ESSAY

GOOD THINGS COME IN WELL-DEFINED PACKAGES: THE SIMPLE ELEGANCE OF *TRAVELERS INDEMNITY CO. v. THE SAM HOUSTON*

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I. INTRODUCTION

American maritime law is excessively enigmatic.[1] At times, in fact, the complexity has been so great that Congress has intervened in an attempt to provide simplification.[2] Despite these well-intended efforts, however, admiralty continues to complicate the uncomplicated. Thus maritime litigators are left to grapple with the convo-

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1. *See* GERALD A. MALIA, MARITIME LAW: THE NEED FOR A COMPREHENSIVE MARITIME CODE 135 (1983) (illustrating American maritime law as "a true patchwork product of old statutes and new litigation which relies heavily on the [overburdened] Supreme Court for any doctrinal development"); Gus A. Schill, Jr., *The Unsolvable Puzzle of Maritime Personal Injury Litigation: One False Move and You're Out*, 24 HOUS. L. REV. 635, 664 (1987) (describing maritime jurisprudence as "a vast, often unpalatable, body of law").

2. The Carriage of Goods by Sea Act (COGSA), ch. 229, 49 Stat. 1207 (1936) (current version at 46 U.S.C. app. §§ 1300–1315 (1988)), was just such an attempt. *See* D.C. Toedt III, Note, *Defining "Package" in the Carriage of Goods by Sea Act*, 60 TEX. L. REV. 961, 981 (1982) (calling uniformity and predictability the "only important COGSA policy" and asserting that COGSA's purpose was to "`provide a common sense standard' with which to measure carrier liability" (quoting Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft, 375 F.2d 943, 945 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967))).

luted definitions of such seemingly simple words as "vessel,"[3] "seaman,"[4] and "unseaworthy."[5] Perhaps the most glaring example, however, is "package."[6]

The importance of the definition of "package" arises in the oft-litigated provisions of the Carriage of Goods by Sea Act (COGSA).[7] Congress passed COGSA in 1936 to divide the risks of ocean commerce more equally between carriers and shippers.[8] Among its risk-spreading provisions, COGSA limits the liability of carriers for lost or damaged cargo to $500 per package, or $500 per customary freight unit for unpackaged cargo.[9] This limitation is a minimum; carriers and shippers may contract for a higher limitation amount.[10]

Because a "choice of one definition or the other frequently mean[s] a difference of tens of thousands of dollars in a recovery for cargo damage,"[11] the determination of what constitutes a package is

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3. *See generally* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 1-6 (2d ed. 1994) (noting the difficulty in defining a vessel because of the vagueness of both statutory definitions and the general maritime law).

4. *See generally id.* at § 4-9 (devoting more than 20 pages to the determination of the question, "Who is a seaman?," a question "which takes so much attorney and judicial time today").

5. *See generally id.* at §§ 4-25, 4-26 (describing at length the various aspects of the doctrine of unseaworthiness).

6. *See* Benjamin W. Yancey, *The Carriage of Goods: Hague, COGSA, Visby, and Hamburg*, 57 TUL. L. REV. 1238, 1245 (1983) (stating that COGSA's $500 per package limitation, "which seems to be perfectly clear, has nonetheless been the subject of a rash of confusing decisions"). "Definition of `package,' which is a perfectly well understood English word, easily ascertainable from any competent dictionary, has given the courts great difficulty." *Id.* at 1259 n.36.

7. Edward C. Hammond, Note, *The Eleventh Circuit Tackles COGSA's Per Package Limitation* — Hayes-Leger v. M/V Oriental Knight, 11 MAR. LAW. 141, 144 (1986) (stating that "[t]he apparently simple language of COGSA has generated an abundance of litigation, particularly concerning the definition of a `package' for purposes of liability limitation").

8. *Id.* at 142–43.

9. 46 U.S.C. app. § 1304(5) (1988), which provides in relevant part:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package . . . or in case of goods not shipped in packages, per customary freight unit . . . unless the nature and value of such goods have been declared by the shipper. . . .
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> By agreement between the carrier . . . and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named.

Id.

10. *Id.*

11. Toedt, *supra* note 2, at 966–67.

an important undertaking for the courts. Unfortunately, the decisions concerning COGSA's liability limitation "have offered no consistently reliable guide to the meaning of the term `package.'"[12]

This Essay suggests that the definition used by the Ninth Circuit in *Travelers Indemnity Co. v. The Sam Houston*[13] provides just such a reliable guide. In *Travelers*, the Ninth Circuit refined its own "plain, ordinary meaning" approach through a partial incorporation of the language employed by the Second Circuit.[14] The result is an elegantly simple definition that provides the courts, the shipping industry, and the lawyers who serve them both with just what they sorely need: a construction of the term "package" that allows easy observation of the boundaries of a carrier's liability.[15]

II. RECITATION OF THE CASE

A. The Facts

In December 1989, L.A. Water Treatment Corporation delivered to Waterman Steamship Corporation an assortment of machinery and equipment for carriage from Louisiana to Alexandria, Egypt.[16] The materials were "to be used in the erection of sewage treatment plants and elevated water tanks."[17] L.A. Water insured the shipment with Travelers Indemnity Company.[18]

Although Waterman disputed the allegation, Travelers insisted that its assured delivered most of the cargo to Waterman's stevedore "with little or no packaging or preparation."[19] The stevedore's general manager, however, asserted that "every piece" of L.A. Water's cargo was "either crafted, skidded, banded, or shrink-wrapped in

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12. 2A ERASTUS C. BENEDICT, BENEDICT ON ADMIRALTY § 167, at 16-32 (7th rev. ed. 1995).

13. 26 F.3d 895 (9th Cir. 1994).

14. *Id.* at 901.

15. *See* Toedt, *supra* note 2, at 986 (stating that until Congress amends or replaces the package limitation, "the shipping industry will be best served by a construction of [the term] that allows ready calculation of the total amount of ocean carrier negligence liability").

16. *Travelers*, 26 F.3d at 897.

17. *Id.*

18. *Id.*

19. *Id.*

package form."[20] The bills of lading listed 286 packages.[21]

The stevedore loaded the cargo onto LASH barges,[22] which were then lifted aboard the Sam Houston for the trans-Atlantic crossing.[23] In January 1990, LASH Barge No. WA10449, carrying seventy-seven of the 286 listed packages, sank in Alexandria's inner harbor.[24] All the cargo aboard was either lost or damaged.[25]

B. Procedural History

Travelers sued the Sam Houston and Waterman in federal court for $1,174,876 in damages.[26] Waterman moved for partial summary judgment, maintaining that under COGSA its liability was limited to $500 per package. The district court judge, Manuel L. Real of the Central District of California, concluded that COGSA's $500 limit on

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20. *Id.*

21. *Id.*

22. LASH stands for "lighter aboard ship." PETER R. BRODIE, ILLUSTRATED DICTIONARY OF CARGO HANDLING 84 (1991).

> These [LASH] barges are loaded with cargo, often at a variety of locations, towed to the ocean ship, sometimes referred to as the mother ship, and lifted or, in some cases, floated on board. After the ocean crossing, the barges are off-loaded and towed to their various locations. The ocean ship then receives a further set of barges which have been assembled in readiness. This concept was designed to avoid transhipment with its consequent extra cost.

Id. at 6.

23. *Travelers*, 26 F.3d at 897. The *Sam Houston* has an interesting legal history, having appeared in more courts than many attorneys. *See, e.g.*, International Sch. Servs., Inc. v. Northwestern Nat'l Ins. Co., 710 F. Supp. 86, 87 (S.D.N.Y. 1989) (concerning a suit for a damaged shipment of school supplies, carried from New York to Aqaba, Jordan, aboard the *Sam Houston* and her sister ship, the *Stonewall Jackson*); Enterprise, Inc. v. M/V Sam Houston, 706 F. Supp. 451, 452–53 (E.D. La. 1988) (granting partial summary judgment to Waterman in a suit for damages sustained by a yacht which was shipped from Singapore to New Orleans atop the deck of the *Sam Houston*); Srivastova v. Waterman S.S., No. 86C85, 1986 WL 7679, at *1 (N.D. Ill. Jul. 1, 1986) (concerning the shipment aboard the *Sam Houston* of 2600 dozen barmops of cotton towels from Madurai, India, to New York); Zervos v. S.S. Sam Houston, 427 F. Supp. 500, 501–02 (S.D.N.Y. 1976) (regarding the proceeds of 150 tons of Djimmah coffee, 75 tons of which was shipped from Ethiopia to New York aboard the *Sam Houston*), *aff'd*, 636 F.2d 1206 (2d Cir. 1980); Osorio v. Waterman S.S. Corp., 557 So. 2d 999, 1003 (La. Ct. App.) (concerning the death of a seaman crushed between two LASH barges aboard the *Sam Houston* during an unloading operation on the Hooghley River near Haldia, India), *writ denied*, 561 So. 2d 99 (La. 1990).

24. *Travelers*, 26 F.3d at 897.

25. *Id.*

26. *Travelers*, 26 F.3d at 897. In a separate lawsuit Travelers also sued its assured, L.A. Water.

liability applied to all seventy-seven packages aboard the ill-fated barge. Judge Real calculated Waterman's liability to be $38,500, and entered judgment for Travelers on January 28, 1992. Travelers appealed to the Ninth Circuit.[27]

C. The Law

The *Travelers* court considered two legal issues — whether Waterman denied L.A. Water a fair opportunity to opt for a higher carrier liability, and whether the lost and damaged cargo constituted "packages" for the purposes of the COGSA per package liability limitation.[28] Because this Essay focuses on the definition of "package," the fair-opportunity issue will be considered summarily.

1. Fair Opportunity

Although COGSA limits the liability of an international carrier for loss of or damage to cargo,[29] the shipper may increase the carrier's liability by declaring the goods' value on the bill of lading and paying a higher freight rate.[30] COGSA's limitation of liability is only available to carriers who give their shippers "a `fair opportunity' to opt for a higher liability by paying a correspondingly greater charge.'"[31] In determining whether a shipper has been provided the required fair opportunity, courts employ a burden-shifting approach. The carrier bears an initial burden of showing that it provided notice to the shipper of the opportunity to increase liability.[32] Travelers conceded that Waterman met this burden through language used in its bills of lading.[33]

Once the carrier makes its initial prima facie showing, the burden shifts to the shipper to disprove that it was given a fair opportunity to opt out of COGSA's $500 limitation. Travelers offered two pieces of evidence that L.A. Water had been denied its fair opportunity. Travelers claimed that the fact that L.A. Water submitted to

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27. *Id.* at 897–98.

28. *Id.* at 898–902.

29. 46 U.S.C. app. § 1304(5) (1988).

30. *Travelers*, 26 F.3d at 898 (citing Carman Tool & Abrasives, Inc. v. Evergreen Lines, 871 F.2d 897, 899 (9th Cir. 1989)).

31. *Id*. (quoting Nemeth v. General S.S. Corp., 694 F.2d 609, 611 (9th Cir. 1982)).

32. *Id*. at 898–99.

33. *Id.* at 899.

Waterman an export declaration valuing the goods at $6 million indicated that L.A. Water would have opted out if it had been given a fair opportunity. The court dismissed this notion, holding that L.A. Water, as "a sophisticated shipper of goods," would have successfully opted out if it had tried to.[34]

As its second piece of evidence, Travelers also complained that Waterman's bill of lading did not contain a specified space in which to declare an higher value. In response, the court tersely declared that "a designated space for an excess value declaration is not mandatory."[35]

The court added that L.A. Water's decision to insure its cargo with Travelers indicated "a deliberate choice to forego the additional cost that would have been incurred in raising Waterman's liability limit."[36] For this reason, and because Travelers failed to bear its burden, the court affirmed the trial court's treatment of the fair opportunity issue.[37]

2. The Definition of "Package"

In addition to its claim of denial of fair opportunity, Travelers also complained that the district court used the Second Circuit's definition of "package" under COGSA rather than the "plain, ordinary meaning" of "package" endorsed by the Ninth Circuit.[38] In *Aluminios Pozuelo Ltd. v. S.S. Navigator*,[39] the Second Circuit defined "package" as cargo for which "`some packaging preparation for transportation has been made which facilitates handling, but which does not necessarily conceal or completely enclose the goods.'"[40]

Indeed, the *Travelers* court conceded that the district court's language was nearly identical to that used by the Second Circuit in *Aluminios*. However, the court refused to accept Travelers' argument that the Ninth Circuit had wholly rejected the *Aluminios* test. Calling the *Aluminios* language "an inherent part of a `plain, ordi-

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34. *Id.*

35. *Id.* at 900 (citing Mori Seiki U.S.A., Inc. v. M.V. Alligator Triumph, 990 F.2d 444, 449 (9th Cir. 1993)).

36. *Id.*

37. *Id.*

38. *Travelers*, 26 F.3d at 900–01.

39. 407 F.2d 152 (2d Cir. 1968).

40. *Travelers*, 26 F.3d at 901 (quoting *Aluminios*, 407 F.2d at 155).

nary meaning' analysis," the *Travelers* court asserted that the Ninth Circuit had rejected merely the subjective purpose language of the Second Circuit test.[41] The court explained that in *Hartford Fire Insurance Co. v. Pacific Far East Line*,[42] the Ninth Circuit refused to consider the purpose of the packaging as called for in the "which facilitates handling" language of the *Aluminios* test.[43] Holding that the district court erred in using the subjective purpose language, the court nonetheless found such usage harmless and affirmed the judgment.[44]

The court also rejected Travelers' contention that the Ninth Circuit considers cargo packaged only when its identity is concealed, citing two cases where unconcealed cargo was held to be packaged.[45] Furthermore, the court agreed with Waterman's assertion that "the cargo fit a plain, ordinary definition of `package.'"[46] Finally, the court also accepted Waterman's argument that L.A. Water's designation of the cargo as "packages" on the bills of lading controlled the inquiry.[47]

III. ANALYSIS

A. Two Traditional Approaches

Commentators acknowledge two traditional approaches to the interpretation of the term "package."[48] The first approach, developed by the Second Circuit in *Aluminios*, treats the word "package" as a term of art in the shipping industry,[49] and includes a concise definition derived from the "confusion" of the interpretive case law.[50]

The Ninth Circuit devised the second approach in *Hartford Fire*

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41. *Id.*

42. 491 F.2d 960 (9th Cir.), *cert. denied*, 419 U.S. 873 (1974).

43. *Travelers*, 26 F.3d at 901.

44. *Id.* at 901–02.

45. *Id.* at 901 (citing Institute of London Underwriters v. Sea-Land Serv., Inc., 881 F.2d 761, 768 (9th Cir. 1989) and Van der Salm Bulb Farms, Inc. v. Hapag Lloyd, AG, 818 F.2d 699, 701 (9th Cir. 1987)).

46. *Id.*

47. *Id.* at 901–02.

48. 2A BENEDICT, *supra* note 12, § 167, at 16-32 (recognizing that some courts use the terms "plain, ordinary meaning" and others interpret the word as a "term of art"); Hammond, *supra* note 7, at 145 (stating that courts either adopt the word's dictionary meaning or expound "their own workable definition").

49. *Aluminios*, 407 F.2d at 156.

50. *Id.* at 155.

essentially as a reaction to the *Aluminios* test.[51] This second approach offers no concise, dictionary-type definition, but instead depends on the assumption that Congress intended for "package" to be given its "plain, ordinary meaning."[52]

At least two caveats must precede this Essay's evaluation of the interpretations given the term "package." First, the circuits appear to agree[53] that parties will be bound to the designation on the bill of lading of the number of packages for the purposes of the COGSA per package limitation, so long as that number is not "plainly contradicted by contrary evidence of the parties' intent" and does not refer "to items that cannot qualify as packages."[54] In other words, a judicial definition of "package" is only necessary when the bill of lading does not note the number of packages or when there is some question as to the validity of the bill's designation.

Second, this Essay's analysis of the definition of "package" is limited to cases concerning non-containerized shipments.[55] Container and non-container cases are not interchangeable and constitute

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51. Hartford Fire Ins. Co. v. Pacific Far E. Line, 491 F.2d 960, 963, 965 (9th Cir.) (rejecting both the notion that "package" has any specialized meaning and the reasoning employed by the Second Circuit in *Aluminios*), *cert. denied*, 419 U.S. 873 (1974).

52. *Id.* at 963.

53. *See* SCHOENBAUM, *supra* note 3, § 8-33, at 606 n.15 (stating that the "courts of appeals have explicitly adopted" the notion that "the contractual agreement evidenced by what is disclosed on the face of the bill of lading will be of the highest relevance in determining the unit or `package' against which to apply the $500 limitation figure").

54. Seguros "Illimani" S.A. v. M/V Popi P, 929 F.2d 89, 94 (2d Cir. 1991); *accord Travelers*, 26 F.3d at 901–02; *cf.* Caterpillar Overseas, S.A. v. Marine Transp., Inc., 900 F.2d 714, 722 (4th Cir. 1990) (stating in dictum that designation of tractor on flat rack in the bill of lading as a "package" may be sufficient to satisfy definition); Hayes-Leger Assocs. v. M/V Oriental Knight, 765 F.2d 1076, 1080 (11th Cir. 1985) (holding that "when a bill of lading discloses the number of COGSA packages in a container, the liability limitation of section 4(5) applies to those packages"); Croft & Scully Co. v. M/V Skulptor Vuchetich, 664 F.2d 1277, 1281 (5th Cir. 1982) (holding that the shippers inclusion on the bill of lading of "the contents of the container and their number" governs the determination of the "package" question); Allstate Ins. Co. v. Inversiones Navieras Imparca, C.A., 646 F.2d 169, 171–72 (5th Cir. 1981) (taking into account as one relevant factor the fact that cartons inside container, later determined to constitute "packages," were identified as such on the bill of lading). *But see* Tamini v. Salen Dry Cargo AB, 866 F.2d 741, 743 (5th Cir. 1989) (holding that the notation on the Certificate of Origin of the number of packages "is, of course, not determinative").

55. "Beginning in the late fifties, an increasing number of shipments have been `containerized,' *i.e.*, carried in metal containers measuring eight feet by eight feet by up to forty feet. The application of the section 4(5) package limitation to such shipments has been a source of considerable confusion." 2A BENEDICT, *supra* note 12, § 167, at 16-37 to -38.

separate lines of authority.[56]

1. The Second Circuit Approach

Courts and commentators alike consider the Second Circuit the leader in the formulation of a definition for "package" under COGSA.[57] That court generated its definition in *Aluminios Pozuelo Ltd. v. S.S. Navigator*,[58] a case concerning whether a damaged three-ton toggle press bolted to a skid constituted a COGSA package.[59]

After noting the absence of a "reliable guide as to what constitutes a package," the *Aluminios* court took "[a] brief glance at some of the available decisions."[60] The court then articulated a definition of "package" based on its interpretation of those cases. "Package," according to the *Aluminios* court, refers to "a class of cargo, irrespective of size, shape, or weight, to which some packaging preparation for transportation has been made which facilitates handling, but which does not necessarily conceal or completely enclose the goods."[61]

The court's application of this definition to the toggle press damaged aboard the S.S. Navigator centered on the determination of whether the skid attached to the press served as a protection of the machine or "to facilitate delivery." Because the attachment of the skid put the press "in a form suitable for transportation or handling," the court concluded that it constituted a "package" under the COGSA liability limitation.[62]

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56. Monica Textile Corp. v. S.S. Tana, 952 F.2d 636, 640 (2d Cir. 1991); 2A BENEDICT, *supra* note 12, § 167, at 16-32.

57. *See* Toedt, *supra* note 2, at 967 n.43 The high esteem in which courts hold the Second Circuit in this particular area is especially notable because the Fifth Circuit, home of preeminent admiralty jurists John R. Brown and Alvin Rubin, has long been considered the premier admiralty circuit. Chevron Oil Co. v. Huson, 404 U.S. 97, 115 (1971) (Douglas, J., dissenting) (referring to Judge Brown as "our leading admiralty authority"); Edith Hollan Jones, *In Memoriam: A Farewell to Judge Alvin Rubin*, 70 TEX. L. REV. 1, 2 (1991) (referring to Judge Rubin as "an acknowledged expert" in admiralty); Jeffrey V. Brown, Note, Penrod Drilling Corp. v. Williams: *The Sinking of Another Maritime Anomaly*, 31 HOUS. L. REV. 1317, 1318 n.5 (1994) (referring to the Fifth Circuit's renown as the leading maritime circuit).

58. 407 F.2d 152 (1968).

59. *Id.* at 153–54.

60. *Id.* at 154–55.

61. *Id.* at 155.

62. *Id.*

Courts have found the *Aluminios* definition helpful in their interpretation of the per package limitation. The Second Circuit reiterated its faith in this approach in *Binladen BSB Landscaping v. M.V. Nedlloyd Rotterdam*,[63] and the Eleventh Circuit adopted it in *Hayes-Leger Associates v. M/V Oriental Knight*.[64] The Fourth Circuit called the *Aluminios* test "[t]he best definition of `package' to be distilled from the decisions."[65] Finally, although it did not cite or quote *Aluminios*, the Fifth Circuit took into account the facilitation of handling aspect of the definition in a case concerning a damaged portable drilling rig.[66]

2. *The Ninth Circuit Approach Prior to* Travelers

The Second Circuit held in *Aluminios* that COGSA's "package" designation had become a term of art in the shipping industry.[67] The Ninth Circuit, on the other hand, concluded in *Hartford Fire* that "[s]ince no specialized or technical meaning was ascribed to the word `package,' we must assume that Congress had none in mind and intended that this word be given its *plain, ordinary meaning*."[68]

Hartford Fire concerned the application of COGSA's per package limitation to an eighteen-ton electrical transformer which, like the three-ton toggle press in *Aluminios*, had been attached to a wooden skid.[69] Although it joined the carrier in urging the Ninth Circuit to adopt the *Aluminios* facilitation-of-handling test, Hartford Fire Insurance Co., the cargo shipper's subrogee, maintained that *Aluminios* was distinguishable from its case. Unlike the press' skid in *Aluminios*, Hartford argued, the transformer's skid was not intended to facilitate its handling and therefore did not render it a

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63. 759 F.2d 1006, 1012 (2d Cir.), *cert. denied*, 474 U.S. 902 (1985).

64. 765 F.2d 1076, 1080 (11th Cir. 1985).

65. Caterpillar Overseas S.A. v. Marine Transp., Inc., 900 F.2d 714, 722 (4th Cir. 1990 dictum).

66. Tamini v. Salen Dry Cargo AB, 866 F.2d 741, 743 (5th Cir. 1989) (Rubin, J.).

67. *Aluminios*, 407 F.2d at 156.

68. Hartford Fire Ins. Co. v. Pacific Far E. Line, 491 F.2d 960, 963 (9th Cir.) (emphasis added), *cert. denied*, 419 U.S. 873 (1974). The court relied upon the Supreme Court's decision in Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607 (1944): "[L]egislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." *Hartford Fire*, 491 F.2d at 963 (quoting *Addison*, 322 U.S. at 618).

69. *Id*. at 961.

package.[70]

The Ninth Circuit refused to follow *Aluminios*: "Any distinction based upon the subjective purpose for which the skid was attached should not be the test for resolving the issue."[71] The court seemed to base this holding on the absurdity to which it could potentially lead: "To hold that somehow a `package' evolved from the mere attachment of the machine to a wooden skid seems a highly unreasonable result," since if the shipper had delivered the free-standing transformer without a skid, "in no way could it be considered a `package' within the meaning of COGSA."[72]

Although the *Hartford Fire* court thus rejected the subjective facilitation-of-handling test put forth by the Second Circuit, it neither accepted nor rejected the remainder of the *Aluminios* definition, nor did it offer its own definition beyond the endorsement of a "plain, ordinary meaning" analysis. A per curiam panel of the Ninth Circuit reaffirmed this interpretation of the per package limitation in *Van der Salm Bulb Farms, Inc. v. Hapag Lloyd, AG*.[73]

B. A Refined Definition

1. The Travelers *Approach*

The trial court in *Travelers* assigned "package" a definition almost identical to that of *Aluminios*.[74] Travelers, the shipper's subrogee, argued that by using such a definition, the district court failed to apply the "plain, ordinary meaning" analysis of *Hartford Fire*.[75] Travelers contended, in fact, that the *Hartford Fire* court had re-

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70. *Id.* at 965.

71. *Id.*

72. *Id.*

73. 818 F.2d 699, 701 (9th Cir. 1987) (per curiam).

74. *Travelers*, 26 F.3d at 900–01. The district court in *Travelers* considered "packages" to include:

> those pieces of cargo . . . which were . . . given some degree of packaging or other preparation for transportation designed to facilitate handling. Even if such packaging did not conceal or completely enclose the cargo, such pieces will be found to be packages if the facts establish some degree of packaging or other preparation for transportation to facilitate handling.

Id. That rendition is substantially identical to the *Aluminios* definition of "package": "[A] class of cargo, irrespective of size, shape or weight, to which some packaging preparation for transportation has been made which facilitates handling, but which does not necessarily conceal or completely enclose the goods." *Aluminios*, 407 F.2d at 155.

75. *Travelers*, 26 F.3d at 901.

jected the *Aluminios* definition.[76]

The court in *Travelers*, however, held that the Ninth Circuit had never rejected the *Aluminios* language. "Indeed," the *Travelers* court stated, "such language is an *inherent part* of a `plain, ordinary meaning' analysis."[77] The court pointed out that the Ninth Circuit "rejected only that part of *Aluminios* that examines the subjective purpose of the packaging."[78]

In this way, the *Travelers* court retained the holding of *Hartford Fire* — both its endorsement of a "plain, ordinary meaning" analysis and its rejection of *Aluminios*' subjective test — and simultaneously adopted at least part of a "package" definition sanctioned by three other circuits.[79] The new definition put forth in *Travelers* might be stated this way: The word "package," for the purposes of COGSA's limitation of liability provisions, is to be given its plain, ordinary meaning, and thus refers to a class of cargo, irrespective of size, shape or weight, to which some packaging preparation for transportation has been made which does not necessarily conceal or completely enclose the goods.[80]

2. The Preference of the Travelers *Test Over Both Traditional Approaches*

Both the *Aluminios* definition and the *Hartford Fire* analysis are essentially flawed. The subjective nature of the *Aluminios* definition threatens the certainty and predictability which the Second Circuit itself considers so important,[81] as well as the uniformity upon which admiralty depends.[82] Subjective tests, rather than

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76. *Id.*

77. *Id.* (emphasis added).

78. *Id.* (citing *Hartford Fire*, 491 F.2d at 965).

79. See *supra* notes 78–80 and accompanying text for a discussion of the endorsement of the *Aluminios* test by the Second, Fourth, and Eleventh Circuits.

80. *See Travelers*, 26 F.3d at 900–01 (stating that the Ninth Circuit follows a "plain, ordinary meaning" analysis and that the language of *Aluminios* — excluding the subjective inquiry — constitutes "an inherent part" of that analysis).

81. *See Aluminios*, 407 F.2d at 156 (stating that "in this field where certainty is so significant, only when the meaning of package is predictable will the parties concerned know when there is a need to place the risk of additional loss on one or the other accordingly"); Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft, 375 F.2d 943, 947 (2d Cir.) (noting the importance of predictability in the determination of per package liability cases), *cert. denied*, 389 U.S. 831 (1967).

82. *See* Lizabeth L. Burrell, *Current Problems in Maritime Uniformity*, 5 U.S.F.

bright-line rules, beg for judicial arbitrariness.[83]

The *Hartford Fire* approach suffers from a similar ailment. Despite its recognition of the weakness of *Aluminios*' subjective examination, the *Hartford Fire* court failed to offer an employable alternative. Requiring merely a "plain, ordinary meaning" analysis rather than providing a clear rule leaves subsequent judges no better equipped to define "package" than does the subjective inquiry put forth in *Aluminios*.

The *Travelers* court carved off the discretion-conferring limb of the Second Circuit cursed by the court in *Hartford Fire*, yet retained the remainder of the finely tuned definition which the Ninth Circuit had failed to adopt. The result may not be perfect, but perhaps it will provide the predictability longed for by judges, attorneys and litigants alike. "Predictability, or as Llewellyn put it, `reckonability,' is a needful characteristic of any law worthy of the name. There are times when even a bad rule is better than no rule at all."[84]

IV. CONCLUSION

The legislative history of COGSA shows that its purpose was to address "the immediate need for uniformity of law" in foreign and domestic oceanside trade.[85] It is not enough, therefore, that rules concerning the definition of "package" under COGSA be clear and predictable; they must also be applied consistently and harmoniously in every courtroom.

> [M]aritime practice would be unmanageable without uniformity of law; it is the reliability of the governing law, no matter where the case may arise, that provides the basis for the advice the attorney gives the client. The governing law must be predictable and uniform, no matter where the vessel or other equally fugitive principals may be found.[86]

The value of *Travelers*' elegantly simple definition will not fully

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MAR. L.J. 67, 69 (1992) (discussing the importance of uniformity in maritime law).

83. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989) (stating that discretion-conferring approaches destroy predictability, facilitate judicial arbitrariness, and impair judicial courage).

84. *Id.* at 1179 (footnote omitted).

85. H.R. REP. NO. 2218, 74th Cong., 2d Sess. 7 (1936).

86. Burrell, *supra* note 82, at 69.

bloom until the other maritime circuits realize its utility and adopt it. May they hesitate no longer.