The Canadian International Freight Forwarders Association (“CIFFA”) strongly opposes the U.S. Senate Sub-Committee draft bill dated September 24th, known as Carriage of Goods by Sea Act, 1999, (“COGSA ‘99”) on the grounds that it is a unilateral regime made without consultation with international governmental organizations and without due consideration for international comity over such matters. Specifically, CIFFA objects to the proposed legislation for the following reasons:

1. COGSA ’99 conflicts with maritime laws of other nations in that it proposes jurisdiction over the movement of goods both outward from and inward to the United States. It should restrict itself to outward movement (from the U.S.) only, as in all other nations’ maritime laws.

2. COGSA ’99 imposes the Hague-Visby maximum liability limits of the greater of 2 SDR (US$2.78 as of Oct. 12/99) per kilo or 666.67 SDR (US$927) per package for loss or damage to cargo during inland movements in the U.S. as well as non-U.S. territory, notwithstanding the maximum liability limits established or adopted by those countries governing such inland movements. U.S. COGSA ’99 should either restrict its scope to that of Hague-Visby, namely tackle-to-tackle, or otherwise provide for inland liability limits that are in conformity with applicable limitations under the respective countries’ existing laws or conventions or otherwise allow such inland liability limitations to be privately agreed upon between the parties of a contract of carriage, as in under current U.S. law.

3. COGSA ’99 provides for suits to be filed arbitrarily in the U.S. notwithstanding any privately agreed upon “forum for arbitration” clause in a contract of carriage. CIFFA believes the forum for arbitration is a private matter to be agreed upon between the parties to the contract, prior to the issuance of the contract of carriage. No government should dictate that suits and arbitration be taken only on its territory, regardless of any provision that the forum could be changed by mutual consent after a claim or suit arises.

4. COGSA ’99 categorizes ‘performing carriers’, who are not parties to a contract of carriage, as ‘carriers’ under the contract of carriage, thereby subjecting sub-contracted third parties outside the United States involuntarily and extra-territorially to U.S. law.

The maximum liability limitations for inland loss and damage under various conventions are as follows:
The category ‘performing carriers’ is redundant and should be deleted as ‘actual carrier’ and ‘contracting carrier’ are sufficient for purposes of claims, particularly since non-vessel-operating ‘contracting carriers’ doing business in the United States are obligated to post security bonds with the U.S. FMC under the Shipping Act (OSRA).

5. COGSA ‘99 exempts ocean carriers from the law, which is contrary to public order. It allows ‘carriers’ to negotiate lower liability limits with shippers, including no liability, through private service contracts under the U.S. Shipping Act. However, ‘contracting carriers’ and ‘performing carriers’, such as NVOCCs and foreign freight forwarders resident in the U.S., although defined as ‘carriers’ under COGSA, are not entitled to enter into such “no-liability” service contracts with shippers under OSRA. CIFFA believes Section 7 (j) and Section 9 (h)(3)(C) are discriminatory and may be in violation of the great principles of the U.S. Constitution and in particular, the IXth and XIVth Amendments.

Accordingly, the Canadian International Freight Forwarders Association calls upon the International Federation of Freight Forwarders Associations (“FIATA”) to retract any endorsement or quasi-endorsement it gave to the U.S. Senate Sub-Committee on COGSA ’99. CIFFA furthermore calls upon FIATA to use all means at its disposal to vigorously protest the proposed unilateral law with the appropriate governmental and non-governmental organizations. CIFFA also calls upon all other national freight forwarders associations to request their governments to formally protest the legislation of COGSA ’99 in its present form with the U.S. embassies in their respective countries, as it is a unilateral and extra-territorial law. If passed into law by the U.S. Congress, the new COGSA will seriously affect freight forwarders, consolidators, terminals, packers and warehouses around the world by greatly increasing their liability exposure and subjecting them and their agents to lawsuits in the United States.

Canadian International Freight Forwarders Association
On behalf of the Board of Directors,
H.J. (George) Kuhn
Executive Director

Attachment
The Canadian International Freight Forwarders Association
(“CIFFA”)

SEAFREIGHT COMMITTEE REPORT ON U.S. COGSA ‘99
An Analysis of How the Proposed New Law Would Affect Freight Forwarders
and NVOCCs Around the World

Further to the committee’s preliminary report on COGSA ’99 submitted to the NBD on September 18th, the writer contacted Professor William Tetley for permission to reproduce the Senate Staff Working Draft of COGSA ‘99 from his website, which is the only copy to be found on the Internet. Professor Tetley not only graciously gave permission to use everything on his website, but also requested an urgent meeting with the writer. Accordingly, on September 23rd, immediately after our NBD meeting in Montreal, the writer, together with Chris Gillespie, Incoming President of FIATA, visited with Prof. Tetley who offered us a number of articles he wrote in various legal journals to help us gain an insight into the proposed draft of the new U.S. Carriage of Goods by Sea Act. Prof. Tetley is a maritime law professor at McGill University in Montreal. He is a world-renowned expert on maritime law, author of Marine Cargo Claims, among other books, and Past President of the Canadian Maritime Law Association and former Vice-president of the Comité Maritime International. As an honorary member of the U.S. Maritime Law Association, he has attended some of the working sessions of the COGSA committee and he was aware of the negotiations between FIATA and the Senate Subcommittee in the drafting of COGSA ‘99. He gave us advice that FIATA should not make any deals with the U.S. MLA whom he said was seeking support from interested parties that will be affected by the new law in order to get it passed through Congress. His commentary dated September 30th on the just released September 24th version of COGSA’99 is also on his website.

To facilitate reading of the latest (6th) version of the proposed COGSA’99, the writer has eliminated sub-paragraphs, titles and enumeration. The sequence of the clauses has also been modified for the purpose of this paper. This report is an analysis of how the proposed changes to the U.S. sea carriage law impacts freight forwarders and NVOCC’s around the world. N.B.: The writer has no legal training except for once having taken Prof. Tetley’s maritime law course some years ago. His remarks are based on his limited knowledge of the law and on his personal experience in handling cargo claims and lawsuits arising out of them as an NVOCC. The sections of the proposed COGSA ‘99 being commented upon are in typed in bold.

1 Go to Professor Tetley’s website: http://www.admiraltylaw.com/frames.htm for a full text of the Senate Staff Working Draft of U.S. COGSA ’99 and for his analysis and commentary.
Selected Clause by Clause Analysis

The term "carrier" means a contracting carrier, a performing carrier, or an ocean carrier. The term "contracting carrier" means the party who enters into a contract of carriage with a shipper of goods.

The term "performing carrier" means a person that performs, undertakes to perform, or procures to be performed any of a contracting carrier's responsibilities under a contract of carriage; but only to the extent that the person acts, either directly or indirectly, at the request of, or under the supervision or control of a contracting carrier, regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage.

EXCLUSION - Notwithstanding subparagraph (A) [PERFORMING CARRIER Definition], the term "performing carrier" does not include any person (other than the contracting carrier) that is retained by the shipper or consignee, or is an employee, servant, agent, contractor, or subcontractor of a person retained by the shipper or consignee.

The term "ocean carrier" means a performing carrier that owns, operates, or charters a ship used in the carriage of goods by sea.

The term "carriage of goods" covers the period from the time goods are received by a carrier to the time they are delivered by a carrier to a person authorized to receive them.

The above new definition of “carrier” introduces a category called “performing carrier”, which does not exist under current U.S. law nor in any of the existing international maritime conventions (Hague, Hague-Visby, Hamburg Rules), which form the basis of all other nations’ carriage of goods by sea laws. There is also a unique exclusion clause which exempts the party who is “retained” by the shipper or consignee (i.e.: their freight forwarding agent) from being deemed “performing carrier”. It stretches one’s imagination how someone who merely arranges a third-party contract of carriage as an agent (booking the shipment with a carrier) could be deemed “performing carrier” in the first place. The definition of “carriage of goods” inherently excludes an agent whose only role is to make a booking with a carrier and to arrange for local delivery from the shipper’s premises to the contracting carrier’s premises, prior to the commencement of the contract of carriage. In fact, by submitting bill of lading instructions to the contracting carrier, the freight forwarder clearly acts as agent of the shipper and therefore cannot possibly be deemed to be performing or “procuring to be performed” any of the contracting carrier’s responsibilities under the contract of carriage. In the writer’s opinion, the exclusion clause is irrelevant, redundant and meaningless.

In any event, “person that is retained” would seem to call for some form of legal mandate such as a letter of appointment or a Power of Attorney. In practice, freight forwarders are rarely “retained” by a shipper or consignee in any formal sense. They are rather contracted on an ad hoc basis, sometimes job by job, depending on their price quotation. Under most countries’ regimes, except the United States, whether a freight forwarder was as an agent or a carrier is determined by way he dealt with the shipper. Even in the case where he is retained as an agent of the shipper, according to this

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3 The draft does not define “consignee”, which poses a problem in cases of “to order” bills of lading.
definition, the moment he issues a house B/L, he automatically becomes a “contracting carrier”, thereby excluding him from the exclusion clause. Yet there have been court decisions where a forwarding agent that did issue a bill of lading was deemed to have been acting as an agent.  Although in the United States, the role of a shipper’s forwarding agent is governed by law to be strictly that of an agent, in other countries, such roles are at times unclear and are subjects of court decisions. Under the proposed law, the existence of a contract of carriage would override any pre-existing forwarding agent retainer agreement.

“Performing carrier” means anyone who had anything to do with the handling or movement of goods under a contract of carriage, i.e.: NVOCC B/L, House B/L or FBL. This includes the contracting carrier and ocean carrier’s sub-contracted warehouse trucker, railway, container yard and stevedore at both port of loading and port of discharge; the co-loader or consolidator, if any, and their sub-contracted warehouses and truckers at both port of loading and port of discharge; as well as the contracting carrier’s overseas agents and the co-loader or consolidator’s overseas agents. The number of parties that would fall under the category of “performing carriers” could well be between ten and twenty, each of whom would be responsible and liable as “carrier” under COGSA ’99 and consequently, co-defendant in a suit.

This Act does not apply to a claim against an interstate or foreign motor carrier, or a rail carrier, that is not a contracting carrier to the extent that the claim relates only to motor carrier services or rail carrier services, respectively. This subsection does not prohibit any extension of rights to a motor or rail carrier by a contract of carriage nor does it adversely affect, or void, any rights so extended.

Amazingly, this latest draft exempts foreign motor carriers (truckers) and railways as well as U.S. interstate truckers and railways. The previous draft exempted only U.S. domestic interstate truckers and railways. Not surprisingly, Transport Canada had pointed out in their memorandum dated May 4th to the Senate Sub-committee that if U.S. interstate truckers and railways were to be excluded, so should Canadian truckers and railways, per Chapter 12 of NAFTA (North America Free Trade Agreement). It would seem that the drafters decided to exempt all long haul truckers, foreign and domestic, and all railways from COGSA ’99 in order to exempt U.S. domestic truckers and railways as “performing carriers”. The exemption effectively nullifies an entire class of actual “performing” carriers, bringing the liabilities of these inland carriers under the responsibility of the “contracting carrier”. In other words, truckers and railways will not be sued under COGSA ‘99, but the contracting carrier other performing carriers will be. This non-applicability to truckers and railways, who are integral players in the multimodal transport chain, basically reverts the proposed COGSA ’99 to the liability scope of the Hamburg Rules, but unfortunately, not for the rest of the “performing carriers”.

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5 Ibid. p.695
This Act applies to any contract of carriage covering transportation to or from the United States.

This clause is in direct conflict with other nations’ maritime laws and is a recipe for trouble. What it means is that American law applies to any cargo that touches its soil, regardless of the exporting country’s maritime laws and regardless of whether the goods were merely transshipped at a U.S. port to a third country, such as Canadian traffic via U.S. ports or Europe-South America traffic transshipped at a U.S. port. Again, not surprisingly, Transport Canada raised its objection to this clause, but so far, to no avail. The earlier draft even stipulated a mandatory arbitration in the U.S. regardless of foreign jurisdiction. This version had been modified by the following clause, which allows for an alternate jurisdiction, but not without a hurdle and potential legal quagmire:

Nothing in this subsection precludes the parties to a dispute involving a claim under a contract of carriage or other agreement to which this subsection applies from agreeing to resolve the dispute by litigation or arbitration in a foreign forum if that agreement is executed after the claim arises.

The paragraph above allows the forum for litigation to be switched to another country once litigation has started in the United States. In other words, notwithstanding any jurisdiction clause stipulated on a bill of lading, suit can be filed in the U.S., but can be changed to another country if both parties agree. It should more aptly be worded, “if the plaintiff agrees”, because if he doesn’t, the designated forum would still be the plaintiff’s court of choice in the U.S. This is another meaningless concession pretending to accommodate those who object to a unilaterally imposed U.S. jurisdiction. At best, this provision would trigger a lawsuit to change the forum of the original lawsuit. The forum for arbitration should be a matter between contracting carrier and shipper to be formalized when the shipper submits bill of lading instructions to the carrier. There is no justification for such a private term to be overridden unilaterally by one country’s laws.

Notwithstanding a provision in a contract of carriage or other agreement to which this subsection applies that specifies a foreign forum for litigation or arbitration of a dispute to which this Act applies, a party to the contract or agreement, at its option, may commence such litigation or arbitration in any appropriate forum in the United States if one or more of the following conditions exists: (A) The port of loading or the port of discharge is, or was intended to be, in the United States. (B) The place where the goods are received by a carrier or the place where the goods are delivered to a person authorized to receive them is, or was intended to be, in the United States.

The clause subjects not only consignments made to or from the U.S., but also any shipment that merely passed through a U.S. port to U.S. law and U.S. arbitration. Since Canada’s COGWA (Carriage of Goods by Water Act) covers only outbound shipments from Canadian ports, it does not apply to shipments loaded at U.S. ports. Therefore U.S. COGSA ’99 would become very much the law for Canadians for both imports as well as exports, even if the forum for arbitration were switched to Canada. Canadian judges would have no choice but to apply COGSA ‘99 on any outbound Canadian shipment loaded at a U.S. port and for inbound shipments, there would be a conflict of laws, as Canada could either apply the law of the exporting nation, or COGSA ‘99. The difference is that sub-contractors can be named in a suit filed in Canada under COGSA
‘99 but not under the laws of a Hague-Visby nation. Likewise, shipments destined to the United States but discharged at a Canadian port (e.g. Montreal) would also be subject to the new U.S. law as well as the laws of the exporting country. Cargo interests (insurance companies) would naturally seek the forum most beneficial to them and most inconvenient for the defendant in order to induce a maximum out of court settlement from as many parties as possible, which of course, would mean the U.S. law in a U.S. forum.

A carrier is subject to the responsibilities and liabilities under this Act, and entitled to the rights and immunities provided by this Act, for receiving, loading, handling, stowage, carriage, custody, care, discharge, and delivery of goods under a contract of carriage.

A contracting carrier is subject to those responsibilities and liabilities, and entitled to those rights and immunities, for the entire period covered by its contract of carriage.

The most significant difference between the present COGSA and the proposed COGSA ’99 is the carrier’s period of responsibility. Presently, COGSA is based on the Hague Rules, which is tackle-to-tackle (loss and damage at sea only) and the maximum liability is US$500 per package, with no provision for loss or damage on land. The proposed new law covers the entire period from the place of receipt (shipper’s door or contracting carrier’s warehouse) to the place of delivery (agent’s warehouse or consignee’s door) according to the contract of carriage and it adopts the Hague-Visby maximum liabilities for the entire multimodal carriage. The Hague-Visby liability limitation of 2 SDR per kilo or 666.67 SDR per package whichever is higher, would apply to loss and damage, not only at sea, but also to any inland point in any country as well. Presently such liability limitations for inland loss and damage under most contracts of carriage are according to the limitations set by the laws of the respective countries. In Canada, for example, the carrier’s liability limitation for loss or damage during motor carriage under the National Transportation Act is C$4.41 per kilo of the goods lost or damaged. In Europe, the maximum liability under the CMR Convention is 8.33 SDR per kilo. The United Nations Convention on the Liability of Operators of Transport Terminals in International Trade of 1994 sets a liability limitation of 2.75 SDR per kilo, without any per package provisions.

Under the proposed COGSA ’99 the liability exposure of contracting carriers is greatly increased. For example, if a package weighs 10 kilos, the carrier’s liability is increased 33.3 fold, from US$27.80 to US$927 for loss or damage on the road or at his warehouse. If the package weighs 1 kilo, his liability is increased 333 fold. Basically, the carrier’s liability for loss and damage on land is increased for any package that weighs less than 333 kilos. This would generally encompass goods most susceptible to pilferage during overland transport and warehousing, such as, apparels, computers, electronics, auto parts and other light density high value commodities. Claims paid by the contracting carrier would not be fully recoverable from the actual carrier as national laws and convention limit motor carriers’ liabilities to a level much lower than that contemplated under COGSA ’99. At a per package limitation of US$927, all the shipper has to do is not pack more than that value into one carton and theoretically, he would not need any marine insurance. COGSA ’99 effectively shifts the burden of insurance costs from cargo to carriers. The increase in the contracting carrier’s maximum liability
exposure for inland losses with the per package liability limitation in COGSA '99 is open ended. Whereas, with a 2 SDR per kilo limitation, the maximum payload of the container physically limits the maximum exposure to 18 tons per 20ft. container and 25 tons per 40ft. container, or 36,000 SDR and 50,000 SDR respectively, under a per package limitation, it is restricted only by the number of packages as enumerated in the contract of carriage. If a B/L reads 1,000 pkgs., the potential maximum liability is 666,670 SDR, already beyond the limit of a typical liability policy. In theory, if it happens to read 10,000 pkgs. of computer boards each worth US$1,000, the carrier’s liability is 6.6667 million SDR (US$9.27 million at today’s exchange rate).

A performing carrier is subject to those responsibilities and liabilities, and entitled to those rights and immunities (1) during the period between the time it receives the goods, or takes them in charge, and the time it relinquishes control of the goods under the contract of carriage; and (2) at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage.

Unlike civil cases, in suits filed against carriers there is no onus on the part of the claimant to prove who among the numerous parties who handled the shipment was liable. It is sufficient only to show that there was loss or damage sustained and ordinarily, only the contracting carrier (issuer of the bill of lading) and the shipowner are named as the defendants. As compensation for the presumption, carriers are entitled to maximum liability limitations and non-liability exclusions as set out in the various conventions. Since the presumption of fault is on the carrier, the onus is upon him to prove non-liability. Under COGSA ‘99, all performing carriers, whether or not they are conscious of their role in a contract of carriage, can be named in a suit and it would be the onus of each of those named to prove his non-liability over his particular involvement in the carriage. Where there is sufficient evidence of gross negligence or breach of contract, the performing carrier would not be able to rely upon the liability limitations and could be ordered to pay the full amount of the claim, which may not necessarily be limited to the actual value of the goods. The clause reads:

Neither a carrier nor a ship is liable for more than the amount of loss or damage sustained.

It is even possible that economic and consequential losses, if proven to be a direct result of the negligence, could be awarded to the claimant. However, it should be stated that no claim for economic and consequential losses pursuant to cargo loss or damage has yet been awarded under the current COGSA.6

Any provision in a contract of carriage relieving a carrier or ship from liability for loss of, for damage to, or in connection with goods from negligence, fault, or failure in the duties and obligations under this Act, or reducing such liability otherwise than as provided in this Act, is unenforceable as contrary to public policy.

Neither subsection (h) nor (i) [i.e.: the clause above and the FOREIGN FORUM PROVISION Clause] of this section applies to a provision of a service contract to the extent that the provision affects only the rights and liabilities of the parties who entered into the service contract.

6 Ibid. p.334
Notwithstanding paragraph (1) [LIABILITY LIMITATION Clause] the parties to a service contract may agree to a greater or lesser amount as the maximum liability of those parties for such loss or damage.

Incredibly, the clause above essentially exempts carriers from COGSA itself! In spite of the prohibition of private acts contrary to public policy, this clause allows a carrier and a shipper to negotiate away the law as part of the “confidential” terms of a service contract under the Ocean Shipping Reform Act (“OSRA”). The shipper could agree that he will not hold the carrier liable for loss or damage in spite of the per-kilo and per-package limitation set by the law. (Fraud, breach and gross negligence are excepted, of course.) Since OSRA permits neither U.S. nor foreign freight forwarders and NVOCC’s resident in the U.S. to enter into service contracts with shippers, this clause is fundamentally discriminatory to them. These parties will be deemed responsible and liable as “carriers”, yet they are not entitled the same privileges granted other carriers, namely ocean carriers, who are permitted to negotiate non-liability with shippers under OSRA and be immune from suits under COGSA ‘99. CIFFA believes this clause may be in violation of the 9th and 14th Amendment (the Equal Protection Clause) of the U.S. Constitution.7

Under COGSA, an NVOCC is responsible and liable to the shipper for any loss or damage during the entire period of carriage, yet by virtue of his service contract with his ocean carrier, he may not have back-to-back recourse against the ocean carrier to recover any claims paid. Needless to say, such non-recoverability would greatly increase his liability insurance premium.

Neither a carrier nor a ship is liable for damage or loss from a deviation to save or attempt to save life or property at sea; or any reasonable deviation. A deviation for the purpose of loading or unloading cargo or passengers is, prima facie, not a reasonable deviation. An unreasonable deviation constitutes a breach of a carrier's obligations under this Act, and the remedies for such a breach shall be determined exclusively under this Act.

Paragraph (1) [LIABILITY LIMITATION] does not apply if it is proved that the loss or damage resulted from an act or omission of the carrier, within the privity or knowledge of the carrier, done with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result; or an unreasonable deviation if the carrier knew, or should have known, that the deviation would result in such loss or damage.

7 Amendment IX - Construction of Constitution.
The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment XIV - Citizenship rights.
1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
Previously, COGSA applied tackle-to-tackle, per the Hague Rules. Now that it is being proposed to extend to multimodal (inland) transport, and “carrier” being “contracting” or “performing” besides being “ocean”, the deviation clause has a new dimension to it. It no longer applies only to ships but to motor carriage as well even though the clause allows deviation only at sea to save property and lives to be reasonable. (Would deviation on the roadways to save lives or property be considered reasonable?) If a trucker hired by the contracting carrier deviates from the stated route on account of providing a ride to a passenger and he encounters an unfortunate mishap or simply misses the vessel, he will technically have committed an unreasonable deviation and a fundamental breach of contract. The result is the contracting carrier could no longer rely upon the liability limitation. It would seem that the drafters might not have taken into account what may or may not constitute unreasonable deviation in inland carriage.

Another point to consider is the relevance of the clause where there is a deviation from an intended port of loading or port of discharge given that the scope of the new COGSA is “from the time goods are received by a carrier to the time they are delivered by a carrier...” Since COGSA will no longer be strictly a tackle-to-tackle or a port-to-port regime as in Hague-Visby, deviation from the stated seaport should no longer constitute fundamental breach as it has no relevance to the place of receipt and place of delivery, which forms the crux of contract of carriage.

CONCLUSION

Lawmaking is not dealmaking. It is the duty of lawmakers to consider public order, the general good, tradition, international comity, and above all, fairness when enacting new laws or amending an existing one. The approach taken by the Senate Sub-Committee on the new COGSA seems more like that of a union bargaining session than lawmaking. They started out completely one-sided and then set out to make deals with various affected parties. As a result, the latest version of COGSA does not apply to truckers, railways or ocean carriers under service contracts. So who are left for COGSA to apply? NVOCC’s, foreign freight forwarders, consolidators and their agents, terminal operators, warehouses and packers. It is also unfortunate that FIATA objected only to the “performing carrier” definition and settled for a meaningless exclusion clause for freight forwarders retained by shippers as agent, while not raising any objection to the more serious issue of liability limitations for inland loss and damage. Numerous parties who are not parties to a contract of carriage will be consigned to face lawsuits in the United States, should the proposed Bill pass Congress. Many of these parties have security bonds on file with the U.S. FMC. Therefore judgments will be easy to collect. While most Canadian forwarders (except for the multi-nationals) have no bonds on file with the FMC, U.S. court judgments are easily served on Canadian companies, even if the liability was the responsibility of the foreign issuer of the bill of lading.

Most marine cargo claims do not go to court due to the low liability limitations for loss and damage on land and the difficulty in proving that a loss occurred at sea, where the limit is higher. However, under COGSA ’99, it will make no difference where the loss occurred as the contracting carrier would have the same liability level throughout
and it will be up to each “performing carrier” to prove his particular non-liability. If any of them ignores the writ, judgment is automatic by default and the effort of going through a court process for even a small claim would be worth a lawyer’s while as the FMC would already be holding the defendant’s funds in many cases. Unfortunately for the performing carriers, such amounts are usually below their liability insurance deductibles but can well add up to a large amount over the course of a year. COGSA ’99 will increase their liability insurance costs as most insurers provide legal defense services as part of the premium. Even on that score, the new COGSA represents a boon to American and Canadian maritime law practice for both sides: plaintiff and defendant.

It is ironic that a carriage of goods by sea law would exempt actual carriers but not “contracting carriers” and “performing carriers” who are not physically carrying anything but would be liable for everything. In the Senate debates on OSRA in April of 1998, Senator Breaux of Louisiana argued:

“The non-vessel-operating common carriers, the so-called NVOCCs, are not actually in the business of carrying cargo at all…it is very, very clear that they are not a carrier, they don't own ships, they don't have the expense of having an entire shipping company at their disposal in building ships and operating ships and everything else… It is simply unfair to say to people who have no responsibility for owning ships or the expense of running ships that they are going to allow them to have the same advantages as a shipping company does.”

Now, under COGSA ’99, they will not only be denied “advantages” given to ocean carriers, all their agents and sub-contractors will be also burdened with disadvantages and increased liabilities. COGSA ’99 is a unilateral and extra-territorial law that will be detrimental to the freight forwarding industry, terminal operators and warehouses throughout the world if it passes the U.S. Congress.

The writer wishes to thank Prof. Tetley for making an ‘advance’ copy of COGSA ’99 publicly available, as otherwise, this report would not have been possible.

Respectfully Submitted,

Tony Young,
Chairman, Seafreight Committee

Toronto, October 19, 1999