

# THINKING OUTSIDE THE BOX—THE APPLICATION OF COGSA’S \$500 PER- PACKAGE LIMITATION TO SHIPPING CONTAINERS

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### I. INTRODUCTION

The introduction of the shipping container revolutionized the maritime shipping industry. Compared to the earlier “break-bulk” method of transporting goods, containerized shipping offered enhanced economy and efficiency in the handling, stowing, and discharge of cargo.<sup>1</sup> Despite these benefits, the use of shipping containers exacerbated the problem of determining the meaning of “package” under section 1304(5) of the Carriage of Goods by Sea Act (“COGSA”).<sup>2</sup> Can massive metal shipping containers be considered packages for purposes of the \$500 limitation of liability under section 1304(5)? This question has been the subject of judicial and scholarly debate for the past 30 years.

Since the early container case of *Leather’s Best, Inc. v. The Mormaclynx*<sup>3</sup> in 1971, courts have fashioned, followed, and abandoned a number of tests used to determine when a container is a COGSA package. The following is an overview of the courts’ tortured search for predictability in applying COGSA’s package limitation to shipping containers. Included in this discussion are sections on (1) the per-package limitation of

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1. *Matsushita Elec. Corp. of Am. v. The Aegis Spirit*, 414 F. Supp. 894, 901 (W.D. Wash. 1976).

2. *See id.* at 902-03 (discussing the prior case law in the Second Circuit concerning the issue of when a container is to be considered a “package” under section 1304(5) of the COSGA).

3. 451 F.2d 800 (2d Cir. 1971) (affirming a district court award in the amount of \$500 for each of the ninety-nine bales of goods lost, despite the fact that the bales were placed in a single steel container).

liability under COGSA, (2) the container revolution, and (3) the application of the per-package limitation to maritime shipping containers.

## II. THE PER-PACKAGE LIMITATION OF LIABILITY UNDER THE CARRIAGE OF GOODS BY SEA ACT

### A. *Before the Enactment of COGSA*

Before Congress passed COGSA, the Harter Act of 1893<sup>4</sup> governed an ocean carrier's liability for cargo damages. Under the Harter Act, carriers were prohibited from inserting limitation clauses in bills of lading.<sup>5</sup> More specifically, carriers were prohibited from claiming relief from "liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery" of the cargo.<sup>6</sup> Despite the Harter Act's prohibition against limitation clauses, courts permitted ocean carriers to limit their liability through "agreed valuation clauses," in which carriers and shippers agreed that the cargo in question was worth some specified amount.<sup>7</sup> Courts allowed these clauses because they viewed them as establishing the value to be used in calculating damages in cargo disputes.<sup>8</sup> They did not interpret the valuation clauses as limitation clauses.<sup>9</sup> As a result, ocean carriers began including agreed valuation clauses in their bills of lading.<sup>10</sup> These clauses usually stated a cargo's value as a specific amount per package.<sup>11</sup>

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4. Harter Act, ch. 105, 27 Stat. 445 (1893) (codified at 46 U.S.C. §§ 190-195 (1982)).

5. 46 U.S.C. §§ 190-191 (1982).

6. *Id.* § 190.

7. 2A MICHAEL STURLEY, BENEDICT ON ADMIRALTY § 166, at 16-22 (7th ed. 2000).

8. *Id.*

9. *See id.* (citing *Western Transit Co. v. A.C. Leslie & Co.*, 242 U.S. 448, 454 (1917), which explained that "[i]n the courts' view, such clauses did not limit a carrier's liability; they simply established the value to be used in calculating damages.").

10. *Id.*

11. *See id.* (citing *Hohl v. Norddeutscher Lloyd*, 175 F. 544, 545 (2d Cir.), *cert. denied*, 216 U.S. 621 (1910)).

In *Hart v. Pennsylvania Railroad Co.*,<sup>12</sup> the Supreme Court held that agreed valuation clauses were valid. The Court reasoned that the ocean carrier reduced its rate to compensate for the low agreed valuation amount placed on the bill of lading.<sup>13</sup> Conversely, the carrier could have raised its rate to compensate for a high agreed valuation amount stated on the bill of lading.<sup>14</sup> This rule, known as the *Hart* doctrine, developed over time and became a restriction on the carrier.<sup>15</sup> Under the *Hart* doctrine, the carrier had to offer the shipper a choice of rates.<sup>16</sup> If the carrier did not, then any agreed valuation clause inserted in a bill of lading was considered invalid.<sup>17</sup> The Supreme Court later applied the *Hart* doctrine to maritime cargo disputes under the Harter Act.<sup>18</sup> Despite the restrictions placed on carriers by the *Hart* doctrine, carriers were still at an advantage over shippers. Because of the superior bargaining power of carriers, shippers often had to accept bills of lading containing extremely low cargo valuation clauses.<sup>19</sup>

Limitation of liability clauses between carriers and shippers received international attention when The International Convention for the Unification of Law Relating to Bills of Lading,<sup>20</sup> commonly known as the Hague Rules, was signed in Brussels, Belgium on August 25, 1924. The Hague Rules were created to establish international uniformity in matters relating to ocean bills of lading in a method fair to ocean carriers, cargo owners, insurers, and bankers.<sup>21</sup> One of the most important provisions of the Hague Rules was a stipulation making carriers liable for cargo damages up to £100 per package or unit, unless a

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12. 112 U.S. 331 (1884).

13. *Id.* at 337.

14. *Id.*

15. STURLEY, *supra* note 7, at 16-23.

16. *Id.*

17. *Id.* (citing *Union Pac. R.R. v. Burke*, 255 U.S. 317, 320-23 (1921)).

18. *Id.* (citing *The Kensington*, 183 U.S. 263, 268, 272-73 (1902)).

19. *Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft*, 375 F.2d 943, 945 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967).

20. 51 Stat. 233 [hereinafter the Hague Rules]; reprinted in WILLIAM TETLEY, *MARINE CARGO CLAIMS* 1121 app. A (3d ed. 1988).

21. *Carriage of Goods by Sea: Hearings on S.B. 1152 Before the Senate Comm. on Commerce*, 74th Cong. 15 (1935) [hereinafter Hearings].

greater value had been declared by the shipper and inserted in the bill of lading.<sup>22</sup> This provision, found in article 4(5), provided:

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion [sic] with goods in *an amount exceeding £100 per package or unit*, or the equivalent of that sum in other currency unless the nature of value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.<sup>23</sup>

Thus, the parties could declare in the bill of lading the value of cargo shipped, but carriers were absolutely prohibited from limiting their liability under £100 per package or unit. Unfortunately, the term “package” was not defined in the Hague Rules.

#### *B. The Carriage Of Goods By Sea Act*

The United States signed the Hague Rules in 1924, but it took more than a decade for Congress to pass domestic legislation giving them effect. In 1936, Congress enacted COGSA.<sup>24</sup> Congress’ central purpose in enacting COGSA was “the avoidance of adhesion contracts, providing protection for the shipper against the inequality in bargaining power.”<sup>25</sup> The language in COGSA is almost identical to the language in the Hague Rules; however, Congress made one important change regarding the carrier’s limitation of liability. The Hague Rules limit a carrier’s liability to £100 “per package or unit.”<sup>26</sup> Conversely, section 1304(5) of COGSA reads:

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding *\$500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit*, or the equivalent of that sum in

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22. *Id.* at 47.

23. The Hague Rules, *supra* note 20, art. 4(5) (emphasis added).

24. 46 U.S.C. §§ 1300-1315 (1994).

25. *Standard Electrica v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft*, 375 F.2d 943, 945 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967).

26. The Hague Rules, *supra* note 20, art. 4(5).

other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.<sup>27</sup>

Thus, section 1304(5) provides that the carrier may not reduce its maximum liability below \$500 per package, or in the case of non-packaged goods, \$500 per customary freight unit.<sup>28</sup> The “customary freight unit” phraseology adopted in section 1304(5) was intended to be more definite than the shorter phrase “per unit” contained in the Hague Rules.<sup>29</sup> The Ninth Circuit Court of Appeals has explained that “[t]his change delineates more clearly than do the Hague Rules that the limitation on the carrier’s liability depends on whether the goods are shipped in a ‘package,’ as distinguished from goods not shipped in ‘packages.’”<sup>30</sup>

Unfortunately, like the Hague Rules, COGSA contains no definition of the term “package.” Compounding the problem, the legislative history of COGSA does not provide any guidance on what constitutes a “package.”<sup>31</sup> The Second Circuit Court of Appeals has suggested that, in selecting the term “package,” the drafters of COGSA had in mind

a unit that would be fairly uniform and predictable in

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27. 46 U.S.C. § 1304(5) (1994) (emphasis added).

28. The remaining material will focus on containers and the circumstances in which federal courts have found containers to be COGSA packages. For a discussion of the \$500 per customary freight unit limitation applied to non-packaged goods, see generally H. Edwin Anderson III & Jason P. Waguespack, *Assessing the Customary Freight Unit: A COGSA Quagmire*, 9 U.S.F. MAR. L.J. 173 (1996).

29. See *The Bill*, 55 F. Supp. 780, 782 (D. Md. 1944). In this case, the district court provided a short history of the phrase “per customary freight unit.” *Id.* at 782. The court noted that the phraseology of the limitation clause in several earlier bills read: “\$100 per package or unit”; “\$500 per package or unit”; and “\$500 per package or, in case of goods not shipped in packages, per customary freight unit”. *Id.*

30. *Hartford Fire Ins. Co. v. Pac. Far E. Line, Inc.*, 491 F.2d 960, 962 (9th Cir.), *cert. denied*, 419 U.S. 873 (1974).

31. *Id.* at 963 (stating that Congress left no interpretive clues in either the statute itself or in any of the legislative hearings on what constitutes a package); *Standard Electrica v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft*, 375 F.2d 943, 945 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967) (stating, “in determining the meaning of ‘package,’ we are without the aid of meaningful legislative history”). The only package case mentioned in the COGSA hearings was *Reid v. Fargo*, 241 U.S. 544 (1916). In that case, the Supreme Court impliedly held that a fully boxed automobile was not a package for purposes of limiting the carrier’s liability. See *id.* at 551.

size, and one that would provide a common sense standard so that the parties could easily ascertain at the time of contract when additional coverage was needed, place the risk of additional loss upon one or the other, and thus avoid the pains of litigation.<sup>32</sup>

Despite the drafters' desire for uniformity and reduction in litigation, section 1304(5) has become a major source of litigation in cargo damage cases.<sup>33</sup>

Courts continue to struggle with the problem of determining what exactly is a package for purposes of section 1304(5).<sup>34</sup>

### C. What Is a "Package" for Purposes of Section 1304(5)?

Before considering whether a container is a package under section 1304(5), it is helpful to consider package issues outside the container context. The following is a brief and general discussion of when non-containerized cargo is considered a package. This discussion will consider cargo's treatment under section 1304(5) when: (1) cargo is completely concealed by a box or crate; (2) cargo is not packaged in any manner whatsoever; and (3) cargo has been partially packaged to aid in the handling and transportation of the cargo.

In determining whether cargo is a package under section 1304(5), the easiest situation occurs when the cargo is completely boxed or crated. When cargo is fully boxed or crated in such a manner that the identity of the cargo is concealed, the decisions indicate that the cargo is a COGSA package, regardless of size, shape or weight.<sup>35</sup> For example, in *Robert C. Herd & Co. v. Krawill Machinery Corp.*,<sup>36</sup> the Supreme Court implicitly recognized that a fully crated, 19-ton press was a package. Additionally, in *Mitsubishi International Corp. v. The*

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32. *Standard Electrica*, 375 F.2d at 945.

33. *See, e.g., Leather's Best, Inc. v. The Mormaclynx*, 451 F.2d 800, 814-15 (2d Cir. 1971) (stating, "[t]his is by no means the first case in which this court has been confronted with the question what constitutes a 'package' within § 1304(5) of COGSA, 46 U.S.C. § 1304(5), and it will hardly be the last").

34. *See* STURLEY, *supra* note 7, at 16-25.

35. *See Hartford Fire Ins. Co.*, 491 F.2d at 964 (citing *Aluminios Pozuelo Ltd. v. The Navigator*, 407 F.2d 152, 155 (2d Cir. 1968)).

36. 359 U.S. 297 (1959).

*Palmetto State*,<sup>37</sup> the Second Circuit held that fully boxed rolls of steel, each weighing thirty-two and one-half tons, were not packages.

An equally straightforward situation occurs when cargo is shipped without any packaging or preparations for shipping. In these situations, the cargo is generally not considered to be a statutory package.<sup>38</sup> For example, in *General Motors Corp. v. Moore-McCormack Lines, Inc.*,<sup>39</sup> the district court held that an electric generator shipped without a box or crate could not be a COGSA package. Also, in *Gulf Italia Co. v. American Export Lines*,<sup>40</sup> the Second Circuit determined that a freestanding tractor with some parts covered by weatherproofing paper, but with the tractor treads showing on the bottom, did not constitute a package.

The package analysis in the first two situations is relatively straightforward. However, classification difficulties arise when the cargo has been partially packaged for facilitating transportation (e.g., placing the cargo on pallets or skids).<sup>41</sup> This type of situation is illustrated by the Second Circuit's decision in *Aluminios Pozuelo Ltd. v. The Navigator*.<sup>42</sup> In *Aluminios*, the

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37. 311 F.2d 382 (2d Cir. 1962), *cert. denied*, 373 U.S. 922 (1963).

38. *Hartford Fire Ins. Co.*, 491 F.2d at 964. *See also Aluminios*, 407 F.2d at 155 (holding that when goods are shipped without packaging the items are not "packages" as specified in section 1304(5). The court cited examples where 106 uncrated pieces of a giant amusement crane, oil shipped in bulk in tow deep tanks of a vessel, 698 pieces of structural steel shipped without any packaging, ten locomotives and tenders, or a tractor in a "loose" condition— uncrated and unboxed—were not considered packages under section 1304(5)).

39. 327 F. Supp. 666, 668 (S.D.N.Y.), *aff'd per curiam*, 451 F.2d 24 (2d Cir. 1971).

40. 263 F.2d 135, 137 (2d Cir. 1959). *See also Tamini v. Salen Dry Cargo AB*, 866 F.2d 741, 743 (5th Cir. 1989) (holding that a drilling rig whose more vulnerable machinery and instrument panels were covered with a minimal amount of wood sheathing was not a COGSA "package." The Court of Appeals found the drilling rig not to be a "package" for the following reasons: the cargo was not enclosed in a container; the rig was fully exposed; no appurtenances or packaging were attached to facilitate its handling during transportation; and transportation charges for the drilling rig were calculated on a weight, not per package, basis).

41. *Hartford Fire Ins. Co.*, 491 F.2d at 965.

42. 407 F.2d 152 (2d Cir. 1968).

plaintiff shipped a three-ton toggle press on *The Navigator*.<sup>43</sup> The toggle press was bolted to a skid, which consisted of two parallel pieces of lumber.<sup>44</sup> The bill of lading described the press under the heading “No. of PKGS” as “One (1) Skid Machinery.”<sup>45</sup> Although the press was delivered to the carrier in perfect condition, it was found to be a total loss after the shipment was delivered.<sup>46</sup> The carrier sought to limit its liability to \$500 because, as it contended, the toggle press on the skid was a package under section 1304(5) of COGSA.<sup>47</sup> The Second Circuit held that the skidded toggle press was a package because the skid served primarily to facilitate the delivery of the press by making it more suitable for transportation or handling.<sup>48</sup> Additionally, the court indicated that the bill of lading, a contractual agreement between the parties, stated the toggle press was a package.<sup>49</sup> Therefore, the parties were bound by their agreement.<sup>50</sup>

The parties’ description of the cargo in the bill of lading was also held a determinative factor in *Standard Electrica v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft*.<sup>51</sup> In that case, Standard Electrica sought damages from the ocean carrier for the loss of 1,680 television tuners shipped from New York to Rio de Janeiro.<sup>52</sup> The complete shipment consisted of nine pallets, each loaded with six cardboard cartons holding forty tuners.<sup>53</sup> The dock receipt, the bill of lading, and Standard Electrica’s claim letter all indicated that the shipment consisted

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43. *Id.* at 153.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 155.

49. *Id.* at 156.

50. *Id.* *But see* Pannell v. United States Lines Co., 263 F.2d 497 (2d Cir.), *cert. denied*, 359 U.S. 1013 (1959) (indicating in dicta that a yacht, placed upon and lashed to a wooden cradle and listed on the bill of lading as a “package,” was not a “package” so as to limit the carrier’s liability).

51. 375 F.2d 943, 946 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967).

52. *Id.* at 944.

53. *Id.*

of nine packages (the number of pallets shipped).<sup>54</sup> Seven of the nine pallets were not delivered to the discharge port.<sup>55</sup>

The Second Circuit rejected the contention that each cardboard carton was a package and held that each pallet constituted a package within the meaning of section 1304(5) of COGSA.<sup>56</sup> In reaching this conclusion, the court enumerated a number of important factors. First, the court relied upon the parties' understanding in the dock receipt, bill of lading, and claim letter; these documents were "entitled to considerable weight in that the parties each had the same understanding as to what constitutes a 'package' . . . ."<sup>57</sup> Second, the court noted that it was the shipper, not the carrier, who chose to ship the cartons on pallets.<sup>58</sup> This fact, compounded with the language in the shipping documents, weighed in favor of finding each pallet a package.<sup>59</sup> Third, Standard Electrica did not avail itself of the opportunity to obtain full coverage by declaring the nature and value of goods on the face of the bill of lading and paying an increased freight rate.<sup>60</sup> Under section 1304(5), this option is available to shippers who wish to avoid the \$500 per package limitation of liability.<sup>61</sup> Finally, the court indicated that the word "package" fairly described the pallets in this case.<sup>62</sup> According to the court, any other decision "would only contribute to confusion as to the meaning of the word 'package.'"<sup>63</sup>

#### *D. The Impact of Technology on the Package Problem*

The Second Circuit observed in *Standard Electrica* that "few, if any, in 1936 could have foreseen the change in the optimum size of shipping units that has arisen as the result of

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54. *Id.* at 946.

55. *Id.* at 944.

56. *Id.*

57. *Id.* at 946.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 947.

technological advances in the transportation industry.”<sup>64</sup> Although *Standard Electrica* involved the application of section 1304(5) to a shipment of palletized cargo, the Second Circuit’s statement applies with even more force to the use of shipping containers. The introduction of the shipping container was a tremendous technological advance in the international shipping industry.<sup>65</sup> Unfortunately, this revolutionary development has not received statutory attention from Congress. Section 1304(5), establishing a carrier’s maximum liability at \$500 per package, has not been amended since COGSA was enacted in 1936.<sup>66</sup> With neither adequate congressional history nor attention since the dramatic changes in the maritime shipping industry, the courts of this country “must wrestle with a statutory provision that has become ill-suited to present conditions.”<sup>67</sup>

Before the first container case reached the Second Circuit in 1971, it was not clear how the courts would apply the package limitation under section 1304(5) to this innovative shipping device.<sup>68</sup> The primary question was whether the individual container or the contents inside the container would be considered a COGSA package.<sup>69</sup> More specifically, would courts follow *Standard Electrica* in container cases and hold that the container, not the contents inside, was the COGSA package? This question was answered in *Leather’s Best, Inc. v. The Mormaclynx*,<sup>70</sup> but before discussing the container as a COGSA package, it is important to review the advent of containerized

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64. *Id.* at 945.

65. Seymour Simon, *The Law of Shipping Containers*, 5 J. MAR. L. & COM. 507, 507 (1974) (discussing the movement toward containerization and delineating the differences between containerization and conventional stowage techniques).

66. *See id.*

67. *Leather’s Best, Inc. v. The Mormaclynx*, 451 F.2d 800, 815 (2d Cir. 1971). *See also* *Nichimen Company v. The Farland*, 462 F.2d 319, 335 (2d Cir. 1972) (recognizing that section 1304(5) “has indeed become unsatisfactory”). In 1985, Dow Chemical Company filed a Petition for Rulemaking with the Federal Maritime Commission requesting that the Commission define the meaning of “package” under section 1304(5). *See* Definition of “Package” under the Carriage Of Goods By Sea Act, 1986 A.M.C. 403 (Federal Maritime Commission 1985). The petition was denied after the Commission found that it was without authority to promulgate such a definition. *See id.*

68. *See* Simon, *supra* note 65, at 507-08.

69. *Id.* at 507.

70. 451 F.2d 800 (2d Cir. 1971).

shipping and its impact on maritime shipping.

### III. THE CONTAINER REVOLUTION

Beginning in the 1960's, ocean carriers introduced a new element into the scheme of transporting cargo, namely, large metal boxes called containers.<sup>71</sup> The "containerization" of cargo revolutionized the international shipping industry by decreasing both transportation costs and the time ships spent in port.<sup>72</sup>

As one commentator has observed:

The explosive popularity of containerization came about because it is an efficient and economical method of handling, loading, stowing, discharging and transferring of hundreds of packages simultaneously by means of mechanized equipment instead of the former slow and costly manual methods of individual package handling.<sup>73</sup>

Before containerization, trains or trucks delivered cargo in loose or "break-bulk" form at a carrier's pier, thereby necessitating the transfer of each individual unit from the inland carrier to storage areas adjacent to the pier.<sup>74</sup> Once a vessel arrived, longshoremen loaded the cargo on the vessel "by handling the packages separately or in very small numbers."<sup>75</sup> After the cargo was loaded aboard the vessel, longshoremen then stowed the units with care so as to prevent damage during the voyage.<sup>76</sup> For example, the shoreside workers sometimes built wooden fences or laid dunnage to prevent cargo from shifting during the voyage.<sup>77</sup> After the vessel arrived at its destination, longshoremen unloaded by repeating the loading

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71. See Simon, *supra* note 65, at 510.

72. See *id.* at 510-13 (1974) (discussing the movement toward containerization and delineating the differences between containerization and conventional stowage techniques); Edward Schmeltzer & Robert A. Peavey, *Prospects and Problems of the Container Revolution*, 1 J. MAR. L. & COM. 203, 206-10 (1970) (noting the great reduction in transportation costs achieved by the container revolution).

73. Simon, *supra* note 65, at 510.

74. *Id.*

75. *Id.*

76. *Id.* at 511.

77. *Id.*

process in reverse order.<sup>78</sup> These loading and unloading procedures were both costly and time-consuming.<sup>79</sup>

The “container revolution” mechanized the transport and loading of cargo.<sup>80</sup> The process of transporting cargo containers can be described as follows: first, the shipper (not the carrier) stows individual cartons or packages in a container,<sup>81</sup> usually at its inland facility;<sup>82</sup> next, the container is carried overland by truck or train to a container yard in close proximity to the ship loading area, where the container waits until the vessel for which the cargo is intended arrives;<sup>83</sup> once the vessel arrives, a yard tractor pulls the container on the chassis alongside the ship;<sup>84</sup> and finally, shoreside cranes lift the container off the chassis and place it into specially built vertical cells inside the containership<sup>85</sup> (these vertical cells within the ship are designed to firmly hold the containers in place during the voyage).<sup>86</sup> As a result of this mechanized process, the time and cost involved in transporting and loading cargo onto ships has been greatly reduced.<sup>87</sup>

Containerization has achieved enormous cost savings for both carriers and shippers. These cost savings include the following: (1) the use of containers has substantially reduced the export costs involved in crating, packaging, or otherwise preparing cargo for stowage in the hold of ships;<sup>88</sup> (2) by eliminating the manual loading of cargo by longshore workers, containerization has reduced the cost associated with damaged

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78. *See id.*

79. *See id.*

80. *See id.*

81. *See id.* at 512.

82. *See* Schmeltzer & Peavy, *supra* note 72, at 205-06 (distinguishing three types of intermodal shipments).

83. *See id.* at 207-08.

84. *Id.* at 208.

85. *Id.*

86. *See* Simon, *supra* note 65, at 511.

87. *See id.*; *see also* Schmeltzer & Peavy, *supra* note 72, at 208 (noting that, “[w]hereas it takes a conventional vessel three days to load and unload . . . cargo, it now takes approximately eight hours for a containership to load and unload the same amount of cargo containerized”).

88. Schmeltzer & Peavy, *supra* note 72, at 206.

cargo;<sup>89</sup> (3) since containers are weatherproof, containerization has eliminated costs associated with building shoreside warehouses to protect conventional cargo from the weather;<sup>90</sup> (4) it costs much less to load and unload containers by crane than it does to load and unload individual packages;<sup>91</sup> (5) a ship's in-port time is greatly reduced due to the speed at which cargo containers can be loaded and unloaded;<sup>92</sup> and (6) container ships can carry much more cargo than conventional ships.<sup>93</sup>

A. *What Exactly Is a "Container"?*

In *Japan Line v. County of Los Angeles*,<sup>94</sup> the U.S. Supreme Court adopted a definition of "container" as used in the maritime shipping industry. The court stated:

A container is a permanent reusable article of transport equipment . . . durably made of metal, and equipped with doors for easy access to the goods and for repeated use. It is designed to facilitate the handling, loading, stowage aboard ship, carriage, discharge from ship, movement, and transfer of large numbers of packages simultaneously by mechanical means to minimize the cost and risks of manually processing each package.<sup>95</sup>

The Supreme Court has also described containers as "a modern substitute for the hold of the vessel."<sup>96</sup>

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89. See Simon, *supra* note 65, at 511 ("[Containerization] prevents cargo damages resulting from the throwing or dropping of packages to the deck of the pier or ship deliberately or otherwise. In addition, the risk of damages to cargoes resulting from stevedores carelessly stowing heavy cargoes on top of delicate ones is eliminated under containerization. Further, it is no longer necessary to fear that the stevedore may fail to or carelessly fence and shore packaged goods within the ship's cargo compartments since damages resulting from horizontal movement are similarly eliminated under containerization.")

90. See Schmeltzer & Peavy, *supra* note 72, at 207-08.

91. *Id.* at 208.

92. *Id.*

93. See *id.* (indicating that even though container ships are more expensive than conventional ships, the large amount of cargo they can carry results in increased cost savings).

94. 441 U.S. 434, 436 n.1 (1979) (quoting Simon, *supra* note 65, at 513).

95. *Id.*

96. N.E. Marine Terminal Co. v. Caputo, 432 U.S. 249, 270 (1977); see also *Leather's Best, Inc. v. The Mormaclynx*, 451 F.2d 800, 815 (2d Cir. 1971) (stating that

The U.S. Coast Guard formulated a more precise definition of “container.” Pursuant to the International Safe Container Act,<sup>97</sup> the Coast Guard is charged with establishing “requirements and procedures for safety approval and periodic examination of cargo containers used in international transport.”<sup>98</sup> The resulting regulations define a “container” as an article of transport equipment:

- (i) Of a permanent character and suitable for repeated use.
- (ii) Specially design [sic] to facilitate the transport of goods, by one or more modes of transport, without intermediate reloading.
- (iii) Designed to be secured and readily handled, having corner fittings for these purposes.
- (iv) Of a size that the area enclosed by the four outer bottom corners is either:
  - a) At least 14 sq. m. (150 sq. ft.), or
  - b) At least 7 sq. m. (75 sq. ft.) if it has top corner fittings. The term *container* includes neither vehicles nor packaging; however, containers when carried on chassis are included.<sup>99</sup>

Although the definition and function of containers in the maritime shipping industry are not a mystery, the treatment of containers under COGSA remains a source of contention and confusion.<sup>100</sup> Attention is now directed to the issue of whether a container is a package for purposes of section 1304(5) of COGSA.<sup>101</sup>

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containers are “functionally a part of the ship”).

97. 46 U.S.C. §§ 1501-1507 (2001).

98. 49 C.F.R. § 450.1 (2001).

99. 49 C.F.R. § 450.3 (2001).

100. See also STURLEY, *supra* note 7, § 166, at 16-22 to 16-33 (listing the large secondary literature generated by the problem of containers as COGSA “packages”).

101. 46 U.S.C. § 1304(5).

## IV. IS A CONTAINER A "PACKAGE" UNDER COGSA § 1304(5)?

A. *The Second Circuit's Early Approaches to the Problem*

In 1971, the Second Circuit became the first federal appellate court to consider the problem of when, if ever, a shipping container should be considered a package under section 1304(5).<sup>102</sup> This court subsequently decided numerous cases dealing with the issue;<sup>103</sup> unfortunately, the early decisions were not harmonious.<sup>104</sup> Chief Judge Friendly suggested the approach that a container should rarely, if ever, be labeled a package for purposes of section 1304(5).<sup>105</sup>

The contradictory approach, principally advanced by Judge Oakes, set forth a "functional economics" test to determine whether a container should be considered a COGSA package.<sup>106</sup>

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102. See *Leather's Best, Inc. v. The Mormaclynx*, 451 F.2d 800, 814 (2d Cir. 1971).

103. Compare *Binladen BSB Landscaping v. The Nedlloyd Rotterdam*, 759 F.2d 1006 (2d Cir.) (holding that thousands of plants shipped in two containers were "goods not shipped in packages" within the meaning of COGSA), *cert. denied*, 474 U.S. 902 (1985), and *Mitsui & Co. v. Am. Exp. Lines*, 636 F.2d 807, 820 (2d Cir. 1981) (propounding that "if the individual crates . . . prepared by the shipper and containing his goods can rightly be considered 'packages' standing by themselves, they do not suddenly lose that character upon being stowed in a carrier's container"), with *Rosenbruch v. Am. Exp. Isbrandtsen Lines, Inc.*, 543 F.2d 967 (2d Cir.) (concluding that a container of household goods was a package within the meaning of COGSA), *cert. denied*, 429 U.S. 939 (1976), *Cameco, Inc. v. The Am. Legion*, 514 F.2d 1291 (2d Cir. 1974) (affirming that a container of imported canned ham was not a COGSA package and clarifying that the individual cartons of ham and the pallets they were placed on were packages), *Shinko Boeki Co. v. The Pioneer Moon*, 507 F.2d 342, 345 (2d Cir. 1974) (reasoning that large tanks provided by the carrier to hold a cargo of liquid latex were not "packages" under COGSA because they were "functionally a part of the ship"), and *Royal Typewriter Co. v. The Kulmerland*, 483 F.2d 645, 649 (2d Cir. 1973) (positing that when a shipper's own packages are inadequate for overseas shipment, the presumption that a container is not a "package" fails and the burden falls on the shipper to show that his units are "packages").

104. See *Yeramex Int'l v. The Tendo*, 1977 A.M.C. 1807 (E.D. Va. 1977) (providing an analysis of the Second Circuit decisions cited *supra* note 103), *rev'd on other grounds*, 595 F.2d 943 (4th Cir. 1979).

105. *Id.*

106. *Id.* at 1830.

### 1. Chief Judge Friendly's Approach

*Leather's Best, Inc. v. The Mormaclynx*<sup>107</sup> was the first decision in which an appellate court decided whether a container was a package under section 1304(5). The plaintiff and shipper, Leather's Best, bought eleven tons of leather from the seller's plant in Germany.<sup>108</sup> The seller's employees loaded the leather into ninety-nine cartons, which in turn were made into bales by binding them with steel straps.<sup>109</sup> The seller's employees then loaded the bales of leather into a container and sealed it.<sup>110</sup> Following delivery of the container to the Mormaclynx in Antwerp, Belgium, the carrier issued a bill of lading describing the cargo as "1 container s.t.c. 99 bales of leather."<sup>111</sup> Additionally, the bill of lading included a clause limiting the carrier's liability to \$500 with respect to the "entire contents of each container."<sup>112</sup> The container was shipped and delivered to a container yard in Brooklyn, New York, but was later stolen. The leather was never recovered.<sup>113</sup>

The defendant carrier, relying on the Second Circuit's earlier decision in *Standard Electrica v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft*, argued that the container, not the bales of leather, should be considered a COGSA package.<sup>114</sup> In *Standard Electrica*,<sup>115</sup> the Second Circuit held that when a shipper had placed six cardboard cartons on each of nine pallets in order to facilitate ocean transportation, the pallets rather than the cardboard cartons were "packages."<sup>116</sup>

Writing for the Second Circuit, Chief Judge Friendly dispelled any ideas that *Standard Electrica*, involving palletized

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107. 451 F.2d 800 (2d Cir. 1971).

108. *Id.* at 804.

109. *Id.*

110. *Id.*

111. *Id.* This information was placed under a heading on the bill of lading that stated: "Number and kind of packages; description of goods." *Id.*

112. *Id.*

113. *Id.* at 806.

114. *See id.* at 815.

115. *Standard Electrica v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft*, 375 F.2d 943 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967).

116. *See id.* at 944.

cargo, would be applied to container cases.<sup>117</sup> He distinguished *Standard Electrica* on the following grounds. First, the pallets in *Standard Electrica* were much smaller shipping units, unlike the container in *Leather's Best*.<sup>118</sup> Second, the court noted that the dock receipt, bill of lading, and libellant's claim letter all indicated that the parties in *Standard Electrica* regarded each pallet as a package.<sup>119</sup> Third, in *Standard Electrica*, there was no language in the shipping documents that gave the carrier any notice of the number of cartons on each pallet.<sup>120</sup> The bill of lading in *Leather's Best*, on the other hand, specified "1 container s.t.c. 99 bales of leather."<sup>121</sup>

Judge Friendly found that the language in the bill of lading limiting the carrier's liability to \$500 per container was an invalid limitation of liability under COGSA.<sup>122</sup> This holding was based upon a number of factors: the identity of the party loading the cargo (the seller as opposed to the shipper); the size of the container; and the description of the cargo on the bill of lading. In its conclusion, the court offered the following observation:

We cannot escape the belief that the purpose of § 1304(5) of COGSA was to set a reasonable figure below which the carrier should not be permitted to limit his liability and that "package" is thus more sensibly related to the unit in which the shipper packaged the goods and described them than to a large metal object, functionally part of the ship, in which the carrier caused them to be "contained."<sup>123</sup>

Courts have stated that the clear holding in *Leather's Best* is that "at least when 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

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117. See *Leather's Best*, 451 F.2d at 804, 815.

118. *Id.* at 815.

119. *Id.*

120. *Id.*

121. *Id.* at 804.

122. *Id.* at 815-16.

123. *Id.* at 815.

‘package’ referred to in [section 1304(5)].”<sup>124</sup> Judge Friendly did leave unresolved whether the container would be treated as a COGSA package when the contents of the container were not disclosed to the carrier on the shipping documents.<sup>125</sup>

Three years later, in *Shinko Boeki Co., Ltd. v. The Pioneer Moon*,<sup>126</sup> the Second Circuit decided for the first time whether section 1304(5) applied to shipments of liquids in a device similar to a container.<sup>127</sup> Shinko Boeki, the plaintiff, ordered liquid latex from Firestone International Company.<sup>128</sup> Firestone, acting as Shinko Boeki’s agent, arranged for the liquid latex to be transported in thirty-four tanks provided by the owner of the *The Pioneer Moon*.<sup>129</sup> The bill of lading set forth the number of tanks, the weight of the liquid latex as 359,170 pounds, and the computation of the freight charges as fifty-four dollars per long ton of the cargo.<sup>130</sup> When the shipment of liquid latex reached its destination in Japan, eleven of the tanks were either empty or contaminated.<sup>131</sup>

Writing for the Second Circuit, Judge Friendly noted that there were three possible methods of transporting the liquid latex.<sup>132</sup> These methods included: (1) shipping the liquid latex in metal drums, each carrying fifty-five gallons; (2) pumping the latex into a ship’s deep tanks; and (3) the method employed in

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124. *Mitsui & Co. v. Am. Exp. Lines, Inc.*, 636 F.2d 807, 817 (2d Cir. 1981); *see also* *Monica Textile Corp. v. The Tana*, 952 F.2d 636, 639 (2d Cir. 1991) (concluding that containers are not “packages” within the meaning of COGSA); *Croft & Scully Co. v. The Skulptor Vuchetich*, 664 F.2d 1277, 1281 (5th Cir. 1982) (holding that container supplied by carrier is not a COGSA package); *Yeramax Int’l v. The Tendo*, 1977 A.M.C. 1807, 1829 (E.D. Va. 1979) (“[A] container should rarely, if ever, be labeled as a package for purposes of the COGSA liability provision.”).

125. *See Smythgreyhound v. The Eurygenes*, 666 F.2d 746, 748 (2d Cir. 1981) (relying on *Mitsui*, 636 F.2d. at 825, in noting that “[i]n the realm of container shipping, where the bill of lading specifies the contents, the ship’s container should not be deemed a package . . .”).

126. 507 F.2d 342 (2d Cir. 1974).

127. *See id.* at 344.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 345.

the present case.<sup>133</sup> Judge Friendly observed that, under the first method, the fifty-five gallon drums clearly would have been considered packages;<sup>134</sup> however, if the liquid latex had been pumped into the ship's deep tanks, as per the second method, there would not have been any packages. Consequently, the shipper's recovery would have been \$500 per customary freight unit instead of per package.<sup>135</sup> After making these observations, Judge Friendly concluded that the method actually employed to transport the liquid latex—shipment in 2,000-gallon tanks—more closely resembled shipment in deep tanks than transportation in fifty-five gallon drums.<sup>136</sup> According to Judge Friendly, the 2,000-gallon tanks were “functionally part of the ship, every bit as much as the metal container holding ninety-nine bales of leather on the Mormaclynx . . . .”<sup>137</sup> Therefore, the 2,000-gallon tanks were not packages for purposes of section 1304(5).<sup>138</sup>

Taken together, *Leather's Best* and *Shinko Boeki* seem to indicate the Second Circuit's reluctance to find containers as COGSA packages. Unfortunately, a second line of decisions from this court formulated the functional economics test, a rule discordant with *Leather's Best* and *Shinko Boeki*.<sup>139</sup>

## 2. *The Functional Economics Test*

In 1973, the Second Circuit sought to “simplify” the section 1304(5) analysis used in *Leather's Best*. In *Royal Typewriter Co. v. Kulmerland*,<sup>140</sup> Judge Oakes developed the “functional economics” test.<sup>141</sup> Under this test, the court's initial inquiry is “whether the contents of the container could have feasibly been

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133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* (referring to the cargo and vessel in *Leather's Best*, 451 F.2d at 800).

138. *Id.*

139. *Cf. Mitsui & Co. v. Am. Exp. Lines, Inc.*, 636 F.2d 807, 818 (2d. Cir. 1981) (stating that the functional economics test is “basically inconsistent” with *Leather's Best*).

140. 483 F.2d 645 (2d Cir. 1973).

141. *Id.* at 648.

shipped overseas in the individual packages or cartons in which they were packed by the shipper.”<sup>142</sup> If the shipper’s own packing units are functional, there is a presumption that a container is not a package.<sup>143</sup> This presumption may be overcome by evidence supplied by the carrier that the parties intended the container to be a package.<sup>144</sup> When the shipper’s own units are not suitable for safe transportation, there is a presumption that the parties intended for the container to be a package.<sup>145</sup> This results in a shifting of the burden to the shipper to show why the individual units within the container should be considered packages.<sup>146</sup> At this point, custom and usage in the trade, the parties’ agreement in the bill of lading, and other factors bearing on the parties’ intent may be introduced.<sup>147</sup>

In *Kulmerland*, the cargo consisted of 350 adding machines plus 700 other machines packed in single-wall cardboard cartons and sealed with thin paper tape.<sup>148</sup> These cartons were placed inside three containers for shipment.<sup>149</sup> The Second Circuit concluded that the three containers were COGSA packages because the individual cardboard cartons were not packing units suitable for overseas transportation, and the shipper failed to meet its burden to show why the items inside the container should be treated as COGSA packages.<sup>150</sup>

The Second Circuit also applied the functional economics test in *Cameco, Inc. v. The American Legion*.<sup>151</sup> In *Cameco*, Danish canned hams were packed in corrugated cartons, with some of these cartons strapped on pallets.<sup>152</sup> The pallets and

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142. *Id.*

143. *Id.* at 649.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 646.

149. *Id.*

150. *Id.* at 648-49 (emphasizing that “adding machines are a delicate product—their little cardboard cartons, stapled and paper-taped, had never been shipped [individually] as such; in the days before containers they were shipped in wooden crates or cases containing 12 to 24 each”).

151. 514 F.2d 1291 (2d Cir. 1974).

152. *Id.* at 1292.

remaining cartons were then placed in a refrigerated shipping container.<sup>153</sup> The container was loaded on The American Legion, and the bill of lading stated that the number and kind of packages shipped were “one container” said to contain the number of cartons, the weight per tin, and the gross weight of the goods.<sup>154</sup>

The Second Circuit found that the cases and pallets of tinned hams met the functional economics test of *Kulmerland* and accordingly placed the burden of proof on the carrier to supply evidence that the parties had intended to treat the container as a package.<sup>155</sup> According to the court, the carrier did not meet its burden for the following reasons:

Here the bill of lading specifically set forth the number of cartons of tinned hams and the respective number of tins and weight per tin in each carton, unlike the one container said to contain machinery in the *Kulmerland* case or the one container said to contain household goods in the *Rosenbruch* case. Here, as in *Leather's Best*, the bill of lading described the goods as one container “s/t/c” a specific number of cartons or bales, etc. (citation omitted).<sup>156</sup>

Although the Second Circuit applied the functional economics test, it is clear from the quoted language that this case is more akin to *Leather's Best* than it is to *Kulmerland*. Like *Leather's Best* and *Rosenbruch*, the decisive factor was the language on the bill of lading disclosing the type and amount of cargo inside the container.<sup>157</sup>

When *Rosenbruch v. American Export Isbrandtsen Lines, Inc.*<sup>158</sup> was decided two years after *Cameco*, the Second Circuit again utilized the functional economics test to determine the application of COGSA's \$500 per package limitation.<sup>159</sup> The court explained its rationale for applying the functional economics test

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153. *Id.*

154. *Id.* at 1293-94.

155. *Id.* at 1299.

156. *Id.*

157. *Id.*

158. 543 F.2d 967 (2d Cir.), cert. denied, 429 U.S. 939 (1976).

159. 543 F.2d at 970.

as follows:

[U]nless and until Congress resolves the limitation of liability problems created by the new container age, we think that the “functional economics test” . . . enunciated in *Kulmerland* . . . while not solving the problem entirely, offers as good a judicial interpretation of the word “package” in Section 1304(5) as we have seen.<sup>160</sup>

*Rosenbruch* involved a shipment of used household goods owned by the shipper, Peter Rosenbruch, whose agent loaded the cargo into a container supplied by the ocean carrier.<sup>161</sup> Although the carrier supplied the container, it took no part in loading or securing the household effects.<sup>162</sup> The container held only the shipper’s goods.<sup>163</sup> Additionally, the bill of lading listed one container under the heading of “no. of packages” and described the contents as “used household goods.”<sup>164</sup> The Second Circuit found this case to be particularly appropriate for the functional economics test because the used household goods could not be transported without the use of a container.<sup>165</sup> Therefore, the court held that the container was a package within the meaning of section 1304(5).<sup>166</sup>

District courts in the Second Circuit applied *Kulmerland*’s functional economics test. In *Baby Togs v. The American Ming*,<sup>167</sup> the U.S. District Court for the Southern District of New York held cartons of infants’ clothing shipped inside a container were packages for purposes of section 1304(5) since the cartons involved could be safely shipped by sea as break-bulk cargo.<sup>168</sup> After the court found that the cartons were functional as individual units, the burden shifted to the ocean carrier to overcome the presumption that the container was not a

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160. *Id.* (citation omitted).

161. *Id.* at 969.

162. *See id.* at 970.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 971.

167. 1975 A.M.C. 2012 (S.D.N.Y. 1975).

168. *Id.* at 2021.

package.<sup>169</sup> According to the district court, the carrier did not meet that burden because

the container was the property of the carrier; the freight was not based upon the measurement of the container, but rather upon that of the cartons contained therein; and the bill of lading listed the contents of the container by number of cartons, nature of cargo, measurement and gross weight.<sup>170</sup>

After *Baby Togs*, the Southern District of New York applied the functional economics test in two other cases. The court held in *Insurance Company of North America v. The Brooklyn Maru*<sup>171</sup> that a container filled with photographic supplies and chemicals constituted a package for the purposes of liability limitation under section 1304(5).<sup>172</sup> Utilizing the functional economics test, the district court limited the carrier's liability to \$500 because the container was loaded with 636 boxes that were not suitable for overseas shipment without further packaging or special shipping arrangements.<sup>173</sup> Because the individual boxes were not functional, a presumption was created that the container was the section 1304(5) package.<sup>174</sup> The shipper failed to rebut this presumption because it chose, packed, and sealed the container.<sup>175</sup> Also, the carrier did not supervise or participate in the packing.<sup>176</sup> Therefore, the container was deemed a package under section 1304(5).<sup>177</sup>

The district court reached a similar conclusion in *Eastman Kodak Company v. Transmariner*,<sup>178</sup> a decision involving a container carrying photographic equipment and chemicals that were not suitable for overseas transportation without further preparations. Because the cargo could not have been shipped

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169. *Id.*  
170. *Id.*  
171. 1974 A.M.C. 2443 (S.D.N.Y. 1974).  
172. *Id.* at 2447.  
173. *Id.* at 2446.  
174. *Id.*  
175. *Id.* at 2447.  
176. *Id.*  
177. *Id.*  
178. 1975 A.M.C. 123 (S.D.N.Y. 1974).

without the use of a container, the shipment failed the functional economics test enunciated in *Kulmerland*.<sup>179</sup>

*B. Criticism of the Functional Economics Test*

After its adoption by the Second Circuit, commentators severely criticized the functional economics test.<sup>180</sup> Seymour Simon, author of *The Law of Shipping Containers*, noted a number of problems with *Kulmerland*'s functional economics test.<sup>181</sup> First, Simon argued that the Second Circuit's use of the word "functional" was unrealistic, for instead of focusing on whether the cargo was suitable for *the voyage*, the Second Circuit focused on the "speculative and theoretical" issue of whether the cargo was suitable for transport without containers.<sup>182</sup> Simon explained:

Functionalism is the varying of the design or structure of anything (such as packaging) to conform with the current exigencies of its use. The very essence of the term is useful efficiency—the adapting of the construction and materials of objects to conform with the actual prevailing requirements. A thing is functional if it works. Clearly, in *Royal Typewriter [Kulmerland]*, the cartons that were used were the only kind of packaging that was really functional for the voyage. Wooden cases for containerized adding machines weighing 12 pounds each, would be superfluous packaging material and hence non-functional. Consequently, it is incomprehensible why the Court held that wooden cases (which were actually non-functional in containers) would have been the only functional package, while holding that cartons (which were undeniably functional for the voyage) were non-

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179. See *id.* at 128.

180. See, e.g., Simon, *supra* note 65, at 520-21; M.E. DeOrchis, *The Container and the Package Limitation—The Search for Predictability*, 5 J. MAR. L. & COM. 251, 257-58 (1974); Joseph A. Calamari, *The Container Revolution and the \$500 Package Limitation—Conflicting Approaches and Unrealistic Solutions: A Proposed Alternative*, 51 ST. JOHN'S L. REV. 687, 713-14 (1977).

181. See Simon, *supra* note 65, at 520-21.

182. *Id.* at 520-22.

functional . . . .<sup>183</sup>

According to Simon, the Second Circuit's approach in *Kulmerland* was anachronistic because the court focused on obsolete pre-containerization packaging methods instead of the realities of modern shipping to determine if the cargo was shipped in packages.<sup>184</sup>

Simon's second criticism of the functional economics test concerned the unfair economic advantage it gave to ocean carriers.<sup>185</sup> Obviously, containerization creates cost-savings for both carriers and shippers; however, the carrier realizes the vast majority of the economic savings from containerization.<sup>186</sup> According to Simon, "evenhanded justice suggests that the balance of 'functional economics' preponderates overwhelmingly against the carrier since it saves 90% of its costs of loading and discharging its ships, rather than against the shipper as a result of the inconsequential economy in the use of carton packaging."<sup>187</sup> Despite this disparity in savings, the functional economics test created in *Kulmerland* focused exclusively on the shipper's cost-savings in using the carrier's container.<sup>188</sup>

Finally, Simon argued that the functional economics test was flawed because it contravened the purpose of section 1304(5).<sup>189</sup> Before COGSA was enacted in 1936, carriers used their superior bargaining position to limit their liability to unconscionably low amounts.<sup>190</sup> The purpose of section 1304(5) was to prevent this practice by protecting the shipper.<sup>191</sup>

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183. *Id.* at 522.

184. *See id.* at 520-21.

185. *See* Simon, *supra* note 65, at 521-22.

186. *See id.* at 521; *see also* *Leather's Best, Inc. v. The Mormaclynx*, 313 F. Supp. 1373, 1376 (S.D.N.Y. 1970) (finding that "containers are provided primarily for the convenience of the carrier, since they cut down handling time and can save as much as 90% of the time required for unloading and reloading a vessel. Shippers derived some advantage from the use of containers, in that expensive export packaging can be reduced because there is less handling and reloading, and also in that they protect against damage if loaded properly and also against pilferage . . .").

187. Simon, *supra* note 65, at 521.

188. *See id.* at 531.

189. *See id.* at 525.

190. *See id.*

191. *See* *Standard Electrica v. Hamburg Sudamerikanische Dampfschiffahrts-*

Therefore, the functional economics test, which limited the carrier's liability to only \$500 per container in *Kulmerland*, was contrary to the purpose of section 1304(5).<sup>192</sup>

Joseph Calamari also criticized the functional economics test.<sup>193</sup> More specifically, he emphasized how the functional economics test promoted economic waste by unjustly penalizing shippers for using the carrier's containers.<sup>194</sup> He argued:

Although the largest benefits under containerization accrue to the carrier in the form of time savings and labor cost reductions, the shipper is also rewarded because the expensive packaging formerly required for overseas break-bulk shipment may be avoided. Presumably, this benefit will be passed on to the consumer through the market mechanism. In the interest of predictability, however, the Second Circuit has eliminated this latter advantage by basing a presumption upon the hypothetical and seemingly irrelevant consideration of whether the individual packaging used by the shipper would have been suitable for shipment. Since an unfavorable presumption arises if the packaging is determined to be unfit for such a shipment, the shipper is unjustly penalized for taking advantage of a cost saving device made possible by modern container technology. *The test thus promotes economic waste*, as the shipper is compelled to use heavier protective packaging to avoid the burden of an adverse presumption.<sup>195</sup>

A number of courts joined the commentators in rejecting the

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Gesellschaft, 375 F.2d 943, 945 (2d Cir. 1967) (noting that when COGSA was enacted in 1936, the statute's principal purpose was "the avoidance of adhesion contracts, providing protection for the shipper against the inequality in bargaining power."); *see also* Hearings, *supra* note 21, at 46 (discussing the bargaining power between shippers and carriers in 1935 and commenting, "[c]ertainly everyone interested in cargo is today definitely committed to the proposition that 'freedom of contract' between shipper and carrier is a pure fiction; that for most shippers . . . the shipper has no voice in determining the terms of his bill of lading, and merely has the option of accepting the bill as tendered by the carrier or not shipping at all").

192. *See* Simon, *supra* note 65, at 525.

193. *See* Calamari, *supra* note 180, at 713.

194. *See id.* at 714.

195. *Id.* at 714 (emphasis added).

functional economics test. In *Matsushita Electric Corporation of America v. The Aegis Spirit*,<sup>196</sup> the U.S. District Court for the Western District of Washington rejected this approach as “contrary to [section 1304(5)], commercially impracticable and unwise.”<sup>197</sup> *Matsushita* involved a shipment of color televisions and other electrical appliances that were stowed in a container shipped from Japan to Tacoma, Washington.<sup>198</sup> Upon arrival, the televisions and electrical appliances inside eleven of the containers were damaged due to entry of seawater into the stowage areas.<sup>199</sup> Judge Beeks declined to apply the functional economics test in this case, and concluded that the test as announced by the Second Circuit was unsatisfactory for two reasons.

First, Judge Beeks criticized the functional economics test’s presumption for or against the container as a COGSA package.<sup>200</sup> He argued that basing this presumption on “whether the shipper has used a ‘functional package’ conforms neither to the sense of 46 U.S.C. section 1304(5) nor the practical economies of containerized shipping” because section 1304(5) distinguishes only between goods shipped in packages and goods not shipped in packages.<sup>201</sup> Therefore, there was no reason for courts to speculate whether cargo is “functional” if shipped without a container.<sup>202</sup> In short, requiring courts to make conjectural determinations concerning the strength and durability of a shipper’s initial packaging was not contemplated by the drafters of section 1304(5).<sup>203</sup> This conclusion is understandable because containerized shipments were neither known nor contemplated in 1936.<sup>204</sup> Judge Beeks, echoing Seymour Simon and Joseph Calamari, also added that the functional economics test punishes shippers for using the more

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196. 414 F. Supp. 894 (W.D. Wash. 1976).

197. *Id.* at 906.

198. *Id.* at 897-98.

199. *Id.* at 898.

200. *Id.* at 904.

201. *Matsushita Elec. Corp.*, 414 F. Supp. at 904.

202. *See id.*

203. *See id.*

204. *See id.*

economical packaging made possible by containerization.<sup>205</sup>

Secondly, the functional economics test is flawed because it makes the intent of the parties important in applying section 1304(5).<sup>206</sup> To rebut the presumption created under the functional economics test, courts utilizing it may look at the other available evidence to determine whether or not the parties intended the container to be a package.<sup>207</sup> Judge Beeks found this approach problematic because it allows carriers to simply label cargo as shipped in packages by means of bill of lading language. The danger involved with this approach is that the plain meaning of the word “package” can be distorted or ignored by the parties.<sup>208</sup> Judge Beeks pointed out that “it is not the parties’ characterization of the shipment, but the court’s interpretation of the statute, that controls.”<sup>209</sup>

After rejecting the functional economics test, Judge Beeks sought guidance from other decisions to determine whether containers should be categorized as COGSA packages. Initially, he relied on the Ninth Circuit’s opinion in *Hartford Fire Insurance Co. v. Pacific Far East Lines, Inc.*,<sup>210</sup> a decision in which the Ninth Circuit extensively reviewed the legislative purpose behind section 1304(5).<sup>211</sup> In that decision, the court of appeals concluded that because Congress gave no technical or specialized meaning to the word “package,” courts should give the word “package” its plain, ordinary meaning.<sup>212</sup>

Judge Beeks also cited the Second Circuit’s observation in

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205. *See id.* (adding that the *Kulmerland* presumption “violates the salutary rule that courts should, whenever possible, foster good commercial practices and, accordingly, refrain from creating disincentives to mercantile economization”); *see also* Calamari, *supra* note 180, at 714 (arguing that the test promotes economic waste).

206. *See Matsushita Elec. Corp.*, 414 F. Supp. at 904.

207. *See id.*

208. *See id.* at 904-905. This point is of particular importance because most bills of lading are form agreements prepared by ocean carriers. *See id.* at 905.

209. *Id.*

210. 491 F.2d 960 (9th Cir. 1974).

211. *Matsushita Elec. Corp.*, 414 F. Supp. at 904-05 (citing, among other sources, *Hartford Fire Insurance Co. v. Pac. Far E. Lines, Inc.*, 491 F.2d 960, 962 (9th Cir. 1974)).

212. *Hartford Fire Ins. Co.*, 491 F.2d at 963.

*Leather's Best, Inc. v. The Mormaclynx*<sup>213</sup> “that ‘package’ is more sensibly related to the unit in which the shipper packed the goods and described them than to a large metal object, functionally a part of the ship, in which the carrier caused them to be contained.”<sup>214</sup> By analogy, Judge Beeks found the containers involved in *Matsushita* to be more like detachable stowage compartments of the ship, rather than packages.<sup>215</sup> He also noted that holding the containers to be COGSA packages would be a distortion of the plain meaning of the word “package.”<sup>216</sup> Therefore, the court held that the individual cartons stowed within the containers were COGSA packages to which the \$500 limitation applied, and this conclusion reflected the plain, ordinary meaning of the word.<sup>217</sup>

The U.S. District Court for the Eastern District of Virginia also rejected the functional economics test in *Yeramex International v. The Tendo*.<sup>218</sup> The court cited with approval Judge Beeks’s opinion in *Matsushita* and opted to apply the plain, ordinary meaning of the word “package.”<sup>219</sup> The district court defined “package” as “a class of cargo . . . to which some packaging preparation for transportation has been made which facilitates handling, but which does not necessarily conceal or completely enclose the goods.”<sup>220</sup> After applying this definition, the district court found that 216 individual cartons stowed inside carrier-owned and -supplied containers constituted COGSA packages to which the \$500 limitation applied.<sup>221</sup>

The *Yeramex* court revisited the issue of which package test to use in *In re Norfolk, Baltimore & Carolina Line, Inc.*<sup>222</sup> Like

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213. 451 F.2d 800 (2d Cir. 1971).

214. *Matsushita Elec. Corp. of Am. v. The Aegis Spirit*, 414 F. Supp. 894, 907 (W.D. Wash. 1976) (quoting *Leather's Best, Inc.*, 451 F.2d at 815).

215. *See id.*

216. *Id.*

217. *Id.* at 907-08.

218. 1977 A.M.C. 1807, 1834 (E.D. Va. 1977).

219. *Id.* (recognizing that Judge Beeks’s opinion in *Matsushita* was “well-reasoned”).

220. *Id.* at 1835 (quoting *Aluminios Pozuelo Ltd. v. The Navigator*, 407 F.2d 152, 155 (2d Cir. 1968)).

221. *Id.*

222. 478 F. Supp. 383, 388-92 (E.D. Va. 1979).

its decision in *Yeramex*, the district court declined to follow the functional economics test announced in *Kulmerland*, and once again the court cited with approval Judge Beeks's opinion in *Matsushita* as one of the bases for rejecting the functional economics test.<sup>223</sup> Instead of using the *Kulmerland* approach, the district court fashioned a new, fact-specific test to determine when a container is a COGSA package.<sup>224</sup> The district court distilled the following twelve criteria after reviewing the principal cases dealing with the issue:

- (1) Whether the carrier actually possesses superior bargaining strength sufficient to coerce the shipper's agreement to adhesion contract;
- (2) Whether the parties treated the container as a single unit in their negotiations, on the documents of contract, and in determining the shipping rate;
- (3) Whether the shipper, or at least one other than the carrier, chose to ship the goods in container;
- (4) Whether the shipper or carrier procured the container;
- (5) Whether the goods were delivered to the carrier previously loaded into the container;
- (6) Whether the goods were loaded by the shipper or by the carrier;
- (7) Whether the carrier actually observed the contents of the container before it was sealed for shipment;
- (8) Whether the container was loaded with the shipper's goods only, and not those of any other shipper;
- (9) Whether the markings on the container provided a complete and accurate indication of the contents and their value;
- (10) Whether the bill of lading contained any declaration of the nature of the container's contents and their value;
- (11) Whether the bill of lading provided the shipper with an adequate opportunity to declare the value of the container and its contents, and to obtain financial

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223. *Id.* at 392.

224. *Id.*

protection for any excess value; and  
(12) Whether the shipper took advantage of this opportunity.<sup>225</sup>

The district court explained that these twelve criteria achieved two purposes. First, they illuminate the intent of the parties to treat the container as a package.<sup>226</sup> Second, they advance Congress' intent to eliminate adhesion contracts between carriers and shippers.<sup>227</sup> Despite the district court's attempt to formulate a comprehensive test to determine when a container should be considered a COGSA package, the district court's complex factual analysis was not followed in other jurisdictions.<sup>228</sup>

### C. *The Abandonment of the Functional Economics Test*

Eight years after the Second Circuit's adoption of the functional economics test in *Kulmerland*, the Second Circuit reconsidered the issue of the package limitation as it relates to containers in *Mitsui & Co., v. American Export Lines, Inc.*<sup>229</sup> In this decision, the court consolidated two cases involving separate consignees, Mitsui and Armstrong.<sup>230</sup>

Mitsui was the consignee of 1834 tin ingots shipped from New York to Japan on board the Red Jacket.<sup>231</sup> The cargo was stacked in "bundles" inside five containers, but it is noteworthy that the bundles inside the five containers were not banded or

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225. *Id.*

226. *Id.*

227. *Id.* at 392-93.

228. See *Mitsui & Co. v. Am. Exp. Lines, Inc.*, 636 F.2d 807, 820 (2d Cir. 1981) (mentioning the twelve criteria in *In re Norfolk* without listing each); *Smythgreyhound v. Eurygenes*, 666 F.2d 746, 753 n.18 (2d Cir. 1981) (rejecting Judge Clarke's analysis because it was not a "common sense test" which will help "avoid the pains of litigation"); see also Timothy J. Armstrong, *Packaging Trends and Implications in the Container Revolution*, 12 J. MAR. L. & COM. 427, 453 (1981) (noting the Second Circuit's refusal to follow the *In re Norfolk* test). Cf. *Croft & Scully Co. v. Skulptor Vuchetich*, 508 F. Supp. 670, 683 (S.D. Tex. 1981) (adopting the *Norfolk* test as the most appropriate approach to the container/package issue), *rev'd*, 664 F.2d 1277, 1281 (5th Cir. 1982) (instead applying the Second Circuit's approach in *Leather's Best*).

229. 636 F.2d 807 (2d Cir. 1981).

230. *Id.* at 810.

231. *Id.*

strapped together as the word “bundle” might suggest.<sup>232</sup> Listed on the bill of lading was a column labeled “No. of Cont. or other Pkgs.,” with the entry being “30 bundles of 438 pcs.) Tin Ingot.”<sup>233</sup> Printed on the opposite side of the bill of lading was Clause 16, stating that the value of the goods would be deemed to be \$500 per package or per shipping unit.<sup>234</sup>

Armstrong was the second consignee of cargo, with 1705 rolls of floor covering.<sup>235</sup> The floor covering was packaged in such a manner that each roll could be stowed in a vessel’s hold as break-bulk cargo.<sup>236</sup> The bill of lading listed the number of containers as well as the number, weight and measurements of the rolls.<sup>237</sup> The Armstrong bill of lading also contained Clause 16, limiting the value of the goods to \$500 per package or shipping unit.<sup>238</sup>

During the voyage to Japan, the Red Jacket’s weather deck collapsed during a storm, and consequently forty-three containers fell overboard.<sup>239</sup> Five containers holding Mitsui’s tin ingots and 13 containers filled with Armstrong’s rolls of floor covering were lost.<sup>240</sup> Mitsui sought damages from American Export Lines (“AEL”), the owner and operator of the Red Jacket, in the amount of \$917,000, a figure representing the total number of lost ingots (1834) multiplied by the \$500 per-package limitation.<sup>241</sup> AEL argued its liability was limited to \$2500 because the five containers, not the tin ingots inside, were the COGSA packages.<sup>242</sup> Armstrong claimed damages in the amount of \$357,946.19 based upon the number of missing rolls.<sup>243</sup> AEL again sought to limit its liability to \$6,500 on the basis that the

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232. *Id.* at 811.  
233. *Id.* at 812.  
234. *Id.*  
235. *Mitsui*, 636 F.2d at 810.  
236. *See id.*  
237. *Id.*  
238. *Id.*  
239. *Id.* at 810.  
240. *Id.* at 811.  
241. *Mitsui*, 636 F.2d at 810-11.  
242. *Id.* at 811.  
243. *Id.*

13 containers, not the 1705 rolls of floor covering, were COGSA packages.<sup>244</sup>

The district court, applying the functional economics test, found the unbanded and unstrapped stacks of tin ingots were packages within the meaning of section 1304(5).<sup>245</sup> Additionally, the court found the 1705 rolls of floor covering were packages under section 1304(5).<sup>246</sup> AEL appealed in each case, taking the position that the containers should be regarded as packages.<sup>247</sup> Faced with the above facts, Chief Judge Friendly declined to use the functional economics test; instead, he reaffirmed the Second Circuit's approach in *Leather's Best* and specifically rejected the functional economics test in *Kulmerland*.<sup>248</sup> During his review of the prior case law, Chief Judge Friendly explained that the clear holding of *Leather's Best* was that carrier-furnished containers whose contents are fully disclosed on the bill of lading are not COGSA packages.<sup>249</sup> He concluded that the functional economics test is inconsistent with *Leather's Best* for the following reason:

Although the *Kulmerland* panel asserted that the critical fact in *Leather's Best* was that the bales of leather could have been shipped breakbulk, nothing in the opinion suggested that the decision had proceeded on that basis, there was no evidence on the point one way or the other, and the shipper had advanced no such argument.<sup>250</sup>

Because the facts in *Mitsui* involved carrier-furnished containers whose contents were disclosed to the carrier, Chief Judge Friendly applied the "square holding" of *Leather's Best* instead of *Kulmerland*.<sup>251</sup>

The court also questioned the presumption created by the functional economics test, noting no problem with the proposition that cargo treated as COGSA packages when

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244. *Id.*

245. *Id.* at 813.

246. *Id.* at 812-13.

247. *Id.* at 813.

248. *Id.* at 821.

249. *Id.* at 817.

250. *Id.* at 818.

251. *Id.*

shipped break-bulk should also be considered COGSA packages when shipped inside containers.<sup>252</sup> However, Chief Judge Friendly expressed serious reservations with respect to the second part of the functional economics test—the rule that the container is presumed to be a COGSA package when the break-bulk cargo is not suitable for transportation.<sup>253</sup> He explained:

Even if this might tend to show that each of those units is not a package[,] a conclusion that is by no means ineluctable[,] it does not follow that the container is. It could just as reasonably, indeed far more reasonably, be the case that the goods are “not shipped in packages” at all[,] a class of cargo specifically provided for in s[ection 130] 4(5). *Kulmerland* does not explain why carrier-furnished containers stowed with fully described units unsuitable for breakbulk shipment constitute packages despite our earlier recognition in *Leather’s Best* . . . that a container is “functionally part of the ship[.]” The *Kulmerland* test simply does not take into account the important possibility that goods shipped in such containers with packaging insufficient for breakbulk shipment might be “goods not shipped in packages.”<sup>254</sup>

Therefore, when cargo shipped in containers is not a package for the purpose of section 1304(5), it does not necessarily follow that the container should be deemed a package.<sup>255</sup> On the contrary, it is more reasonable to then apply the \$500 customary freight unit limitation for goods “not shipped in packages.”<sup>256</sup>

To further bolster his rejection of the functional economics test, Chief Judge Friendly pointed out that other district court opinions indicated that the functional economics test was not widely accepted.<sup>257</sup> Furthermore, the approach in *Leather’s Best* better conforms to international developments respecting the

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252. *Id.*

253. *Id.*

254. *Id.* at 818-19.

255. *Id.* at 818.

256. *Id.* at 821 n. 17.

257. *Id.* at 819-20 (reviewing the district court opinions in *Matsushita Elec. Corp v. The Aegis Spirit*, 414 F. Supp. 894 (W.D.Wash. 1976); *Yeramex Int’l v. The Tendo*, 1977 A.M.C. 1807 (E.D.Va. 1977); and *In re Norfolk Baltimore & Carolina Line, Inc.*, 478 F. Supp. 383 (E.D.Va. 1979)).

package limitation. More specifically, the approach in *Leather's Best* conforms to the approach implemented by the 1968 Brussels Protocol,<sup>258</sup> an international agreement (commonly known as the Visby Rules) that amended the Hague Rules in a number of important areas. Most importantly, article II(c) of the Visby Rules answers the question of when a container may be considered a package by deleting article 4(5)<sup>259</sup> of the Hague Rules and replacing it with the following language:

Where a *container*, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the Bill of Lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this package or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.<sup>260</sup>

Therefore, under these rules, the number of packages listed on the bill of lading is deemed to be the number of packages for limitation purposes. If the bill of lading does not list the number of separate packages within a container, then each article of transport (container) is deemed to be a package.<sup>261</sup> Chief Judge Friendly thought the goal of international uniformity is better served by the approach in *Leather's Best* because it is consistent with the Visby Rules.<sup>262</sup>

After rejecting the functional economics test, Chief Judge Friendly applied *Leather's Best* to the consolidated cases in *Mitsui*.<sup>263</sup> *Leather's Best* states that "at least when 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' referred to in section

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258. Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, February 23, 1968 [hereinafter Visby Rules], reprinted in TETLEY, *supra* note 20, at 1133 app. A.

259. *Supra* note 23 and accompanying text.

260. See Visby Rules, *supra* note 258, at 1133.

261. *Mitsui*, 636 F.2d at 821.

262. *Id.* at 820-21.

263. *Id.* at 821-22.

[130]4(5).”<sup>264</sup> In Armstrong’s case, the bill of lading put AEL on notice that AEL was shipping rolls of floor covering, not just loaded containers.<sup>265</sup> Therefore, the containers could not be considered COGSA packages.<sup>266</sup> The court’s next inquiry, however, was whether the rolls of floor covering inside the containers could fairly be described as packages.<sup>267</sup> Chief Judge Friendly indicated that, in making this determination, the court would use the plain, ordinary meaning of the word “package.”<sup>268</sup> In Armstrong’s case, the shipper had wrapped the rolls, inserted fiber discs at the bottom and top, and covered the bottom of the discs with burlap cloth.<sup>269</sup> Clearly, the rolls could be considered packages.<sup>270</sup>

The court had more difficulty with Mitsui’s case. The bill of lading listed “bundles of tin ingots” under the heading “No. of Cont. or other Pkgs.”<sup>271</sup> Because the containers could not be considered packages under section 1304(5),<sup>272</sup> the next issue was whether the tin ingots were packages even though they were in no way secured or bundled but merely placed in separate stacks. After noting that the shipper had done nothing to bind the tin ingots together inside the containers, Chief Judge Friendly held that the “bundles” of tin ingots in this case could not be regarded

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264. *Id.* at 817.

265. *Id.* at 821.

266. *Id.* at 822

267. *See id.* at 821.

268. *Id.* at 814. Judge Friendly approved of the Ninth Circuit’s method of determining the plain, ordinary meaning of the word “package.” *Id.* In *Hartford Fire Ins. Co. v. Pac. Far E. Lines, Inc.*, 491 F.2d 960, 963 (9th Cir. 1974), the court of appeals stated that dictionary definitions provided a starting point in determining the meaning of “package.” The court quoted Webster’s Third New International Dictionary 1617 (1966), defining a package as “a small or moderate sized pack; bundle, parcel . . . a wrapper or container . . . a protective unit for storing or shipping a commodity.” *Id.* Additionally, the court quoted Black’s Law Dictionary 1262 (4th ed. 1968), defining a package as “a bundle put up for transportation or commercial handling; a thing in form to become, as such, an article of merchandise or delivery from hand to hand . . . . As ordinarily understood in the commercial world, it means a shipping package.” *Id.*

269. *Mitsui*, 636 F.2d at 821.

270. *See id.*

271. *Id.* at 812.

272. *See id.* at 822.

as packages within the ordinary meaning of that term.<sup>273</sup> However, the court concluded that the consignee was estopped from denying that the cargo was shipped as packages due to the entry on the bill of lading.<sup>274</sup>

In a concurring opinion, Judge Oakes, author of the *Kulmerland* decision, acknowledged the rejection of the functional economics test.<sup>275</sup> As an apology, he stated that his object was to create a common sense test that would aid in predictability and reduce litigation,<sup>276</sup> but despite these efforts, he conceded that *Kulmerland* no longer could be used in resolving disputes. Judge Oakes stated

Judge Friendly's most perceptive opinion in this case, coupled with that of Judge Beeks in *Matsushita* . . . have persuaded me that the "functional economics" test of *Kulmerland* does not function well and had better be abandoned. In the realm of container shipping, where the bill of lading specifies the contents, the ship's container should not be deemed a package . . . ."<sup>277</sup>

Thus, the functional economics test was "repudiated even by its creator."<sup>278</sup>

#### D. Mitsui-Binladen: *The Modern Analysis*

After *Mitsui*, it is clear that when a bill of lading reveals the number of individual items within a container, and those items

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273. *Id.* at 821-22.

274. *See id.* at 823.

The typewritten material in the bill of lading, found to have been included by the shipper, represented that the contents of the containers consisted of 'bundles' of ingots. If the ingots had in fact been bundled, each bundle would have been a package. When the S.S. Red Jacket sailed from New York, AEL had no way of knowing that the shipper's representation was false. If the action here were by the shipper, this would seem a classic case for the application of estoppel. Mitsui and its insurer can stand no better; the shipper must be regarded as their agent in preparing the shipping documents.).

*Id.* (citations omitted).

275. *Id.* at 825.

276. *See id.*

277. *Id.*

278. Armstrong, *supra* note 228, at 452.

can fairly be described as packages using the ordinary, plain meaning of the term, then those items are considered packages for limitation purposes.<sup>279</sup> The question remaining after *Mitsui*, though, was what happens when the bill of lading does not list the cargo within a container as being packaged?<sup>280</sup> Can the container then be considered a COGSA package? These questions were answered in *Binladen BSB Landscaping v. The Nedlloyd Rotterdam*.<sup>281</sup>

*Binladen* involved the shipment of live plants from Houston and Miami to Saudi Arabia in ten refrigerated containers aboard the Nedlloyd Rotterdam.<sup>282</sup> Upon arrival in Saudi Arabia, the plants inside two of the containers were dead due to a malfunction of the refrigeration units.<sup>283</sup> The bill of lading for the container shipped from Houston read “1 40’ reefer container said to contain: 7,990 live plants,” with the container from Miami being shipped under a bill of lading reading “5/40’ reefer containers said to contain 11735 pcs. live plants misc. and 24 pkgs. shade cloth.”<sup>284</sup> The district court found Nedlloyd responsible for the damaged cargo.<sup>285</sup> The court then found that because the bills of lading disclosed the contents of the containers, the two containers were not packages under COGSA’s section 1304(5).<sup>286</sup> Nedlloyd appealed, arguing that the containers were COGSA packages and that the trial court incorrectly awarded damages in excess of section 1304(5).<sup>287</sup>

The Second Circuit noted that the bills of lading in this case, while listing the number of live plants inside the containers,

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279. See *Binladen BSB Landscaping v. The Nedlloyd Rotterdam*, 759 F.2d 1006, 1013 (2nd Cir. 1985); *Smythgreyhound*, 666 F.2d 746, 748 (2nd Cir. 1981).

280. *Mitsui*, 636 F.2d at 821 n.18 (“Nothing said here, of course, covers the situation in which the bill of lading does not show how many packages or units there are.”).

281. *Binladen BSB Landscaping*, 759 F.2d at 1006.

282. *Id.* at 1008-10.

283. *Id.* at 1008-09, 1011.

284. *Id.* at 1009.

285. *Id.* at 1011 (citing the district court’s decision in *Binladen BSB Landscaping v. The Nedlloyd Rotterdam*, 593 F. Supp. 546, 547-50 (S.D.N.Y. 1984)).

286. *Binladen BSB Landscaping*, 759 F.2d at 1011.

287. *Id.*

gave no indication whether or how the plants were packaged.<sup>288</sup>

The court explained:

But the word “plant,” standing alone in a bill of lading, does not describe an item that has been packaged for transport. Nor can a carrier that has agreed to transport a container of “live plants” reasonably infer from this description that each plant has been so packaged. Some plants may be simply stowed or stacked without potting, tying, wrapping or other preparation for shipping, in which event they are not individual packages but rather “goods not shipped in packages.”<sup>289</sup>

Because the bills of lading in this case failed to indicate the number of packages inside the two containers, the court affirmatively answered the question reserved in *Mitsui*—whether the container should be considered a COGSA package when the bill of lading lists only the number of containers and does not describe the contents as being shipped as packages.<sup>290</sup>

The Second Circuit held that when a bill of lading does not clearly indicate an alternative number of packages, the container must be treated as a COGSA package if it is listed as such on the bill of lading and if the parties have not specified that the shipment is one of goods not shipped in packages.<sup>291</sup> The court recognized that the allocation of risk in shipping is a matter governed by contract between the parties, but the parties cannot allocate the risk if the carrier has no information concerning the number and type of packages being shipped inside the containers.<sup>292</sup> According to the court, any other rule would “prevent the carrier from accurately assessing its potential liability at the time it contracts to transport the goods.”<sup>293</sup>

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288. *Id.* at 1013.

289. *Id.* at 1014.

290. *Id.* at 1015-16.

291. *Id.* (“If [the bill of lading] lists the container as a package and fails to describe objects that can reasonably be understood from the description as being packages, the container must be deemed a COGSA package.”).

292. *Id.* at 1016.

293. *Id.*

Due to the uncertainty of prior decisions, it was possible that the parties in this case might have reasonably believed the description of the number of plants on the bill of lading was sufficient to give Nedlloyd notice of the number of packages inside the containers.<sup>294</sup> Therefore, the Second Circuit held that the rule in *Binladen* would only be applied prospectively.<sup>295</sup> Because the holding was limited to future disputes, the court deemed the plants “goods not shipped in packages,” and pursuant to this finding, the court remanded the case to the district court to determine the applicable customary freight unit.<sup>296</sup>

After *Mitsui* and *Binladen*, the Second Circuit follows two general rules to determine when a container may be deemed a COGSA package under section 1304(5). These rules are:

- (1) When the bill of lading lists the number of containers and describes the items inside the containers in terms that can reasonably be understood as “packages,” the items inside, not the containers, will be treated as COGSA packages.<sup>297</sup>
- (2) “[W]hen the bill of lading does not clearly indicate an alternative number of packages, the container must be treated as a COGSA package if it is listed as a package on the bill of lading and if the parties have not specified that the shipment is one of ‘goods not shipped in packages.’”<sup>298</sup>

We now turn to the acceptance of the *Mitsui-Binladen* rules in the federal circuits.

### 1. First Circuit Decisions

Before *Granite State Insurance Co. v. Caraibe*,<sup>299</sup> the First Circuit had not adopted an analytical procedure for determining

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294. *Id.* (recognizing the uncertainty noted in prior cases such as *Mitsui*, 636 F.2d at 807, and *Smythgreyhound*, 666 F.2d at 746).

295. *Binladen BSB Landscaping*, 759 F.2d at 1016.

296. *Id.*

297. See *Mitsui*, 636 F.2d at 821; *Smythgreyhound*, 666 F.2d at 748.

298. *Binladen BSB Landscaping*, 759 F.2d at 1015-16.

299. 825 F. Supp. 1113 (D.P.R. 1993).

when a container is a COGSA package.<sup>300</sup> In *Granite State*, the federal district court of Puerto Rico reviewed the case law in other federal circuits and decided to adopt the Second Circuit's analysis in *Binladen* as it was interpreted by the Eleventh Circuit in *Hayes-Leger Associates v. Oriental Knight*.<sup>301</sup> In *Hayes-Leger*, the Eleventh Circuit distilled the following two-part test from the *Binladen* analysis:

- (1) when a bill of lading discloses the number of COGSA packages in a container, the liability limitation of section 1304(5) applies to those packages; but
- (2) when a bill of lading lists the number of containers as the number of packages, and fails to disclose the number of COGSA packages within each container, the liability limitation of section 1304(5) applies to the containers themselves.<sup>302</sup>

The federal district court of Puerto Rico adopted this test because it was logical and reasonable, and also because it furthered the goal of national and international uniformity of maritime cargo law.<sup>303</sup> Applying the test in *Hayes-Leger*, the federal district court of Puerto Rico held that two containers filled with machinery and parts were COGSA packages.<sup>304</sup> The shipper listed three containers on the bill of lading with the containers' contents described as "2 SYSTEMS SKID ASSEMBLY, 6 PCS. HARDWARE AND PARTS, PROBES AND STABILIZERS."<sup>305</sup> The shipper did not set forth any particular information regarding the manner in which the machinery and parts inside the containers had been prepared for ocean transportation.<sup>306</sup> For this reason, the court held that the containers "fall into the category of containers that should be treated as packages."<sup>307</sup>

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300. *Id.* at 1125.

301. *Id.* at 1126 (adopting analysis of *Hayes-Leger Assoc. v. Oriental Knight*, 765 F.2d 1076 (11th Cir. 1985)).

302. *Hayes-Leger Assoc.*, 765 F.2d at 1080.

303. *Granite State Ins. Co.*, 825 F. Supp. at 1126.

304. *Id.* at 1130-31.

305. *Id.* at 1116.

306. *Id.* at 1130.

307. *Id.*

## 2. *Second Circuit Decisions*

*Smythgreyhound* concerned cartons of stereo equipment shipped in containers from Japan to New York and European ports.<sup>308</sup> The shipper in this case, Universal Electric Merchandise Co. (“Universal”) had its freight forwarder load 1500 cartons of stereo equipment into eight containers.<sup>309</sup> The freight forwarder delivered the sealed containers to the vessel.<sup>310</sup> The bill of lading specified both the number of containers and the number of cartons inside the containers.<sup>311</sup>

Unfortunately, the ship caught fire during the voyage, severely damaging Universal’s stereo equipment.<sup>312</sup> Reaffirming its *Mitsui* holding, the Second Circuit Court of Appeals held that “in the absence of clear and unambiguous language indicating agreement on the definition of ‘package,’ . . . we will conclusively presume that the container is *not* the package where the bill of lading discloses the container’s contents.”<sup>313</sup> The court noted that the *Mitsui* rule “has the advantage of being a bright line, achieving ‘certainty’ but not ‘at the expense of legislative policy and equity.’”<sup>314</sup> Furthermore, the court stated that “*Mitsui* and our decision today will put carrier interests on notice that the container will not be considered the COGSA ‘package’ where the bill of lading discloses the contents of the container.”<sup>315</sup> The court did qualify its holding, stating: “This does not mean that the parties cannot agree between themselves that the container will be the COGSA ‘package’ . . . .”<sup>316</sup>

Because the bill of lading in *Smythgreyhound* listed the number of cartons inside the containers, the Second Circuit held that the cartons of stereo equipment rather than the containers

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308. *Smythgreyhound v. Eurygenes*, 666 F.2d 746, 747 (2d Cir. 1981).

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.* at 753 n.20.

314. *Id.* at 753 (quoting *Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft*, 375 F.2d 943, 948 (2d Cir. 1967)).

315. *Id.* at 753.

316. *Id.* at 753 n.20.

constituted packages under section 1304(5).<sup>317</sup> In reaching this holding, the court rejected the carrier's argument that whenever a shipper affirmatively prefers to use containers for its convenience, the containers must be COGSA packages.<sup>318</sup> According to the court, its previous decisions did not support the carrier's contention.<sup>319</sup> The *Mitsui* rule clearly applied, "regardless of the fact that the shipper had a choice of break-bulk or container shipment."<sup>320</sup>

What happens when the bill of lading purports to show the number of packages inside a container, but in reality the items inside the container do not qualify as COGSA packages? To resolve this important question, the court in *Seguros Illimani S.A. v. The Popi P*<sup>321</sup> placed heavy reliance on the parties' agreement as evidenced by the bill of lading.<sup>322</sup> The court in *Seguros* stated that "the number appearing on the bill of lading under the heading 'NO. OF PKGS.' is our starting point for determining the number of packages for purposes of the COGSA per-package limitation."<sup>323</sup> If the number under this heading refers to items that qualify as COGSA packages, then the court will "readily hold the parties to that number in applying the per-package limitation."<sup>324</sup> If, however, the number refers to items that are not packages, then the court "will accept, as the next best indication of the parties' intent, the numbers on the bill of lading that do refer to something that qualifies as a 'package.'"<sup>325</sup> This analysis applies only to situations in which the parties dispute which items inside the containers should be considered

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317. *Id.* at 753 ("[T]here is no evidence which leads us to conclude that the [stereo] cartons are not 'packages' for COGSA purposes."). Accordingly, the Second Circuit in *Smythgreyhound* also held that the \$500 per package limit on liability applied to the stereo cartons. *Id.*

318. *Id.* at 750.

319. *Id.*

320. *Id.* at 753.

321. 929 F.2d 89 (2d Cir. 1991).

322. *Id.* at 94. "We begin with a bill of lading's use of the term 'package,' . . . and will adopt the unit of packaging unambiguously identified in the bill of lading." *Id.* (citations omitted).

323. *Id.*

324. *Id.* at 95.

325. *Id.*

COGSA packages; when a container itself is alleged to be the COGSA package, the *Seguros* analysis does not apply.<sup>326</sup>

In *Monica Textile Corp. v. The Tana*,<sup>327</sup> the court addressed the undefined “exception” to the *Mitsui* rule set forth in *Smythgreyhound* that the parties may agree between themselves that the container will be the COGSA package.<sup>328</sup> The carrier in *Monica Textile* seized upon the dictum in *Smythgreyhound* and argued that the bill of lading could be construed as an agreement that the single container was the relevant package.<sup>329</sup> The court rejected this argument.<sup>330</sup> To invoke the “exception” to the *Mitsui* rule, the agreement to treat the container as a package must be “explicit and unequivocal.”<sup>331</sup> In this case, the bill of lading was ambiguous because it contained two different kinds of language: (1) language disclosing seventy-six bales of cloth inside the container;<sup>332</sup> and (2) two boilerplate provisions limiting the carrier’s liability to \$500 per container.<sup>333</sup> The exception to *Mitsui*’s rule was inapplicable because the bill of lading was ambiguous; consequently, the seventy-six bales of cloth, not the container, were COGSA packages.<sup>334</sup>

The Southern District of New York has also followed the Second Circuit’s approaches in *Mitsui*, *Smythgreyhound*, and *Binladen*.<sup>335</sup> However, in its most recent decision involving

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326. *Monica Textile Corp. v. The Tana*, 952 F.2d 636, 641 (2d Cir. 1991).

327. 952 F.2d 636 (2d Cir. 1991).

328. *Id.* at 642 (noting that the court remarked in a footnote in *Smythgreyhound* that the parties could “agree between themselves that the container will be the COGSA ‘package’”); see also *Allied Int’l Am. Eagle Trading Corp. v. The Yang Ming*, 672 F.2d 1055, 1061 (2d Cir. 1982) (stating in dictum that “when the bill of lading expressly refers to the container as one package, or when the parties fail to specify an alternative measure of the ‘packages’ shipped, the courts have no choice but to respect their express or implied understanding and to treat the container as a single package”).

329. *Monica Textile*, 952 F.2d at 642.

330. *Id.* (stating that “this supposed exception to the *Mitsui* rule . . . is more apparent than real,” and concluding that “*Mitsui* and its progeny resolve this ambiguity against the carriers”).

331. *Id.*

332. *Id.* at 637.

333. *Id.* at 641-42.

334. *Id.* at 643.

335. See *Alternative Glass Supplies v. Nomzi*, 1999 A.M.C. 1080, 1085

containers and the per-package limitation, *Orient Overseas Container Line, Ltd. v. Sea-Land Service, Inc.*,<sup>336</sup> the court relied on a somewhat different test in reaching its decision.<sup>337</sup> This case involved the shipment of 1,768 Ford automobile engines that were stowed on racks inside seventeen containers.<sup>338</sup> The entire shipment of engines was covered by a single bill of lading which listed, among other information, the following language: "1768 PCS." under the sub-caption "QUANTITY PACKAGES;" the typed notation "S.T.C. AUTOMOBILE ENGINES GASOLINE FOR NEW ENGINES PACKED INTO 17 x 40' CONTAINER" under the sub-caption "DESCRIPTION OF PACKAGES AND GOODS;" and the notation "TOTAL: \* \* \*1768\* \* \* PACKAGES."<sup>339</sup> The court concluded that the containers were the COGSA packages because the engines did not qualify as such, and because Ford did not disclose the existence of the racks on the bill of lading.<sup>340</sup> Although the court quoted the Second Circuit's holding in *Binladen*,<sup>341</sup> the court indicated that

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(S.D.N.Y. 1999) (following *Binladen* and holding that the container, not its contents, was the package for COGSA purposes); *Orion Ins. Co. v. Humacao*, 851 F. Supp. 575, 580 (S.D.N.Y. 1994) (concluding "under the rule set forth in *Binladen*, the container must be treated as a COGSA package"); *Judy-Philippine Inc. v. Verazano Bridge*, 805 F. Supp. 185, 188 (S.D.N.Y. 1992) (applying *Mitsui* and concluding that the 1542 cartons of children's garments were packages under section 1304(5) "because the bills of lading expressly describe the contents of each container in terms of cartons"); *Norwich Union Fire Ins. Soc'y, Ltd. v. Lykes Bros. Steamship Co.*, 741 F. Supp. 1051, 1057 (S.D.N.Y. 1990) (stating "the bill of lading unambiguously states that the container is the package," and holding the container was the COGSA package); *Ins. Co. of N. Am. v. Texas*, 1985 A.M.C. 1358, 1364 (S.D.N.Y. 1984) (holding, in accordance with *Mitsui* and *Smythgreyhound*, that "the container constitute[d] the COGSA 'package'"); *Marcraft Clothes, Inc. v. Kurobe Maru*, 575 F. Supp. 239, 242 (S.D.N.Y. 1983) (following *Mitsui* and concluding the container was not a package because the bill of lading fully disclosed the contents of the container); *Ins. Co. of N. Am. v. Italica*, 567 F. Supp. 59, 63 n.2 (S.D.N.Y. 1983) (citing both *Mitsui* and *Smythgreyhound* and concluding "[w]here, as here, the bill of lading lists the contents of the container as a specified number of packages of goods, the container is not . . . the 'package' for purposes of COGSA's package limitation").

336. 122 F. Supp. 2d 481 (S.D.N.Y. 2000).

337. *Id.* at 489.

338. *Id.* at 482.

339. *Id.* at 483.

340. *Id.* at 489.

341. *Id.* "[I]f the bill of lading lists the container as a package and fails to disclose objects that can reasonably be understood from the description as being

the rule in *Binladen* was not essential to reach the conclusion in this case.<sup>342</sup> Instead, the court relied on dicta from *Allied International American Eagle Trading Corp. v. The Yang Ming*,<sup>343</sup> which stated the following:

But when the bill of lading expressly refers to the container as one package, *or when the parties fail to specify an alternative measure of the “packages” shipped*, the courts have no choice but to respect their express or implied understanding and to treat the container as a single package. In such a situation, the carrier’s lack of notice of the container’s contents indicates that the parties agreed upon no meaning for “package” other than the container as a whole.<sup>344</sup>

Finding that the engines referred to in the bill of lading could not conceivably qualify as COGSA packages, the court in *Orient Overseas* concluded that the container was the package for limitation purposes.<sup>345</sup>

The decision in *Orient Overseas* was interesting because the court relied upon a pre-*Binladen* decision, *Allied International*, to justify its conclusion that the container was a package.<sup>346</sup> The holding in *Binladen* clearly indicates that the container is considered the COGSA package if the bill of lading lists the container as a package *and* fails to disclose objects that can reasonably be described as packages.<sup>347</sup> The language in *Allied International*, however, seems to indicate that a container can be a COGSA package when the bill of lading expressly refers to the container as a package *or* when the bill of lading fails to specify an alternative number of packages.<sup>348</sup>

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packages, the container must be deemed a COGSA package.” *Id.* (quoting *Binladen*, 759 F.2d at 1015).

342. *Id.* at 489-90. “If the bill of lading cannot be read to list the container as a package, then *nothing* described on the bill of lading qualifies as a COGSA package . . . .” *Id.*

343. 672 F.2d 1055 (2d Cir. 1982).

344. *Id.* at 1061 (emphasis added).

345. *Orient Overseas*, 122 F. Supp. 2d at 490.

346. *Id.* (following *Allied International*, and concluding that “the container must be regarded as the COGSA package by operation of law”).

347. *Binladen*, 759 F.2d at 1015.

348. *Allied Int’l*, 672 F.2d at 1061 (emphasis added).

### 3. *Fourth Circuit Decisions*

In *Universal Leaf Tobacco Co. v. Companhia De Navegacao Maritima Netumar*,<sup>349</sup> the Fourth Circuit adopted without reservation the Second Circuit's rule in *Mitsui*; namely, that "when a bill of lading discloses on its face what is inside the container, and those contents may reasonably be considered COGSA packages, then the container is not the COGSA package."<sup>350</sup>

The Fourth Circuit also followed the *Mitsui-Monica Textile* rule that "[w]hen a bill of lading refers to both containers and other units susceptible of being COGSA packages, it is inherently ambiguous."<sup>351</sup> In these situations, specific references to the quantity of cargo inside the containers trumps both the more general "no. of pkgs." designation on the bill of lading form, and boilerplate language referring to the containers as packages.<sup>352</sup>

The cargo that was the subject of the *Universal Leaf* decision was 1200 cases of tobacco stuffed into twelve containers.<sup>353</sup> Concluding that each case was a package, the Fourth Circuit referred to the language on the bills of lading.<sup>354</sup> Under the form heading, "Particulars furnished by shipper/description of packages and goods," the bill of lading listed the number of cases of tobacco sealed within each container.<sup>355</sup> Because the bill of lading disclosed on its face the containers' contents, and the tobacco cases could reasonably be considered COGSA packages, the containers were not deemed COGSA packages.<sup>356</sup> This was so even though the bill of lading had additional language indicating

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349. 993 F.2d 414 (4th Cir. 1993).

350. *Id.* at 417 (quoting *Monica Textile Corp. v. The Tana*, 952 F.2d 636, 639 (2d Cir. 1991)).

351. *Universal Leaf Tobacco Co. v. Companhia de Navegacao Maritima Netumar*, 993 F.2d 414, 417 (4th Cir. 1993) (quoting *Monica Textile Corp.*, 952 F.2d at 642).

352. *Id.*

353. *Id.* at 414.

354. *Id.* at 416.

355. *Id.* at 415.

356. *See id.* at 416-17.

the containers were packages.<sup>357</sup> Under *Mitsui* and *Monica Textile*, the more specific provisions canceled the general language on the bill of lading form.<sup>358</sup>

#### 4. Fifth Circuit Decisions

In *Allstate Insurance Co. v. Inversiones Navieras Imparca*,<sup>359</sup> the Fifth Circuit adopted and followed the holdings in *Leather's Best* and *Mitsui*.<sup>360</sup> The cargo in question was a shipment of stereo receivers and digital clock radios consisting of 341 cartons loaded into a vessel's container by the inland shipper.<sup>361</sup> The bill of lading described the cargo as "One 20' Ft. Container With 341 Cartons," and as "One 20' Container said to contain electronic equipment radio apparatus."<sup>362</sup> The Fifth Circuit recognized that the facts in *Allstate* fell squarely within those of *Leather's Best* and one of the two fact situations set forth in *Mitsui*.<sup>363</sup> The court held the container was not a package for purposes of section 1304(5) because the bill of lading disclosed on its face the amount and kind of packages inside the container.<sup>364</sup>

Judge John Brown used colorful language in *Croft & Scully Co. v. Skulptor Vuchetich*<sup>365</sup> to confirm the standard in *Allstate* would determine what constitutes a package under section 1304(5).<sup>366</sup> *Croft & Scully* involved the shipment of a container

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357. See *id.* at 415.

358. *Id.* at 417.

359. 646 F.2d 169 (5th Cir. Unit B 1981).

360. *Id.* at 173 n.1.

361. *Id.* at 170.

362. *Id.*

363. *Id.* at 172. "In *Leather's Best*, the carrier furnished the shipper with a 40-foot container that the seller loaded with 99 cartons or bales of leather." *Id.* at 171. The bill of lading described the cargo as "1 container s.t.c. 99 bales of leather." *Id.* The Second Circuit held the 99 bales of leather to be COGSA packages. *Id.* One of the consolidated cases in *Mitsui*, involving Armstrong Cork Canada, Ltd., involved the shipment of rolls of floor covering material which were covered with paper and capped on each end by fiber discs. *Id.* at 173 n.2. The *Mitsui* court held that the rolls qualified as "package[s]" in the "ordinary sense of the word." *Id.*

364. See *id.* at 172-73.

365. 664 F.2d 1277 (5th Cir. 1982).

366. See *id.* at 1280.

loaded with 1755 cases of soft drinks.<sup>367</sup> The bill of lading described the container's contents as "20' CONTAINER STC: 1755 CASES DELAWARE PUNCH."<sup>368</sup> Judge Brown concluded that there was "nothing in the Bill of Lading to indicate that the contracting parties intended some special meaning of the term 'package.'"<sup>369</sup> Under the *Allstate* rule (the Fifth Circuit's adoption of the *Mitsui* concept), the container was not a COGSA package because the bill of lading disclosed information to the carrier about the contents of the container.<sup>370</sup>

The most recent decision from a Fifth Circuit district court is *In re Floreana*.<sup>371</sup> The court applied the *Mitsui* rule that if a bill of lading discloses the number of separate items within a container that can reasonably be considered packages, then the items, not the container, constitute the packages.<sup>372</sup> Applying this rule, the district court concluded that seventy-eight drums and twenty-eight other packages listed on a bill of lading precluded the container from being considered a COGSA package.<sup>373</sup>

#### 5. Seventh Circuit Decisions

The U.S. District Court for the Northern District of Illinois accepted the *Mitsui-Binladen* analysis in *International Adjusters, Inc. v. Korean Wonis-Son*<sup>374</sup> by holding that the word "package," as used in section 1304(5), "refers to the individual cartons and cases contained in a large container, and not the large container itself, when the number of individual cartons and cases is disclosed, at least in the absence of a clear and

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367. *Id.* at 1278-79.

368. *Id.* at 1279, n.1.

369. *Id.* at 1281.

370. *See id.* One interesting note is that the case was remanded to the trial court to determine the proper "customary freight unit," the measure for applying the \$500 limitation if the cargo is not shipped in packages. *Id.* at 1282. This conclusion is questionable because the Delaware Punch was shipped in cartons, i.e., a proper "package."

371. 65 F. Supp. 2d 489 (S.D. Tex. 1999).

372. *Id.* at 493 (citing *Mitsui & Co. v. Am. Exp. Lines, Inc.*, 636 F.2d 807 (2d Cir. 1981)).

373. *See id.*

374. 682 F. Supp. 383 (N.D. Ill. 1988).

unambiguous agreement to treat the container as a package.”<sup>375</sup> The bill of lading listed under “TOTAL NO. OF Packages” the entry “ONE (1) CONTAINER ONLY;” however, it also listed under “NO. OF COUNT OR PKGS. OTHER” the entry “DESCRIPTION OF PACKAGES ([9] CASES & 42 CARTONS).”<sup>376</sup> The district court resolved this ambiguity in favor of the more specific listing—the description of the packages as nine cases and forty-two cartons.<sup>377</sup> The court reasoned that by listing the cases and cartons on the bill of lading, the shipper gave notice to the carrier that the shipment involved two levels of packaging.<sup>378</sup> Therefore, the container was not the COGSA package.<sup>379</sup>

#### 6. Ninth Circuit Decisions

Even before the Second Circuit decided *Mitsui* in 1981, the Western District of Washington expressed its disapproval of the functional economics test in *Matsushita Electric Corp. of America v. The Aegis Spirit*.<sup>380</sup> As an alternative to the functional economics test, Judge Beeks embraced the Second Circuit’s holding in *Leather’s Best* as the most “workable” test.<sup>381</sup>

Unlike the Western District of Washington, the Ninth Circuit Court of Appeals has not expressly adopted the Second Circuit’s approach to determining when a container is a package under section 1304(5). In *All Pacific Trading, Inc. v. Vessel Hanjin Yosun*,<sup>382</sup> the Ninth Circuit concluded that a container could not be a COGSA package if the shipper listed the number of packages as being the container’s contents.<sup>383</sup> The court stated that “by listing the number of packages and containers, the shipper avail[s] itself of the opportunity to clarify the liability

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375. *Id.* at 386.

376. *Id.* at 385.

377. *Id.* at 385-86.

378. *Id.* at 385.

379. *See id.* at 386.

380. *See* 414 F. Supp. 894 (W.D. Wash. 1976).

381. *Id.* at 906-07.

382. 7 F.3d 1427 (9th Cir. 1993).

383. *See id.* at 1433.

limits.”<sup>384</sup> To support this statement, the court cited *Universal Leaf Tobacco* and *Monica Textile*,<sup>385</sup> both of which fully incorporated the *Mitsui-Binladen* analysis developed by the Second Circuit.<sup>386</sup> By citing these two decisions, it is clear that the Ninth Circuit adheres to the principles embodied in *Mitsui* and *Binladen*.

### 7. Eleventh Circuit Cases

The Eleventh Circuit wholly adopted the rule and analysis announced in *Binladen*. In *Hayes-Leger Associates, Inc. v. The Oriental Knight*,<sup>387</sup> this court distilled the holding of *Binladen* into the following two rules:

- (1) when a bill of lading discloses the number of COGSA packages in a container, the liability limitation of section [130]4(5) applies to those packages; but
- (2) when a bill of lading lists the number of containers as the number of packages, and fails to disclose the number of COGSA packages within each container, the liability limitation of section [130]4(5) applies to the containers themselves.<sup>388</sup>

Like the court in *Binladen*, the Eleventh Circuit applied these two rules *prospectively* to bills of lading issued after the date of the decision.<sup>389</sup> For bills of lading prepared before the date of the court’s decision, the court decided to apply the “goods not shipped in packages” limitation.<sup>390</sup>

The pertinent facts of the case are relatively straightforward. Hayes-Leger was the consignee of five containers of woven baskets and rattan goods shipped from the

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384. *Id.*

385. *Id.* (citing *Monica Textile Corp. v. The Tana*, 952 F.2d 636, 639-43 (2d Cir. 1991) and *Universal Leaf Tobacco Co. v. Companhia De Navegacao Maritima Netumar*, 993 F.2d 414, 416-17 (4th Cir. 1993)).

386. *Monica Textile Corp.*, 952 F.2d at 639 (“*Mitsui* settled the law in container cases for this circuit and has been steadily followed.”); *Universal Leaf Tobacco Co.*, 993 F.2d at 417 n.1 (“In adopting the Second Circuit’s rule in its entirety, . . .”).

387. 765 F.2d 1076 (11th Cir. 1985).

388. *Id.* at 1080.

389. *Id.*

390. *Id.* at 1080-81.

Philippines.<sup>391</sup> Virtually every piece of cargo inside the containers was prepared for shipment in some fashion.<sup>392</sup> The five containers were covered by five separate bills of lading.<sup>393</sup> The first bill of lading listed the number of packages as “TWO THOUSAND SIX HUNDRED FORTY ONE PCS. ONLY,” with the additional description of “2,641 WOVEN BASKETS AND RATTAN FURNITURES.” The second bill of lading listed the number of packages as “ONE CONTAINER ONLY,” with the contents described as “1 CONTAINER SAID TO CONTAIN: 3,542 PCS. WOVEN BASKETS AND RATTAN FURNITURES.”<sup>394</sup> The other three bills of lading were essentially identical to the first one.<sup>395</sup>

Applying the *Binladen* framework, the court of appeals first addressed the second bill of lading.<sup>396</sup> The bill of lading listed “ONE CONTAINER ONLY,” but did not list the number of packages inside the container.<sup>397</sup> Ordinarily, the container would be considered the COGSA package in this situation.<sup>398</sup> However, since the court decided to apply the *Binladen* rules prospectively, the court determined that the goods must be considered as “goods not shipped in packages” for purposes of section 1304(5).<sup>399</sup>

Next, the court examined the remaining four bills of lading.<sup>400</sup> These four bills of lading purported to list the number of packages inside the containers, but they did so inaccurately.<sup>401</sup> More specifically, the shipper overstated the number of packages because not every item inside the containers could be considered a package using the plain, ordinary meaning of the

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391. *Id.* at 1077.

392. *Id.* at 1079.

393. *See id.* at 1081.

394. *Id.*

395. *Id.*

396. *Id.*

397. *Id.*

398. *See id.*

399. *Hayes-Leger v. The Oriental Knight*, 765 F.2d 1076, 1080-81 (11th Cir. 1985).

400. *Id.* at 1081.

401. *Id.*

term.<sup>402</sup> The court of appeals drew a distinction at this point between decisions in which the shipper overstates the number of packages in the container, and those in which the shipper understates the number of packages.<sup>403</sup> When the shipper understates the number of packages, the court of appeals stated that the preferred approach was to limit the carrier's liability based on the number of packages as stated in the bill of lading.<sup>404</sup> When the shipper overstates the number of packages in a container, the court held that the COGSA liability limitation should be applied to the actual number of packages in the container.<sup>405</sup> Since the district court properly applied the per-package limitation to the actual number of packages in the container, the court of appeals affirmed the district court's award of damages under those four bills of lading.<sup>406</sup>

*Fishman & Tobin, Inc. v. Tropical Shipping & Construction Co.*,<sup>407</sup> the Eleventh Circuit's most recent container/package decision, involved an ambiguous bill of lading issued for a containerized shipment of 5,000 men's jackets on hangers. The carrier sent to MacClenny, the shipper,<sup>408</sup> a bill of lading listing the dimensions of the container in the "Quantity" column and describing the goods as "5000 units men's suits." To resolve the ambiguity and determine the appropriate COGSA package in this case, the court looked beyond the bill of lading to shipping

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402. *See id.*

403. *Id.* at 1082.

404. *Id.*

405. *Hayes-Leger v. The Oriental Knight*, 765 F.2d 1076, 1082 (11th Cir. 1985).

406. *See id.*

407. 240 F.3d 956 (11th Cir. 2001).

408. MacClenny was one of two shippers in this case. *Id.* at 959. The other shipper, Fishman, arranged for the transport of 39 "big packs" of children's clothing inside the carrier's container. *Id.* "Big packs" are articles of transport designed to hold bundles of clothing. *Id.* The bill of lading in Fishman's case listed the dimensions of the container in the "Quantity" column and also described the goods as 39 "big packs" containing units of boy's pants. *Id.* at 961. The customs declaration form (reembarque) made out by Fishman included the same information, but also stated that 2,325 dozens (bundles) of pants were inside the big packs. *Id.* Based on this disclosure, Fishman argued that the smaller bundles of pants inside the big packs should be considered packages. *Id.* at 960. The court held the 39 big packs as packages because the bill of lading and reembarque agreed as to the type and number of packages shipped. *See id.* at 959-60.

documents prepared by MacClenny and other evidence.<sup>409</sup> Citing *Hayes-Leger*, the court explained its approach as follows:

[O]ur precedent has clearly required that the number of packages that are declared must be indicated in the number/quantity of packages column on the bill of lading. . . . Absent such an indication (and in light of the circumstances such as the present), the shipper's own documents as the next most reliable source of information should give some clear indication that more than one package is being shipped in order to claim multiple losses.<sup>410</sup>

Finding that neither the bill of lading nor the reembarque or customs form offered a clear indication that each jacket was a package, the court held the single container was a package.<sup>411</sup>

## V. CONCLUSION

Every major maritime judicial circuit has followed the *Mitsui-Binladen* approach to problems that arise concerning containers.<sup>412</sup> This development is beneficial for two reasons. First, both courts and commentators agree that the functional economics test was fundamentally unsound.<sup>413</sup> Judge John Brown of the Fifth Circuit said it best when he stated:

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409. *See id.* at 964. MacClenny offered affidavits stating that the description of 5,000 units was made according to U.S. Customs regulations and therefore represented de facto shipping units. Additionally, MacClenny's commercial invoice clearly indicated that each jacket was a package. *Id.* On the other hand, both the customs declaration form and reembarque indicated that MacClenny stipulated the number of packages as one. *Id. See also* *In re Belize Trading, Ltd. v. Sun Ins. Co. of New York*, 993 F.2d 790, 792 (11th Cir. 1993) (indicating that when a bill of lading does not accurately reflect information provided by the shipper to the carrier, the court will look beyond it to documents provided by the shipper).

410. *Tropical Shipping*, 240 F.3d at 965.

411. *See id.* The Court did note, however, that "this is not to say that there may never be a case where the conflict between the information provided in the quantity column and the description column would lead to a different result. There was simply not enough evidence to support that conclusion in this case. It is also our hope that by providing a bright-line rule now, such conflicts may be avoided in the future and shippers and carriers alike will be on notice as to how to proceed." *Id.* at 965 n.13.

412. *See* *Monica Textile Corp. v. The Tana*, 952 F.2d 636, 639-640 (2d Cir. 1991).

413. *See* *Mitsui & Co. v. Am. Exp. Lines, Inc.*, 636 F.2d 807, 819-820 (2d Cir. 1981).

That test, which lingered beyond its time as a Sprite disrupting the admiralty for some years, looks to see whether the goods as packaged prior to shipping were “functional”, i.e. fit for shipping and transport individually as packed. It necessitated much judicial guessing work, and we are well rid of it.<sup>414</sup>

Second, the *Mitsui-Binladen* approach is consistent with the position of the international community.<sup>415</sup> As discussed earlier, the Visby Rules provide that when a container is used to consolidate goods, the number of packages enumerated on the bill of lading shall be deemed to be the number of packages.<sup>416</sup> If the bill of lading does not show how many separate packages there are, then each container shall be deemed a package.<sup>417</sup> Because the *Mitsui-Binladen* approach is consistent with the Visby Rules, this approach best serves the goal of international uniformity.<sup>418</sup>

The preferable solution to the package problem under section 1304(5) would be one of a legislative measure. Section 1304(5) has not been amended since its enactment in 1936.<sup>419</sup> As

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414. *Croft & Scully Co. v. Skulptor Vuchetich*, 664 F.2d 1277, 1281 n. 10 (5th Cir. 1982).

415. *See Monica Textile Corp.*, 952 F.2d at 640.

416. *See The Visby Rules*, Art. II(c), reprinted in TETLEY, *supra* note 20, at 1121, app. A.

417. *See Mitsui*, 636 F.2d at 821.

418. *See id.*

419. There have been unsuccessful efforts to amend COGSA; the most recent of which occurred in 1999. In that year, a draft bill prepared by the United States Senate adopted the package and kilo limitations found in the Visby Rules. The proposed legislation also included a provision for goods consolidated in containers. The relevant portions were as follows:

SEC 9. RIGHTS AND IMMUNITIES OF CARRIER AND SHIP

(h) LIMITATIONS ON LIABILITY

- (1) IN GENERAL.—Except as provided in paragraph (3), the aggregate liability of all carriers and their ships for loss of, for damage to, or in connection with goods under a contract of carriage may not exceed the higher of—
  - (A) 666.67 Special Drawing Rights (as defined by the International Monetary Fund) per package; or
  - (B) 2 Special Drawing Rights (as so defined) per kilogram of gross weight of the goods lost or damaged.
- (2) SPECIAL RULE FOR CONSOLIDATED GOODS.—If a

a result, technological advances such as containerization have rendered this section “ill-suited to present conditions.”<sup>420</sup> In the absence of a legislative response to the problem, the *Mitsui-Binladen* approach is the best judicial solution.<sup>421</sup>

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container, pallet, or similar article of transport is used to consolidate goods, the number of packages enumerated in the contract of carriage as packed in the article of transport shall be deemed to be the number of packages for purposes of paragraph 1(A). Except as provided in the preceding sentence, such an article of transport shall be considered to be the package for such purpose.

(3) EXCEPTIONS.—

(A) DECLARED VALUE.—Paragraph (1) does not apply if the nature and value of the goods have been declared by the shipper before shipment and the declaration is contained in the contract of carriage, but the declaration shall be only prima facie evidence of the nature and value of the goods.

(B) AGREEMENT ON GREATER LIMIT.—Paragraph (1) does not apply if the contracting carrier and the shipper agree on a greater amount as the maximum liability of the carrier and its ship for loss or damage. Any such agreement is binding only on the parties who entered into the agreement.

Carriage of Goods by Sea Act of 1999, S., 106th Cong. § 9 (1999), at <http://tetley.law.mcgill.ca/cogsa99.htm>.

420. *Leather's Best, Inc.*, 451 F.2d at 815.

421. *Allstate Ins. Co. v. Inversiones Navieras Imparca*, 646 F.2d 169, 172 n.1 (5th Cir. 1981).