Unwrapping the COGSA Package Limitation: A Survey of How It is Interpreted and Applied by U.S. Courts

However, COGSA neither defines what qualifies as a package or customary freight unit, nor does it clarify which situations and circumstances will prompt courts to disregard the limitation. Thus, examining how the United States courts analyse the COGSA package limitation and its exceptions is crucial to an informed understanding of how the COGSA limitation is applied.

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What is a COGSA package?

Since COGSA's enactment nearly eighty years ago, the federal courts have struggled to provide a clear and succinct definition of a COGSA package. One of the most commonly followed interpretations, for example, defines a COGSA package as "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."[3] Such a broad description is not unusual; there is no widely accepted concise definition of a COGSA package. Nonetheless, the courts have charted a map of reference points that an observer may use to create the boundaries of what constitutes a package and what does not; there is a general framework that courts apply when determining whether a particular item is a COGSA package.

Generally, there are two schools of thought when determining whether a particular object is a COGSA package.[4] The first school is derived from Second Circuit Court of Appeals' case law and elucidated *in Aluminios Pozuelo, Ltd. v. S.S. Navigator*.[5] *Aluminios* announced a broad view that a package generally consists of preparation that facilitates an item's handling.[6] The *Aluminios* analysis looks to both the facts surrounding the item's package, and the "subjective purpose of the packaging."[7] In contrast, the Ninth Circuit Court of Appeals' school of thought adheres to a narrower conception of COGSA packages.[8] It focuses almost exclusively on the plain meaning of the term, package.[9] The upshot of the Ninth Circuit's narrow approach is that the answer to whether a particular item is a package is very clear in some instances, and murkier in others.[10] For example, items fully enclosed, such as boxed crates, almost always qualify as packages. However, items that are not completely concealed or enclosed may, or may not, qualify as packages.[11]

Generally, when a bill of lading unambiguously describes a unit of packaging that can be reasonably construed as a package, a court will accept the bill of lading's package definition as a COGSA package.[12] Litigation issues arise, however, when bills of lading are unclear, imprecise, or ambiguous. When a court finds ambiguity in the bill of lading's description of a package, it will enter into a relatively fact-intensive analysis based on the "best indication of the parties' intent."[13] Nonetheless, carriers should note that the Eleventh Circuit construes unclear bills of lading against the carrier, "in light of the widely accepted understanding that the original purpose of [COGSA] was to protect shippers against carriers."[14]

Ocean containers as COGSA packages

Written decades before the rise of containerised transport, COGSA simply does not address whether ocean containers are "packages." Despite this gaping hole in the statute's reach, COGSA has not yet been clarified to include consideration of ocean containers. Thus, the courts carry the burden of determining whether and when ocean containers qualify as COGSA packages. Once in force, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, the Rotterdam Rules, will clarify the limitation.

Typically, the Second Circuit, the leading circuit on this issue, does not recognize ocean containers as COGSA containers. Beginning with Judge Friendly's pronouncement that ocean containers rarely qualify as COGSA packages more than four decades ago, the Second Circuit views any claim that an ocean container is a COGSA package with considerable scepticism.[15] As a result, courts following the Second Circuit's analysis will see little persuasive power in a bill of lading's boilerplate statement that ocean containers will be considered COGSA packages.[16] In addition to boilerplate pronouncements, the factual circumstances behind how individual items are "wrapped, bundled, or tied" inside the container will not, without more, sway courts following the Second Circuit to rule that ocean containers are COGSA packages.[17]

Notwithstanding, the Second Circuit has previously determined that ocean containers can be COGSA packages: "if the bill of lading lists the container as a package and fails to describe objects that can reasonably be understood from the description as being packages, the container must be deemed a COGSA package."[18] Yet, the Second Circuit has also held that "when a bill of lading discloses on its face what is inside the container, and those contents may reasonably be considered COGSA packages, then the container is not the COGSA package."[19] The Fourth,[20] Fifth,[21] Ninth,[22] and Eleventh[23] Circuits have either explicitly or implicitly embraced the Second Circuit's approach.

Shipping pallets as COGSA packages

In contrast to their reluctance to consider ocean containers as COGSA packages, courts generally are much more receptive to the idea that pallets should be COGSA packages. The Second and Eleventh Circuits are among the leading circuits that view pallets as COGSA packages. Both Circuits' holdings stand for the proposition that where the bill of lading explicitly lists pallets as packages, and where the shipper uses the pallets in a manner consistent with a package's purpose, the pallet is a COGSA package.[24] Unlike COGSA, however, the Hague-Visby Rules and the Rotterdam Rules considerably narrow the application of the package limitation to pallets.[25]

The customary freight unit

The customary freight unit (CFU) liability limitation is applied to goods not shipped in packages. Like the COGSA package limitation, the CFU limitation restricts a carrier's liability to USD 500 "per customary freight unit."[26] Typical goods that often fall under the CFU limitation scheme include bulk cargo, bulk machinery, and unpackaged equipment.[27] Common measures of freight units include weight, cubic feet, and the actual cargo itself, such as an unboxed automobile.[28]

Despite the fact that the term CFU includes the word "customary," courts generally do not look at industry customs and practices when calculating CFU.[29] Rather, courts look to the "unit by which the freight was calculated in the particular case" by the shipper and the carrier.[30] This approach requires a detailed examination of the contracting parties' intent, which often involves scrutinising the bill of lading[31] or tariff.[32] By and large, there is little dispute over the calculation of CFUs. The Second Circuit is the leading Circuit on CFU calculations,[33] and is followed by the First,[34] Fourth,[35] Ninth,[36] and Eleventh[37] Circuits.

While the Fifth Circuit generally tracks the Second Circuit's approach, the Fifth Circuit has indicated that it may look "perhaps elsewhere" to find the contracting parties' intent when determining the customary freight unit.[38] Despite a lack of clear guidance from the Fifth Circuit as to what sources it would consider, this indication demonstrates the Fifth Circuit's broader view of CFU calculation methods.

Exceptions to the package limitation

Generally, where the shipper does not request a higher limitation and thus does not agree to pay a higher freight, the courts will apply the COGSA package or CFU limitation to each COGSA package or CFU. In the absence of an express provision in COGSA itself, similar to that inserted in the Hague-Visby Rules,[39] the courts have carved out exceptions to application of the COGSA package or CFU limitation.[40] Common exceptions include the Fair Opportunity Doctrine, Unreasonable Deviation and Fundamental Breach.

The Fair Opportunity Doctrine

Under the Fair Opportunity Doctrine, "[a] carrier may limit its liability under COGSA only if the shipper is given a 'fair opportunity' to opt for a higher liability by paying a correspondingly greater charge."[41] A carrier's failure to provide the shipper with a "fair opportunity to declare higher value and pay an excess charge for additional protection" has been held to invalidate the USD 500 package or CFU limitation.[42] What constitutes a "fair opportunity," however, varies from circuit to circuit. The Ninth Circuit, for example, takes a narrow view of the Fair Opportunity Doctrine:[43] it requires carriers to draft warnings in bills of lading in a manner that mirrors the text of COGSA.[44] These warnings inform the shipper "that it can opt for higher liability by declaring the value of the goods and paying an extra charge,"[45] and thus provide a fair opportunity for the shipper to declare the value of shipped goods. In contrast, the Fifth Circuit merely looks to whether the carrier offered scaled shipping rates for higher declared values.[46] Notably, the First, Second, and Ninth Circuits endorse the principle that the shipper's purchase of third-party insurance for the cargo indicates that the shipper received a fair opportunity to gain increased coverage, and thus "counsels against invalidating the limitation on liability."[47]

Not all federal circuits have embraced the Fair Opportunity Doctrine.[48] While the Second, Fourth, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits have recognized it,[49] other circuits have not expressed their views on the Fair Opportunity Doctrine,[50] reluctantly accepted its legitimacy,[51] or declined to recognize it at all.[52]

Unreasonable deviation and fundamental breach

A carrier may lose the right to avail itself of the package limitation if there is an unreasonable deviation or fundamental breach of the contract of carriage. As stated in *Mobil Sales and Supply Corp*. v. *M.V. Banglar Kakoli*, "[a]n unreasonable deviation is a fundamental breach of the contract of carriage; by engaging in such a deviation, the vessel 'ousts' the contract of carriage and the provisions limiting the carrier's liability incorporated therein, thereby rendering the carrier an 'insurer' of the cargo."[53]

In the past, courts found an unreasonable deviation only when they held that a carrier committed a geographic deviation – unreasonably wandering off "the regular and usual course of voyage."[54] However, § 4(2) and § 4(4) of COGSA immunise efforts to save or attempt to save life or property at sea, and § 4(4) of COGSA explicitly states that a reasonable deviation does not amount to a breach of contract.[55]

The courts have broadened the unreasonable deviation exception to include "quasi-deviations".[56] While the circuits differ over what qualifies as a quasi-deviation, one settled matter is that the unreasonable stowage of goods on deck, without prior contractual agreement or a showing of general custom, is a quasi-deviation.[57]

Of the federal circuits, the Second, Third, Fourth, and Fifth Circuits generally take a narrow construction of the quasi-unreasonable deviation exception and limit its reach to unauthorized on-deck stowage of cargo.[58] The Second Circuit, for example, has refused to include gross negligence and wanton and wilful misconduct as examples of quasi-deviation.[59] That circuit limits quasi-deviation arguments to "misrepresentations concerning the physical condition or location of the goods at the time the bill of lading was issued."[60] In contrast, the Ninth Circuit has included instances of intentional destruction of the shipper's goods as a quasi-deviation.[61] Yet, even the Ninth Circuit has explicitly declared that mere negligence does not qualify as a quasi-deviation. With respect to package limitation exceptions, the Fundamental Breach Doctrine bears close resemblance to the Unreasonable Deviation Doctrine.[62] This close relationship effectively allows deviations and quasi-deviations to be viewed as a subset of fundamental breaches, but more narrowly tailored and applied. Thus, a carrier could face

liability for fundamental breach without committing an infraction that attacks the "essence of the contract."[63] Unfortunately, while there is no "clear standard for distinguishing fundamental breach from ordinary liability under COGSA,"[64] the Fundamental Breach Doctrine is almost always reserved for deliberate actions by the carrier,[65] and should be distinguished from ordinary breach of warranty, which covers situations such as the substitution of the carrier vessel.[66]

Looking Ahead: The Rotterdam Rules and the Package Limitation

Much of the package limitation litigation that occurs today may well disappear when the Rotterdam Rules are ratified by 20 nations and come into force one year later.[67] Like COGSA, the Rotterdam Rules permit carriers to limit their liability by means of a package limitation. However, the Rotterdam Rules' similarity with COGSA ends there.

Unlike COGSA, but similar to the Hague-Visby Rules, the Rotterdam Rules establish an alternative weight limitation: a carrier's liability exposure is capped at "875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is higher."[68] Section 2 of Article 59 of the Rotterdam Rules addresses when containers and pallets qualify as Rotterdam Packages. Section 2 unambiguously restricts when containers and pallets can be considered packages: if the goods transported on a pallet or in a container are not "enumerated in the contract particulars,"[69] the goods on each pallet, or in each container, will be considered one singular Rotterdam Package.

In addition to the package limitation of Article 59, the Rotterdam Rules significantly weaken the package limitation exceptions discussed above. Article 61, for example, abolishes the Fair Opportunity Doctrine, the Unreasonable Deviation Doctrine, and the Fundamental Breach Doctrine, and except for a specified provision regarding stowage on deck in violation of an agreement, makes the package or weight limitation virtually unbreakable.[70] Article 25 of the Rotterdam Rules clearly sets out what kinds of cargo may and may not be carried on deck, paragraph 5 of which denies the carrier the benefit of limitation for loss, damage or delay resulting from carriage on deck if the carrier and shipper expressly agreed that the goods would be carried under deck.[71]

Although the clear aim of the Rotterdam Rules is to address what has been viewed as the flaws and faults of COGSA, it remains to be seen whether some of its provisions may fall prey to judicial interpretation and nuances that currently are not foreseen – a 'perfect' statute has yet to be written. Even the Rotterdam Rules do not precisely define a package or unit, leaving to the courts the burden and authority to interpret what is enumerated in the bill of lading.[72]

Questions or comments concerning this Gard Insight article can be e-mailed to the Gard Editorial Team.

[1] J.D., 2014, Boston University School of Law. B.A., 2010, University of Wisconsin-Madison.

[2] See Carriage of Goods by Sea Act § 4(5), Ch. 229, 49 Stat. 1207 (1936), *reprinted in* note following 46 U.S.C. § 30701. The relevant COGSA paragraph reads, "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier."

[3] *Aluminios Pozuelo Ltd*. v. *S. S. Navigator* - 407 F.2d 152, 155, 1968 AMC 2532 (2d Cir. 1968).

[4] See *Malloy* v. *The Vessel Oregon Rainbow*, 1980 AMC 2183 (M.D. Fla. 1980).

[5] 407 F.2d 152, 1968 AMC 2532 (2d Cir. 1968).

[6] *Id*. Specifically, the Second Circuit stated that "[t]he meaning of 'package' which has evolved from the cases can therefore be said to define 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" *Id*. at 155.

[7] See *Travelers Indem. Corp*. v. *Vessel Sam Houston*, 26 F.3d 895, 901, 1994 AMC. 2162 (9th Cir. 1994) (discussing the Ninth Circuit's disagreement with the Second Circuit's definition of a COGSA package)*; Aluminios Pozuelo, Ltd*., 407 F.2dat 155-156.

[8] *Hartford Fire Ins. Co*. v. *Pac. Far East Line, Inc*., 491 F.2d 960, 1974 AMC 1475 (9th Cir. 1974), *cert. denied*, 419 U.S. 873, 1974 AMC 2677 (1974).

[9] *Travelers Indemn. Corp*., 26 F.3d at 901.

[10] *Deltak* v. *Indus. Mar. Carriers Worldwide*, 2004 AMC 1781, 1788-1789 (9th Cir. 2004).

[11] *Id*.

[12] *Seguros "Illimani" S.A*. v. *M/V Popi v. Universal Mar. Serv. Corp*., 929 F.2d 89, 94, 1991 AMC 1521 (2d Cir. 1991); Thomas J. Schoenbaum, Admiralty and Maritime law 647-648 (5th ed. 2012).

[13] Schoenbaum, *supra* note 12, at 648.

[14] *Sony Magnetic Prods. Inc*. v. *Merivienti O/Y*, 863 F.2d 1537, 1542, 1989 AMC 1259 (11th Cir. 1989).

[15] See, e.g., *Monica Textile Corp*. v. *S.S. Tana*, 952 F.2d 636, 1992 AMC 609, (2d Cir. 1991); *Leather's Best, Inc*. v. *S.S. Mormaclynx*, 451 F.2d 800, 1971 AMC 2383 (2d Cir. 1971) (Friendly, C.J.).

[16] See generally *Monica Textile Corp*., 952 F.2d 636.

[17] *Mitsui & Co., Ltd*. v. *Am. Exp. Lines, Inc*., 636 F.2d 807, 822, 1981 AMC 331 (2d Cir. 1981) (Friendly, C.J.).

[18] *Binladen BSB Landscaping* v. *M.V. Nedlloyd Rotterdam*, 759 F.2d 1006, 1015, 1985 AMC 2113 (2d Cir. 1985). See also *Peter Rosenbruch* v. *Am. Exp. Isbrandtsen Lines*, 543 F.2d 967, 1976 AMC 487 (2d Cir. 1976), *cert. denied*, 429 U.S. 939, 1976 AMC 2684 (1976).

[19] *Monica Textile Corp*., 952 F.2d at 639.

[20] *Universal Leaf Tobacco Co*. v. *Companhia De Navegacao Maritima Netumar*, 993 F.2d 414, 1993 AMC 2439 (4th Cir.1993).

[21] *Croft & Scully Co*. v. *M/V Skulptor Vuchetich*, 664 F.2d 1277, 1982 AMC 1042 (5th Cir. 1982).

[22] *All Pac. Trading, Inc*. v. *Vessel M/V Hanjin Yosu*, 7 F.3d 1427, 1994 AMC 365 (9th Cir. 1993).

[23] *Hayes-Leger Assoc*. v. *M/V Oriental Knight*, 765 F.2d 1076, 1986 AMC 1724 (11th Cir. 1985).

[24] See generally *Groupe Chegaray* v. *P&O Containers*, 251 F.3d 1359, 2001 AMC 1858 (11th Cir. 2001) ("[t]he 42 units of plastic-wrapped cartons clearly facilitated the efficient transport of the individual cardboard boxes, and reduced any safety or damage risks that may have been involved in handling them. Under the principles laid out in Hayes-Leger and Fishman & Tobin, the fact that [the shipper] chose to package the cartons in these manageable units instead of shipping them loose supports our conclusion that they represent the COGSA package"); *Allied Int'l Am. Eagle Trading Corp.* v. *S.S. Yang Ming*, 672 F.2d 1055, 1982 AMC 820 (2d Cir. 1982); *Standard Electrica* v. *Hamburg Sud*, 375 F.2d 943, 1967 AMC 881 (2d Cir. 1967); *DCI Mgmt. Grp., Inc.* v. *MV Miden Agan*, 2004 AMC 1294 (S.D.N.Y. 2004) (finding pallets to be COGSA packages because the bill of lading listed the number of pallets, the shipper packed its cargo onto pallets and wrapped each pallet in plastic for better handling and transportation, and because in one communication between the shipper and carrier, the shipper described the cargo as pallets).

[25]1968 Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, signed at Brussels on 25 August 1924 (Visby Amendments to the Hague Rules); 1979 Protocol Amending the International Convention for the Unification of Certain Rules Relating to Bills of Lading as modified by the Amending Protocol of 23rd February 1968, Article IV (5)(c) (SDR Protocol); United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea art. 59 (Rotterdam Rules).

[26] See Carriage of Goods by Sea Act § 4(5), Ch. 229, 49 Stat. 1207 (1936), *reprinted in* note following 46 U.S.C. § 30701.

[27] Schoenbaum, *supra* note 12, at 652.

[28] *Id.*

[29] *FMC Corp.* v. *S.S. Marjorie Lvkes*, 851 F.2d 78, 1988 AMC 2113 (2d Cir. 1988).

[30] Schoenbaum, *supra* note 12, at 652. See also *Edso Exporting LP* v. *Atl. Container Line AB*, 2012 AMC 1811 (2d Cir. 2012).

[31] *Caterpillar Overseas, S.A.* v. *Marine Transp. Inc.,* 900 F.2d 714, 723-724, 1991 AMC 75 (4th Cir. 1990).

[32] See Schoenbaum, *supra* note 12, at 652; *Gen. Motors Corp.* v. *Moore-McCormack Lines, Inc.,* 451 F.2d 24, 1971 AMC 2408 (2d Cir. 1971).

[33] *Edso Exporting LP*, 2012 AMC at 1812-1813. See generally *FMC Corp.*, 851 F.2d 78.

[34] *Henley Drilling Co.* v. *McGee*, 36 F.3d 143, 148, 1995 AMC 1047 (1st Cir. 1994).

[35] *Caterpillar Overseas, S.A.*, 900 F.2d at 723-724; *Aetna Ins. Co.* v. *M/V Lash ltalia*, 858 F.2d 190, 193, 1989 AMC 135 (4th Cir. 1988).

[36] *Vision Air Flight Serv., Inc.* v. *M/V Nat'l Pride*, 155 F.3d 1165, fn.5, 1999 AMC 1168 (9th Cir. 1998).

[37] *Fireman's Fund Ins. Co.* v. *Tropical Shipping & Constr. Co.*, 254 F.3d 987, 999, 2001 AMC 2474 (11th Cir. 2001).

[38] *Craddock Int'l, Inc.* v. *W.K.P. Wilson & Son, Inc.,* 116 F.3d 1095, 1108-1109, 1998 AMC 1107 (5th Cir. 1997).

[39] 1968 Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, signed at Brussels on 25 August 1924 art. 2 (creating Rule 5e of Article 4 of the Hague-Visby Rules).

[40] See, e.g., *Vision Air Flight Serv., Inc*., 155 F.3d 1165, 1999 AMC 1168; *Peter Rosenbruch* v. *Am. Exp. Isbrandtsen Lines*, 543 F.2d 967, 1976 AMC 487 (2d Cir. 1976), *cert. denied*, 429 U.S. 939, 1976 AMC 2684.

[41] *Vision Air Flight Serv., Inc*., 155 F.3d at 1168-69.

[42] *Nippon Fire & Marine Ins. Co*. v. *M.V. Tourcoing*, 167 F.3d 99, 101, 1999 AMC 913 (2d Cir. 1999).

[43] *Carman Tool & Abrasives, Inc*. v. *Evergreen Lines, Metro. Stevedore Co*., 1989 AMC 913 (9th Cir. 1989) (Kozinski, C.J.).

[44] See *Kukje Hwajae Ins. Co., Ltd*. v. *M/V Hyundai Liberty*, 408 F.3d 1250, 2005 AMC 1550 (9th Cir. 2005). The Second Circuit used the same test in a 2014 summary order, which does not have precedential effect. *OOO "Garant-S" v. Empire United Lines Co., Inc., et al*., 2014 AMC 600, 605 [LTD] (2d Cir. 2014).

[45] *Id*. at 1256.

[46] *Brown & Root, Inc*. v. *M/V Peisander*, 648 F.2d 415, 424, 1982 AMC 929 (5th Cir.1981).

[47] *Kemper Ins. Co*. v. *Fed. Exp. Corp*., 252 F.3d 509, 513-514 (1st Cir. 2001) (citing *Vision Air Flight Serv., Inc*. v. *M/V Nat'l Pride*, 155 F.3d 1165, 1169, 1999 AMC 1168 (9th Cir. 1998)); *Nippon Fire & Marine Ins. Co.,* 167 F.3d at 101 (also citing *Vision Air Flight Serv., Inc*., 155 F.3d at 1169).

[48] See *Ferrostaal, Inc*. v. *M/V Sea Phoenix*, 447 F.3d 212, 220, 2006 AMC 1217 (3d Cir. 2006).

[49] *Id*. (citing *Nippon Fire & Marine Ins*., 167 F.3d 99); *Caterpillar Overseas, S.A*. v. *Marine Transp. Inc.,* 900 F.2d 714, 719, 1991 AMC 75 (4th Cir. 1990); *Sabah Shipyard SDN BHD*. v. *M/V Harbel Tapper*, 178 F.3d 400, 404, 2000 AMC 163 (5th Cir. 1999); *Acwoo Int'l Steel Corp*., v. *Toko Kaiun Kaish, Ltd.,* 840 F.2d 1284, 1288-89, 1988 AMC 2922 (6th Cir. 1988); *Gamma-10 Plastics* v. *Am. President Lines,* 32 F.3d 1244, 1251-54, 1995 AMC 909 (8th Cir. 1994); *Kukje Hwajae Ins. Co*., 408 F.3d at 1255 (9th Cir. 2005); *Fireman's Fund Ins. Co*. v. *Tropical Shipping & Constr. Co*., 254 F.3d 987, 996, 2001 AMC 2474 (11th Cir. 2001)).

[50] The Seventh and Tenth Circuits have not espoused their stances on the Fair Opportunity Doctrine. See, e.g., *DB Trade Intern., Inc*. v. *Astramar,* 592 F. Supp 1215, 1218, 1985 AMC 1476 (N.D. Ill. 1984) (stating, "[t]he Seventh Circuit has not spoken to the issue of what constitutes such a fair opportunity").

[51] The First Circuit, in *Henley Drilling Co*. v. *McGee*, 36 F.3d 143, 146-148, 1995 AMC 1047 (1st Cir. 1994), accepted the litigating parties' recognition of the Fair Opportunity Doctrine but simultaneously criticised the doctrine's use as an imperfect creation of the judiciary that inserts uncertainty into maritime commerce.

[52] The Third Circuit is, thus far, the only circuit that explicitly rejects the Fair Opportunity Doctrine as binding law. See *Ferrostaal, Inc*., 447 F.3d 212 ("[l]ooking for a 'fair opportunity' means ignoring COGSA in favor of the very regime COGSA overrode. The statute is not neutral as between carriers and shippers on this point; the burden is on the shipper to declare a greater value. Nor is the fair opportunity doctrine to be found in case law that binds us").

[53] 588 F.Supp. 1134, 1146 (S.D.N.Y. 1984)

[54] Theodara Nikaki, "The Quasi-Deviation Doctrine," 35 J. Mar. L. & Com. 45, 48 (2004) (quoting *Hostetter* v. *Park*, 137 U.S. 30, 40 (1890) (internal quotations omitted)).

[55] Carriage of Goods by Sea Act § 4(2) & 4(4), Ch. 229, 49 Stat. 1207 (1936), *reprinted in* note following 46 U.S.C. § 30701.

[56]See, e.g., *Jindo Am. Inc.* v. *M/V Tolten*, 2003 AMC 1312; *St. Johns N.F. Shipping Corp.* v. *S.A. Companhia Geral Commercial do Rio de Janeiro*, 263 U.S. 119, 124-125, 1923 AMC 1131 (1923).

[57]See, e.g., *St. Johns N.F. Shipping Corp.*, 263 U.S. at 124-125 ("[b]y stowing the goods on deck the vessel broke her contract, exposed them to greater risk than had been agreed and thereby directly caused the loss. She accordingly became liable as for a deviation, cannot escape by reason of the relieving clauses inserted in the bill of lading for her benefit, and must account for the value at destination."); *Konica Bus. Mach., Inc.* v. *Vessel Sea-Land Consumer*, 153 F.3d 1076, 1078, 1998 AMC 2705 (9th Cir. 1998) ("[b]ecause the record supports a finding that Sea-Land's clean bill of lading is subject to the custom of permitting on-deck stowage at the carrier's option, stowage of Konica's container above deck was not a deviation from the contract.").

[58] *Nikaki*, *supra* note 54, at 49. See also *Rockwell Int'l Corp.* v. *M/V Incotrans Spirit*, 998 F.2d 316, 318-19, 1994 AMC 71 (5th Cir. 1993) (negligence in off-loading does not constitute unreasonable deviation); *Universal Leaf Tobacco Co.* v. *Companhia De Navegacao Maritima Netumar*, 993 F.2d 414, 417, 1993 AMC 2439 (4th Cir. 1993) (refusing to broadly construe the unreasonable deviation exception); *SPM Corp.* v. *M/V Ming Moon*, 965 F.2d 1297, 1304, 1992 AMC 2409 (3d Cir. 1992) ("[a]lthough COGSA did not abolish the doctrine of deviation, the statute's very existence and broad scope obviate the need for an expansive concept of deviation to protect shippers, and the statutory limitation on deviations suggests that courts should construe the doctrine narrowly."); *Iligan Integrated Steel Mills, Inc.,* v. *S.S. John Weyerhaeuser*, 507 F.2d 68, 1975 AMC 33 (2d Cir. 1974) (carrier's unseaworthy vessel is not an unreasonable deviation).

[59] *Iligan Integrated Steel Mills, Inc.*, 507 F.2d at 71-72 (Friendly, C.J.). See also *OOO "Garant - S"*, 2014 AMC at 604 [LTD].

[60] *St. Paul Travelers Ins. Co.* v. *M/V Madame Butterfly*, 700 F.Supp.2d 496, 506, 2010 AMC 1299 (S.D.N.Y. 2010) (quoting *Delphi-Delco Elec. Sys.* v. *M/V Nedlloyd Europa*, 324 F.Supp.2d 403, 411, 2004 AM