THE ELECTRONIC EXPRESS SEA WAYBILL AS PERCEIVED IN *SEA-LAND SERVICE, INC. V. LOZEN INTERNATIONAL, L.L.C.* AND LATER CASE LAW

Lili Sehayek Niv∗

I. INTRODUCTION

In this article, I will examine the electronic express sea waybill as perceived by the U.S. court in the *Sea-Land, Inc. v. Lozen International L.L.C.*[1] case and in later case law citing it. The overview will lead us to the freight forwarders' world, both in practice and from a legal point of view, and describe in essence my evolving research. I will proceed through a reflecting corridor, describing hastily the first signs of a common practice by air freight forwarders towards a paperless process. Then I will advance to the next part of this article, which will describe the facts in the *Sea-Land* case, followed by an analysis of the court's ruling, focusing on the electronic express sea waybill of lading, the Ninth Circuit Court of Appeals' attitude toward it, and its validity and the application of the Carriage Of Goods by Sea Act (COGSA) to it. I shall argue that interestingly enough, the court's core decision in the *Sea-Land* case regarding those issues is summarized in two footnotes. Concisely, the court acknowledges that in this particular case, the non-electronic bills of lading controlled the shipment; however, it does not rule, not even as an *obiter dictum*, whether the terms of a traditional bill of lading control all shipments sent via electronic express sea waybills or whether COGSA applies to electronic shipping documents. The latter part of this article will examine later U.S. case law, and I will conclude the article with an examination of whether or not the rules set forth in the *Sea-Land* case regarding the electronic express sea waybill of lading were reinforced, evolved, or remained unchanged.

II. AN OVERVIEW

One of the key players in transportation of goods and the supply chain from shipper to consignee is the freight forwarder. A freight forwarder is always considered the "Architect of Transport."[2] It is his task to plan the route of the shipment, whether sea, air or inland segments are involved, as well as the means,

---

∗ Graduate LLM, James E. Rogers College of Law, University of Arizona. Currently SJD student, James E. Rogers College of Law, University of Arizona. Currently Advocate, Head of Legal Department, Lapid Logistics. Ltd. Acknowledgments: I wish to thank Professor Boris Kozolchyk for his worth, more than its weight in gold, guidance and his enlightening remarks.

[1] Sea-Land Serv., Inc. v. Lozen Int'l, L.L.C., 285 F.3d 808 (9th Cir. 2002).

[2] FÉDÉRATION INTERNATIONALE DES ASSOCIATIONS DE TRANSITAIRE ET ASSINILÉS, THE FORWARDER - THE ARCHITECT OF TRANSPORT (1975).

i.e., trucks, airplanes, ocean going vessels, and within those means "break bulk," containers, and so on.

The increased activity of freight forwarders and the expanded diversity of their work are striking facts of modern carriage of goods. This increase is a result of the container revolution, the emergence of multimodal systems of inland carriers, terminal owners and sea carriers, the long term over-availability of tonnage in the world shipping market coincidental, and the rapid and unprecedented development of the global logistics industry.[3] Freight forwarders have fitted into this new global logistics order, and hence their new importance.[4] Freight forwarders have become more sophisticated and aware of their customers' needs. Against a background of global trade and electronic communications, the forwarding industry operates at all levels in the transportation chain, providing a valuable service to companies large and small.[5] The forwarding industry is experiencing tremendous volatility, among other factors, due to the ever changing modes and means of transportation, including computer-to-computer communications.[6]

From a practical point of view, the core definition of a freight forwarder is that of an intermediary between shippers or consignors and consignees, who bears operation responsibilities for forwarding freight from one place to another.[7] I suggest that this core definition reveals the legal entanglement in which freight forwarders find themselves. Furthermore, as a result of consolidation and restructuring of the freight-forwarding sector, a concept of "total logistics" has evolved,[8] or as referred to in laymen terms, "one stop freight shop." This changing role can be attributed to shifting market trends, including: globalism of production; deregulation and dismantling of institutional obstacles to competition; increased competition between transport modes; technological change; and outsourcing of the logistics function.[9] I suggest that once the essence of the freight forwarder's job includes numerous operational responsibilities, they

---

[3] William Leung, *Freight Forwarder: Agent or Principal Contractor?*, HONG KONG TRADE DEV. COUNCIL, http://info.hktdc.com/shippers/vol29_3/vol29_3_legalframework.htm# (last visited Sept. 20, 2013).

[4] *Id.*

[5] *A Brief Introduction to Logistics*, BRITISH INT'L FREIGHT ASS'N (June 2011), www.bifa.org/_attachments/Resources/525_S4.pdf.

[6] *See* Paul R. Murphy & James M. Daley, *Profiling International Freight Forwarders: An Update*, 31 INT'L J. OF PHYSICAL DISTRIB. & LOGISTICS MGMT. 152–68 (2000); William Armbruster, *Changing Times for Forwarders: Small and Medium-Sized Intermediaries Face a Difficult Business Environment*, 33 J. COMMERCE 145 (2003).

[7] Steven W. Easley, *Job Description of a Freight Forwarder*, EHOW.CO.UK, http://www.ehow.co.uk/about_6292383_job-description-freight-forwarder.html (last visited Sept. 20, 2013).

[8] *See* Vassilis Markides & Matthias Holweg, *On the Diversification of International Freight Forwarders: A UK Perspective*, 36 INT'L J. OF PHYSICAL DISTRIB. & LOGISTICS MGMT. 336–59 (2006).

[9] *See* Murphy & Daley, *supra* note 6.

become legally responsible for duties they themselves are not able to control, and in some cases, might not foresee.

I decided to further investigate the legal status of the freight forwarder, both theoretically and empirically through questionnaires handed to freight forwarders around the globe, and am currently conducting a study on the subject as part of my SJD study at the University of Arizona. In this study, I explore the law and practice of freight forwarding, as well as the need and possibility of a global unifying set of standards and best practices of freight forwarding.

From a legal point of view, as thoroughly presented by Professor William Tetley:

> [T]he freight forwarder traditionally acts as an agent who arranges for the shipment of goods belonging to his client or to the shipper. The freight forwarder as agent typically arranges for transportation, pays freight charges, insurances, packing, custom duties and then charges a fee, usually a percentage of the total expenses. All the costs are (or should be) disclosed and in consultant with the client. The specific scope of the forwarding agent's duties is determined primarily by its contract – either written or oral – with the customer (ordinarily the shipper) who retains its services. At times, the freight forwarder has acted as principal contractor arranging the carriage in his own name. His fee, payable by the shipper, is a straight freight charge. He then arranges to pay lower freight rates to the carrier and obtains his profit from the difference between the two. Very often, the freight forwarder consolidates the cargo of a number of clients into a single container, resulting in savings which benefit the freight forwarder and clients. [10]

The determination of whether the freight forwarder has acted as an agent or as a principal contractor depends on the facts of each case.[11] No equation exists to determine the role taken by the freight forwarder, and courts all over the world have considered this subject. This determination is especially important since it will determine the applicable law and responsibilities imposed on the freight forwarder.

If the freight forwarder acts merely as a forwarding agent, he is only liable for his negligence.[12] The common assumption by freight forwarders and lawyers is that the legal status of freight forwarders who act as agents is analogous to that of travel agents, except that instead of dealing with tourists they deal with cargo. They are no more liable to their customers for the acts of other providers

---

[10] 2 WILLIAM TETLY, MARINE CARGO CLAIMS 1694–95 (4th ed. 2008).

[11] *See id.* at 1686.

[12] *See, e.g.*, Chi., Milwaukee, St. Paul & Pac. R.R. Co. v. Acme Fast Freight, 336 U.S. 465 (1949); U.S. v. Am. Union Transp., Inc., 327 U.S. 437 (1946).

of shipping services than are vacation planners, who book space for tourists in hotels or on cruise lines that later provide disappointing services.[13]

On the other hand, if he acts as a principal, he might be held liable for any omission made through the transport chain as a carrier,[14] but he might also enjoy carriers' diminished liability under international conventions relating to International Carriage by Air, signed at Warsaw on October 12, 1929, including the Warsaw Convention 1929 and Montreal Convention (if transportation is by air), or under the Hague-Visby Rules and Brussels Protocol (if transportation is by sea). Amazingly enough, no specific international convention exists for such a highly international process, such as that of arranging for the shipment of goods by freight forwarders, even though it often relies on different modes and means of transportation and warehousing.

In my SJD study, I will investigate the various criteria the courts have set in deciding whether the freight forwarder is considered to be an agent or a principal contractor. I intend to explore what principles instruct the court's determination of the role of the freight forwarder, as well as the legal consequences of certain actions or omissions. On this part of the research, I shall focus mainly on the United States and Israel, but will also focus on France, Germany, and the United Kingdom. The questionnaires, however, were handed out to freight forwarders from twenty-one countries and were answered by twenty-seven freight forwarders. Among those countries and cities are: United States, France, Germany, Greece, Italy, Ireland, Netherlands, Spain, Switzerland, United Kingdom, Turkey, Israel, China, Hong Kong, Philippines, South Africa, Kuala Lampur, Seoul, Mexico, Panama, and Jakarta.

The questionnaires reflected different understandings of important terms and conditions of the freight forwarding business. After much thought and consideration, the questions included in the questionnaires related to three different areas: the first was the licensing of a freight forwarder; the second related to the transport and storage documents issued directly by a freight forwarder or one in which he participates as one of the issuers, endorsers, or holders; and the third related to the applicable law to the freight forwarder's activities, especially his liability. It is out of the scope of this overview to include in detail the answers and analysis of the questionnaires. But, as an appetizer to the reader, I can point out that as expected, the answers indicate an inconsistency when comparing the different countries with regard to licensing and legal liability.

Sometimes, even in the same country, different freight forwarders gave different answers. Even a relatively simple question such as, "do you need to obtain a license in order to become a freight forwarder," yielded different answers in the same country. Additionally, there was a lack of knowledge with respect to liability issues, which is an area that is not fully comprehensive to any of the persons involved, including freight forwarders themselves, lawyers, or insurers.

---

[13] Steve Block, *Dangerous Goods and Ocean Transportation Intermediary Liability*, FORWARDERLAW.COM (Nov. 19, 2005), http://www.forwarderlaw.com/library/view.php?article_id=350.

[14] *See* TETLY, *supra* note 10, at 1695.

Bearing in mind the lack of standards and the complexity of the applicable law, those outcomes are totally expected.

To emphasize, the freight forwarders who answered the questionnaires are skillful professionals and who are heads of mid-sized companies, or belong to large organizations that are well established in the industry. The outcomes should be attributed to the existing confusion, which may be the result of lack of uniformity. Assuming global uniform standards existed regarding liability issues, a tool that would aid freight forwarders, whether in the form of a code or even as a set of recommendations, not only would prevent confusion, but it would contribute to a better and easier global trade. Such guidance is more than reasonable and sufficient, considering the limited knowledge an individual freight forwarder has about his country's legal status of freight forwarders. A global uniform standard would result in a lack of privity between the freight forwarder and other authorities in another country, such as subcontractors or another freight forwarder, which exists today. Today, the tendency of the freight forwarder in such agreements is to enforce and implement his country's rules, if a neutral set of rules were available, that tendency would dissipate.

Note that I am not suggesting aiming as high as to legislate and enforce a treaty, although such a treaty should have been implemented long ago. Rather, I will attempt to offer some guidelines and rules that can be enforced globally, while still allowing application of each country's rules. Surely, in my mind, this is a best practice to adopt. One might claim it is an ambitious goal and maybe even impossible, but it is one of the reasons I decided to begin my journey and conduct this research; that is, to investigate if such an agenda, or even part of it, is feasible, and if so, to suggest it to the freight forwarding industry.

On the other hand, going back to the answers to the questionnaires, some identical references were shown in the transport documents. For example, freight forwarders gave similar answers with regards to the house waybill. In the air leg, when a shipment is sent directly, only the carrier issues a master air waybill, usually. However, when shipments are consolidated, grouping together various clients' consignments under one master waybill, another document that is issued is the house air waybill for each individual client, usually issued by the freight forwarder.[15] Most of the freight forwarders note that the house waybill serves as a receipt of goods for shipment by air, which includes the actual contract of transportation between the freight forwarder, consignor (shipper), and/or the consignee, and also as a receipt of goods and contract of transportation issued when grouping the consignments of more than one client under one master bill of lading or waybill. Similarly, almost all freight forwarders mentioned they used a house waybill not only in the air, but also for other means of transportation, such as ocean (where the document is known as a house bill of lading) and inland transportation. And on that note, I will make the leap to the purpose of this article, which is to illustrate the scope and methodology of my SJD work by

[15] *See* Adsin Media, *Difference Between Airway Bill and Master Airway Bill*, HOWTOEXPORTIMPORT.COM (July 31, 2013), http://www.howtoexportimport.com/Difference-between-Airway-bill-and-Master-Airway-B-468.aspx.

focusing on the freight forwarders' relatively new practice of using the electronic sea waybill during the sea leg of a single or multi-modal shipment. U.S. statutes and case law provide the vantage point of this narrow analysis. In order to get a better perspective, my analysis will start with the air leg.

III. TOWARDS A PAPERLESS PROCESS IN THE AIR LEG

In the shipment journey, it is common practice that freight forwarders and others use accompanying customary paperwork. Such paperwork includes, as a central document in the air leg, an air waybill, and in the sea leg, a bill of lading. When comparing an air waybill to a bill of lading, I have to instantly raise a red flag when considering the fundamental legal difference between an air waybill and a bill of lading. From a legal point of view, an air waybill has no property characteristics whatsoever, whereas a bill of lading, by its very nature, is a document of title. In other words, in the usual course of business, financing the bill of lading is sufficient proof that the person who holds it is entitled to receive, hold, convey, and dispose of the goods. Thus, both the waybill and the bill of lading are facilitative instruments of international trade. But the main difference between a waybill and a bill of lading is that while the bill of lading conveys title, whereas the waybill merely serves as evidence that the consignee has contracted with the shipper to carry the goods to an specific destination.[16] This immense difference is crucial and will be reflected later on as I discuss the electronic express sea waybill. Bearing that difference in mind, I move forward to hastily review the process toward the paperless trend of electronic air waybills, leading to the main discussion regarding the electronic express sea waybill.

In general, due to technological developments and ecologic awareness, an e-freight process in the air leg was proposed. The process would eliminate the use of paper documents and replace it with the use of electronic documents.[17] Describing that process alone will produce a full article, thus I would like to provide a quick glance at the current relevant trend in the air e-freight process, in order to provide a better background for this review and to reflect on it.

In September 2012, the Global Air Cargo Advisory Group (GACAG) announced the creation of task forces to pursue primary air cargo issues. One of those task forces is the E-commerce Task Force (ECTF), whose goal is to boost collaboration and define a joint air cargo industry approach that GACAG members can consider adopting for the future implementation of a paperless transportation process.[18] In December 2012, the ECTF drew a "road map" that

---

[16] Ester Ejim, *What is the Difference Between a Waybill and Bill of Lading*, WISE GEEK, http://www.wisegeek.com/what-is-the-difference-between-a-waybill-and-bill-of-lading.htm (last visited Sept. 20, 2013).

[17] *See* Silvia Cappelli, *Are We Ready to Waive Paper Goodbye*, CARGO MATTERS, at 4 (Mar. 2013), http://www.swissworldcargo.com/web/EN/pressroom/publications/Documents/ Cargo%20Matters%202013_1.pdf.

[18] *Id.*

would accelerate the adoption of a paperless transportation process in 2013.[19] One of the three "pillars" of that road map calls for the development of a plan to digitize the commercial and special cargo documents that typically accompany airfreight in or outside the "cargo pouch."[20] As a central document in the air cargo transportation process, the e-AWB (the electronic air waybill) is a natural first step towards creating a fully paperless environment.

The air industry's goal is to make the cargo business completely paperless by 2015. In March 2013, this was announced by the International Air Transport Association (IATA), jointly with the International Federation of Freight Forwarders Association (FIATA), in the *IATA-FIATA Joint Statement on Multilateral e-AWB Agreement*.[21] As stated by FIATA's chairman in the announcement, the new e-AWB agreement allows forwarders to sign only once in order to connect to all signatory airlines.[22] This means that a freight forwarder entering into IATA's agreement will effectively enter into agreements with all the participating carriers who have appointed IATA as their agent to enter into agreements with forwarders on their behalf. Such a practice, if indeed carried out, is very reasonable, efficient, environmentally friendly, and cost saving. Moreover, I believe freight forwarders will question how they managed the air leg process before the implementation of the new practice the same way one cannot imagine how work was done before computers were used.

As opposed to this seemingly well-established trend with the air waybill, which suggests that the electronic air waybill is supposed to eventually replace the traditional air waybill, the reflected image with regard to the sea leg is completely different. I shall now advance to review the electronic express sea waybill, which still stands "light years" behind in the sense of replacing the traditional bill of lading, and examine a fairly basic query of whether or not the court has recognized it as a valid document and what the interaction of it is with the traditional paper bill of lading.

---

[19] *See e-freight Roadmap*, GLOBAL AIR CARGO ADVISORY GROUP (Dec. 2012), http://www.iata.org/whatwedo/cargo/e/efreight/Documents/gacag-ef-roadmap.pdf.

[20] *See* Cappelli, *supra* note 17, at 17.

[21] *See* IATA-FIATA Joint Statement on Multilateral e-AWB Agreement, Mar. 2013, *available at* http://www.iata.org/whatwedo/cargo/e/eawb/Documents/iata-fiata-joint-statement-on-multilateral-eawb-agreement.pdf (last visited Sept. 21, 2013).

[22] *Id.*

IV. THE *SEA-LAND* CASE

A. The Facts

The facts, as described by Circuit Judge Susan Graber, are as follows:

> Lozen arranged with Sea-Land to transport three 40 foot containers of grapes from Hermosillo, Mexico, to Felixstowe, England. The route of the containers was to travel by truck from Hermosillo to Long Beach, California. From there, they were to be transported by rail to Elizabeth, New Jersey, where they were to be loaded on an ocean vessel that would be stopping in Felixstowe, within a journey that was supposed to last 9 days. In short, the planned route included a truck, a railroad and an ocean leg, therefore generating a multimodal transportation.
>
> Unfortunately, on the rail leg, Sea-Land's railroad agent placed the containers on the wrong train. As a result, Lozen's grapes did not arrive in New Jersey in time for the sailing on the planned vessel.
>
> Sea-Land notified Lozen of the problem and asked whether the company preferred to send the containers on the next week's vessel or instead to sell them domestically.
>
> After its customer in England agreed to buy the delayed grapes only at a reduced price, Lozen elected to sell them domestically at lower prices than it would have received under its original contract with the customer in England. A week's delay in England was critical because by then, cheaper European grapes were expected to "flood the market."[23]

Only later on in the case discussion, it becomes apparent that the railroad agent failed to follow Sea-Land's instructions and deramp the loads, a finding that is crucial, and which resulted in the reverse and remand of the case.[24] Sea-Land filed the action to recover the full amount of its contract with Lozen to transport the containers of grapes. The parties settled this claim, and the district court granted a stipulated request for dismissal.[25]

---

[23] *Sea-Land*, 285 F.3d at 813.

[24] *Id.* at 818. The appellant court found that based on the evidence there was indeed a genuine issue of fact as to whether the railroad agent committed an unreasonable deviation (i.e., intentionally caused damage to shipper's goods), and hence, the "liberty clauses" (protecting Sea-Land from liability) appearing in the express sea bill of lading were unenforceable. *Id.*

[25] *Id.* at 813.

Lozen, claiming that as a result of Sea-Land's delay in transporting the containers, it suffered damages, counterclaimed, alleging a breach of contract under state law and cargo loss and damages pursuant to Sections 11706 and 14706 of the Interstate Commerce Act, commonly known as the Carmack Amendment.[26] The district court granted Sea-Land's motion for summary judgment with respect to both counterclaims, and Lozen filed a timely notice of appeal. The appeals court reviewed *de novo*, among other things, the district court's interpretation of the terms of a bill of lading.[27]

B. An Analysis of the Court's Ruling

1. The Status of the Electronic Express Sea Waybill

The bill of lading terms are initially discussed in light of the terms of the parties' agreement. Lozen and Sea-Land disputed the nature of the agreement between them and the terms governing that agreement.[28]

Lozen argued that the parties entered into a special oral contract whereby Sea-Land expressly promised to deliver the three containers of grapes by a certain date. Sea-Land, on the other hand, argued that the terms of its international bills of lading constituted the parties' agreement. Those terms provided Sea-Land with

---

[26] *Id.* at 812. The Carmack Amendment was part of the Interstate Commerce Commission Act of 1887. The Amendment itself was added in 1906. It was split up and is currently codified at 49 U.S.C. 11706 (for rail carriers) and 49 U.S.C. 14706 (for motor carriers and freight forwarders). The main purpose of the Carmack Amendment is to relieve shippers of the burden of discovering which carrier, among often numerous carriers, was responsible for the damage of goods. *See* Kawasaki Kisen Kaisha, Ltd. v. Regal-Beloit Corp., 130 S. Ct. 2433, 2441 (2010).

The amendment requires that the first rail carrier who receives goods for interstate transportation (called the receiving carrier) issue a bill of lading. If the parties don't agree to alternative terms or it turns out that their agreement is invalid, Carmack applies, and any damage to the goods, whether caused by the receiving carrier or some other carrier, is paid by the receiving rail carrier.

The Carmak Amendment codified the common law rule making a carrier liable, without proof of negligence, for all damages to the goods it transports, unless it affirmatively shows that the damages were occasioned by an act or omission of the shipper, an act of God, the public enemy, public authority, or the inherent vice or nature of the goods transported. *See, e.g.*, Chesapeake & Ohio Ry. Co. v. Thompson Mfg. Co., 270 U.S. 416, 421–422 (1926); Adams Express Co. v. Croninger, 226 U.S. 491, 506–09; *In re* Bills of Lading, 52 I.C.C. 671, 679 (1919); *see also* Wesley S. Chused, *The Evolution of Motor Carrier Liability Under the Carmack Amendment into the 21st Century*, 36 TRANSPORT L.J. 177, 179–80 (2009).

[27] Yang Ming Marine Transp. Corp. v. Okamoto Freighters Ltd., 259 F.3d 1086, 1095 (9th Cir. 2001).

[28] *Sea-Land*, 285 F.3d at 814.

some latitude as to the date by which it was required to deliver the three containers.[29]

The dispute arose because Lozen requested that express sea waybills of lading be used in the transportation of its grapes.[30] The court directly examined the role and validity of the express sea waybills of lading under the specific circumstances and facts concerning the case at hand. I will attempt to review the essential rulings of the court with respect to the express sea waybills of lading.

Had this been a traditional shipment, documents incorporating the terms of Sea-Land's international bills of lading would have been printed by Sea-Land and given to Lozen. Express sea waybills, however, are issued electronically; therefore, Sea-Land did not give a printed copy to Lozen.[31] Lozen claimed that when it entered into the shipping agreement, it was unaware that the terms printed on Sea-Land's international bills of lading also typically apply to shipments sent via its electronic Sea waybills.[32] Lozen further contended that the parties entered into an oral agreement with respect to this particular shipment and that Sea-Land expressly guaranteed the date by which the grapes would arrive, regardless of the terms applicable to other shipments of this type.[33]

The court completely rejected Lozen's arguments on this point. The court found Lozen's arguments unpersuasive; more important was the fact that Lozen had shipped cargo several times before under Sea-Land's traditional bills of lading.[34] In addition, Lozen's President admitted that "he had read the reverse side of Sea-Land's bills of lading before initiating the shipment at issue here."[35]

In the court's words: "Perhaps most importantly, Myring [Lozen's President-l.s.n] demonstrated his awareness that the terms printed on traditional bills of lading generally apply to express sea waybills."[36] In other words, Lozen's president fully admitted that it was a fair statement to say it was his understanding that when cargo was moving under an express sea waybill, it was still moving under the terms and conditions of Sea-Land's bills of lading.

The experience and knowledge of the shipper—who was perceived to be a sophisticated shipper by the court—created an essential obstacle for him to overcome the validity and applicability of the electronic express sea waybill. For the purpose of this discussion—investigating the status of the express sea waybill—it remains an open question as to how the court would have ruled if the shipper was a layman, if it was his first shipment, and if he had no experience whatsoever with bills of lading. In fact, the court overtly asserts in footnote two:

---

29 *Id.*
30 *Id.*
31 *Id.*
32 *Id.*
33 *Sea-Land*, 285 F.3d at 814–15 (emphasis omitted).
34 *Id.* at 815.
35 *Id.*
36 *Id.*

> The evidence in the record demonstrates that both parties understood that the terms on Sea-Land's non-electronic bills of lading controlled the shipment of the grapes in this case. *Therefore, we need not decide whether the terms of a traditional bill of lading control all shipments sent via electronic express Sea waybills*.[37]

In sum, the court only acknowledges that in this particular case the terms of the electronic express sea waybills are valid, which is indeed a recognition, although a narrow one, and leaves the validity of an electronic express sea waybill by its own merits with no essential ruling.

As I mentioned earlier in this article, the court's reference to the status of the electronic express sea waybills is mentioned in the above-cited footnote. As per the ruling in the *Sea-Land* case, the court concluded its opinion by stating that the above-described evidence justified the conclusion, and "the terms printed on Sea-Land's non-electronic bills of lading controlled the parties' agreement."[38]

2. Application of COGSA to the Parties' Agreement

The Carriage of Goods by Sea Act (COGSA) is the United States statute governing the rights and responsibilities between shippers of cargo and ship-owners involving ocean shipments to and from the United States. The International Convention Regarding Bills of Lading, commonly known as the Hague Rules, have been adopted by the United States through COGSA.[39] It was previously located in Title 46 Appendix of the United States Code, starting at Section 1301, but has been moved to a note in Title 46 United States Code 30701.[40] The COGSA, although not intended to be a code, "is really a bill of lading act governing the relations of cargo and ship so long as a bill of lading embodies the contract of carriage."[41]

The District Court in the *Sea-Land* case applied COGSA in its analysis to determine the extent of Sea-Land's liability.[42] Lozen argued that instead of applying COGSA, the court should have applied either the Carmack Amendment[43]

---

[37] *Id.* at 815 n.2 (emphasis added).

[38] *Sea-Land*, 285 F.3d at 815.

[39] *See* Charles M. Davis, *The Rotterdam Rules: Changes From COGSA*, THE LAW OFFICE OF CHARLES M. DAVIS (2010), http://davismarine.com/articles/Rotterdam%20Rules%20-%20Changes%20from%20COGSA.pdf.

[40] EDWARD V. CATTELL, JR., 3 BENEDICT ON ADMIRALTY: THE LAW OF AMERICAN ADMIRALTY § 33 n.30 (2009), http://redressright.org/pdf/Benedict%20on%20Admiralty-THE%20LAW%20OF%20AMERICAN%20ADMIRALTY%20ITS%20JURISDICTION,%20LAW%20&%20PRACTICE%20WITH%20FORMS%20&%20DIRECTIONS.pdf.

[41] Benjamin W. Yancey, *The Carriage of Goods: Hague, Cogsa, Visby, and Hamburg*, 57 TUL. L. REV. 1238, 1244 (1982-1983).

[42] *Sea-Land*, 285 F.3d at 816.

[43] *Id*; *see also supra* text accompanying note 26.

or the Harter Act,[44] 46 U.S.C app. § 190.[45] According to 46 U.S.C. app. § 1300, "COGSA applies to '[e]very bill of lading or similar document of title, which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade.'"[46] Lozen argued that COGSA was not applicable as the carriage of goods was not to or from ports in the U.S. According to the facts in this case, Sea-Land was hired to transport the containers of grapes from Hermosillo, Mexico, to Felixstowe, England.[47] Despite the fact that the ocean carrier made a scheduled stop in Hawaii, U.S., Lozen relied on case-law precedent that found COGSA inapplicable to a shipment from Chile to China.[48]

The previously discussed ruling of the court, with regard to the status of the electronic express sea waybill lead to the conclusion that Sea-Land's international bills of lading were applicable, becomes essential to the court's decision to apply COGSA to the case at hand. The court determined that even though COGSA did not apply by its own force to the shipment, Sea-Land's international bills of lading contained a "Clause Paramount," specifying that the bill of lading shall have effect subject to all the provisions of COGSA.[49] It is at that point where the other footnote that summarizes the court's decision presents itself, this time referring to COGSA and its relation to electronic sea waybills.

In footnote four, the court clearly stated that it did not express an opinion "as to whether COGSA would have applied by its own force to the electronic sea waybill had this not been a foreign-to-foreign shipment," and it emphasized that "*whether COGSA applies to electronic shipping documents appears to be an open question*."[50]

---

[44] Courts consistently state that "[t]he Harter Act applies prior to loading, COGSA applies from the loading of the goods until the discharge of the goods from the vessel, and the Harter Act applies from discharge until the goods are delivered to the consignee." Kathryn J. Hall, *Cogsa Limitation Applicable to Damage Occurring on Land at an Intermediate Port: Schramm, Inc. v. Shipco Transport, Inc.*, 29 TUL. MAR. L.J. 481, 485 (2005).

[45] *Sea-Land*, 285 F.3d at 816.

[46] *Id.* (alteration in original) (other emphasis omitted).

[47] *Id.*

[48] People's Ins. Co. of China v. M/V Damodar Tanabe (*In re* Damodar Bulk Carriers, Ltd.), 903 F.2d 675, 677 (9th Cir. 1990).

[49] *Sea-Land*, 285 F.3d at 816–17; *see also A Brief Introduction to Logistics*, *supra* note 5.

[50] *Sea-Land*, 285 F.3d at 817 n.4 (emphasis added).

V. SUCCEEDING CASE LAW

The *Sea-Land* case was published in 2002. Eleven years later, do we have more of an insight or a clear comprehension of the electronic express sea waybill of lading or its validity and the application of COGSA to it? *Sea-Land* has been quoted in at least fifty cases since it was published.[51] I will try to examine the pertinent cases and select the husk from the straw.

In some cases, the *Sea-Land* case was referred to, mentioned, or cited as a rule. In *Federal Insurance Company v. Union Pacific Railroad Co.*, the court, *inter alia*, reinforced the ruling that COGSA can be incorporated by contract into the bill of lading.[52] Much to our disappointment, the bill of lading discussed is a through bill of lading, which "allows the transportation of goods both within domestic borders and through international shipment,"[53] and therefore, it does not contribute any comprehension to our discussion. Similarly, in *Starrag v. Maersk, Inc.*, the court repeats the ruling in the *Sea-Land* case applying COGSA to a bill of lading that contractually extended COGSA through a Clause Paramount.[54] Similar to the previous ruling, the case revolved around a negotiable sea waybill.

In footnote five, in *Underwood Cotton Co. v. Hyundai Merchant Marine (America), Inc.*, the court pointed out that it followed the *Sea-Land* case, stating, "It should also be noted that each of the COGSA defenses at 46 U.S.C. app. § 1304 can have the effect of limiting the reach of some right that a holder of a bill of lading might otherwise have."[55] But unlike the aforementioned cases, the facts of this case does not revolve around an electronic express sea waybill of lading; rather, they involve a shipper who brought an action against a carrier under COGSA, alleging that the carrier improperly issued the bill of lading and then delivered goods to the holder of that document.

Likewise, in *Fischer International Forwarders, Inc. v. Hyundai Merchant Marine Co.*, the court, citing *Sea-Land*, stated, "[W]hile the COGSA, by its terms, applies port-to-port, it can be extended to the entire period during which the carrier has custody," which the bill of lading in question did in applying COGSA to "to the land portions of the carriage."[56] In this case, the plaintiff was familiar with those terms because of its past dealings with defendants. Again, the discussion does not focus on an electronic express sea waybill of lading.

---

[51] *Citing References for* Sea-Land, WESTLAWNEXT, http://www.next.westlaw.com (search for "285 F.3d 808," then click "Citing References" tab) (last visited Sept. 20, 2013).

[52] Fed. Ins. Co. v. Union Pac. R.R. Co., 651 F.3d 1175, 1179 (9th Cir. 2011).

[53] *See Through Bill of Lading Definition*, INVESTOPEDIA US, http://www.investopedia.com/terms/t/throughbilloflading.asp (last visited Sept. 20, 2013).

[54] *See* Starrag v. Maersk, Inc., 486 F.3d 607 (9th Cir. 2007).

[55] Underwood Cotton Co. v. Hyundai Merch. Marine (Am.), Inc., 288 F.3d 405, 414 n.5 (9th Cir. 2002).

[56] Fischer Int'l Forwarders, Inc. v. Hyundai Merch. Marine Co., 02 C 4485, 2002 WL 31017670 (N.D. Ill. Sept. 5, 2002).

The *Sea-Land* case is also cited as a reference to the application of COGSA on a bill of lading in both *Shoaga v. Maersk, Inc.*[57] and *American Home Assurance Co. v. TGL Container Lines, Ltd*.[58] Both cases state that under 46 U.S.C. app. § 1300, COGSA applies to every bill of lading or similar document of title that is evidence of a contract for the carriage of goods by sea to or from ports regarding foreign trade of the United States. Those cases did not deal with an electronic express sea waybill of lading. As opposed to those mere declarations, some serious reinforcement to our discussion can be found in *Delphi-Delco Electronics Systems v. M/V Nedlloyd Europa*.[59]

A. The Facts in the *Delphi-Delco* Case

The action arose from the sale and shipment of various automotive parts by Delphi from the United States to Daewoo Corporation in Busan, South Korea. Delphi arranged to ship most of these parts through Ace, a non-vessel operating common carrier (NVOCC), which issued ninety-one bills of lading to Delphi covering the majority of these shipments. Delphi alleged that Ace failed to issue or provide Delphi with bills of lading for some of these shipments.[60] However, the Opinion and Order address only those shipments for which bills of lading have been produced.[61] Ace, in turn, arranged for the actual shipment of the parts to South Korea through the ocean carriers Hanjin and NYK. Hanjin, which was party to a service agreement with Ace, transported its share of the shipments in containers on board the Hanjin Amsterdam, the Hanjin Athens, the Hanjin Paris, and the Hanjin Valencia.

However, rather than issuing bills of lading for these shipments, Hanjin issued electronic sea waybills at the request of Ace. These waybills list Ace as the shipper, but consign the shipments to either Daewoo or "Sun Express Corp.," as opposed to the Korean banks listed as consignees in the Ace bills of lading.[62] NYK, which arranged to transport its share of the shipments on vessels either slot or time chartered from P & O Nedlloyd and the other NYK defendants, also issued electronic sea waybills at Ace's request for the shipments it carried. The NYK waybills list either Ace or Daewoo as shipper and Daewoo as consignee.[63]

Note, as far as bills of lading, there were 91 bills of lading issued by the NVOCC (Ace) naming the shipper, the actual shipper—Delphi, and the Korean

---

[57] Shoaga v. Maersk, Inc., C 08-786 SBA, 2008 WL 4615445 (N.D. Cal. Oct. 17, 2008).

[58] Am. Home Assurance Co. v. TGL Container Lines, Ltd., 347 F. Supp. 2d 749, 762 (N.D.Cal. 2004).

[59] Delphi-Delco Elecs. Sys. v. M/V Nedlloyd Europa, 324 F. Supp. 2d 403, 426 (S.D.N.Y. 2004).

[60] *Id.* at 406.

[61] *Id.* at 428 n.2.

[62] *Id.* at 407.

[63] *Id.* at 406–07.

banks as consignees.[64] Later on in the chain of transport, the ocean carriers both issued electronic sea waybills. While one of the ocean carriers (Hanjin) listed the NVOCC as shipper and the actual consignees (Daewoo or Sun Express) as consignees, the other ocean carrier (NYK) listed either the actual consignee (Daewoo) or the NVOCC as shipper and the actual consignee as consignee.[65]

As opposed to the *Sea-Land* case, the electronic sea waybill was not issued directly by the freight forwarder to the shipper; rather, the ocean carriers issued the electronic sea bill of lading to the NVOCC or to the consignee. However, similar to the *Sea-Land* case, where the court relied upon the non-electronic bills of lading, in the *Delphi-Delco* case the court referred to the classic bill of lading and the service contract between Ace and Hanjin. In the *Sea-Land* case, the court took previous experience into consideration, and in the *Delphi-Delco* case, the court considered the other ninety-one bills of lading issued by the NVOCC and the service contract of carriage between Ace and Hanjin.

B. The Relevant Claims in the *Delphi-Delco* Case

In general, Ace (NVOCC) wished to rely on COGSA's per package liability limitation.[66] Ace further submitted that its subcontractors, including the ocean carriers NYK, Hanjin, and the vessels on which the cargoes were ultimately shipped, were entitled to the same U.S. $500 package limitation pursuant to a "Himalaya Clause"[67] in the Ace bills of lading.[68]

The case raises many interesting claims and dilemmas; regretfully, I will confine myself to the discussion as per the court's reference to the electronic sea waybills. The status of the electronic sea waybill arises in this case under the fair opportunity doctrine. Under this doctrine, "the COGSA limit is inapplicable if the shipper does not have a fair opportunity to declare higher value and pay an excess charge for additional protection."[69]

Interestingly enough, the service contract between Hanjin and Ace incorporated by reference the standard terms on Hanjin's bill of lading and sea waybills, which applied COGSA limitations and fulfilled the demands of the fair

---

64 *Delphi-Delco*, 324 F. Supp. 2d at 406.

65 *Id.* at 406–07.

66 46 U.S.C.A. § 1304(5) (1936).

67 The "Himalaya Clause" is the common name for the exculpatory clauses found in most bills of lading that attempt to extend the protective clauses of the Hague Rules or the Hague Visby Rules to third parties, such as agents, servants, warehousemen, or stevedores, who are not directly protected by the language of these two Conventions. Daniel E. Murry, *The Entension of Damage and Time Limitations of the Hague, Warsaw, and Lausanne Conventions to Agents and Independent Contractors of Ship Lines and Air Lines*, 25 TRANSP. L.J. 1, 3 (1997).

68 *Delphi-Delco*, 324 F. Supp. 2d at 408–09.

69 *Id.* at 423; *see also* Nippon Fire & Marine Ins. Co. v. M.V. Tourcoing, 167 F.3d 99 (2d Cir. 1999).

opportunity doctrine.[70] To the contrary, the electronic sea waybills issued by Hanjin did not directly refer to COGSA, and one can argue, as Delphi did, that it failed to provide a fair opportunity to the shipper (Ace in this case) to declare a higher value for the cargo and avoid the package limitation.[71]

C. The Relevant Discussion

As opposed to the *Sea-Land* case, where the court did not discuss the status of the electronic express sea waybill of lading overtly, here the court straightforwardly declares: "At Ace's request, Hanjin issued electronic sea waybills. A relatively new phenomena in ocean shipping, the Sea way-bill, unlike a traditional bill of lading, *is not a document of title; it functions merely as a non-negotiable receipt that may also serve as the contract of carriage*."[72]

The court cited Professor Thomas J. Schoenbaum's opinion on sea waybills, according to which:

> The requirements of intermodal carriage, shipment of goods in containers, and other technological advances have produced new types of shipping documents with different functions than traditional ocean bills of lading. An increasingly popular and useful alternative is to ship goods under a non-negotiable receipt known as a liner (sea) waybill. This is a contract for the shipment of goods (including loading and delivery by the carrier) by which the carrier undertakes to deliver the goods to the consignee named in the document. Accordingly, in contrast to the traditional bill of lading, the liner waybill is non-negotiable. The goods may be delivered to the consignee who identifies himself as such. The waybill is not a document of title, but merely conveys information. Since the physical document is no longer necessary to the transaction, the liner waybill may be transmitted electronically or telexed between the parties. As a non-negotiable bill of lading, the liner waybill is subject to the Pomerene Act and the Hague Act under American law. The Hague (or Hague/Visby) Rules are generally incorporated by a standard clause on the face of the waybill.[73]

The court continues to rely upon Professor Schoenbaum's opinion, stating:

---

[70] *Delphi-Delco*, 324 F. Supp. 2d at 422.

[71] *Id.* at 423.

[72] *Id.* at 424.

[73] *Id.* at 425 n.12 (quoting 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW §§ 10-11, at 63 (3d ed. 2001)).

> Often issued as a short form or blank back document, Sea waybills provide significant advantages to the shipper and the carrier in terms of efficiency and speed because, in contrast to bills of lading, the original waybill does not need to be physically transported to its destination in order for the consignee to claim the shipment.[74]

Then, the court applied it to the case at hand:

> Here, for example, when Ace booked shipments with Hanjin under the service contract, it faxed a description of goods and the details of the shipment to Hanjin. Hanjin, under standing instructions from Ace, then faxed the corresponding waybill back to Ace, rather than issuing traditional bills of lading that would have had to be physically transported to the shipment's destination.[75]

The court added another layer to its decision, giving more weight to the service contract, stating: "[T]he service contract, rather than the sea waybills, represented the contract of carriage between Ace and Hanjin."[76] Therefore, "where the parties' relationship is governed by a separate contract, that contract acts as the contract of carriage and bills of lading are 'mere receipts.'"[77] Accordingly, the court concluded that under these circumstances, the question for the court was whether the service contract gave Ace sufficient notice of the liability limitation to satisfy the fair opportunity doctrine and, more specifically, whether the court may consider the incorporated terms and conditions of Hanjin's bill of lading in making this determination.[78] The court stated that "[t]he answer to this question must be *yes*." [79]

I suggest that as in the *Sea-Land* case, where the knowledgeable shipper is supposed to be familiar with the shipping terms and conditions, here the court emphasizes the service contract, which incorporated "the terms of a standard form bill of lading that is on file with the Federal Maritime Commission and available both on the internet and at the offices of the carrier and its agent."[80] Hence, the "terms and conditions incorporated in the contract of carriage may satisfy the fair opportunity doctrine."[81]

---

[74] *Id.* at 425 (citing SCHOENBAUM, *supra* note 73, §§ 10–11, at 63 n.25).

[75] *Delphi-Delco*, 324 F. Supp. 2d at 425.

[76] *Id.*; *see also* Great White Fleet (US) Ltd. v. DSCV Transp., Inc., No. 00 Civ. 4073(JSM), 2000 WL 1480404, at *2 (S.D.N.Y. Oct. 5, 2000).

[77] *Delphi-Delco*, 324 F. Supp. 2d at 425 (citing Great White Fleet, *supra* note 76, at *2).

[78] *Id.*

[79] *Id.* (alteration in original).

[80] *Id.*

[81] *Id.* at 426.

Indeed, as a final point to this argument, the court referenced the *Sea-Land* case and cited it.[82] The court noted that it was the case "finding that where shipment was transported under electronic sea waybills, terms of non-electronic bills of lading controlled the parties' agreement."[83] The court in the *Delphi-Delco* case concluded that it would be illogical to apply a different rule where, as here, it was the shipper who requested a sea waybill, rather than the long form bill of lading, especially since this position was supported by case law:

> The primary purpose of issuing [an electronic waybill] is for the shipper's convenience, so that the consignee need not await receipt of a paper bill of lading before collecting its cargo at disembarkment. Because an [electronic waybill] is not meant to be issued in paper form, it would be illogical and unfair to penalize [the carrier] for not maintaining a contemporaneous printout of a document that in shipping practice is not intended to be viewed except on a computer screen . . . . Because [the shipper] specifically requested the [electronic waybill], it cannot now complain that it was not issued a paper printout of the same or that it had no notice of the bill of lading's terms and conditions.[84]

Therefore, the court determined:

> The terms and conditions of the bill of lading applicable to the cargoes shipped under the Ace/Hanjin service contract unquestionably meets the fair opportunity test. In order to view these terms, Ace merely had to visit Hanjin's web site, request a copy of long form bill from Hanjin's offices, or, indeed, change its standing request to ship the cargoes under sea waybills. In short, the application of COGSA's package limitation to the shipments in question is unambiguous and the route to the relevant terms and conditions in Hanjin's long-form bill of lading is clear and straight. Under the circumstances, it would be an absurd result to find that Ace lacked a fair opportunity to declare a higher value and pay a correspondingly higher transportation rate.[85]

As a side note, I will add that unfortunately for Hanjin, this elaborate discussion did not grant a motion in full due to unresolved agency issues.[86]

---

82 *See Delphi-Delco*, 324 F. Supp. 2d at 426.

83 *Id.* at 426.

84 *Id.* at 426 (citing Jockey Int'l, Inc. v. M/V "Leverkusen Express," 217 F. Supp. 2d 447, 454 (S.D.N.Y. 2002) (Haight, J.)).

85 *Id.* at 426–27.

86 *Id.* at 427.

To briefly conclude, one can argue that the 2004 *Delphi-Delco* case reinforces the rule set forth in the *Sea-Land* case, assuming the factual evidence supports the shipper's knowledge (as in the *Sea-Land* case), or even an available opportunity to achieve the knowledge (as in the *Delphi-Delco* case) that the electronic sea waybill can be reinforced by non-electronic bills of lading. However, this analysis can also be construed another way, claiming that the electronic sea waybill does not stand on its own and that it is merely a piece of paper specifying factual information about the transport of the shipment. In order to obligate the parties, a thorough bill of lading is needed to support the electronic sea waybill. Interestingly enough, a well-detailed review by Dr. Marek Dubovec, which examined the problems and possibilities of using electronic bills of lading as collateral, declares: "[N]onnegotiable transport documents, such as sea waybills, cannot entirely displace the negotiable bill of lading, and therefore, enactment of electronic bills of lading laws is desirable."[87]

Another case that might be considered relevant with an indirect reinforcement of the rule regarding a shipper's knowledge might be found in *CSX Transportation*.[88] Though citing the *Sea-Land* case with relevance to the affidavit, it also cites the case when noting an employment duty to be familiar with the waybills and bills of lading and when referring to the affiant's personal knowledge.

VI. CONCLUSION

I commenced this discussion with the intention of examining whether or not the rules set forth in the *Sea-Land* case regarding the electronic express sea waybill of lading were reinforced, evolved, or remained unchanged. It turns out from the examined case law that not many cases citing the *Sea-Land* case revolve around the electronic express sea waybill of lading. In fact, it seems that a comparison between the *Sea-Land* case and the *Delphi-Delco* case exhausts the analysis. One might hope to attribute to the fact that the practice of shippers, freight forwarders, ocean carriers, and consignees in using the electronic express sea waybill of lading operates and functions on its own, and thus does not need a court's ratification in everyday life. The fact that the electronic express sea waybill of lading in the *Sea-Land* case and the *Delphi-Delco* case was used by different entities and on different levels (freight forwarder-shipper in the *Sea-Land* case, ocean carrier-NVOCC or consignee in the *Delphi-Delco* case) might encourage such an assumption. Furthermore, one can also maintain that this practice of involved parties solving problems on their own (or without a third party) is reasonable and efficient, and if this is indeed the case, it can be considered a best practice chosen by the freight industry.

---

[87] Marek Dubovec, *The Problems and Possibilities for Using Electronic Bills of Lading as Collateral*, 23 ARIZ. J. INT'L & COMP. L. 437, 437 (2006).

[88] CSX Transp. Co. v. Novolog Bucks Cnty., Civil Action No. 04-4018, 2008 WL 4613862 (E.D.Pa. Oct. 16, 2008).

I shall further argue that as far as recognition of the electronic express sea waybill is concerned, as was set in the *Sea-Land* case, the *Delphi-Delco* case reinforces that. In other words, the electronic express sea waybill was recognized as an established document as part of the set of documents that accompanies a sea voyage. On the other hand, as already mentioned, both court rulings were based on evidence of the "acting" person's knowledge. In the *Sea-Land* case, it was the knowledgeable shipper; in the *Delphi-Delco* case, it was the shipper's opportunity to obtain the knowledge and the service contract. Ultimately, the court narrowed the electronic express sea waybill's force, perhaps unconsciously labeling it as an "aiding" tool in comparison to its well-established "big brother," the bill of lading. I might suggest that just as the electronic express sea waybill of lading can be considered relatively new phenomena, it is easier for the court to assimilate it with knowledge as a crutch and refer to other documents, such as the bill of lading or the service contract, when determining its validity. Whether this will strengthen its status or weaken it remains to be seen. However, as I have already suggested, it might be considered as weakening the force of the electronic express sea waybill of lading since the court does not believe it applies by its own force. This is unlike the e-AWB mentioned prior, which is gaining momentum as a replacement to the traditional air waybill.

I might offer another angle to construe the court's hesitation to affirmatively confirm the independent status of the electronic express sea waybill. In Professor Kozolchyk's exhaustive and profound article, *Evolution and Present State of the Ocean Bill of Lading from a Banking Law Perspective*, one of the conclusions is: "[T]he terms and conditions inserted in this layout will also need to be uniform for each type of bill or related electronic message."[89] Such uniformity was achieved recently in the e-AWB regarding air cargo shipments, as announced by IATA and FIATA.[90] This uniformity will eventually enable and ensure the e-AWB's independent status. This is a reasonable best practice as per the air leg.

As was stated in the joint statement by IATA's Global Head of Cargo: "The approval of the multilateral e-AWB agreement is the most important new cargo standard developed in the last two decades. It gives us critical momentum to achieving the e-freight vision of a paperless cargo system."[91] As mentioned above, fundamentally different from its "cousin," the e-Air Way Bill, which does not serve as a document of title, the electronic express sea waybill evidently still lacks such uniformity. This might be another factor that resulted in the court's cautioned approach to the electronic express sea waybill, i.e., the court could not approve it as a separate independent document since no uniformity exists for this type of waybill.

---

[89] Boris Kozolchyk, *Evolution and Present State of the Ocean Bill of Lading from a Banking Law Perspective*, 23 J. MAR. L. & COM. 161, 244 (1992).

[90] *See* IATA-FIATA Joint Statement on Multilateral e-AWB Agreement, *supra* note 21.

[91] *See id.*

The applicability of COGSA seems to be the trigger that encourages the consideration of the electronic express sea waybill of lading. The court in the *Sea-Land* case seems to set a precedent, though a narrowed one, that when circumstances allow, such as when there is a knowledgeable shipper and where shipment was transported under electronic sea waybills, terms of non-electronic bills of lading control the parties' agreement.

It seems that although eleven years have passed since the *Sea-Land* case, there are no answers to the questions that were left unanswered in the *Sea-Land* case: whether the terms of a traditional bill of lading control all shipments sent via electronic express sea waybills and whether COGSA applies to electronic shipping documents. The *Delphi-Delco* case partially answers the second question when it applied COGSA in the case, but it also relied upon the service agreement and did not determine conclusively that COGSA automatically applies to the electronic express sea waybill. I might hope that my humble attempt to direct the spotlight on the electronic express sea waybill, and the relatively new practice of using it in the sea leg, will encourage the court to clarify the matter when the opportunity presents itself. Finally, hopefully, my fully developed research study, in which I shall try to offer some guidelines and rules regarding liability issues to freight forwarders that can be enforced globally, will also contribute to uniformity in the freight forwarding industry.