of the United States' domestic efforts to amend COGSA, before preparatory work for the Convention was begun).

even if successful—could never achieve the substantial benefits that follow from a uniform international regime that provides with certainty the same predictable solutions in every port at which a vessel calls.

Ratifying a treaty is often a time-consuming process. It took the United States almost twelve years to put the Hague Rules into force (by enacting COGSA).[240] That delay was due in large part to the need to achieve a national consensus among the affected segments of the industry.[241] Fortunately, U.S. industry today has already achieved a broad consensus in favor of the Rotterdam Rules as part of the negotiation process. That was the primary force behind the success of the negotiations. Now that the Convention has been completed, it is time for the government to recognize that consensus, sign the final instrument, and ratify the new regime as quickly as possible.

240. *See generally* Sturley, *History*, *supra* note 78.

241. *See id.* at 36–35 (discussing years of debates over COGSA provisions by representatives of various national organizations, including the U.S. Shipping Board, Institute of American Meat Packers, and National Industrial Traffic League, as well as shipowners, bankers, cargo underwriters, chambers of commerce, and government agencies, among others).