Overview of Maritime Law Carriage of Goods By Sea

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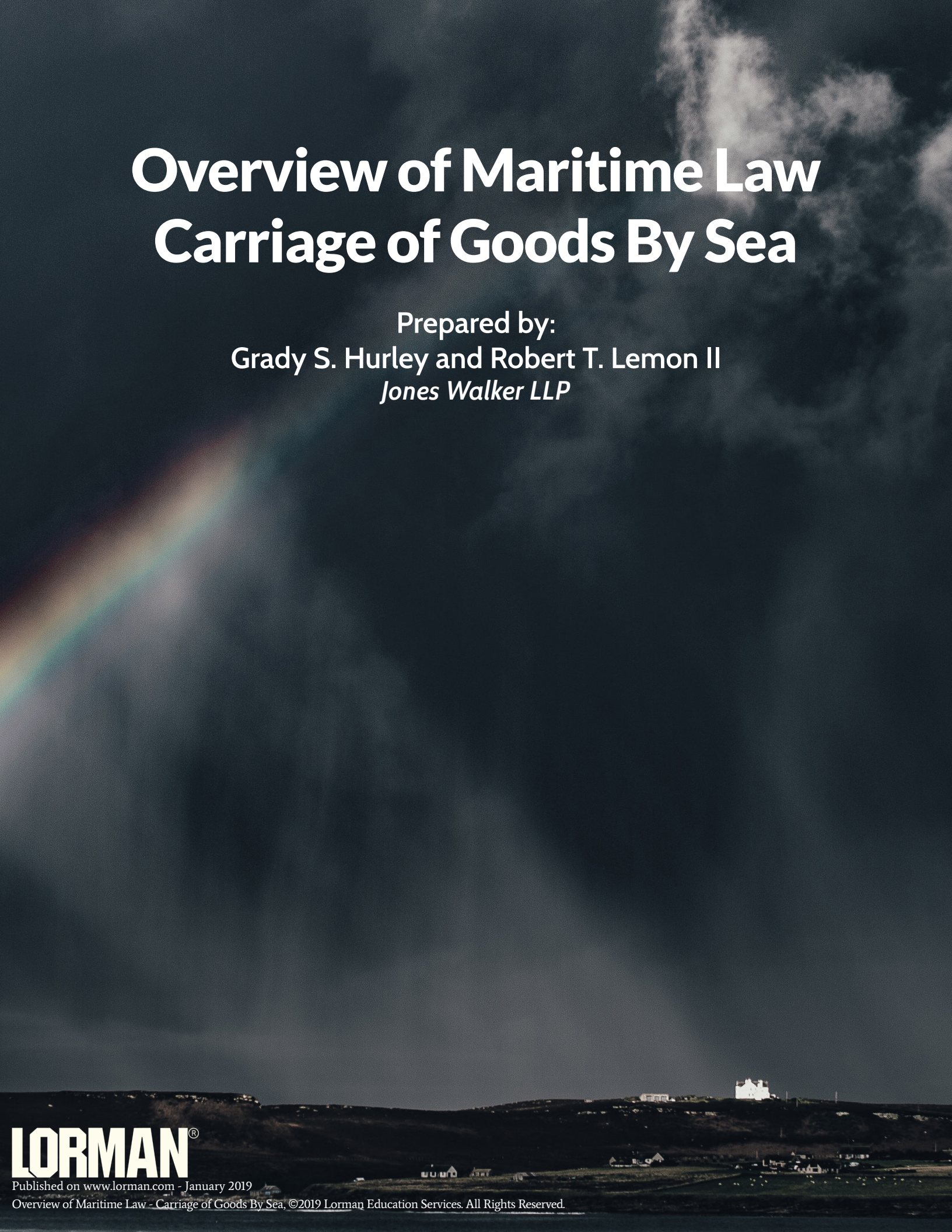

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I. CARRIAGE OF GOODS BY SEA

A. Commercial Shipping Transaction

The Contract for the Carriage of Goods is usually ancillary to the commercial transaction between the Seller and Buyer of the goods. The Contract for the Carriage of Goods facilitates the sale of those goods by the Seller to the Buyer.

The typical commercial transaction for which the Contract of Carriage facilitates the sale involves the following agreements:

1. Contract of Sale/Purchase Agreement - Seller and Buyer

The Contract of Sale is not a maritime Contract. Therefore, it is governed by commercial law principles. See United Nations Convention on Contracts for the International Sale of Goods, (Vienna 1988); see Article 2 of the Uniform Commercial Code.

Contracts of Sale generally contemplate that the goods will be delivered by the Carrier to the Buyer.

Shipment Contract – Seller's responsibility for the goods terminates on shipment.

Destination Contract – Seller is required to deliver the goods to a particular destination.

The International Chamber of Commerce – mercantile terms:

F.O.B. (Free On Board) & F.A.S. (Free Alongside Ship)

F.O.B. – Free On Board: Price of the good includes delivery of the goods at the Seller's expense to a specified point (i.e. ship's sail) and no further. F.O.B. is used to identify a physical location to determine (1) responsibility and basis for **payment** of freight charges, and (2) the point at which title to the goods and risk of loss passes from Seller to Buyer.

"F.O.B. [Origin/Shipment]": Seller undertakes only to deliver and load the goods on board the vessel at port of shipment – on board the ship designated by the Buyer. Seller delivers the goods on board the Vessel nominated by the Buyer at the named point of shipment. Title to the goods and risk of loss in the goods passes from Seller to Buyer once the cargo is loaded aboard the ship. Seller must load the goods on board the vessel designated by the Buyer. The risk of loss changes from Seller to Buyer when the goods are actually on board the vessel. Buyer assumes the risk of marine transportation. The Seller must clear the goods for export. The Seller pays the transportation of the goods to the port of shipment and loading costs; thereafter, Buyer pays freight, ocean transportation and insurance from port of shipment to port of destination; Buyer also pays for unloading. Risk of loss transfers to the Buyer when the goods pass the ship's rail at port of shipment. Buyer arranges at its expense the Contract of Carriage.

"F.O.B. [Destination]" – Seller retains title and control of the goods until they are delivered to the Buyer at destination and the Contract of Carriage has been completed. Seller selects the carrier and is responsible for the risk of transportation.

In a "F.O.B. [Port of Shipment]" sale, the sale is considered to occur at the Seller's shipping dock once the goods are loaded aboard the ship. However, with "F.O.B. [Destination]," the sale is complete at the Buyer's destination.

F.A.S. – Free Alongside Ship [Port of Shipment] – A variant of F.O.B.,but title and risk of loss (including transportation and insurance costs) passes from the Seller to the Buyer once the Seller delivers the cargo alongside the ship at the named port of shipment. Seller must obtain export clearance of the goods, but the Seller delivers the cargo when the

goods are placed alongside the Vessel at the named port of shipment. Buyer assumes all costs and risk from this point forward.

CF (Cost and Freight) & CFR & C.I.F. (Cost, Insurance and Freight)

CF [Port of Destination] – CF or CFR – Cost and Freight "Named Port of Destination" :Seller must pay the cost and freight necessary to bring the goods to the named port of destination. However, title and risk of loss to the goods is transferred from the Seller to the Buyer when the goods pass the ship's rail at the port of shipment (Port of Origin). Seller delivers the goods on board the ship at port of shipment whereupon title and risk of loss of the goods transfers to the Buyer. Seller must arrange and pay for the cost of freight necessary to bring the goods to the named port of destination. Seller has to clear the goods for export, and Seller must arrange and pay for delivery of the goods to the ship at the port of shipment. Seller pays freight. Seller arranges for Bill of Lading and other transport documents, and arranges and pays for the Contract of Carriage to the named port of destination. Buyer pays purchase price of goods and assumes all risk of loss in the goods and title to the goods after the goods are put on board the ship during loading at port of shipment. Under CF of or CFR, Buyer pays for the insurance of the goods and pays all costs at port of destination including customs duties, taxes, port charges at destination.

C.I.F. – Cost Insurance and Freight ("Port of Destination"): Same as CF or CFR except that Seller must in addition procure and pay for the insurance. Risk of loss and title to the goods transfer form Seller to Buyer once the goods have been loaded on board the vessel at port of shipment, but Seller arranges and pays for transport of the goods from the Seller's premises to the named port of shipment, Seller delivers the goods cleared for export on board the vessel, and Seller arranges and pays for the marine

transport and insurance of the goods for carriage to the named port of destination.

D.A.P. – Delivered At Place ("Named Port of Destination"): Seller clears the goods for export and bears all risk and costs associated with delivering the goods to the Buyer at the named place of destination; but Seller does not pay for unloading of the cargo at destination. Buyer is responsible for all costs and risks associated with the unloading of the goods and clearing customs to import the goods into the named country of destination. Seller takes responsibility for the goods until they are ready to be unloaded by the Buyer.

Under D.A.P., the Seller pays for the carriage of the goods to the named place of destination. Except for costs related to import clearance (which are paid for by the Buyer), Seller assumes all risk prior to the point that the goods are ready for unloading to the Buyer. Under D.A.P., the Seller pays for transport to the specified destination, but the Buyer pays the cost of importing the goods. Under D.A.P., the Seller delivers the goods when they are placed at the disposal of the Buyer ready for unloading at the named place of destination. Risk of loss transfers from Seller to the Buyer at this point of destination – when goods are ready for discharge. Seller obtains the Contract of Carriage and Seller is required to clear the goods for export. Buyer is responsible for effecting customs clearance and paying customs duties for import.

D.A.T. – Delivered At Terminal – is a variant of D.A.P. It means the Seller delivers the goods when the goods, once unloaded from the arriving vessel, are placed at the disposal of the Buyer at a named terminal at the named port of destination.

F.C.A. – Free Carrier: Under Free Carrier, Seller is responsible for arranging transportation, but Seller is acting at the risk and expense of the Buyer. Seller chooses the carrier. Under F.C.A., title and risk of loss – including responsibility for transportation and insurance costs – passes from Seller to Buyer when the Seller delivers the goods cleared for export to the carrier at the named place of shipment.

2. **Letter of Credit** – issued by the Buyer's bank to the Buyer. Bank promises to honor a draft or other demand for payment by the Seller if the conditions set forth in the Letter of Credit are fulfilled. The Letter of Credit assures that payment will be made by the Buyer to the Seller under specified conditions. The Letter of Credit is forwarded to the Seller's bank who acts as agent.

   The conditions under which payment under a Letter of Credit is typically made include the delivery of the required documents (Bill of Lading, Commercial Invoice, Contract of Insurance, Customs Invoice, Packing List, and Inspection Certificate).

   The Letter of Credit is a separate contract but is linked to the Contract of Sale. The bank issuing the Letter of Credit is dealing only in documents and not the goods themselves, and therefore, the bank is not responsible for any breach of warranty or nonconformity of the goods with respect to the underlying sales agreement.

   The Bill of Lading and other documents identified in the Letter of Credit must precisely conform with the Letter of Credit's requirements. Otherwise, the bank may legally refuse or withhold payment.

   The Letter of Credit is usually opened by the issuing bank at the request of the Buyer. The Seller presents the sales documents under the Letter of Credit to the negotiating bank (Seller's bank), which in turn notifies the

issuing bank that the documents have been presented and then sends those documents to the issuing bank. Only the issuing bank is legally obligated to pay the Seller.

3. Both the Buyer and the Seller may have a credit arrangement with their respective bank. The Buyer may have a credit arrangement under which the bank is advancing the money paid out under the Letter of Credit, and the bank may also have a security interest in the goods themselves. The Seller may have a credit arrangement with its bank to finance the sale of the goods. The Seller's bank may pay the Seller for the documents before the Letter of Credit is paid by the Buyer's bank.

4. **"Draft" for "Bill of Exchange"** – Negotiable instrument drawn on the Buyer or his bank by the Seller.

5. **Contract of Carriage** – may be in the form of a Bill of Lading or a Charter Party. Contract of carriage facilitates the sale of the goods by the Seller to the Buyer by providing the means of transport to deliver the Seller's goods to the Buyer.

6. The commercial transaction will also require a contract for Marine Cargo Insurance on the goods, and may also involve a contract with an independent contractor for the inspection of the goods to certify the quality, condition and/or quantity of the goods when they are shipped from the Seller's premises.

B. **<u>Private Carriage And Common Carriage</u>**

PRIVATE CARRIAGE – The Carrier contracts with a single Shipper to carry its cargo aboard the ship. The cargo space aboard the vessel is reserved for a single Shipper. The Carrier's liability is determined by the Contract of Carriage. The Contract of Carriage is usually in the form of a Time or Voyage Charter Party. The Carrier is <u>not</u> an "insurer" of the cargo during its transport aboard the vessel. The Carrier is, however, the

"bailee" of the cargo, subject to the terms of the Contract of Carriage. The Private Carrier is liable only for loss or damage to the cargo to the extent it is proximately caused by a breach of an obligation contained in the Contract of Carriage. The Private Carrier is held liable only or its negligence as a "bailee" of the cargo. In private carriage, the burden of proof is on the Shipper to prove cargo damage and prove the cause of the damage.

J. Aron & Co. v. Cargill Marina Terminal, Inc., 998 F.Supp. 700, 1998 AMC 2286 (E.D.La. 1998); *Commercial Molasses Corp v. New York Tank Barge Corp.*, 314 US 104 62 S. Ct. 156 (1941); *Pure Oil Co. v. M/V Caribbean*, 235 F.Supp. 299 (W.D.La. 1964) aff'd *Pure Oil Co. v. Boyne,* 370 F.2d 121 (5th Cir. 1966); *Alamo Chemical Trasnp. Cp. v. M/V Overseas Valdes*, 469 F.Supp. 2033 (E.D.La. 1979).

Freedom of Contract. – Contractual exemptions to liability are valid and are enforceable in private carriage. However, a "bailment" is created.

Consolidated Grain & Barge Co. v. American Barge & Towing Co., 766 F.Supp. 754 (E.D.Mo. 1991); *Caribe Tugboat Corp. v. J.D. Barter Construction Co.,* 509 F.Supp. 312, 1982 A.M.C 1013 (M.D.Fla. 1981); *J. Aron & Co. v. Cargill Marina Terminal, Inc.,* 1998 AMC 2286 (E.D.La. 1998); *Hercules, Inc. v. Stevens Shipping Co.*, 698 F.2d 726 (5th Cir. 1983); *Pure Oil Co. v. M/V Caribbean*, 235 F.Supp. 299 (W.D.La. 1964) aff'd *Pure Oil Co. v. Boyne,* 370 F.2d 121 (5th Cir. 1966).

COMMON CARRIAGE – Under the general maritime law, the Common Carrier was chargeable as an "insurer" of the goods, accountable for any loss or damage to the cargo happening in the course of the vessel's care, custody or control over the goods. The general maritime law recognized narrow exceptions to this liability namely, acts of God, acts of public enemy, inherent vice of the goods or faults of the shipper.

See *The New Jersey Steam Navigation Co. v. The Merchants' Bank of Boston,* 47 U.S. (6 How.) 344, 381 (1848).

The Common Carrier holds itself out to the general public as engaged in the business of marine transport of goods for compensation. The vessel carries different cargoes for different and independent Shippers. The Carrier's liability is determined by

some statute [USA – COGSA & Harter Act] and to some extent, by the Contract of Carriage (at least to the extent the Contract of Carriage is not inconsistent with the governing statute).

Shipper need only prove a prima facie case, i.e., good condition of cargo when delivered to the Carrier and bad/damaged condition of the cargo on its discharge from the vessel. In Common Carriage, the cargo is usually carried pursuant to a Bill of Lading.

The general maritime law concerning the law of common carriage has been largely superseded and is now governed primarily by statute – The Harter Act, 46 USC §§ 30701 et seq. and The Carriage of Goods by Sea Act (COGSA) 46 U.S.C. § 30701 Footnote.

C. The Bill Of Lading

The Bill of Lading is the document which is signed by the Carrier (or the Carrier's agent) acknowledging that the goods have been loaded and shipped aboard a specific vessel that is bound for a specific destination, and states the terms on which the goods are to be carried aboard the ship.

The Bill of Lading serves three functions:

1. A receipt and acknowledgment by the Carrier that goods of a specific kind, quantity and condition have been loaded aboard the ship for shipment to a particular destination; a receipt for goods shipped onboard the vessel.

2. Evidence of the Contract of Carriage between the Carrier and the Shipper of the goods.

3. Document of Title to the goods which enables the Shipper to sell them by endorsement and delivery of the Bill of Lading.

The typical Bill of Lading identifies the name of the Shipper and Consignee (intended receiver of the goods), a description of the goods, including shipping marks for identification purposes, stipulations regarding payment freight , and (on the backside of

the Bill of Lading) a memorandum of the Contract of Carriage. The Bill of Lading also states the apparent condition of the cargo received by the vessel for shipment.

In Common Carriage , the Bill of Lading serves as evidence of the Contract of Carriage. In Private Carriage, however, the Bill of Lading serves only as a receipt for goods shipped, the Contract of Carriage being the applicable time a voyage charter party to which the Bill of Lading is subject.

"Order " and "Straight" Bills of Lading:

An **"order"** Bill of Lading is a negotiable instrument, and is negotiable "to order" or "to bearer" by endorsement of the order party and delivery of the Bill of Lading. The endorsement may be "blank" or name a specific person.

The order Bill of Lading functions as a document of title such that the goods are merged with the bill; the owner "holder" of the Bill of Lading has title to the goods. The Seller can thus retain control of the goods in transit by requiring the payment of the purchase price before the Bill of Lading is delivered to the Buyer. [The intermediary bank that extends credit is fully protected by becoming a consignee or by retaining possession of the bill.] The goods can be transferred or resold by negotiation of the Bill. The Carrier satisfies his duty to deliver the goods by delivery of the goods against the Bill. The Carrier may release the cargo only to the party who presents the original Bill of Lading (And if the Carrier delivers the goods to someone other than the holder of the Bill of Lading, then the Carrier is liable for misdelivery.)

A **"straight"** Bill of Lading is not a negotiable instrument, and functions as a receipt for goods shipped onboard. The duty of the Carrier under a straight bill is to deliver the goods to the named consignee.

Federal Bills of Lading Act 49 U.S.C. §§ 80101-80116 – applies to Bills of Lading issued by a Common Carrier for transport of goods between U.S. ports and from places in the U.S. to a foreign country. Applies to Bills of Lading issued by a Common Carrier inside the U.S.A. in interstate or in foreign commerce. Bills of Lading issued outside the U.S.A. are governed by the general maritime law. A Bill of Lading issued

from a foreign country for goods that ship from a foreign country to the United States is not governed by the FBLA.

The FBLA distinguishes between Straight Bills of Lading and Order Bills of Lading. Under the FBLA, a straight Bill of Lading consigns cargo to a specific person (§ 801013(b)). An Order Bill of Lading consigns cargo to be delivered to the order of a consignee and does not contain on its face an agreement with the Shipper that the Bill is "non-negotiable." (§801013(a)) The Order Bill of Lading is negotiable by endorsement and delivery of the Bill; therefore, constitutes a document of title. A straight bill of Lading is not negotiable and must contain the words "non-negotiable" on the face of the Bill of Lading.

The Harter Act 46 USC § 30703(a) provides that the Carrier shall issue a Bill of Lading on demand of the Shipper, that the Bill of Lading shall include a statement concerning (1) the marks necessary to identify the goods, (2) the number of packages or the quantity or weight (and whether it is the Carrier's or shipper's weight) of the goods, and (3) the apparent condition of the goods on receipt by the Carrier.

Electronic Bills of Lading – Waybills, Datafreight Receipts and Electronic Data Interchange (EDI).

Waybill or Datafreight Receipt – non-negotiable receipt for goods shipped aboard a vessel. Alternative to a Bill of Lading, usually sent by email or by fax, and constitutes a contract for the shipment of goods (including loading and delivery by the Carrier) pursuant to which the Carrier undertakes to deliver the goods to the Consignee named in the document. A Waybill or Datafreight Receipt is not a negotiable instrument, and therefore, it is not a document of title. A Waybill of Datafreight Receipt is a non-negotiable form of Bill of Lading, and therefore, is subject to the Federal Bills of Lading Act and the Harter Act. A Waybill is a form of Straight Bill of Lading. The Waybill is advantageous in that (1) it does not have to be produced to obtain the goods, thus alleviating delays in transmitting the Bill of Lading; and (2) the goods can be transferred

easily an open account transaction where the parties are used to dealing with each other; and (3) the Waybill facilitates inter-company transfers of goods.

Electronic Data Interchange (EDI) – allows communications, including Bills of Lading to be transmitted instantaneously between Shippers and Carriers and other third parties. Currently Bills of Lading which are accessed by EDI are not negotiable instruments.

Clean Bill of Lading & Carrier Estoppel:

The Bill of Lading serves as prima facie evidence that the goods were loaded on board the ship in the condition therein described on the face of the bill. The Harter Act 46 USC § 30703(c). A Bill of Lading can either be a "clean" Bill of Lading or a "claused" Bill of Lading.

A Clean Bill of Lading attests to the apparent good order and condition of the cargo as received by the Carrier based on external inspection. A claused Bill of Lading indicates damage or shortage to the cargo or some other problem with the cargo on its receipt by the Carrier.

Tennaco Resins, Inc. v. Davy International AG, 881 F.2d 211 (5th Cir. 1989); *United States v. Lykes Brothers Steamship Co.*, 511 F.2d 218 (5th Cir. 1975).

A Clean Bill of Lading has no notations indicating that the goods were in any way defective or damaged when received by the Carrier. In a cargo damage/loss/shortage case, a clean onboard Bill of Lading satisfies the Shipper's burden of proof of establishing "good order" of the cargo at time of shipment. The clean Bill of Lading establishes that the cargo was received aboard the ship in apparent good order and condition.

Crisis Transportation Co. v. M/V Erlangen Express, 794 F.2d 185 (5th Cir. 1986); *Armco Chile Prodein v. M/V NORLANDIA*, 880 F.Supp 781 (M.D.Fla. 1995); *Blasser Brothers, Inc. v. Northern Pan-American Lines*, 628 F.2d 376 (5th Cir. 1980); *Tennaco Resins, Inc. v. Davy International AG*, 881 F.2d 211 (5th Cir. 1989); *Thyssen v. S/S*

EUROUNITY, 21 F.3d 533 (2nd Cir. 1994); *Couthino Caro & Co. v. M/V Sava*, 849 F.2d 166 (5th Cir. 1988); *United States v. Lykes Brothers Steamship Co., Inc.*, 511 F.2d 218 (5th Cir. 1975); *International Trading Co. v. M/V ZENIT SUO*, 684 F. Supp. 861 (E.D.Pa. 1988).

A Clean Bill of Lading with respect to packaged goods merely attests to the apparent good order and condition of the cargo based on an external inspection. A Clean Bill of lading does not constitute prima facie evidence of condition of goods shipped in sealed packages or containers where Carrier is prevented from observong damage conditions that existed when goods were loaded. The Carrier is under no duty to examine or inspect the packaged cargo before issuing a clean Bill of Lading. The Carrier is under no duty to open the packaged goods and inspect the contents inside. Therefore, a clean Bill of Lading does not constitute prima facie evidence of the condition of the cargo when the cargo is shipped in sealed packages.

Caemint Food Inc. v. Brasileiro, 647 F.2d 347 (2nd Cir. 1981); *Bally Inc. v. M/V Zim America*, 22 F.3d 65 (2nd Cir. 1994); *Caemint Food Inc. v. Brasileiro*, 647 F.2d 347 (2nd Cir. 1981); Tennaco Resins, Inc. v. Davy International AG, 881 F.2d 211 (5th Cir. 1989); *Perisford Metals Corp. v. SS SALVADOR*, 779 F.2d 841 (2nd Cir. 1985); *Daewood International (America) Corp. v. Sea-land Orient Ltd*., 32 F.Supp. 2d 705 (D.N.J. 1998)

Estoppel: The Carrier's Bill of Lading must disclose the apparent order and condition of the goods received. This disclosure normally refers to the external appearance of the cargo; however, if the Carrier knows or should have known that the goods are damaged/missing, there is a duty on the part of the Carrier to disclose the facts known on the Bill of Lading.

T.J. Stevenson & Co. v. 81193 Bags of Flour, 629 F.2d 338 (5th Cir. 1980); *Yeramex Int v. SS TENDO*, 595 F.2d 943 (4th Cir. 1979).

If the Carrier has no means of verifying or determining the weight of the cargo, the number of the packages or the marks or condition of the goods, the Carrier should omit the statement completely, as especially permitted under COGSA. Clauses in the Bill

of Lading disclaiming liability or purporting to rely on the Shipper's declaration, such as "shipper's load and count," or on the Shipper's representation of what the cargo is "said to contain" are invalid under COGSA.

The Doctrine of Estoppel makes the Carrier liable to the Consignee for false statements in the Bill of Lading. The Carrier is bound by the representations of fact made in the Bill concerning such matters as description of the goods, condition of the cargo, the date of shipment, the method of stowage, and other statements of fact on the face of the Bill of Lading.

Elgie & Co. v. SS S.A. Nederburg, 599 F.2d 1177 (2nd Cir. 1979).

There is liability even for an innocent misstatement; fraud or intentional deception is not required. Therefore, the issuer of a clean Bill of Lading (one which has no notation or clause that declares a defective condition of the goods or packaging) may be estopped from denying that he received the goods in good order and condition as stated on the Bill. The issuance of a false or misleading Bill of Lading is considered a "fundamental breach," and the Carrier cannot claim the limitations and defenses under COGSA. However, in order for a Bill of Lading to be void because of a misrepresentation, the misrepresentation must go to the essence of the contract – must be a material misrepresentation. *Berisford Metals Corp. v. SS SALVADOR*, 779 F.2d 841 (2nd Cir. 1985). See *Atlantic Mutual Ins. Co. v. M/V PRESIDENT TYLER*, 765 F.Supp. 815 (S.D.N.Y. 1990).

The Estoppel Doctrine requires that the Consignee be in good faith and rely upon the false Bill of Lading; without reliance, the holder of the Bill cannot have been harmed by any false description of the goods, and so cannot recover against the Carrier.

Berisford Metals Corp. v. SS SALVADOR, 779 F.2d 841 (2nd Cir. 1985); T.J. Stevenson *& Co. v. 81193 Bags of Flour*, 629 F.2d 338 (5th Cir. 1980).

Under the estoppel doctrine, a ship which issues a clean Bill of Lading for cargo which turns out to be damaged is estopped from attempting to show the pre-shipment damage condition against a holder for value of the Bill of Lading (the Carrier is not

estopped from offering evidence of the cargo's pre-shipment condition where the cargo owner did not rely on clean bills of lading). As between the Carrier and the Shipper who supplies the count and thereby obtains the Bill of Lading, the Carrier is entitled to the guaranteed accuracy of the count by the Shipper, and the Carrier is not estopped from challenging the count contained in the Bill of Lading as being inaccurate. See COGSA 46 U.S.C. Appx § 1303(3) & (4).

T.J. Stevenson & Co. v. 81193 Bags of Flour, 629 F.2d 338 (5th Cir. 1980); *Elgie & Co. v. SS S.A. Nederburg*, 599 F.2d 1177 (2nd Cir. 1979); *Cummins Sales & Service, Inc. v. The London & Overseas Insurance Co.*, 476 F.2d 498, 1973 AMC 2047 (5th Cir. 1973); *Raphely International , Inc. v. Waterman SS Corp.*, 764 F.Supp. 47 1991 AMC 2687 (S.D.N.Y. 1991); *Portland Fish Co. v. States SS Co.*, 510 F.2d 628 (9th Cir. 1974); *Dempsey & Associates, Inc. v. SS Sea Star*, 461 F.2d 1009 (2nd Cir. 1972); *Nitram Inc. v. Cretan Life*, 599 F2d 1359 (5th Cir. 1979).

D. RELEVANT STATUTES

1. Harter Act, formerly 46 U.S.C. Appx. § 190-192 , 46 U.S.C. § 30701-30706

2. Carriage of Goods By Sea Act (COGSA), 46 U.S.C. Appx. §§ 1300-1315

3. Federal Bills of Lading Act, 49 U.S.C. § 80101 – 80116

4. Carmack Amendment, 49 U.S.C. § 11706 and 14706. [See also 49 USC § 13501.]

5. New: "Rotterdam Rules" – United Nations Convention on Contracts for the International Carriage of Goods by Sea: UN adopted Dec. 11, 2008. USA signed Convention on Sept. 23, 2009. Awaiting ratification.

E. PRE-STATUTORY LAW

The general maritime law held the Common Carrier absolutely responsible for the safe arrival of the goods carried aboard the Carrier's vessel, unless the loss or damage to the cargo was caused by (1) the act of God, or (2) act of the public enemy or (3) by the

inherent vice of the goods or by the fault of the Shipper, and (even where the loss was caused by one of these occurrences) the Carrier was not negligent or otherwise at fault.

The Common Carrier's liability for cargo damage or loss did not rest on a finding of fault – all the Shipper of the goods had to do was to prove receipt for carriage in good order and non-delivery or delivery in bad order; and if the Carrier could not show that one of the "exceptions" was the cause of the loss or damage, then the Carrier was liable.

Gilmore & Black, The Law of Admiralty § 3-22 (2nd Ed. 1975)

F. HARTER ACT, 46 U.S.C. Formerly § 190-192, now 46 U.S.C. § 30701 et seq.

1. The Harter Act, 46 USC § 30701-30707

* Governs U.S. inland and coastwise carriage of cargo by water.

* Prohibits the Carrier from inserting any exculpation clause which purports to relieve the carrier from liability arising out of its negligence in the proper loading, stowage, custody care and delivery of cargo. Such clauses are null and void.

* Prohibits the Carrier from inserting any provision which seeks to avoid or lessen its obligation to exercise due diligence to provide a seaworthy vessel or its obligation to properly man, equip and supply the vessel. Such clauses are null and void.

* Does not provide the carrier with any limitation of liability provision.

The Harter Act, 46 U.S.C. §30701-30707 (formerly 46 U.S.C. App. at §190-192). Contracts of carriage between ports of the United States and inland water carriage under bills of lading are governed by the Harter Act. Governs U.S. inland and coastwise carriage of cargo by water. Applies to a carrier engaged in the carriage of goods "to or from any port in the United States."

The Harter Act prohibits the Carrier from inserting any exculpation or exoneration clause in a bill of lading or shipping document which purports to relieve the

carrier from liability arising out of its negligence or fault in the proper loading, stowage, custody care and delivery of cargo. [§30704] The Harter Act also prohibits the Carrier from inserting in a bill of lading or other shipping document any provision which seeks to avoid or lessen its obligation to exercise due diligence to provide a seaworthy vessel or its obligation to properly man, equip and supply the vessel. Any such provisions in a bill of lading or shipping document are void. [§30704 and §30705]

The Harter Act requires the Carrier to issue a bill of lading or shipping document, which must include a statement of the marks necessary to identify the goods, the number of packages or the quantity or weight of the cargo, and a statement whether it is the carrier's or shipper's weight, and state the apparent condition of the goods. [§30705(c)] [§30705(a) & (b)] bill of lading issued under the Harter Act is prima facie evidence of receipt of the goods as described.

The Harter Act does afford the carrier certain defenses to liability: (1) If the carrier has exercised due diligence to make the vessel in all respects seaworthy and to properly man, equip, and supply the vessel, then the carrier and the vessel are not liable for loss or damage arising from an error in the navigation or management of the vessel. ["Error in Navigation Defense"] [§30706(a)]

Furthermore the carrier and the vessel are not liable for loss or damage arising from (1) dangers of the sea or other navigable waters, (2) acts of God, (3) public enemies, (4) seizure under legal process, (5) inherent defect quality or vice of the goods, (6) insufficiency of package, (7) act or omission of the shipper or owner of the goods or their agent, or (8) saving or attempting to save life or property at sea. [§30706(b)]

The Harter Act does not provide the carrier with any limitation of liability provision for cargo damage or loss.

The Harter Act applies to common Carriers with respect to contracts for the carriage of cargo between ports of the United States; inland water carriage and coastwise carriage under bills of lading is governed by the Harter Act.

The Harter Act invalidates any exculpatory clause in a Bill of Lading which purports to relieve the Carrier from liability arising out of its negligence or fault in the proper loading, stowage, custody, care, discharge and delivery of the cargo, and prohibits any exculpatory clause in a Bill of Lading which purports to relieve the Carrier from its duty to provide a seaworthy and properly equipped vessel. Any such exculpatory clause in a Bill of Lading shall be null and void.

The Harter Act does provide the Carrier with limited exemptions from liability: If the Carrier shall exercise due diligence to make the vessel in all respects seaworthy and properly manned and equipped and supplied, then neither the vessel nor the Carrier shall be liable for loss or damage (1) "resulting from faults or errors in navigation or in the management of said vessel" nor liable for losses arising from (2) "dangers of the sea or other navigable waters, (4) act of God, (4) acts of public enemy, or the (5) inherent defect quality or vice of the thing carried, or (6) from insufficiency of package, or (7) seizure under legal process, or (8) for loss resulting from any act or omission of the Shipper or owner of the goods, or (9) from saving or attempting to save life or property at sea. However, any "errors in navigation/management of the vessel" defense is denied the Carrier if the Carrier is shown to have failed to exercise due diligence to provide a seaworthy vessel (even if this is not a cause of the loss). See §192

The Harter Act has no statute of limitations. The Harter Act is subject to laches.

G. CARRIAGE OF GOODS BY SEA ACT

COGSA, 46 U.S.C. Formerly §§ 1300-1315, now Ch. 229, 49 Stat 1207 (1936), reprinted as Footnote to 46 U.S.C. § 30701

United States Carriage of Goods by Sea Act (COGSA) formerly 46 USC Appx. 1301-1315).

* Applies to contracts for the carriage of goods by sea "to or from ports of the United States in foreign trade."

* Imposes non-delegable duty on the carrier before and at the beginning of the voyage to exercise due diligence to (1) make the ship seaworthy; (2) properly man, equip and supply the ship; and (3) make the ship's holds and refrigerating chambers, etc. fit and safe for their reception carriage of preservation.

* Imposes additional non-delegable duty on the carrier to properly and carefully load, handle, stow, carry, keep, care for and discharge the goods.

* Provides the carrier a list of defenses (exceptions) against liability for cargo loss or damage.

* COGSA $500.00 per package/customary freight unit limitation.

COGSA applies by operation of law to Common Carriers with respect to any Bill of Lading (or similar document of title) which is evidence of a Contract of Carriage to or from ports of the United States in foreign trade. Applies to Common Carriers in foreign trade on ocean shipments to and from the United States. Applies "tackle to tackle" – applies from the time the cargo is loaded aboard the vessel until the time the cargo is discharged. [Harter Act applies before loading, and may apply after discharge.]

Applies to contracts for the carriage of goods by sea "to or from ports of the United States in foreign trade." COGSA governs the relationship between the parties to a bill of lading, where the a bill of lading is issued as the contract of carriage for shipment of cargo to or from ports of the U.S. and foreign ports.

COGSA may apply by contract to Private Carriers depending on the terms and conditions of the private Contract of Carriage. See Clause Paramount.

COGSA applies form the period of time when the goods are loaded through the time in which they are discharged from the ship. COGSA applies while the goods are aboard the ship, after loading and before discharge – i.e. "tackle to tackle." If the Carrier or its agent accepts custody of the cargo before loading, the responsibilities of the parties are determined by the Harter Act (not COGSA), which also applies to any period between the discharge of the cargo from the ship and its proper deliver.

See *Allstate Ins. Co v. International Shipping Corp*., 703 F.2d 497 (11th Cir. 1983).

COGSA imposes upon the "carrier" before and at the beginning of the voyage the non-delegable duty to exercise due diligence to (1) make the ship seaworthy; (2) properly man, equip and supply the ship; and (3) make the ship's holds, refrigerating and cooling chambers and all parts of the ship in which the goods are carried, fit and safe for their reception, carriage and preservation. [§3(1)] COGSA imposes an additional non-delegable duty on the "carrier" to properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried. [§3(2)]

COGSA affords the "carrier" certain defenses: First, neither the carrier nor the ship is liable for loss or damage arising or resulting from the unseaworthiness of the vessel, unless caused by want of due diligence on the part of the "carrier" to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the hold's refrigerating and cooling chambers on all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation. [§4(1)]

In addition, COGSA provides that neither the carrier nor the ship is liable for loss or damage arising or resulting from certain exempted perils:

a. Act, neglect or default of the master, mariner, pilots or the servants of the carrier in the navigation or in the management of the ship [Error in Navigation Defense];

b. Fire, unless caused by the actual fault or privity of the carrier;

c. Perils of the sea;

d. Act of God;

e. Act of war;

f. Act of public enemies;

g. Act or restraints of princes, rulers, or people or seizure under legal process;

h. Quarantine restrictions;

i. Act or omission of the Shipper or owner of the goods or their agent;

j. Strikes or lockouts or stoppages or restraints of labor;

k. Riots and civil commotions;

l. Saving or attempting to save life or property at sea;

m. Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods;

n. Insufficiency of packing;

o. Insufficiency or inadequacy of marks;

p. Latent defects not discoverable by due diligence; and

q. Any other cause arising without the actual fault and privity of the carrier or its agents. [§4(2)(a-q)]

In addition to exoneration from liability, and unlike the Harter Act, COGSA allows the "carrier" to limit its liability to "$500 per package or customary freight unit". [§4(5)]

1. Carrier Duties Under COGSA – § 1303(1) 3(2) & (3)

a. Seaworthiness – Carrier must before and at the beginning of the voyage exercise due diligence to (a) make the ship seaworthy, (b) properly man, equip and supply the vessel, and (c) make the cargo holds and all parts of the ship where cargo is carried "fit and safe for their reception, carriage and preservation".

b. Cargo – Carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the cargo carried.

c. Contents of Bill of Lading – After receiving the cargo aboard the vessel, the Carrier shall issue to the Shipper a Bill of Lading. The Bill of Lading

must show leading marks necessary for identification of goods, and must show either the number of packages or the quantity or weight of the cargo as furnished by the Shipper, and the "apparent good order and condition of the cargo."

These duties are non-delegable – the Carrier has a non-delegable duty to exercise due diligence to make the ship seaworthy, properly man, equip and supply the vessel, and to make the cargo holds fit and safe" for the carriage and preservation of the cargo; and the Carrier has a non-delegable duty to properly load, handle, stow, carry, keep, care for and discharge the cargo. The Carrier cannot "contract away" those duties to the Shipper or Consignee.

Dempsey & Associates, Inc. v. SS SEA STAR, 461 F.2d 1009 (2nd Cir. 1972); *Nichimen Co. v. M/V FARLAND*, 462 F.2d 319 (2nd Cir. 1972); *Agrico Chemical Co. v. S/S ATLANTIC FOREST*, 620 F.2d 487 (5th Cir. 1980); .]; *Associated Metals & Minerals Corp. v. M/V ARTKIS SKY,* 987 F.2d 47 (2nd Cir. 1992); *United States v. Lykes Brothers Steamship Co.*, 511 F.2d 218 (5th Cir. 1975).

Duty to provide seaworthy vessel:

Under the general maritime law (prior to COGSA), an implied but absolute warranty of seaworthiness was opposed on the Carrier at the beginning of the voyage; the implied warranty of seaworthiness was absolute and not dependent on a finding of negligent conduct. The Harter Act modified the general maritime law rule by reducing the vessel owner's duty to an obligation to due diligence to provide a seaworthy vessel at the beginning of the voyage.

The Carrier's duty of due diligence to provide a seaworthy vessel at the beginning of the voyage is non-delegable, and the Carrier is accordingly responsible for the acts of agents he utilizes to fulfill his duty before the commencement of the voyage. The duty of due diligence to make the ship seaworthy operates "before and at the beginning of the voyage" and continues during the loading of the cargo. The legal test for seaworthiness is whether the vessel is reasonably fit to carry the cargo which she is undertaking to transport. See *Farrell Lines Inc. v. Jones,* 520 F.2d 7 (5th Cir. 1976).

Carrier's duty to properly load, etc.:

Carrier's duty to properly load, handle, stow, carry, keep, care for and discharge the cargo is non-delegable; accordingly, the Carrier is responsible for the acts of the ship's master, crew, stevedore, and the Carrier's other agents. Carrier's duty of care of the cargo operates during the voyage (unlike the Carrier's duty to provide a seaworthy vessel). See *Nichimen Co. v. M/V FARLAND*, 462 F.2d 319 (2nd Cir. 1972).

2. Free In Free Out (FIFO) –

Imposes the Contractual obligation on the Shipper to appoint, arrange and pay for the loading and discharging stevedore. COST of loading/unloading is on the Shipper, and not the Carrier. The term merely indicates WHO hires/pays for loading and discharge.

But Carrier is still subject to COGSA's statutory non-delegable duty to properly load, stow and discharge the cargo (§ 1303/2) – and any Contractual stipulation purporting to relieve the Carrier from this responsibility is null and void (§ 1303/8).

Nevertheless, courts hold that FIFO terms do not per se violate COGSA, but such terms do not alter or affect the Carrier's non-delegable obligation to properly load, stow, discharge, etc. the cargo. In order to avoid liability for cargo damage in FIFO shipments, the Carrier still has to prove the Carrier was not negligent and that its actions did not cause or contribute to causing the cargo damage or loss. Notwithstanding FIFO terms, the Carrier must still prove its freedom from negligence.

See *Tubacex, Inc. v. M/V RISAN* 45 F3d 951 (5TH Cir. 1995) [Held: Although COGSA opposes a non-delegable duty on the Carrier to properly load, stow and discharge the cargo, under FIFO terms where the Shipper engages the stevedore to load or discharge the cargo, and the cargo is damaged by the acts of that stevedore, then the Carrier may be exonerated from liability by virtue of COGSA's "Act of Shipper" and "Q Clause" defenses, but the Carrier has the burden of proof.]; *Associated Metals & Minerals Corp. v. M/V ARTKIS SKY*, 987 F.2d 47 (2nd Cir. 1992).

3. Carrier Exoneration Clauses –

COGSA invalidates any clause in a Bill of Lading which purports to remove, eliminate, lessen or limit the Carrier's obligations under COGSA. Any such exoneration clause is null and void. See § 1303(B).

Examples – "Benefit of insurance clauses" are invalid. "Both to blame collision clauses" are invalid. "Valuation clauses" – those that limit the Carrier's liability to less than $500.00 per package or those that limit to invoice value - are invalid. Contractual "trade allowance" "shrinkage allowance" clauses may be invalid and unenforceable.

But COGSA permits the Carrier to increase its liabilities and obligations to the Shipper.

4. Carrier Notations on the Bill of Lading –

The Bill of Lading must disclose the apparent order and condition of the cargo. This normally refers to the cargo's external appearance, but if the Carrier knows or should have known that the cargo is damaged or missing, there is a duty on the part of the Carrier to disclose the facts known.

Clauses in the Bill of Lading seeking to disclaim Carrier's liability or purporting to rely on the Shipper's declaration such as "Shipper's load and count", or purporting to rely on the Shipper's representation of what the cargo is "said to contain" will not be given effect. The Carrier will be estopped from asserting it received a smaller shipment unless the goods were in fact loaded by the Shipper and this is stated on the Bill of Lading.

When packaged goods are delivered to the Carrier for loading, the Carrier must count the packages. If the Carrier lists the weight of the goods he represents that he has no reasonable ground for suspecting that the weight of the goods actually varies from the listed weight and he has reasonable means of checking the weight. A clause in the Bill of Lading that the weight of the cargo is determined by a third party and that the issuance of

the Bill of Lading is not an admission by the Carrier that the weight is accurate is only given effect if this is the custom of the port and the custom of the trade in question.

However, the Carrier is not required to open sealed containers or boxes to check on the internal condition of the goods. A "clean Bill of Lading" only attests to the external condition of the cargo. Although weight and quantify of cargo are features that can normally be verified, if the Carrier has no reasonable means for checking or a reasonable ground for doubting the accuracy of the weight or count, then this fact should be noted on the face of the Bill of Lading.

The following Carrier notations on the Bill of Lading have been held to be void and without effect under COGSA "weight and quality unknown" "weight and condition of contents unknown" "said to contain" "Shipper's weight and count" where the cargo has been loaded by the Carrier.

However, such notations as "Shipper's weight load and count" is valid if the cargo has been loaded onboard the ship by the Shipper or the Shipper's agent. See FIFO cases.

5. Carrier Exemptions from Liability -- § 1304 –

a. Unseaworthiness not resulting from lack of Carrier's due diligence.

b. Uncontrollable losses – is losses beyond the control of the Carrier – neither the Carrier nor the ship shall be liable for cargo lost or damaged arising or resulting from the following –

1. Error in navigation and error in the management of the ship on the part of master and crew;

2. Fire; [See also Fire Statute, 46 U.S.C. Appx § 182]

3. Perils of the sea;

4. Act of God;

5. Act of war;

6. Act of public enemies;

7. Arrest or restraint of princes or seizure under legal process;

8. Quarantine restrictions;

9, Act or omission of the Shipper or owner of the goods;

10. Strikes, lockouts, work stoppages or restraints of labor;

11. Riots and civil commotions;

12. Saving or attempting to save life or property at sea;

13. Wastage in bulk or weight, inherent defect or vice of the goods;

14. Insufficiency of packing;

15. Insufficiency or inadequacy of marks;

16. Latent defects not discoverable by due diligence;

17. – "Q Clause" - Any other cause arising without the actual fault and privity of the Carrier or its agents and servants.

6. COGSA Package Limitations – § 1304 (5) –

COGSA provides at § 1304 (5) "Neither the Carrier nor the Ship shall become liable for any loss or damage to or in connection with the transportation of the goods in an amount exceeding $500 per package (or in the case of goods not shipped in packages) per customary freight unit… unless the nature in value of such goods have been declared by the Shipper before shipment and inserted in the Bill of Lading."

$500 per package or per customary freight unit "unless the nature and value of the goods have been declared by the Shipper before shipment and inserted in the Bill of Lading."

There are two inquiries: (1) are the goods "shipped in packages"? (2) if so, what is the COGSA "package"?

If the cargo, irrespective of its size, weight or shape, is fitted into or onto some packaging preparation that facilitates handling or stowage, it will be considered to have been shipped in a package. What is the "COGSA package" first turns on the terms of the Bill of Lading or other Contract of Carriage. Look at the face of the Bill of Lading.

If the Shipper declares the value of the cargo on the face of the Bill of Lading, then the COGSA package limitation does not apply. In order to invoke the COGSA package limitations, the Carrier must afford the Shipper a "fair opportunity to avoid the COGSA package by declaring the actual value of the cargo on the face of the Bill of Lading and paying increased freight. The Carrier satisfies this "fair opportunity" requirement if the Carrier notifies the Shipper in the Bill of Lading that the Shipper may avoid the $500 package limitation by declaring a higher value and paying it freight. Insertion of a U.S. "Clause Paramount" in the Bill of Lading satisfies the "fair opportunity requirement."

The choice to accept the COGSA package limitation lies with the Shipper. To avoid the COGSA package limitation, the Shipper must declare the value of the goods on the face of the Bill of Lading and pay a higher freight rate; otherwise, the Shipper may accept the COGSA limitation, profit form a lower freight rate and procure insurance independently or not at al.

Only the COGSA Carrier is entitled to invoke the protection of the COGSA package limitation absent a Himalaya Clause inserted in the Bill of Lading.

Brown & Root Inc. v. M/V PEISANDER, 648 F.2d 415 (5th Cir. 1981); *Sabah Shipyard Sdn. Bhd. v. M/V Harbel Tapper*, 178 F.3d 400 (5th Cir. 1999); *Couthino Caro & Co. v. M/V Sava*, 849 F.2d 166 (5th Cir. 1988); *Insurance Co. of N. America v. M/V OCEAN LYNX*, 901 F.2d 934 (11th Cir. 1990); *Nippon Fire & Marine Insurance Co. v. M/V TOURCOING*, 979 F.Supp. 206 (S.D.N.Y. 1997), aff'd 167 F.3d 99 (5th Cir. 1999);

Industrial Maritime Carriers (Bahamas)Inc. v. Seimens Westinghouse Power Corp., 202 AMC 2081 (E.D.La. 2002); *Perusahaan Pertambangan Minyak Dan v. CHAINAT NAVEE M/V*, 136 F. Supp. 2d 586 (E.D. La. 2001).

COGSA package limitation and Himalaya Clause: *Nippon Fire & Marine Insurance Co. v. M/V TOURCOING*, 979 F.Supp. 202 (S.D.N.Y. 1997), aff'd 167 F.3d 99 (5th Cir. 1999); *Steel Coils, Inc. v. M/V Lake Marion*, 331 F.3d 422 (5th Cir. 2003).

A Carrier can be deprived of the GOGSA package limitation in two situations, in which the courts have found that the Carrier's conduct constitutes a "fundamental breach" of the Contract of Carriage: (1) the unreasonable geographic deviation of the vessel, and (2) the unauthorized "on deck" stowage of the cargo (i.e. "quasi-deviation").

Rockwell International Corp. v. M/V Incotrans Spirit, 707 F.Supp. 272 (S.D.Tex. 1989) aff'd 998 F.2d 316 (5th Cir. 1993); *Constructores Tecnicos v. Sea-land Service, Inc.*, 945 F.2d 841 (5th Cir. 1991); *Calmaquip Engineering West Hemisphere Corp. v. West Coats Carriers Ltd.*, 650 F.2d 633 (5th Cir. 1991); *Sedco Inc. v. SS Strathewe*, 800 F.2d 27 (2nd Cir. 1986); *Spartus Corp. v. SS Yafo*, 590 F.2d 1310 (5th Cir. 1979).

However, negligence in the stowage or the handling of the cargo on the part of the Carrier or the Carrier's agents does not constitute a "fundamental breach" of the Contract of Carriage or constitute an "unreasonable deviation" or a "quasi-deviation" and so it does not deprive the Carrier of the COGSA package limitation.

The Carrier may be deprived of the COGSA package limitation in the event the Carrier issues a fraudulent Bill of Lading or the Bill of Lading contains a material misrepresentation of fact. See section on Clean Bills of Lading and Estoppel.

Rockwell International Corp. v. M/V Incotrans Spirit, 707 F.Supp. 272 (S.D.Tex. 1989) aff'd 998 F.2d 316 (5th Cir. 1993); *Sedco, Inc. v. SS Strathewe*, 800 F.2d 27 (2nd Cir. 1986); *Sabah Shipyard Sdn. Bhd. v. M/V Harbel Tapper*, 178 F.3d 400 (5th Cir. 1999).

7. Shipper's Notice of Claim - § 1303 (6)

"3 day notice" – Following discharge of the cargo from the ship, the removal of the cargo by the consignee or his agent shall be "prima facie evidence" of delivery by the Carrier of the goods as described in the Bill of Lading unless the consignee or consignee's agent provides in writing notice of loss or damage to the Carrier/Carrier's agent at the port of discharge before or at the time of the removal of the goods to the custody of the consignee/consignee's agent.

COGSA at 46 U.S.C. § 1303(6) requires the cargo plaintiff to notify the Carrier of cargo loss or damage within three days of Carrier's delivery of the cargo, otherwise the cargo plaintiff's removal of the goods form the Carrier "shall be prima facie evidence of delivery by the Carrier of the goods as described in the Bill of Lading."

See *Associated Metals & Minerals Corp. v. M/V Rupert de Larrinaga*, 581 F.2d 100 (5th Cir. 1978); *Sumitomo Corp. of America v. M/V Sie Kim,* 632 F.Supp. 824 (S.D.N.Y. 1985); *Northeast Petroleum Corp. v. SS Prairie Grove,* 1977 AMC 2139 (S.D.N.Y. 1977).

If the loss or damage is not apparent, then notice must be given within 3 days of delivery.

Failure to give notice within the "3 day notice period" does not affect or prejudice the right of the Shipper to bring suit – it merely shifts the burden of proof. A presumption is created that delivery of goods in the condition as described in the Bill of Lading has been made. In order to overcome this presumption the Shipper/consignee must come forward with evidence to suggest that the cargo was damaged before discharge.

The Harter Act does not specify any time for giving notice to the Carrier of loss or damage to the goods."

8. Statute of Limitation / Prescription - § 1303 (6)

"1 Year" – "The Carrier and the vessel shall be discharged from all liability in respect of loss or damage "unless suit is brought within 1 year after delivery of the goods or the date when the goods should have been delivered." ["3 years" for U.S. government. See 28 U.S.C. §2415(b)]

COGSA does not permit the Carrier to shorten the 1 year time for suit provision. The 1 year statutory limitations period commences (i.e., is triggered) when the cargo is delivered – When the consignee is given notice of the cargo's arrival and an opportunity to retrieve the cargo. In case of non-delivery a reasonable time when delivery should have occurred. In case of delay, statute runs from the actual delivery of the goods. In case of shortage, the time when the last item was delivered.

"Delivery" For purposes of the COGSA 1 year statute of limitation, generally occurs when the Carrier discharges the cargo and gives notice to the Consignee that the cargo has arrived. However, some courts provide that in addition to discharge and notice, delivery requires that the Consignee have a reasonable opportunity to inspect or take possession of the goods.

Bally Inc. v. M/V Zim Am, 22 F.3d 65, 1994 AMC 2762 (2nd Cir. 1994); *Cargill Ferrous International v. M/V Elikon,* 857 F.Supp. 45, 194 AMC 2172 (N.D.Ill. 1994);

Sumitomo Corp. v. M/V Pennsylvania Rainbow, 1989 AMC 1467 (N.D.Cal. 1989).

The Harter Act does not have a "statute of limitations" provision. Suits under the Harter Act are subject to the doctrine of "latches".

An unreasonable deviation does not deprive the Carrier of the 1 year statute of limitations.

A claim by the Carrier for indemnity against a third party under COGSA is not governed by the COGSA 1 year provision (since indemnity does not arise until after the indemnity has to make payment).

Bungee Edible Oil Corp. v. M/V Torm Rask, 756 F.Supp. 261 (E.D.La. 1991) aff'd 949 F.2d 786 (5th Cir. 1992); *Reisman v. Medafrica Lines USA,* 592 F.Supp. 50 (S.D.N.Y. 1984); *Servicios Expoarma Ca v. Industrial Maritime Carriers, Inc.,* 135 F.3d 984, 1998 (5th Cir. 1998).

H. Choice of Law Clauses/Forum Selection Clauses/Arbitration Clauses

Clause Paramount – U.S. COGSA Choice of Law Clause –

Specifies the law of the contract of carriage as U.S. COGSA to govern rates, liabilities, obligations of the parties. By virtue of a Clause Paramount, U.S. COGSA is deemed incorporated as the applicable law of the contract. Incorporates all of COGSA, including $500 per package limitation, carrier exceptions from liability, and the one-year statute of limitations. COGSA becomes the exclusive cause of action by the Shipper against the Carrier, and any claim against the Carrier is subject to COGSA.

Nippon Fire & Marine Ins Co. v. M/V TOURCOING, 167 F.3d 99, 1999 AMC 913 (2nd Cir. 1999); *Fireman's Fund Ins Co. v. Tropical Shipping & Construction Co.*, 254 F.3d 987, 2001 AMC 2474 (11th Cir. 2001); *Shell Oil Co. v. M/T GILDA,* 790 F.2d 1209 (5th Cir. 1986); *Leather's Best Int Inc. v. M/V LLOYD SERGIPE,* 760 F.Supp. 301 (S.D.N.Y 1991); *Farrell Lines Inc. v. Columbus Cello-Poly Corp.,* 32 F.Supp. 2d 118, 1998 AMC 334 (S.D.N.Y 1997), aff'd *Farrell Lines Inc. v. Ceres Terminals, Inc.,* 161 F.3d 115 (2nd Cir. 1998); *Insurance Co. of N. America v. M/V OCEAN LYNX,* 901 F.2d 934 (11th Cir. 1990).

Forum Selection Clauses –

Valid and enforceable where asserted and Bill of Lading. Forum selection clauses do not violate COGSA. Allows the Carrier to enforce the terms of its bills of lading against the maritime laws of other countries. By virtue of forum selection clause, the

Carrier can enforce $500 package protection against claims of foreign Shippers. But forum selection clause must be reasonable. Forum selection clauses are presumptively valid, and are unenforceable only if found to be subject to duress, fraud or deprivation of due process.

Vimar Seguros y Reaseguros v. M/V Sky Reefer, 515 U.S. 528, 115 S. Ct. 2322 (1994); *M/S Bremen v. Zapata Offshore Co.,* 407 U.S. 1, 92 S. Ct. 1907 (1972). 407 U.S. 1, 92 S. Ct. 1907; *Mitsui and Co. (USA), Inc. v. Mira M/V,* 111 F.3d 33 (5th Cir. 1997).

Arbitration Clauses –

Valid and enforceable. The Federal Arbitration Act, 9 U.S.C. §§ 1-16, validates and enforces a written arbitration provision in any maritime transaction or contract, including "bills of lading of water carriers." Arbitration clauses contained in ocean Bills of Lading are valid and enforceable under the Federal Arbitration Act. Arbitration clauses stipulating foreign arbitration are also valid and enforceable by virtue of the convention on the recognition that enforcement of foreign arbitral awards, 9 U.S.C. §§ 201-208.

COGSA does not render arbitration clauses invalid or unenforceable. Arbitration clauses are valid even if stipulation for foreign arbitration.

Vimar Seguros y Reaseguros v. M/V Sky Reefer, 515 U.S. 528, 115 S. Ct. 2322 (1995); *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.,* 130 S.Ct. 2433 (2010); Japan Sun Oil Co. Ltd. V. M/V MAASDIJK, 864 F.Supp. 561, 1995 AMC 726 (E.D.La. 1994).

Himalaya Clause –

When inserted in a Bill of Lading, the Carrier extends the benefit of COGSA protections to the Carrier's agents and servants and contractors, namely stevedores, terminal operators, and assist tugs. The Himalaya Clause extends COGSA protections -- $500 per package limitation and one-year prescriptive period – to the Carrier's stevedore and agents.

The purpose of the Himalaya Clause is to extend the COGSA one year time bar and the COGS $500 package defense to the Carrier's agents, servants and contractors. If

the stevedore/terminal operator is functioning as an agent or contractor of the Carrier, then the stevedore/terminal operator is entitled to the benefits of the COGSA one year time bar and $500 package defense, provided the Carrier's Bill of Lading extends this protection. However, the Bill of Lading must clearly show the intent of the Carrier to extend these protections to the Carrier's agents and contractors. Strictly construed.

The Himalaya Clause is valid if the Bill of Lading contains a Clause Paramount (incorporating COGSA) and provides that COGSA is extended to cover the periods prior to loading and subsequent to discharge.

See *Fireman's Fund Ins Co. v. Tropical Shipping & Construction Co.,* 254 F.3d 987 (11th Cir. 2001); *Brown & Root Inc. v. M/V PEISANDER,* 648 F.2d 415 (5th Cir. 1981). See *Norfolk Southern Railway Co. v. Kirby,* 543 U.S. 14, 125 S. Ct. 385 (2004); *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433 (2010).

I. Carrier's Loss of COGSA Exemptions and Limitations – Fundamental Breach of Contract of Carriage – Deviation

Deviation – Unauthorized or unreasonable deviation – is defined as the intentional or voluntary departure (without necessity or reasonable cause) from the regular and usual course of the voyage. See *Hostetter v. Park*, 137 U.S. 30, 11 S.Ct. 1 (1890). Deviation has come to mean any variation in the conduct of the ship and the carriage of goods whereby the risk incident to the shipment will be increased; such conduct is held to be a departure from the course of agreed transit, thereby subjecting the goods to greater risk.

The fundamental breach of the bill of lading – deviation – can result in the Carrier's loss of the COGSA exemptions and limitations of liability. A fundamental breach of the Contract of Carriage, resulting in the Carrier's loss of COGSA protections – can occur in three instances:

- Unexcused, unreasonable geographic deviation. See 46 U.S.C. Appx § 1304(4) re "excused or reasonable deviation."
- Unauthorized on-deck stowage – "quasi deviation."

- Carrier's fraud in preparation of bills of lading. Fraudulent bills of lading.

Spartus Corp. v. SS Yafo, 590 F.2d 1310 (5th Cir. 1979); *Constructores Tecnicos v. Sea-land Service, Inc.*, 945 F.2d 841 (5th Cir. 1991); *Hellenic Lines Unlimited v. United States*, 512 F.2d 1196 (2nd Cir. 1975); *Sedco, Inc. v. SS Strathewe*, 800 F.2d 27 92nd Cir. 1986). See *Bungee Edible Oil Corp. v. M/V Torm Rask,* 756 F.Supp. 261 (E.D.La. 1991) aff'd 949 F.2d 786 (5th Cir. 1992); *Itel Container Corp. v. M/V TITAN SCAN*, 1997 AMC 1568 (S.D.Ga. 1996).

An unauthorized and unreasonable deviation is a fundamental breach of the Contract of Carriage, and therefore, if unreasonable deviation is found, the Carrier is deprived of reliance on the provisions of the Contract of Carriage including the COGSA defenses. The Carrier cannot complete or rely on the exoneration and limitation of liability provisions in COGSA. The concept of deviation and fundamental breach have been extended to include situations in addition to geographic deviation. The most frequent application of fundamental breach is the Carrier unjustifiably stows cargo "on deck" despite the issuance of a Clean Bill of Lading implying underdeck stowage. In addition, erroneous or fraudulent misrepresentations in a Bill of Lading may constitute a fundamental breach.

J. Delivery –

The Harter Act and COGSA require proper delivery of the goods by the Carrier. However, the Harter Act and COGSA do not define "proper delivery."

Proper delivery must be either actual or constructive. Actual delivery means the transfer of full possession and control of the goods to the consignee or to his agent. Constructive delivery means the goods must be unloaded from the vessel onto the dock wharf or terminal, segregated by the Bill of Lading and count, and made assessable to the consignee or his agent in a suitable place under proper care and custody. The consignee must be given proper notice in a reasonable time to pick up the goods.

Essentially, delivery occurs as soon as the Carrier has discharged the cargo from the vessel and has given notice to the Consignee; however, delivery is not the literal discharge of cargo to the dock but involves relinquishment of possession and control over the goods by the Carrier to some other party (not necessarily the Consignee or it s agent) coupled with actual notice to the Consignee that the goods have arrived.

The duty of proper delivery is a non- delegable duty of the Carrier, and any clause in the Bill of Lading which attempts to shift or lessen that duty is invalid.

Proper delivery may turn on local customs, practices and laws of the port of discharge.

Carrier is under duty to deliver the cargo upon presentation by the consignee of the Bill of Lading; Carrier is strictly liable for misdelivered goods. The consignee has a duty to accept cargo delivered by the Carrier, notwithstanding the cargo may be damaged.

Delivery is important: (1) delivery is the event which triggers the running of the COGSA one year statute of limitations;, (2) delivery triggers the COGSA three day notice period during which the Shipper should give the Carrier notice of non-apparent cargo damage; and (3) improper delivery breaches the fundamental duty of the Carrier which imposes liability on the Carrier.

Orient Overseas Container Line Ltd. V Crystal Co. Seafood Corp., 2012 AMC 1395 (S.D.N.Y. 2012); *Servicios Expoarme C.A. v. Industrial Maritime Carriers, Inc*., 135 F.3d 984 (5th Cir. 1998); *Mannesman Dumag Corp. v. M/V Concert Express*, 200 AMC 2935 (5th Cir. 2000); *C. Tennant Sons & Co. v. Norddeutsher Lloyd*, 220 F.Supp. 448 (E.D.La. 1983);

K. <u>Measure of Damages –</u>

General Rule: "Market Value Rule" -- the difference between the fair market value of the goods at "port of destination and the condition they were in when shipped

and their value as damaged." Burden of proof on plaintiff. If the cargo is lost entirely rather than damages, the measure of damages is the market value of the cargo at the port of destination. If the goods are delayed through the fault of the Carrier, the measure of damages is the difference between the market value of the goods at the time and place they should have arrived and the market value of the goods when they did arrive. In no event, however, is the Carrier liable for more than the "amount of damage actually sustained."

BP North American Petroleum v. Solar ST, 250 F.3d 307, 2001 AMC 1844 (5th Cir. 2001); *Minerais US Inc. v. M/V Moslavina,* 46 F.3d 501 95th Cir. 1995); *Cook Industries , Inc. v. Barge UM,* 308, 622 F.2d 851 (5th Cir. 1980). See COGSA 46 U.S.C. at § 1304(5).

"Market value in sound condition at destination" less "market value in damaged condition." "Market value minus salvage value equals damages."

In addition, reasonable incidental expenses causally related to the cargo damage are generally held recoverable. *Santiago v. Sea-land Service, Inc.*, 366 F.Supp. 1309 (D.P.R. 1973) Burden of proof on Shipper/consignee.

Application of the "Market Value Rule" is not absolute. In some exceptional circumstances, the courts may allow "invoice value" rather than "market value" to form the basis of the damage award. Where there is no market value at destination or where at destination the consignee contracted to resell the cargo at a higher price, the market value rule is not applied in favor of awarding actual incidental expenses, such as the cost of reconditioning the cargo.

Dixie Plywood Co. v. SS Federal Lakes, 404 F.Supp. 461, 1996 AMC 439 (S.D.Ga. 1975) aff'd 525 F.2d 691 (5th Cir. 1975); *Texport Oil Co. v. M/V AMOLYNTOS*, 11 F.3d 361, 1994 AMC 815 (2nd Cir. 1993); *Dessert Service, Inc. v. M/V MSC Jamie/Rafaela*, 219 F.Supp 2d, 504, 2002 AMC 2358 (S.D.N.Y 2002).

However, the recovery of consequential damages and special damages – such as lost profits and lost business opportunity – are generally denied. Consequential damages

and special damages are generally not recoverable in a COGSA case. Limited exception: Shipper may recover consequential and special damages provided (1) the Shipper satisfies the "foreseeability" requirements of the Hadley Baxendale Rule, and (2) the Shipper was not able to mitigate against lost profits through the sale of substituted cargo.

BP North American Petroleum v. Solar ST, 250 F.3d 307, 2001 AMC 1844 (5th Cir. 2001); *Packol (Canada) Ltd. V. M/V Minerva*, 523 F.Supp. 579 (S.D.N.Y. 1981); *Santiago v. Sea-land Service, Inc.*, 366 F.Supp. 1309 (D.P.R. 1973); *Dixie Plywood Co. v. SS Federal Lakes*, 404 F.Supp. 461(S.D.Ga. 1975) aff'd 525 F.2d 691 (5th Cir. 1975); *Anyangwe v. Nedlloyd Lines*, 909 F.Supp. 315 (D.Md. 1995).

L. Burden of Proof

Under COGSA to establish a *prima facie* case of liability against the Carrier, the Shipper has the burden of proving that the cargo was received by the Carrier in good condition and the cargo was damaged upon delivery by the Carrier at its destination. A Bill of Lading is prima facie evidence that the Carrier received the goods as described therein and creates a rebuttal presumption that the goods were delivered to the Carrier in good condition. In other words, the plaintiff's *prima facie* case regarding receipt by the Carrier in good condition is satisfied by the introduction into evidence of the clean Bill of Lading. Once the Shipper presents a *prima facie* case, the Carrier then has the burden of proving either that it exercised due diligence to prevent the damage or that the harm was occasioned by one of the excepted causes delineated in 46 U.S.C. §1304(2)(a-q).

Furthermore, once the Shipper has presented its prima facie case, the Carrier, if unable to rebut the Shipper's position, will be liable for the entire damaged cargo unless it can prove what portion was not actually damaged or was damaged under one of the exceptions in §1304(2). The Carrier bears this heavy burden because of its legal responsibility to exercise due diligence to make the ship seaworthy, to properly man, equip, and supply the ship, and to make all parts of the ship in which the goods are carried fit and safe for the reception, carriage and preservation of the cargo.

If the Carrier is able to rebut the Shipper's *prima facie* case by availing itself of one of the exceptions, then the burden returns to the Shipper who must then show that there were at least concurring causes of loss in the fault and negligence of the Carrier. If the Shipper is able to show such negligence, the burden then re-shifts to the Carrier who then has the difficult task of proving the portion of the loss caused by the negligence and the portion caused by the exception. Failure to differentiate such damage results in full liability for the loss against the Carrier.

See *United States v. Ocean Bulk Ships, Inc*., 248 F.3d 331 (5th Cir. 2001); *Quaker Oats Co. v. Torvanger*, 734 F.2d 238 (5th Cir. 1984); *Blasser Brothers, Inc. v. Northern Pan-American Lines*, 628 F.2d 376 (5th Cir. 1980); *Tennaco Resins, Inc. v. Davy International AG*, 881 F.2d 211 (5th Cir. 1989).

M. Carmack Amendment – 49 USC § 11706(a) – Intermodal Transportation

The Carmack Amendment governs the terms of the Bill of Lading issued by the domestic rail carrier.

The Carmack Amendment applies to railroad transportation and allows a Shipper to recover for cargo damage or loss from either the delivering rail carrier or the rail carrier issuing the railroad Bill of Lading or receipt. The rail carrier that pays the Shipper may in turn recover the amount paid plus reasonable defense costs from the rail carrier on whose line the loss or damage occurred; and if this cannot be determined, the receiving or delivering rail carrier must absorb the loss. Under the Carmack Amendment, the rail carrier is relieved of liability if it can prove freedom from negligence and that the damage was due to an act of God, public enemy act or omission of the Shipper or the inherent vice of the goods.

The issue becomes whether the Carmack Amendment applies to inter-modal or multi-modal transportation of goods in which the goods are transported by both rail carrier and ocean carrier. The issue is simply whether the Carmack Amendment applies

to the inland portion of a multi-modal shipment under a Through Bill of Lading when the Bill of Lading calls for door-to-door application of COGSA.

The application of Carmack is determined by reference to 48 USC § 13501 which extends Carmack to motor and rail transportation of property "(1) between a place in a state and a place in another state; or (2) between a place in the United States and a place in a foreign country to the extent the transportation is in the United States." The question becomes whether Carmack or COGSA applies in the situation where a Through Bill of Lading is issued by an ocean carrier for a shipment originating outside the United States and destined for import into the interior of the United States. Under COGSA, the ocean carrier (and subsequent rail carriers) argue they are entitled to the protections of COGSA, mainly the instances of exoneration from liability under § 1304 and the COGSA package limitation of liability under §1304(5); on the other hand, shippers and consignees of cargo argue Carmack applies against the rail carriers to the extent the cargo loss or damage occurred while in the care, custody or control of the rail carriers.

In *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.,* 130 S. Ct. 2433 (2010), the Supreme Court held that with respect to shipments originating outside the United States, where the shipment is pursuant to an Ocean Through Bill of Lading which utilized rail carriage as a connecting or delivering carrier, Carmack does not apply. (Carmack applies to shipments beginning with a receiving rail carrier since Carmack requires a Bill of Lading to be issued only by a receiving rail carrier. The Supreme Court construed the Carmack Amendment to apply only when the Carrier that first receives the goods for shipment does so in the United States, the Court finding that Carmack does not apply if the property is received at an overseas location under a Through Bill of Lading that covers the transport into an inland location inside the United States.

Kawasaki holds that the Carmack Amendment does not apply to carriage of cargo by rail from a U.S. port of entry to various U.S. inland destinations as part of a Through Bill of Lading from a foreign country evidenced by a single Through Multi-modal Bill of Lading which incorporates COGSA.

The issue is unsettled whether Carmack applies to the inland portion of a Through Bill of Lading for cargo exported out of the United States where the shipment originates with a rail carrier.

N. PRIVATE CARRIAGE – CHARTER PARTIES

The charter party is the principle document used in the private carriage of cargo. It is a specialized form of contract for the hire of the entirety of a specific named vessel. Charters are usually concluded through a series of telex/faxes/email communications between intermediaries ("ship brokers") representing the owner of the vessel and the charterer of the vessel. The party that obtains the use and service of the ship is called the "charterer," and the party supplying the ship is the "shipowner." Usually the charterer is the shipper of the cargo carried onboard the ship, and the shipowner is the "Carrier" of the cargo.

The charter party is a private contract of carriage, and thus the parties are free to allocate risks contractually either by express contractual provisions or by allocating specific duties concerning the cargo, the voyage and the ship. However, charter parties often contain a Clause Paramount, incorporating COGSA as the applicable law of the contract.

There are three principle forms of charter parties: (1) demise charter and/or bareboat charter, (2) voyage charter and (3) time charter.

See generally 2 Schoenbaum, *Admiralty and Maritime Law* § 11-1 – 11-19 (5th ed. 2011)

Coghlin, Baker, Kenny & Kimball, Time Charters (6th Ed. 2003)

Cooke, Young, Ashcroft, Taylor, Kimball, Martowski, Lambert, & Starkey, Voyage Charters (4th Ed. 2015)

DEMISE/BAREBOAT CHARTER:

A demise charter is the transfer of full possession and control of the vessel from the vessel owner over to the charterer. The charterer obtains complete possession and control of the vessel and obtains the exclusive right to run the vessel and carry whatever cargo he chooses. The charterer mans, supplies and equips the vessel during the term of the charter. The charterer is considered the "owner pro hac vice" and operates the vessel as if he were the owner of the vessel. (Owner retains title to the vessel.) The charterer pays the owner "hire" (essentially rent).

Owner provides the vessel; charterer provides crew and supplies and operates vessel.

The demise charter and the bareboat charter are essentially the same thing. However, a bareboat charter allows the charterer to select his own master and crew. If the vessel owner provides the master and crew, tendering them as agents and servants of the charterer, the charter is a demise charter, but not technically a "bareboat" charter.

The legal test for a demise charter is whether the owner of the vessel has completely and exclusively relinquished possession, command and navigation of the vessel over to the charterer. The demise charter exists when the provisions of the charter party show that those in charge of the vessel are intended to be the agents, servants and employees of the charterer and not the shipowner.

Under a demise or bareboat charter, the charterer is responsible in personam for the fault and neglect of the captain and crew; the shipowner is not responsible in personam for the fault or neglect of the captain and crew, but the owner remains subject to the in rem liability of its vessel.

Under a demise/bareboat charter, the charterer is eligible to claim limitation of liability, and is entitled to recover a salvage award for salvage conducted by the vessel.

The relationship between charterer and owner is determined by the terms of the charter party. The essential characteristic of the demise charter is that the entire command and possession of the vessel be turned over to the charterer.

Owner's fundamental obligation under a charter party is to provide a seaworthy vessel of the specified class and type set forth in the charter party. The extent of the warranty of seaworthiness is determined by the terms of the charter party, and the warranty may be waived. The charterer's basic obligation is to pay the charter hire stipulated in the charter party and at the end of the charter term, return the vessel in the same condition as received excepting ordinary wear and tear.

Typical provisions of demise charter party include delivery and redelivery of the vessel, restrictions on use., payment of hire and maintenance and repair of the vessel, and owner's rights in the event of charterer's default. Of primary importance are provisions pertaining to the responsibility to make repairs and maintain the vessel, purchase insurance, and indemnity requirements.

Torch Inc. v. Alesich, 148 F.3d 424 (5th Cir. 198); *Deal v. A.P. Bell Fish Co*., 674 F.2d. 438 (5th Cir. 1982); *Agrico Chemical Co. v. M/V Ben W. Martin*, 664 F.2d 85 (5th Cir. 1981); *Baker v. Raymond Int, Inc*., 656 F.2d 173 (5th Cir. 181); *Gaspard v. Diamond M. Drilling Co.*, 593 F.2d 605 (5th Cir. 1979); *Forrester v. Ocean Marine Indemnity Co*., 11 F.3d 1213 (5th Cir. 1993).

VOYAGE AND TIME CHARTER:

Voyage and Time Charters are "Affreightment Charters." That is, they are Contracts of Affreightment. Both concern the contracting for the cargo space aboard a specific vessel either for a specific voyage (Voyage Charter) or of a specific period of time (Time Charter). Under both a voyage and time charter, the owner retains possession, control and command over the operation and navigation of the vessel; The owner (and not the charterer "operates" the vessel. The owner is the "Carrier" of the cargo carried onboard the vessel, and the voyage or time charterer is usually the "Shipper" of the cargo.

(But in a subcharter arrangement, the time charterer can be the Carrier and the voyage charterer the shipper of the cargo).

The voyage charterer pays "freight." The time charterer pays "charter hire."

VOYAGE CHARTER (a/k/a "SPOT CHARTER"):

Voyage Charter is a Contract of Affreightment entered into for the purpose of transporting cargo for the charterer for a specific voyage. Voyage Charters typically involve the entire reach of the cargo carrying capacity of the vessel. Private Contract of Carriage.

Voyage Charter is a contract to hire a vessel for a specific voyage (or voyages) under which the shipowner is compensated with charterer's payment of freight. The charterer contracts for the use of the vessel, specifically the cargo space aboard the vessel, for a specific voyage. Under a Voyage Charter, the Carrier agrees to transport a certain amount of cargo from one port to another (the voyage) in return for the payment of freight. The charterer promises to deliver the cargo to the ship and to pay freight.

Important clauses in a Voyage Charter: (1) named or to be named vessel, (2) ship's cargo capacity, (3) seaworthiness warranty, (4) specifics of voyage and vessel speed, (5) specifics where to load and where to discharge cargo, (6) safe port and safe berth, (7) loading and discharge obligations. The charter party will specify who has responsibility for loading and discharge and the time (laytime) for loading and discharge. The demurrage clause fixes the liability of the charterer where loading or unloading takes longer than the specified laytime. Clause Paramount – incorporating Hague Rules (US COGSA) or Hague Visby Rules (UK COGSA). Bill of Lading clause gives the master authority to sign bills of lading for all cargo shipped.

Forrester v. Ocean Marine Indemnity Co., 11 F.3d 1213 (5th Cir. 1993); *Chembulk Trading LLC v. Chemex Ltd.*, 393 F.3d 550 (5th Cir. 2004).

TIME CHARTER:

Time Charter is a contract for the use of the vessel for a particular period of time, usually 12 months. Vessel owner retains possession and control of the vessel and owner operates the vessel. The time charterer has the right to direct the movements of the vessel during the charter period. Charterer determines route and destination of the vessel.

A Time Charter is a Contract of Affreightment for use of vessel in order to ship goods for a specific period of time – usually one year. The Carrier/owner makes the ship's cargo capacity available to the time charterer for this purpose. The charterer bears the expenses connected with each voyage and pays hire to the Carrier based upon the time the ship is under charter.

The time charterer has no operational control over the vessel, and therefore, assumes no liability for damage to cargo due to crew negligence or vessel unseaworthiness, unless the vessel the charter party determines otherwise.

The time charterer has the prerogative of "employment" and "dispatch" – The charterer has the prerogative to direct the vessel where to go. In a voyage charter, the charterer typically manages the carriage of goods and cares for the cargo, but in a time charter there is some division of responsibility imposed on the time charterer. In general, the Carrier is to keep the ship properly equipped so that the orders of the time charter can be properly carried out. The costs are divided so that the Carrier pays fixed costs and the charterer pays variable costs such as bunkering. The charterer is generally responsible for loading and discharge of the cargo.

Forrester v. Ocean Marine Indemnity Co., 11 F.3d 1213 (5th Cir. 1993); *Randall v. Chevron USA Inc.*, 13F.2d 888 (5th Cir. 1994); *Walker v. Braus*, 995 F.2d 77 (5th Cir. 1993); *Kerr-McGee Corp. v. Ma-Ju Marine Services Inc*. 830 F.2d 1332 (5th Cir. 1987); *Williams v. Central Gulf Lines*, 874 F.2d 1058 (5th Cir. 1989).

SLOT CHARTER:

A vessel operator charters certain amount of cargo space onboard another non-owned vessel to carry cargo for or on behalf of the vessel owner. In such an instance, the vessel owner is the "charterer" of certain space ("slot") on another vessel owner's vessel, but in turn that vessel owner charters with another Shipper to carry that Shipper's cargo aboard that other vessel owner's vessel in that slot.

FULLY FOUND CHARTER:

A type of time charter – the vessel owner provides vessel fully equipped, crewed and supplied – except fuel. Vessel owner provides insurance.

EMPLOYMENT AND AGENCY CLAUSE:

Most time charters have a clause providing that the charterer has the full use of the vessel and the master will comply with the charterer's order and instructions. In return, the charterer agrees to indemnify the owner for all liability resulting from the charterer's directions. However, the shipowner retains responsibility for matters relating to ship management and navigation.

SAFE PORT/SAFE BERTH CLAUSES:

Safe port and safe berth. The charterer typically warrants the safety of ports or berths to which he directs the vessel. In the case of a "berth charter" the Carrier bears the risk that congestion will cause delays; in the case of a "port charter" the risk is borne by the charterer.

Time and voyage charter parties typically provide that the ship shall "safely lie, always afloat." Unless this is modified by language reducing this obligation to due diligence, the charterer who nominates a port is held to warrant that the particular vessel can proceed to port or berth without being subjected to the risk of physical damage. The safe port warranty may relate to political dangers to the physical safety of the vessel as well as natural hazards. The safe port warranty also encompasses the approaches to a port or berth and is judged according to whether it is safe for the particular vessel involved.

The safe berth clause is not interpreted to obligate the charterer to indemnify the vessel against personal injury actions.

The effect of the safe port warranty is that the ship can refuse to proceed to the port nominated without being in breach of the charter. Furthermore, if the ship reasonably complies with the order and proceeds to port, the charterer is liable for any damage sustained. If extra expenses of loading or unloading are incurred because the ship cannot safely enter a port or berth, the expenses are borne by the charterer. The crucial time for determining whether a port is safe is the time it is named by the charterer. The safe port warranty is inapplicable if it becomes unsafe after the arrival of the vessel. If, however, the port becomes unsafe after its nomination, it is the responsibility of the charterer to substitute another port if that is reasonable under the circumstances. Poor weather conditions do not ordinarily render a port unsafe.

If a master or shipowner unconditionally accepts the nomination of a port with full knowledge of local conditions, the charterer is not liable for damage incurred. Similarly, where the master negligently enters an unsafe port, the charterer may not be liable. In the last analysis, it is the responsibility of the master to make the decision whether to enter a port. If the fault is shared between the charterer and the master, damages may be divided proportionately.

HIRE/OFF HIRE CLAUSES:

Time charters typically contain an off-hire clause as follows:

> In the event of dry docking or other necessary measures to maintain the efficiency of the vessel deficiency of the men or the owner's stores, breakdown of the machinery, damage to hull or other accident, either hindering or preventing the working of the vessel and continuing more than 24 consecutive hours, no hire is to be paid in respect of any

time lost thereby during the period in which the vessel is unable to perform the service immediately required.

This clause recognizes that what the charterer has bargained for in a charter is the use of the vessel, and where he is deprived of that use, there is no obligation to pay hire. When one of the listed events in the off-hire clause deprives the charterer of the vessel's use, the hire is automatically suspended without regard to fault on the part of the shipowner. The off-hire clause suspends only the obligation to pay hire; other obligations under the charter, such as the responsibility for bunkers or supplies, continue during the off-hire period. If the off-hire event is triggered by the fault or responsibility of the charterer, payment of the hire is not excused.

As a general rule, under an off-hire clause, payment of hire is suspended for the period equal to the net overall time lost to the charterer. Some charters provide, however, that hire is to be resumed when the vessel again regains an efficient state to resume service.

LAYTIME, DEMURRAGE AND DETENTION AND DESPATCH – VOYAGE CHARTER:

Loading and discharge. For both the voyage charter will specify who has responsibility and the time (laytime) for loading and discharge. Laytime can be determined by many methods: fast as can (FAC), running working days (RWD) or hours (RWH), weather working days (WWD), or Sundays and holidays excepted (SHEX).

There may be a *clause tolling the running of laytime* for bad weather, strikes, or riots, and the like.

A *demurrage clause* fixes the liability of the charterer – liquidated damages - where the loading or unloading takes longer than the specified laytime.

Particularly important in voyage charters is the delineation of the rights and duties of the parties in the event of delays in loading or unloading cargo. The period of time allowed for loading and unloading is called *laytime*. The period allowed and its

calculation depend on the terms of the charter party. After the allowed laytime has expired, the charterer is liable for delay at a rate of demurrage that is stipulated in the charter. *Demurrage* is a reparation paid to the shipowner to compensate for vessel time lost; however, the fact that the charter stipulates a liquidated sum for demurrage does not obviate the need to show actual damages. The charter party may also provide for a money payment called *dispatch* by the owner to the charterer if the vessel is loaded and allowed to depart prior to the expiration of laytime.

In order that laytime may commence, the vessel must be an "arrived ship" as defined in the charter party. This can mean that the vessel has reached either a port, a dock, or a berth, depending on the terms of the charter. The vessel must be clean and ready to receive cargo, and a notice of her readiness to load must be communicated to the charterer. Many berth charters contain a clause that "time lost waiting for berth is to count as laytime," and this provision effectively shifts any delay in waiting for a berth to the charterer.

The charterer must make the cargo available to load, but unless the charter party provides to the contrary, the responsibility for loading and stowing (as well as unloading) is on the shipowner. The charterer is also obliged to load the amount of cargo stipulated in the charter party, and will be liable for "dead freight" if this is not done.

Laytime runs according to the particular clause of the charter party. Frequently a grace period of several hours is given from the time notice of readiness to load is given to the beginning of laytime. If laytime is expressed in "running days," this means days when the ship would be run continuously, and holidays are not excepted. A qualification of "weather permitting" excepts only those days when bad weather reasonably prevents the work contemplated.

The running of laytime is also subject to any general exceptions clause in the charter that excludes time lost due to strikes, restraint of princes, and *vis majeur*.

Demurrage begins to run after the expiration of laytime. The rate is normally set by the charter party. Demurrage runs continuously according to the maxim "once on demurrage always on demurrage, "and is not interrupted by holidays, bad weather, or a strike, unless this is provided unambiguously in the charter party. Nevertheless, demurrage may be interrupted if the shipowner removes the vessel for bunkering or by a *vis majeur* beyond the control of the charterer.

Where the delay runs beyond the stated time for demurrage in the charter party or the delay causes additional damages, the charterer may be liable for actual damages incurred by the Carrier/shipowner for *detention.*

THE ROTTERDAM RULES

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea a/k/a "The Rotterdam Rules".

* Signing ceremony held in Rotterdam on September 23, 2009
* USA is a signatory; awaiting ratification by U.S. Senate
* Intended to replace the Hague Rules (1924), the Hague-Visby Protocol (1977) and the Hamburg Rules (1992)

The U.N. General Assembly adopted the Convention on December 11, 2008. The formal signing ceremony was held in Rotterdam on September 23, 2009, hence the Convention is called the "Rotterdam Rules". Among the signatories is the United States. The Rotterdam Rules are currently awaiting ratification by the United States Senate, at which time the Rotterdam Rules will become U.S. law.

The Rotterdam Rules will go in effect as an international convention 1 year after 20 countries ratify the treaty. [Art. 94.1]

The Rotterdam Rules are intended to replace the Hague Rules (1924), the Hague-Visby Protocol (1977) and the Hamburg Rules (1992). In the United States, if ratified,

the Rotterdam Rules will replace the U.S. Carriage of Goods by Sea Act (COGSA), which for the most part is based on the Hague Rules.

OVERVIEW OF THE ROTTERDAM RULES

* Purpose – Modify the existing laws governing the carriage of goods by sea in foreign commerce.

* Facilitate the carriage of goods by sea by providing practices for the use of electronic documents.

The purpose of the Rotterdam Rules is to modify the existing laws governing the carriage of goods by sea between nations. The Rotterdam Rules constitute the most recent attempt by the international community to have a single set of rules to govern the carriage of goods by sea.

1. Scope and Application:

* Apply to contracts of carriage in which the place of receipt and the place of delivery are in different countries, and the port of loading and the port of discharge are in different countries.
* Do not apply statutorily (as a matter of law) to liner transportation, where a charter party is the contract of carriage.
* Do not apply to contracts of carriage in non-liner transportation except when there is no charter party.
* Parties may agree that Rotterdam Rules apply contractually.

The Rotterdam Rules apply to contracts of carriage in which the place of receipt and the place of delivery are in different countries, and the port of loading and the port of discharge are in different countries. [Article 5]

"**Contract of carriage**" is defined by the Rotterdam Rules to mean a contract in which the carrier, against the payment of freight, undertakes to carry the goods from one place to another. The contract shall provide for carriage by sea, but may also provide for

carriage by other modes of transport in addition to sea carriage. [The Rotterdam Rules broaden the definition of the term "contract of carriage" from that contained in COGSA.]

The Rotterdam Rules do not apply statutorily (as a matter of law) to liner transportation, where a charter party (or other contract for the use of a ship) is the contract of carriage. [Article 6]

The Rotterdam Rules also do not apply to contracts of carriage in non-liner transportation except when there is no charter party (or other contract for the use of the ship) and a transport document or an electronic transport record is issued. [Art. 6]

However, the Rotterdam Rules can apply contractually if the parties so agree in the charter party, etc.

While the Rotterdam Rules do not apply as between the original parties to a contract of carriage excluded under Article 6, the Rotterdam Rules nevertheless apply as between the carrier and the consignee, controlling party or holder (that is not an original party to the charter party) or other contracted carriage excluded from application of the Convention. [Art. 7]

2. "Tackle to Tackle" Coverage to Be Replaced by "Door to Door" Coverage:

* The Rotterdam Rules will expand the carrier's period of responsibility to a "door to door" approach.
* Article 12 of the Rotterdam Rules defines the period of responsibility of the Carrier to begin "when the carrier or a performing party receives the goods for carriage, and ends when the goods are delivered."
* The period of responsibility commences when the carrier actually receives the goods, and not when those goods are actually loaded above the ship.
* The carrier's responsibility continues after the goods are discharged from the ship until the carrier actually makes delivery of the goods to the intended consignee.

Under COGSA, the carrier's period of responsibility for the cargo runs "tackle to tackle"; that is the carrier is responsible only during "the period from the time when the goods are loaded on board the vessel to the time when they are discharged from the vessel."

The Rotterdam Rules will expand the carrier's period of responsibility to a "door to door" approach. Under the Rotterdam Rules the carrier is responsible for the entire contractual period of carriage, which in a multi-modal shipment, could be from the time of the carrier's receipt of the goods at an inland location in the country of origin all the way to the time of the carrier's delivery of goods at an inland destination in the country of destination.

Article 12 of the Rotterdam Rules defines the period of responsibility of the carrier to begin "when the carrier or a performing party receives the goods for carriage, and ends when the goods are delivered." The period of responsibility commences when the carrier actually receives the goods, and not when those goods are actually loaded above the ship; and the carrier's responsibility continues after the goods are discharged from the ship until the carrier actually makes delivery of the goods to the intended consignee.

The Rotterdam Rules further provide that the parties (shipper and carrier) may agree on a time and location of receipt and delivery of the goods, but such a contractual provision is void to the extent that (a) it provides the time of receipt is subsequent to the beginning of the initial loading under the contract of carriage or (b) provides the time of delivery of the goods is considered prior to the completion of the final unloading.

3. Use of Electronic Transport Documents – Articles 8-10:

* Provide practices for use of electronic documents

* Paper documents = electronic documents

* "Procedures" agreed to by the parties in the contract particulars

One of the goals of the Rotterdam Rules is to facilitate the carriage of goods by sea by providing practices regarding the use of electronic documents. The Rotterdam Rules take the position that anything which can be accomplished with a paper document, can also be equally accomplished with an "electronic transport record" so long as the parties agree. [Art. 8] Electronic transport documents have the same legal effect as paper documents so long as the parties agree. The issuance, exclusive control over and the transfer of an electronic transport record has the same legal effect as the issuance, control and possession over and the transfer of a transport document. [Art. 9]

The Rotterdam Rules [Art. 9] provide that use of negotiable electronic transport records will be subject to certain procedures, but at the same time the Rotterdam Rules do not define those procedures. Instead, the Rotterdam Rules take the position those procedures should be set out in the contract particulars by the parties.

4. To Whom the Rotterdam Rules Are Applicable:

* Carrier

* Maritime performing party

* Shipper and documentary shipper

* Consignee

* Controlling party

Carrier – The person that enters into a contract of carriage with a Shipper.

Maritime Performing Party – A "Performing Party" means a person other than the Carrier that performs or undertakes to perform any of the Carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods to the extent such person acts, either directly or indirectly, at the Carrier's request or under the Carrier's supervision or control. A "Maritime Performing Party" means a performing party to the extent that it performs or undertakes to perform any of the Carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of

discharge of a ship. (An inland carrier is a Maritime Performing Party only if it performs or undertakes to perform its services exclusively within a port area.)

Shipper – A person that enters into a "contract of carriage" with a Carrier. "Performing Party" does not include any person that is retained directly or indirectly by a Shipper, by a Documentary Shipper or by the Controlling Party or by the Consignee instead of by the Carrier.

Documentary Shipper – A person, other than the Shipper, that agrees to be named as "shipper" in the transport document or electronic transport record.

Controlling Party – The person that, pursuant to Article 51, is entitled to exercise the "right of control" regarding instructions in respect of the goods. [The Controlling Party has the right to give/modify instructions in respect of the cargo (so long as they are not a variation of the Contract of Carriage), such as the right to replace the Consignee and the right to take delivery.]

Consignee – A person entitled to delivery of the goods under a contract of carriage or other a transport document or electronic transport record.

5. Carrier's Obligations – Articles 11-16:

* Non-delegable duty to provide seaworthy vessel expanded – "before, at the beginning, and during the voyage".

* Duty to load, handle, stow, etc.

* Duty to load, handle, stow, unload – no longer non-delegable

* Authorize "Free In, Free Out"

A. Due Diligence to Provide Seaworthy Vessel.

Under COGSA, the Carrier's non-delegable duty to exercise due diligence to provide a seaworthy vessel, etc., is limited only "before and at the beginning of the voyage." The Rotterdam Rules continue the non-delegable due diligence obligation, but extend the duration of the obligation to include "during the voyage".

Under the Rotterdam Rules, the Carrier is bound before, at the beginning of and during the voyage to exercise due diligence to (a) make and keep the ship seaworthy, (b) properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage, and (c) make and keep the cargo holds and all other parts of the ship in which goods are carried (as well as any container supplied by the Carrier) fit and safe for their reception, carriage and preservation. [Art. 14] This duty of the Carrier remains non-delegable, and the Carrier remains liable for breach of this duty even if the breach is caused by a Carrier's Maritime Performing Party. [See Art. 20] If the Carrier supplies containers, then those containers must be fit and safe for the reception and carriage of the cargo.

B. Due Diligence to Load, Stow, Discharge, etc.

The Rotterdam Rules modify COGSA's non-delegable duty imposed on the Carrier to properly and carefully load, handle, stow, carry, keep, care for and discharge the goods. Under the Rotterdam Rules, the Carrier shall, during the period of its responsibility, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods. However, this obligation is no longer "non-delegable". [Art. 13] The Rotterdam Rules provide that the Carrier and Shipper may expressly agree in the contract of carriage that the loading, handling, stowing or unloading of the goods is to be performed by the Shipper, the Documentary Shipper or the Consignee. [The Rotterdam Rules permit "free in, free out" terms.]

Furthermore, under the Rotterdam Rules the Carrier's "period of responsibility" for the goods "begins when the Carrier or a performing party receives the goods for carriage and ends when the goods are delivered." [Art. 12] However, the Rotterdam Rules provide that the Carrier and Shipper may agree in the contract of carriage on a time and location of receipt and delivery of the goods, but such a provision in the contract of carriage is void (1) to the extent it provides either that the time of receipt of the goods is subsequent to the beginning of their initial loading under the contract of carriage, or (2) provides that the time of delivery of goods is prior to the completion of their final unloading under the contract of carriage. [Art. 12]

6. Liability of the Carrier for Damages – Articles 17-23:

* Both Carrier and Maritime Performing Party are liable – Joint and Several Liability

* Liability for Loss, Damages and Delay

* Claimant must prove loss/damage/delay or event which caused/contributed to it occurred during Carrier's period of responsibility.

The **Carrier** is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage or delay, or the event or circumstance that caused or contributed to it, took place during the period of the Carrier' responsibility. [Art. 17]

The Carrier is liable for breach of its obligations under the Convention or under the contract of carriage caused by the acts or omissions of any performing party, the master or crew of the ship, the employees of the Carrier or a performing party, or any other person that performs or undertakes to perform any of the Carrier's obligations under the contract of carriage to the extent that person acts directly or indirectly at the Carrier's request or under the Carrier's supervision or control. [Art. 18]

Maritime Performing Party: A Maritime Performing Party is similarly subject to the obligations and liability imposed on the Carrier, but is also entitled to claim the Carrier's defenses and limits of liability, if the occurrence that caused the loss, damage or delay took place (a) during the period between the arrival of the goods at the port of loading of the ship and their departure for the port of discharge from the ship, (b) while the Maritime Performing Party had custody of the goods, or (c) at any other time to the extent the Maritime Performing Party was participating in the performance of any of the activities contemplated be performed by the Carrier or the Maritime Performing Party in the contract of carriage. [Art. 19]

The liability of the Carrier and its Maritime Performing Party is joint and several. [Art. 20]

7. Carrier Defenses and Application to Maritime Performing Party – Articles 17 & 19:

* Burden of Proof on Carrier

* "Error in navigation" defense eliminated

* "Fire" defense modified

* Carrier still responsible for carrier fault – claimant burden of proof

Defenses to Liability:

(1) The Carrier proves its "freedom from fault". The Carrier is relieved of all or part of its liability if it proves that the cause or one of the causes of the loss, damage or delay was not attributable to its fault or the fault of any person for whom the Carrier is responsible. [Art. 17]

(2) The Carrier is also relieved of all or part of its liability if, in the alternative to proving absence of fault on its part or that of its agent, the Carrier proves that one or more of the following events or circumstance caused or contributed to the loss, damage or delay:

a. Act of God;

b. Perils, dangers and accidents of the sea or other navigable waters;

c. War hostilities, armed conflict, piracy, terrorism, riots and civil commotion;

d. Quarantine restrictions, interference by or impediments created by governments, public authorities, rulers or people, including detention, arrest or seizure not attributable to the Carrier or any person for whom the Carrier is responsible;

e. Strikes, lockouts, stoppages or restrains of labor,

f. Fire on the ship,

g. Latent defects not discoverable by due diligence;

h. Act or omission of the Shipper, the Documentary Shipper, the Controlling Party or any other person for whose acts the Shipper or the Documentary Shipper is responsible;

i. Loading, handling, stowing or unloading of the goods performed pursuant to an agreement made in accordance with Article 18(2) unless the Carrier or performing party performs such activity on behalf of the Shipper, the Documentary Shipper or Consignee;

j. Wastage in bulk or weight or any other loss or damage arising from the inherent defect, quality or vice of the goods;

k. Insufficiency or defective condition of packing or marking not performed by or on behalf of the Carrier;

l. Saving or attempting to save life at sea;

m. Reasonable measures to save or attempt to save property at sea;

n. Reasonable measures to avoid or attempt to avoid damage to the environment, or

o. Acts of the Carrier made pursuant to Article 15 (Hazardous or Dangerous Cargo) or Article 16 (General Average Sacrifices). [Art. 17]

Note: The Rotterdam Rules eliminate COGSA's "error in navigation and management defense". The Rotterdam Rules also modify COGSA's "fire" defense, removing the proviso "unless caused by the actual fault or privity of the Carrier" and requiring that the fire occur "on the ship". Carrier is not liable under FIFO terms (see "i" above).

However, notwithstanding the above list of defenses, the Carrier is still liable for all or part of the loss, damage or delay (a) if the claimant proves that the fault of the Carrier or a person for the whom the Carrier is responsible caused or contributed to the event or circumstances on which the Carrier relies, or (b) if the claimant proves that an event or circumstance not listed in the list of defenses contributed to the loss, damage or

delay and the Carrier cannot prove that this event or circumstance is not attributable to its fault or to the fault of any person for whom the Carrier is responsible. [Art. 17]

The Carrier is also liable for all or part of the loss, damage or delay if the claimant proves that the loss, damage or delay was or was probably caused by or contributed to by the unseaworthiness of the ship, the improper crewing, equipping and supplying of the ship, or the fact that the holds or other parts of the ship in which the goods are carried (or any containers supplied by the Carrier) were not fit and safe for reception, carriage and preservation of the goods, and the Carrier is not able to prove either that none of the exempted perils (listed defenses) caused the loss, damage or delay or is unable to prove that it complied with its obligations to exercise due diligence. [Art. 17]

Nevertheless, when the Carrier is relieved of part of its liability, the Carrier is liable only for that part of the loss, damage or delay that is attributed to the event or circumstance for which it is liable.

The Maritime Performing Party is subject to the same obligations and liability imposed on the Carrier, but is also entitled to the Carrier's defenses (and limits of liability) if (1) the Maritime Performing Party received the goods for carriage in a country subscribing to the Rotterdam Rules or delivered them in a country subscribing to the Rotterdam Rules, or it performed its activities with respect to the goods in a port subscribing to the Rotterdam Rules, and (2) the occurrence or event that caused the loss, damage or delay took place (a) during the period between the arrival of the goods at the port of loading of the ship and their departure for the Port of Discharge from the ship, (b) while the Maritime Performing Party had custody of the goods, or (c) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

Liability for cargo damage or loss or delay is not imposed on the Master or the Crew of the Carrier's ship or an employee of the Carrier or an employee of the Maritime Performing Party. A Maritime Performing Party is liable for breach of its obligations under the Rotterdam Rules or under the contract of carriage caused by the negligence of

any person to which the Maritime Performing Party has entrusted the performance of any of the Carrier's obligations under the contract of carriage.

Damages: Articles 22 and 60

* Value of the goods at the time and place of delivery

* Value of goods fixed according to commodity exchange price, or market price, or value of the goods of the same kind and quality at place of delivery

* Carrier is not liable for payment of compensation beyond value of goods, unless carrier and shipper have otherwise agreed in the contract of carriage.

* Delay – damages calculated by reference to value of goods at time and place of delivery. Notice of delay required.

* Delay – damages for economic loss due to delay – 2 1/2 times the freight payable

Damages – Cargo Damage/Loss: The compensation payable by the Carrier for loss of or damage to the goods is calculated by reference to the value of such goods at the time and place of delivery. [Art. 22] The value of the goods is fixed according to the commodity exchange price, or if there is no such price, then fixed according to their market price; and if there is no commodity exchange price or market price, then by reference to the normal value of the goods of the same kind and quality at the place of delivery. The Carrier is not liable for payment of any compensation beyond what is provided for in Article 22, except when in the contract of carriage, the Carrier and Shipper have agreed to calculate damages in a different manner.

Delay: Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time period agreed. No compensation in respect of delay is payable unless notice of loss due to delay was given to the Carrier within 21 consecutive days of the delivery of the goods.

Damages for Delay: Compensation for loss over damage to goods due to delay shall be calculated in accordance with Article 22 [calculated by reference to the value of the goods at the time and place of delivery]. Damages for economic loss due to delays

limited to an amount equivalent to 2½ times the freight payable on the goods delayed. [Art. 60] But the total amount payable cannot exceed the "unit limitation" (Art. 59) that would be established in respect of the total loss of the goods.

Unauthorized Deviation:

* Constitutes a breach of the Carrier's obligations, but does not by itself deprive the Carrier of any of the Carrier's defenses to liability or limitation of liability.

* Exception – unauthorized deviation done with intent to cause such loss or done recklessly and with knowledge that such loss would probably result.

Unauthorized Deviation: Unauthorized deviation constitutes a breach of the Carrier's obligations, but deviation in and of itself does not deprive the Carrier or a Maritime Performing Party of any of the Carrier's defenses or limitations under the Rotterdam Rules, except when such unauthorized deviation was done with intent to cause such loss or was done recklessly and with knowledge that such loss would probably result. [Arts. 24 & 61]

On Deck Cargo:

* Rotterdam Rules permit "on deck carriage", but only if (1) such carriage is required by law, or (2) cargo is carried in or on containers or vehicles that are fit for on deck carriage, or (3) on deck carriage is in accordance with the terms of the Contract of Carriage or the customs, usages or practices of the trade.

* Unauthorized on deck carriage constitutes a breach of Carrier's obligations.

* Carrier is liable for loss/damage/delay exclusively caused by their carriage on deck, and in such situation, the Carrier is deprived of Carrier defenses.

* Carrier not permitted to benefit of limitation of liability if, in the Contract of Carriage, Carrier and Shipper agreed that goods would be carried under deck.

On Deck Cargo: The Rotterdam Rules permit on deck carriage, but only if such carriage is required by law, the cargo is carried in or on containers or vehicles that are fit

for on deck carriage, or the carriage on deck is made in accordance with the terms of the contract of carriage or the customs, usages or practices of the trade. [Art. 25(1)].

Unauthorized On Deck Carriage: If the goods have been carried on deck in situations other than those authorized in Article 25, then the Carrier is liable for loss/damage to the goods or delay in their delivery that is exclusively caused by their carriage on deck, and the Carrier is not entitled to the Carrier's defenses provided in Article 17. [Art. 25(3)].

If the Carrier and Shipper expressly agree in the contract of carriage that the goods would be carried under deck, then the Carrier is not permitted to the benefit of the limitation of liability for any loss, damage or delay in the delivery of the cargo to the extent such loss, damage or delay resulted from on deck carriage. Unauthorized on deck carriage will preclude the Carrier from relying on the defenses to liability provided by the Rotterdam Rules in Article 17. [Art. 25]

8. Limitation of Liability – Articles 59-61

* Rotterdam Rules eliminate Hague Rules (COGSA) $500 per package or customary freight unit limitation.

* New limitation: "unit limitation" based on weight of the goods.

* Carrier may limit its liability to 875 SDR per package or other shipping unit or 3 units per kilogram of the gross weight of the goods, whichever is higher.

* Fair Opportunity Doctrine - Notice to Shipper

* Limit of Liability for Delay – Economic loss due to delay limited to 2 1/2 times the freight payable on the goods delayed.

* Loss of Limitation: Loss attributable to a personal act or omission of the Carrier done with intent to cause the loss or done recklessly and with knowledge that such loss would probably result.

* Unauthorized on deck carriage – Carrier forfeits limitation of liability.

The Rotterdam Rules eliminate the Hague Rules (COGSA) $500 per package or customary freight unit limitation, and replace that package limitation with a "unit limitation" based on the weight of the goods. The Rotterdam Rules essentially utilize a unit limitation similar to the Hague-Visby Rules but with higher limits.

The Rotterdam Rules' "unit limitation" is not based on the U.S. dollar, but is instead based on the International Monetary Funds' "Special Drawing Right" (SDR). [The Hague-Visby package limitation is 666.67 SDR per package.] The Rotterdam Rules increase the limitation to 875 SDR per unit.

In April 2011, 1 SDR = U.S. $1.61. 875 SDRs = U.S. $1,408.75.

Under the Rotterdam Rules, Article 59(1), the Carrier may limit its liability to 875 SDR per package or other shipping unit, or 3 units per kilogram of the gross weight of the goods, whichever is higher.

There is also a container clause which not only applies to containers, but expands the scope to include pallets and goods carried both "in and on a vehicle". Under the container clause the individual package or shipping units enumerated in the contract particulars as packed in the container or vehicle are deemed the "packages or shipping units" for the limitation fund calculation; however, if the individual packages or shipping units are not enumerated in the contract particulars, then the container or vehicle itself is deemed 1 shipping unit.

Like the COGSA package limitation, the Rotterdam Rules' unit limitation provides that the Carrier's right to limitation of liability is subject to the "fair opportunity" doctrine – that is, there must be notice provided to the Shipper in the contract of carriage that the Carrier has the right to limit its liability and that the Shipper may avoid limitation of liability by declaring a higher value of the goods in the contract of carriage.

Loss of Limitation of Liability: Under the Rotterdam Rules, unauthorized deviation is no longer grounds in and of itself to preclude the Carrier limitation of liability. Nevertheless, unauthorized deviation still constitutes a breach of the Carrier's

obligations under the Rotterdam Rules and under the contract of carriage, and if the breach is done with intent to cause loss or recklessly, then the Carrier is precluded from relying on the Rotterdam Rules' defenses to exonerate itself from liability.

Instead, the Carrier loses his right to limit its liability only if the claimant proves that the loss "was attributable to a personal act or omission of the person claiming the right to limit done with intent to cause the loss or recklessly and with knowledge that such loss would probably be the result." [Art. 61].

Carrier also forfeits limitation of liability for unauthorized "on deck" carriage; if the contract of carriage provided that the cargo would be carried "under deck". [Art. 25(5)].

Limitation of Liability for Loss Caused by Delay – Article 60: Damages for loss due to delay shall be calculated in accordance with Article 22, [i.e., "value of goods at time and place of delivery"], and liability for economic loss due to delay is limited to an amount equivalent to 2½ times the freight payable on the goods delayed. The total amount payable pursuant to Articles 59 and 60 cannot exceed the limit that would be established pursuant to Article 59 [875 SDR per unit, 3 units per kilogram of gross weight] in respect of the total loss of the goods concerned.

9. Shipper's Obligations – Articles 27-34:

* Deliver the goods ready for carriage to the Carrier in such condition as to withstand the intended carriage.

* Properly perform any obligation assumed under the Contract of Carriage.

* Perform any obligation assumed in a "free in, free out" or similar agreement.

* Duty of cooperation – Provide information, instructions and documents relating to the goods (not otherwise reasonably available to the Carrier) required for proper handling and carriage of the cargo.

* Information for Contract Particulars – Shipper shall provide to the Carrier in a timely manner accurate information required for the compilation of contract

particulars and for the issuance of transport documents or electronic transport records:

(1) Particulars required to be inserted in the transport documents/electronic transport records (i.e., description and identification of the goods, etc.);

(2) Name of the Shipper, name of the Consignee, name of the person to whose order the transport document/electronic transport record is to be issued.

* Shipper is liable for loss or damage sustained by Carrier if Carrier proves such loss or damage was caused by breach of the shipper's obligations.

* Shipper liable for breach of its obligations resulting from any act/omission of any person for whom the shipper is responsible.

* Dangerous goods – Shipper's duty to inform Carrier of dangerous nature or character of the goods in a timely manner before they are delivered to the Carrier.

Delivery for Carriage: The Shipper shall deliver the goods ready for carriage to the Carrier (or Carrier's agent) in such condition that the goods will withstand the intended carriage, including their loading, handling, stowing, lashing, securing and unloading, and that they will not cause harm to persons or property. [Art. 27]

In addition, the Shipper shall properly and carefully perform any obligation assumed under an agreement made pursuant to Article 13 (permitting agreements in which the Shipper will performing the loading, handling, stowing or unloading of the goods – *i.e.*, free in, free out). When the container is packed or a vehicle is loaded by the Shipper, the Shipper shall properly and carefully stow, lash and secure the contents in or on the container or vehicle.

Duty of Cooperation: The Carrier and Shipper shall respond to requests from each other to provide information and instructions required for the proper handling and carriage of the goods if the information in the requested party's possession or the instruction are within the requested party's reasonable ability to provide and they are not otherwise reasonably available to the requesting party. [Art. 28] The Rotterdam Rules

impose a duty on both the Shipper and Carrier to mutually cooperate in the providing of information and instructions regarding the handling and carriage of the goods.

Shipper's Obligation to Provide Information: The Shipper shall provide to the Carrier, in a timely manner, such information, instructions and documents relating to the goods that are not otherwise reasonably available to the Carrier and that are reasonably necessary (1) for the proper handling of the goods (including precautions to be taken by the Carrier or a Carrier's performing party) and (2) for the Carrier to comply with laws, regulations and other requirements of public authorities in connection with the intended carriage (provided the Carrier notifies the shipper in a timely manner of the information, instructions or documents it requires). [Art. 29]

Shipper's Liability: The Shipper is liable for loss or damage sustained by the Carrier if the Carrier proves that such loss or damage was caused by a breach of the Shipper's obligations under the Rotterdam Rules or under the contract of carriage. [Art. 70] Except for loss or damage caused by breach of the Shipper's obligations in Article 31 and 34, the Shipper is relieved of all or part of its liability if the cause or one of the causes of the loss is not attributed to its fault or to the fault of any person for whom the Shipper is responsible.

Information for Contract Particulars: The Shipper shall provide to the Carrier in a timely manner accurate information required for the compilation of contract particulars and the issuance of the transport documents or electronic transport records, including (1) the particulars required to be inserted in the transport documents or electronic transport records, and including (2) the name of the party to be identified as Shipper in the contract particulars, (3) the name of the Consignee and (4) the name of the person to whose order the transport document or electronic transport record is to be issued. [Art. 31].

The Shipper is deemed to have guaranteed the accuracy at the time of receipt by the Carrier of the information that is provided by the shipper. The Shipper shall

indemnify the Carrier against loss or damage resulting from the inaccuracies of its information. [Art. 31]

A Documentary Shipper is subject to the same obligations and liabilities imposed on the Shipper, but it is also entitled to the Shipper's rights and defenses. [Art. 33]

The Shipper is also liable for breach of its obligations under the Convention caused by any act or omission of any person for whom the Shipper is responsible or to whom the Shipper has entrusted the performance of any of its obligations. However, the Shipper is not liable for acts or omissions of the Carrier or a performing party acting on behalf of the Carrier to which the Shipper has entrusted the performance of its obligations. [Art. 34]

Dangerous Goods: Shipper shall inform the Carrier of the dangerous nature or character of the goods in a timely manner before they are delivered to the Carrier or the Carrier's performing party. If the Shipper fails to do so, and the Carrier or its performing party does not otherwise have knowledge of their dangerous nature of character, then the Shipper is liable to the Carrier for such loss or damage resulting from such failure to inform. The Shipper is also required to mark or label dangerous goods in accordance with applicable national law, and if the Shipper so fails to do, then it is liable for the Carrier for any loss or damage resulting from such failure.

10. Contents of Bill of Lading & Qualifying Clauses - Articles 35-42:

* Rotterdam Rules set out procedures for issuance and use of transport document/electronic transport records, including requirements for contract particulars.

* Issuance of Transport Document: Upon delivery of the goods for carriage to the Carrier or its performing party, the Shipper is entitled to obtain from the Carrier either a non-negotiable transport document or non-negotiable electronic transport record, or a negotiable transport document or negotiable transport records as previously agreed by the parties.

* Contract Particulars – Shipper must provide the following information: (1) Description of the goods; (2) Leading marks necessary for identification of the goods; (3) The number of packages or pieces or the quantity of the goods; and (4) If furnished by the shipper, the weight of the goods.

* On receipt of the goods for carriage, the Carrier or Maritime Performing Party must provide the following information: (1) Statement of the apparent order and condition of the goods at time Carrier/maritime performing party receives goods for carriage; (2) Name and address of Carrier; (3) The date on which Carrier/maritime performing party received the goods, or on which the goods were loaded on the ship, or in which the transport documents/electronic transport record was issued; and (4) In the event of a negotiable transport document, the number of originals.

* Contract particulars must also state the name and address of the Consignee if named by the Shipper, the name of the ship, the place of receipt and place of delivery of the goods, and the port of loading and port of discharge of goods.

* Deficiencies in Contract Particulars

* Carrier's Qualifying Remarks – Carrier must have either actual knowledge or reasonable grounds to believe Shipper's statements are false or misleading.

The Rotterdam Rules set out procedures for the issuance and use of the transport document or the electronic transport records, including requirements for contract particulars.

Unless the Shipper and the Carrier have agreed not to use a transport document or an electronic transport record, or it is the custom, usage or practice of the trade not to use one, then upon delivery of the goods for carriage to the Carrier or a performing party, the Shipper (or Documentary Shipper) is entitled to obtain from the Carrier at the Shipper's option: (1) a non-negotiable transport document or non-negotiable electronic transport record, or (2) an appropriate negotiable transport document or negotiable electronic

transport record (unless the Carrier and Shipper have agreed not to use negotiable documents. [Art. 35]

The contract particulars for the transport document or electronic transport record shall include the following information provided by the Shipper: (1) a description of the goods as appropriate for transport, (2) the leading marks necessary for identification of the goods, (3) the number of packages or pieces or the quantity of the goods, and (4) if furnished by the Shipper, the weight of the goods.

The contract particulars in the transport document or electronic transport record shall also include (1) a statement of the apparent order and condition of the goods at the time the Carrier or performing party receives them for carriage, (21) the name and address of the Carrier, (3) the date on which the Carrier or a performing party received the goods, or on which the goods were loaded on board the ship, or on which the transport document or electronic transport record was issued and in the event of a negotiable transport document, the number of originals of the negotiable transport document when more than one original is issued. [Art. 36]

The contract particulars in the transport document or electronic transport record shall also include: (1) the name and address of the Consignee if named by the Shipper, (2) the name of the ship (if specified in the contract of carriage), (3) the place of receipt and place of delivery, and (4) the port of loading and the port of discharge if specified in the contract of carriage. [Art. 36]

Under the Rotterdam Rules the phrase "apparent order and condition of the goods" refers to the order and condition "based on a reasonable, external inspection of the goods as packaged at the time the Shipper delivers them to the Carrier or a performing party, and any additional inspection that the Carrier or performing party actually performs before issuing a transport document or electronic transport record. [Art. 36(4)]

Identity of the Carrier: If the Carrier is identified by name in the contract particulars, then any information in the transport document or electronic record relating

to the identity of the Carrier shall have no effect to the extent that it is inconsistent with that identification. [Art. 37] Furthermore, if no person is named in the contract particulars as the Carrier, but the contract particulars indicate that the goods have been loaded on board a named ship, then the registered owner of the ship is presumed to be the Carrier unless it proves that the ship was under a bareboat charter at the time of the carriage and it identifies the bareboat charterer and its address, in which case the bareboat charterer is presumed to be the Carrier.

Deficiencies in the Contract Particulars: The absence or inaccuracy of one or more of the Contract Particulars required under the Rotterdam Rules does not in and of itself affect the legal character or validity of the transport document or the electronic transport record. If the Contract Particulars fail to state the apparent order and condition of the goods at the time the Carrier or performing party receives them, then the Contract Particulars are deemed to have stated that the goods were in apparent good order and condition at the time the Carrier or performing party received them. [Art. 39]

Qualifying Remarks: The Carrier may qualify the information referred to in the Contract Particulars to indicate that the Carrier does not assume responsibility for the accuracy of the information furnished by the Shipper if the Carrier has actual knowledge that the material statement in the transport document or electronic transport record is false or misleading, or if the Carrier has reasonable grounds to believe that such a material statement in the transport document or electronic transport record is false or misleading. [Art. 40]

Evidentiary Effect: Except to the extent the contract particulars have been qualified, a transport document or electronic transport record is prima facie evidence of the Carrier's receipt of the goods as stated in the contract particulars. Proof to the contrary by the Carrier is not admissible when such contract particulars are included in a negotiable transport document that is transferred to a third party acting in good faith. Proof to the contrary by the Carrier shall not be admissible against the Consignee who in good faith has acted in reliance on the contract particulars. [Art. 41]

11. Freedom of Contract – Articles 79-80:

* The Carrier and the Shipper may agree to increase the Carrier's liability, but may not directly or indirectly reduce that liability.

* The Shipper's obligations may not be increased or decreased.

* Benefit of Insurance Clauses - Void

* Volume Contracts – Authorize limited derogation of Rotterdam Rules so long as such derogation is prominently indicated in Contract of Carriage.

The Rotterdam Rules permit limited contractual freedom between the Carrier and Shipper in their contract of carriage.

The Carrier and the Shipper may agree to increase the Carrier's liability, but may not directly or indirectly reduce that liability. The Shipper's obligations may not be increased or decreased. [Art. 79].

Void Contractual Terms – Article 79:

Any term in any contract of carriage is void to the extent that it:

a. Directly or indirectly excludes or limits the obligations of the Carrier or a Maritime Performing Party under the Rotterdam Rules;

b. Directly or indirectly excludes or limits the liability of the Carrier or a Maritime Performing Party for breach of an obligation under the Rotterdam Rules;

c. Assigns a Benefit of Insurance of the goods in favor of the Carrier or Maritime Performing Party;

d. Directly or indirectly excludes, limits or increases the obligations under the Rotterdam Rules of the Shipper, Consignee, Controlling Party, Holder or Documentary Shipper; or

e. Directly or indirectly excludes, limits or increases the liability of the Shipper, Consignee, Controlling Party, Holder or Documentary Shipper for breach of any of its obligations under the Rotterdam Rules.

Special Rules – Volume Contracts: However, with respect to Volume Contracts (*i.e.*, a contract of carriage that provides for carriage of a specified quantity of goods in a series of shipments during an agreed period of time) the parties may agree that the obligation to load and stowed the cargo will be assumed by the Shipper rather than the Carrier. [In the U.S.A., Volume Contracts are called "service agreements, which are subject to regulation by the Federal Maritime Commission, per the Ocean Shipping Reform Act of 1998 ("OSRA")].

Therefore, in the context of Volume Contracts, the Rotterdam Rules authorized "**free in, free out**" and similar such agreements. But any derogation from the General Rules must be expressly and prominently stated in the contract of carriage, including a notice provision notifying the Shipper that it may conclude a contract of carriage on terms and conditions that fully comply with the Rotterdam Rules. [Art. 80].

Furthermore, the Shipper and Carrier may agree on a time and location of receipt and delivery of the goods, but such a contractual provision is void to the extent it provides that the time of receipt is subsequent to the beginning of the initial loading under the contract of carriage, or provides that the time of delivery of the goods is considered prior to the completion of the final discharge of the goods from the vessel.

Even in a Volume Contract, however, the Carrier and Shipper cannot derogate the Carrier's obligation to exercise due diligence to provide a seaworthy and properly manned vessel (Art. 14), the Shipper's obligation to cooperate (Art. 29) or the Shipper's obligations with respect to dangerous cargo (Art. 32). [Art. 80.4]

12. Jurisdiction – Articles 66-74:

* The claimant may sue the Carrier in any of the following jurisdictions: (1) The domicile of the Carrier, (2) the place of receipt of the cargo agreed in the Contract

of Carriage, (3) the place of delivery of the cargo agreed in the Contract of Carriage, or (4) the port where the goods were initially loaded on a ship or the port where the goods were finally discharged from the ship. In addition, suit may be brought against the Carrier in a place designated by an agreement between the Shipper and Carrier.

* Exclusive choice of court [forum selection] clauses in Volume Contracts.

Jurisdiction over cargo claims brought pursuant to the Rotterdam Rules is covered in Articles 66-74. The Rotterdam Rules, at Article 74, allow each nation which adopts the Rotterdam Rules to decide for itself whether or not to be bound by the jurisdiction provisions in the Rotterdam Rules. Thus the Rotterdam Rules take an "opt in" approach concerning the applicable competent court to adjudicate cargo claims brought pursuant to the Rotterdam Rules. In order to "opt in" a nation need only make a formal declaration to elect to be bound by the jurisdiction provisions. [The United States has elected to "opt in" to the jurisdiction provisions.]

The Rotterdam Rules provide the cargo claimant a choice among reasonable forums to pursue its cargo claim. Under Article 66, the plaintiff has a right to institute judicial proceedings under the Rotterdam Rules against the Carrier in any one of the following places: (1) The domicile of the Carrier, (2) the place of receipt of the cargo agreed in the Contract of Carriage, (3) the place of delivery of the cargo agreed in the Contract of Carriage, or (4) the port where the goods were initially loaded on a ship or the port where the goods were finally discharged from the ship. In addition, suit may be brought against the Carrier in a place designated by an agreement between the Shipper and Carrier.

The Rotterdam Rules also provide for enforcement of "exclusive choice of court agreements" (form selection clauses), at least in a Volume Contract. Under Article 67, the jurisdiction of a court chosen by the parties is exclusive for disputes between those parties only if (1) those parties so agree; and (2) the agreement conferring jurisdiction is contained in a Volume Contract provided that it clearly states the names and addresses of

the parties, is either individually negotiated or contains a prominent statement in the contract that there is an exclusive choice of court agreement, and the contract specifies the sections in the contract containing that agreement and clearly designates the court(s).

The Rotterdam Rules also provide that the cargo claimant has a right to institute judicial proceedings directly against a Maritime Performing Party, but may do so only (1) in the domicile of the Maritime Performing Party, or (2) the port where the goods were received by the Maritime Performing Party, (3) the port where the goods were delivered by the Maritime Performing Party, or (4) the port in which the Maritime Performing Party performs its activities with respect to those goods.

Notwithstanding the jurisdiction provisions in the Rotterdam Rules regarding competent courts of jurisdiction, the Rotterdam Rules specifically provide that they do not affect jurisdiction obtained under provisional or protective matters, including in rem ship arrest.

13. Notice of Claim and Suit Time – Articles 23 and 62:

* Notice of Loss or Damage – 7 working days

* Notice of Loss – Delay – 21 consecutive days

* Statue of Limitations – 2 years from delivery of goods or when should have been delivered.

Under COGSA [at §3(6)], the cargo claimant is required to give "notice of loss or damage" in writing to the Carrier or his agent at the Port of Discharge before or at the time of the removal of the goods, or if the loss or damage is not apparent, then written notice <u>within 3 days</u> of delivery. Failure to give the required 3-day notice does <u>not</u> affect or prejudice the cargo claimant's right to bring suit; rather it merely affects the burden of proof. (A presumption is created that delivery of the good in the prescribed condition has been made, and to overcome this presumption, the Shipper must come forward with sufficient evidence to suggest that the cargo was damaged or lost before discharge.)

COGSA also provides that the cargo claimant must bring suit within 1 year after delivery of the goods or the date when the goods should have been delivered.

Under the Rotterdam Rules [Article 23], the Carrier is presumed, in the absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars, unless notice of loss or damage to the goods, is given to the Carrier or a performing party that delivered the goods before or at the time of the delivery or, if the loss or damage is not apparent, within 7 working days at the place of delivery after delivery of the goods. The Rotterdam Rules increase the 3-day COGSA notice period to 7 working days. However, like COGSA, the Rotterdam Rules notice provision does not affect the right to claim compensation, but in addition, does not affect the allocation of the burden of proof. Notice to the Performing Party has the same effect as notice given to the Carrier, and vice versa.

Joint Surveys: Furthermore, the Rotterdam Rules provide that this notice is not required when the damage or loss to the cargo is determined by a joint survey of the goods by the person(s) to which the goods have been delivered and the Carrier or the Carrier's Maritime Performing Party.

Delay: The Rotterdam Rules (Article 23) go on to provide that no compensation in respect of "delay" is payable unless notice of loss due to delay was delivered to the Carrier within 21 consecutive days of the delivery of the goods.

2 Year Statute of Limitations: The Rotterdam Rules (Article 62) have a statute of limitations of 2 years. The 2-year prescriptive period commences on the day which the Carrier has delivered the goods, or in cases of non-delivery, or on the last day in which the goods should have been delivered. The "day" on which this prescriptive period commences is not included in the calculation of 2 years. [Article 62]

14. Delivery – Articles 43-49:

* Obligation of Consignee to Accept Delivery – consignee must accept delivery within time limit and location stated in Contract of Carriage.

* Carrier Entitled to Acknowledgment of Receipt - and may refuse delivery if Consignee refuses to give acknowledgment of receipt.

When the cargo has arrived at its destination, the Consignee stated in the Contract of Carriage shall accept delivery of the goods within the time period and at the location agreed to in the Contract of Carriage (or failing such agreement, at the time and location at which the customs, usages or practices of the trade and the circumstances of the carriage delivery could reasonably be expected). [Art. 43]

On request of the Carrier or Performing Party that delivers the goods, the Consignee shall acknowledge receipt of delivery of the goods from the Carrier or Performing Party in the manner that is customary at the place of delivery. [Art. 44] The Carrier may refuse delivery if the Consignee refuses to acknowledge such receipt. The Carrier may refuse delivery if the person claiming to be the Consignee does not properly identify itself as Consignee at the request of the Carrier. [Art. 45]

If the name and address of the Consignee are not referred to in the contract particulars, then the controlling party shall, prior to the arrival of the goods at destination, notify the Carrier of such name and address. If the goods are not deliverable because the Consignee, after receiving notice of arrival, does not within the time period referred to in the Contract of Carriage claim delivery of the goods from the Carrier after arrival at the place of destination, or the Carrier refuses delivery because the person claiming to be the Consignee does not properly identify itself as such, or the Carrier is after a reasonable effort unable to locate the Consignee in order to request delivery instructions, then the Carrier may so advise the Controlling Party and request instructions in respect of delivery. [Art. 45] If the Carrier is unable to locate the Controlling Party, the Carrier may so advise the Shipper and request instructions from the Shipper in respect of delivery; and if the Carrier cannot locate the Shipper then the Carrier may advise the Documentary Shipper and request instructions in respect of delivery of the goods. The Carrier that delivers the goods upon instructions of the Controlling Party, the Shipper or the Documentary Shipper is discharged from its obligations to deliver the goods under the Contract of Carriage. [Art. 45]

If the goods have remained undelivered, the Carrier may at the risk and expense of the person entitled to take the goods, take such action in respect to the goods as circumstances may reasonably require, including storage of the goods at a suitable place, unpack the goods if they are packaged in containers or vehicles, or to act otherwise in respect to the goods including moving them, and to cause the goods to be sold or destroyed in accordance with the practices or pursuant to the law or regulations of the place where the goods are located at the time.

Nothing in the Rotterdam Rules affects the right of the Carrier or a Performing Party to retain the goods to secure payment of sums due (such as freight).