

## Legal Implications of "The Container Revolution" in International Carriage of Goods\*

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«*Omnis Nova Constitutio Futuris Temporibus  
Formam Imponere Debet*»

No technological advance since the steamboat has had such a resounding impact upon the patterns and movement of international trade as has the modern land-bridge concept brought about by "containerisation". During the past several years, international trade publications, particularly those dealing with shipping, forwarding and the handling of cargo have debated, discussed and analysed in depth the phenomenon most commonly referred to as "the container revolution".<sup>1</sup> Costly feasibility studies have been undertaken by governments and private enterprise with a view to determining the future of intermodal transportation systems based on containers.<sup>1a</sup>

No unanimity has as yet been reached as to the ultimate destiny of containerisation. Some experts are convinced the experiment will end in disaster and that the land-bridge concept will succeed only in disrupting well-established and proven methods of international

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\* See also: W.D. Angus, *Containers and the Law*, Seaports and The Transport World, January, 1968, p. 30; W. D. Angus, *Containeritis - The Law and Canada's Position*, Seaports and The Transport World, April, 1966, p. 30; Gerald H. Ullman, *The Ocean Freight Forwarder, The Exporter and The Law*, (Ithaca, 1967); Erling Selvig, *Unit Limitation of Carrier's Liability*, (London, 1960); Kaj Pineus, *Les Containers et les Transports Combinés*, 1967, *Droit Maritime International* 394.

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<sup>1</sup> For example: H. Kummerman, *To Survive - With or Without Containers*, Canadian Shipping and Marine Engineering News, January, 1968, p. 20; J. W. Gulick, *The Container Evolution*, Seaports and The Transport World, November, 1966, p. 38; *Australia - Enthusiasm for Containerisation*, Fairplay International Shipping Journal, July 4, 1968, p. 125; Harold Meyers, *The Maritime Industry's Expensive New Box*, Fortune, November, 1967, p. 150; J. Smit, *Containers*, International Cargo Handling Coordination Association (ICHCA) Journal, July, 1966.

<sup>1a</sup> An excellent general survey of the "container revolution" is contained in a supplement to the Sept. 14, 1968 issue of *The Economist*, which is devoted entirely to the subject: *Moving Goods in the 1970's*.

transport of goods.<sup>2</sup> On the other hand, it appears that many experts consider that containers are here to stay and that the revolution will continue to work inexorably until the bulk of world trade moves in unitized loads over vast integrated transportation systems. Many operators are revolutionizing their organizations accordingly; several substantial container operating consortia have been formed in Europe and Australia, numerous specialized container-carrying vessels have been designed and launched, and major seaports around the globe are investing millions to develop container-handling facilities and terminals.

Thus, no matter what the future brings, containerisation is at least for the present an established factor in the movement of international trade. Necessary adjustments are now being made in many areas to enable all facets of the carriage of goods industry to adapt to the container age. Apart from the new developments in ocean vessels and port facilities mentioned above, effects of containerisation have been felt in a variety of related fields. Not the least of these are the over-lapping spheres of maritime law and marine insurance; as might be expected, intermodal transport has given rise to complex legal and insurance problems which cannot easily be resolved within the long-accepted frameworks provided by the *Hague Rules*<sup>3</sup> and Britain's *Marine Insurance Act, 1906*.<sup>4</sup>

The purpose of this article is to review some of the marine law and insurance problems that have been born of the container revolution and to discuss how the maritime industry has attempted to cope with them. Let there be no mistaken impression, therefore, that this is an attempt to analyse all aspects of containerisation or that the author claims any expertise whatsoever as to the technical, commercial or underwriting aspects of integrated transportation systems or international combined transport.

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<sup>2</sup> See: Captain M. Markussen, *Containerisation - Colonisation in a New Way?* Fairplay International Shipping Journal, August 8, 1968, p. 41; Dagfinn Gunnarshaug, *Is Containeritis a Sickness?*, Fairplay International Shipping Journal, February 8, 1968, p. 13; Erik Heirung, *Containerisation: The Key to Waste of Money*, Fairplay International Shipping Journal, October 5, 1967, p. 43.

<sup>3</sup> *International Convention for the Unification of Certain Rules of Law Relating To Bills of Lading*, signed at Brussels, August 25, 1924 and amended at Brussels, February 23, 1968 (hereinafter referred to as the *Hague Rules*), adopted by Canada through the *Water Carriage of Goods Act*, 1 Ed. VIII, S.C. 1936, c. 49, now R.S.C. 1952, c. 291.

<sup>4</sup> 6 Ed. VII, c. 41. See also: *Chalmer's Marine Insurance Act, 1906*, 6th ed., (London, 1966); Lord Chorley of Kendal and C. T. Bailhache, *The Law of Marine Insurance and Average*, British Shipping Laws, vols. 9 and 10, (London, 1961).

### Benefits of Land-Bridge Concept

At the outset, one might ask what is so revolutionary about the use of containers, which after all are nothing more than large boxes into which are packed various commodities for shipment. To answer this, it is necessary briefly to illustrate how goods traditionally have moved in international trade. A typical example would be the movement of a shipment of 100,000 cigarette lighters from Tokyo, Japan, to say, Pittsburgh, U.S.A. Traditionally, the lighters would be packed into numerous cardboard or wooden cases and delivered to the dock in Tokyo. The cases would then be placed one by one on board a ship for carriage to an east-coast United States port such as New York, pursuant to the terms of an ocean bill of lading incorporating *Hague Rules* legislation. When the ultimate consignee received notice of arrival of the goods at New York, he would then arrange through a customs broker and a freight forwarder for their transshipment to Pittsburgh by rail and thence by truck from the rail terminal to his warehouse. This movement would involve a minimum of three stages of transport (sea, rail, road) plus considerable other handlings if one considers stevedores, terminal operators and freight handlers at the various points along the route.

If the cigarette lighters were damaged or short at outturn, the receiver would have to determine where, when and how the loss occurred before he could commence recovery proceedings. He would then have to proceed against one or more of the carriers involved and the rules governing each individual recourse might well be different. This has always proved complex and costly.

In the container age, operators are offering to shippers a door to door service whereby they are prepared to accept custody of the goods from point of origin until delivery at final destination. At present, the liabilities accepted by container operators are not in all cases uniform and the implications of this will be discussed below. In the example of the Japanese cigarette lighters, either the operator or the shipper would pack them all into a single container at Tokyo and the operator would undertake ultimate delivery of the container and its contents to the consignee's warehouse in Pittsburgh; the operator, rather than the receiver, arranges for the rail and road carriage after discharge from the ship at New York.

The land-bridge concept might be applied in the following manner. Assume that the lighters from Tokyo were destined for Middlesborough, England. Rather than ship the container by ocean vessel to London via the Suez Canal, the operator might arrange for ocean carriage of the container to San Francisco where it would

be off-loaded directly on to a container-carrying rail car and thence transported across the North American continent at high speed and loaded on board another ocean vessel at New York for further ocean carriage to London. It is understood that this land-bridge route is potentially sixteen days faster than proceeding via Suez. The time and cost saving possibilities of such a system are evident, provided the appropriate interchange facilities exist.<sup>5</sup>

### What Is a Container?

There are, of course, many varieties of containers. Prior to proceeding further, therefore, it is essential to clearly delineate the object under discussion, which is far from being a simple task. Hundreds of definitions of containers have been suggested by legal and insurance experts as well as by commercial and technical people closely connected with the developments in this new field of transportation. There are special containers for liquids and others for solids. There are wooden containers and steel containers. There are containers designed to be used only once and others intended for repeated use over many years. There are both rigid and flexible containers. What then are the essential characteristics required to qualify a container as the container of the "container revolution"? The answer to this question may develop from an analysis of the following definitions which are but a few of the many advanced to date:

1. It is a closed receptacle of standard dimensions and rigid metal frame, designed :
  - (a) to be lifted by mechanical means;
  - (b) for the transport, security, protection and preservation of cargo contained therein;
  - (c) for repeated use; and
  - (d) for the through transit of cargo by different forms of transport with clear identification markings.<sup>6</sup>

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<sup>5</sup> See: *Containerisation: Its Cost Advantages*, Fairplay International Shipping Journal, September 14, 1967, p. 5; United Nations, Department of Economic and Social Affairs: *The Turn-Around Time of Ships in Port*, (New York, 1967), pp. 29-31; John L. Eyre, *A Naval Battle Fought Ashore*, (Cambridge, Mass., 1962), *The Unhappy Marriage*, (Cambridge, Mass., 1965), *Measuring The Miracle*, (Cambridge, Mass., 1966); *Containerisation: The Key To Low Cost Transport*, a report prepared for the British Transport Docks Board, (London, 1966-67); Jean-Noel Gorge, *Design and Economics of Atlantic Container Ships*, Fairplay International Shipping Journal, July 4, 1968, p. 140.

<sup>6</sup> This is the definition arrived at by the Joint Container Committee formed in 1966 in Britain by Lloyds marine underwriters and underwriters of private marine insurance companies.

2. A freight container is a container of rectangular configuration either rigid or collapsible for holding bulk material or a number of packages for handling in transit as a unit.<sup>7</sup>
3. Le container est un récipient conçu pour contenir des marchandises en vrac ou légèrement emballées, spécialement en vue de leur transport sans manipulations intermédiaires en rupture par un moyen de locomotion quelconque ou la combinaison de plusieurs entre eux.<sup>8</sup>
4. A container is a closed but not necessarily a locked package of varying form, size and construction repeatedly used for transport of bulk cargo in units or quantities too large for manual handling or for transport of general cargo consolidated into such units as to make mechanical handling necessary.<sup>9</sup>

The aforesaid examples speak for themselves and point up and are symptomatic of the problems posed by containerisation. For how can a new system of transportation become established without encountering complex problems in the process if the main element of such new system defies concise definition?

In discussing the legal and insurance aspects of containers, the problems shall be considered in the context of international combined transport of goods whether they move in "containers" or in some other form of unit load; the essential point is that the transport is by two or more stages, at least one of which is by sea or water. It is hoped that this discussion will emphasize the urgent necessity for shipowners, shippers, insurers and governments throughout the world to co-operate in an endeavour to arrive at a workable set of uniform regulations, standards and legal rules for international combined transport.

The assorted legal problems posed by containers and combined transport range from the adaptability to container shipments of *Hague Rules* concepts to the anti-trust implications of container-owning and container-operating consortia. It is proposed to examine closely the principal maritime law problems and to make only passing reference to others. Some comments on insurance will follow the strictly legal discussion to highlight the close relationship between marine insurance and the law in this area.

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<sup>7</sup> International Organization For Standardization (I.S.O.).

<sup>8</sup> Bureau International des Containers.

<sup>9</sup> This is the definition arrived at by Mr. Kaj Pineus, Chairman of the International Maritime Committee (C.M.I.) Working Group established in 1965 to prepare a draft International Convention on Combined Transport. See: C.M.I. Document "Containers 1", Brussels, January, 1966. For further details of the C.M.I. work on the subject, see *infra* at pp. 422 *et seq.*

## A Multiplicity of Legal Regimes

Perhaps the most perplexing legal problem arising from the container revolution concerns its effect on the basic principles of the *Hague Rules* and the wide variation in the respective liabilities of land and sea carriers.<sup>10</sup> Under conventional arrangements, goods in international trade normally pass through the hands of a number of different carriers, involving the use of several forms of transport. The minimum level of responsibility which these various carriers are obliged to accept varies considerably according to the type of transport involved, the country concerned, and even the particular province or state within such country. The degree of liability generally accepted by ship operators is in accordance with the *Hague Rules*, the minimum permitted by international agreement. The land carriers' minimum level of responsibility is almost always higher than that of the sea carrier, but varies widely with the different contracts of carriage employed. In the event of loss or damage, the extent of the goods owner's recovery is largely dependent on who was responsible for the goods at the time the damage occurred. Because of the very nature of containers, damage to containerised goods is in most cases concealed and not discovered until the container is unsealed and opened at the final destination. By this time, the container may well have endured a long over-land passage by road or rail, lengthy storage exposed to the elements at a seaboard container terminal, handling by stevedores, a rough passage across the ocean on the deck of a conventional vessel, further handling by stevedores at port of discharge and a final inland transit to the consignee's warehouse. Rough handling, damage or loss could have occurred at any point during this journey and yet it is quite possible that clean receipts would have been given by one operator to another all the way down the line.

Unless the container operator has accepted strict liability in the contract of carriage, the owner of the goods, in seeking to recover his loss must consider at least the following questions:

- a) Who owned the container? Was it the shipper, the shipowner or some third party such as a freight forwarder, and what was its physical condition?

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<sup>10</sup> See: Kaj Pineus, in C.M.I. Documents "Containers 1", *loc. cit.*, and "Containers 3", Brussels, October 1966; Peter Wright, Q.C., "Notes for An Address To The Canadian Board of Marine Underwriters," Proceedings of The 51st Annual Meeting of The Canadian Board of Marine Underwriters, February 15th and 16th, 1968; *Containers: Realignment of Responsibility*, Fairplay International Shipping Journal, June 15, 1967, p. 21; *Container Operators' Liabilities*, Fairplay International Shipping Journal, February 9, 1967, p. 19.

- b) Who packed the goods into the container? Was it the shipper, the shipowner or some third party, and what surveys and inspections took place at point of origin?
- c) During the sea voyage, was the container stowed on deck or under deck, and what did the ocean bill of lading say about on deck stowage?
- d) What legal rules applied at each of the various stages of transit, and what did the contract of carriage provide? For example, what legal rules, if any, were stipulated for the inland movement prior to loading on board the ocean vessel?
- e) Where, in fact, did the actual fault occur which caused the loss or were there a series of faults?
- f) What court has jurisdiction over a claim for recovery of the loss?

All of these problems have existed in the past in the case of goods shipped under through bills of lading, but as there was not such a great volume of shipments, no serious demand arose for a uniform set of rules.

The advent of containerisation has brought with it substantial demand for harmonising all the various legal relationships referred to above. Some container operators are accepting liability for all stages of the transit, advising the goods owners that they will not have to look beyond them for recovery and if loss occurs in the hands of a sub-carrier, that they will exercise the appropriate recursory action against their agents or sub-contractors. Various arrangements have been devised in this regard and they will be described in the discussion of bills of lading below.

To date, there have not been sufficient decided cases to afford definitive guide-lines, but many cases are presently before the courts. An interesting case of liability arose in *St. Paul Fire and Marine Insurance Co. v. American President Lines Ltd.*<sup>11</sup> This case concerned 168 packages of medicines and chemicals packed in two cargo containers and shipped on board a steamer at New York for delivery at Manila under an ocean bill of lading issued by the shipowners. The containers were landed and delivered into the custody of the Customs at Manila apparently in good order and condition and properly sealed and padlocked. However, when the consignee ultimately opened the containers, 22 of the packages were missing.

The shipowners were able to establish the exercise of due diligence and care of the containers while they were in their possession. The court concluded that on the preponderance of evidence, the ship-

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<sup>11</sup> [1966] A.M.C. 1873.

owners had safely discharged the two containers with contents complete into the care and custody of customs and that thereafter one of the containers was pilfered and the seal and the padlock broken. The court, although absolving the shipowners, ruled that the Republic of the Philippines, as operators of the Bureau of Customs, should make good the loss to the cargo owners.

### The Stowage of Containers on Deck

Experience has shown that ship operators find it convenient to carry containers on deck as well as under deck in the 'tween decks and lower holds. In fact, it is not uncommon today to see vessels plying the ocean with loads of huge steel containers stacked three and four tiers high on their decks. This containerisation practice is another source of legal difficulties.<sup>12</sup>

Article 1(c) of the *Hague Rules* defines goods as:<sup>13</sup>

(c) "Goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and *cargo which by the contract of carriage is stated as being carried on deck and is so carried.*<sup>13a</sup>

This provision therefore excludes cargo expressly designated for carriage on deck from the *Hague Rules* and ship operators are free to stipulate rigid non-responsibility clauses with respect thereto. It is important to remember, however, that if a carrier contracts to carry goods without *specifically* designating deck stowage, it may be assumed by the shipper that his goods will be stowed under deck;<sup>14</sup> deck stowage in such circumstances constitutes fundamental breach of contract.<sup>15</sup> The *Hague Rules* rights and immunities would only apply in the case of declared deck cargo in the event the contract of carriage specifically invoked the *Rules* for such cargo.

Many container operators, especially those engaged in liner services stipulate general clauses in their bills of lading to the effect

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<sup>12</sup> See: *Problem of Containers On Deck*, Fairplay International Shipping Journal, December 21, 1967, p. 21; *Problems Posed By Containers*, Fairplay International Shipping Journal, February 1, 1968, p. 21.

<sup>13</sup> See also: *Water Carriage of Goods Act, 1936*, R.S.C. 1952, c. 291, Schedule I(C).

<sup>13a</sup> Emphasis added.

<sup>14</sup> *T. Roberts & Co. v. Calmar S.S. Corp.*, [1945] A.M.C. 375, *Schooner St. Johns N.F.*, [1923] A.M.C. 1131, *Jones & Guerrero v. Flying Clipper*, [1954] A.M.C. 259, *Royal Exchange Shipping Co. v. W. J. Dixon & Co.*, (1886), 12 App. Cas. 11.

<sup>15</sup> For a discussion of the general legal problems of on-deck stowage see: William Tetley, *Marine Cargo Claims*, (Toronto, 1965), pp. 191-197; and William Tetley, *Selected Problems of Maritime Law under the Hague Rules*, (1963), 9 McGill L.J. 61.

that "the carrier shall be entitled to carry the goods on deck in containers." At the same time they add a phrase to the customary Clause Paramount to the effect that "such *Rules* and *Act* shall also apply to deck cargo." It is felt by many that such clauses are not sufficient to afford the carrier the protection of the *Rules* for containers carried on deck. However, in *Svenska Traktor Aktiebolaget v. Maritime Agencies (Southampton) Ltd.*,<sup>16</sup> where the bill of lading stipulated:

Steamer has liberty to carry goods on deck and shipowners will not be responsible for any loss, damage or claim arising therefrom

England's Court of Queen's Bench, although finding the non-responsibility portion of the clause repugnant to the *Rules* and so without effect, upheld the general liberty clause and did not deem deck stowage of the relevant cargo a fundamental breach of contract. The court did find, though, that the liberty clause did not amount to a statement that the goods were in fact being carried on deck and this carriage was therefore subject to the *Rules*.

One pre-*Hague Rules* decision is useful to those who support the proposition that a general liberty in a bill of lading to stow on deck at the shipowner's option is sufficient to protect the carrier. In *Armour & Company v. Leopold Walford, Ltd.*,<sup>17</sup> the bill of lading provided:

The Company has the right to carry the goods below deck or on deck. Part of a consignment of candles shipped on deck was washed overboard during the voyage and lost, and the remaining cases were damaged. The question arose as to whether the carrier had the right to stow the goods on deck without prior notice to the shippers. It was held that the clause gave the carrier the right to do so, and that notice of deck stowage was not essential to the efficiency of the contract.

There is also an argument based on custom and usage which supports the legality of stipulations granting carriers a general liberty to stow containers on deck. Proponents of this argument assert that in the container trades, deck stowage is such a well-established and recognized custom that shippers must be deemed to have agreed to deck stowage — that is to say as an implied clause in the contract of carriage. If this proposition were to be tested before the courts, the case would turn on whether or not the stowage of

<sup>16</sup> [1953] 2 Lloyd's L.L.R. 124.

<sup>17</sup> (1921), 8 Lloyd's L.L.R. 497. See also *The Peter Helms*, [1938] A.M.C. 1220; and *Delawanna Inc. v. Blijdendijk*, [1950] A.M.C. 1235. Cf. *Italian Importing Co. v. Navigazione (The Carso)*, (1930), 38 Lloyd's L.L.R. 22.

containers on deck is a custom sufficiently well recognized and long standing as to make it an established usage of the trade.

This particular issue may well be resolved as far as United States law is concerned in *Encyclopaedia Britannica, Inc. v. Steamship Hong Kong Producer*,<sup>18</sup> presently awaiting trial on the merits before the United States District Court, Southern District of New York. This action concerns eight containers said to contain volumes of the *Encyclopaedia Britannica* shipped under a "clean" bill of lading. Despite this, six of the containers were shipped on deck, and two were damaged by rough seas during the voyage.

The plaintiff claims that the clean bill of lading implied under-deck stowage, that shipment on deck was an unreasonable deviation from the agreement to ship and that the relevant *Hague Rules* limitation of liability should not prevail to favour the carrier. The carrier argues that while a "clean" bill usually implies under-deck stowage, it has been the custom of container carriage to ship containers on deck under a "clean" bill of lading and that plaintiff-shipper was aware of this fact. The defendant-carrier therefore alleges that the \$500.00 per package limitation contained in the *United States Carriage of Goods By Sea Act*<sup>19</sup> (the U.S. *Hague Rules* statute) should apply in its favour.

Plaintiff-shipper moved for partial summary judgment claiming that no factual issues are present and requested the court to rule immediately on the aforesaid questions of law. Plaintiff's motion was denied by Croake, D. J., who wrote:<sup>20</sup>

This court recognizes that there has been an increase in the use of containers in the shipping industry. The United States Supreme Court in construing the meaning of the term "clean" bill of lading has indicated that a general port custom permitting above deck stowage could modify the meaning of a "clean" bill. See *St. Johns N.F. Shipping Co. v. S.A. Companhia Geral Commercial Do Rio De Janeiro*.<sup>20a</sup> Because of the growth in this type of shipping arrangement and the importance of the questions presented to the shipping industry, we do not believe that justice would be served if we attempted to decide questions concerning custom in the industry on the present affidavits or without a full evidentiary proceeding. Neither do we feel that justice will be served by piecemeal legal determinations in this matter. See *Boston & Maine R.R. v. Lehigh & New England R.R. Co.*<sup>20b</sup> The particular factual and legal questions should be determined at trial.

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<sup>18</sup> [1968] A.M.C. 169.

<sup>19</sup> 46 U.S.C. §§ 1300 *et seq.*, particularly, § 1304(5).

<sup>20</sup> [1968] A.M.C. 169, at p. 170.

<sup>20a</sup> (1923), 263 U.S., at p. 124, [1923] A.M.C., at p. 1132.

<sup>20b</sup> (1960), 188 F. Supp. 487 (S.D.N.Y.), at p. 491.

At the time of writing, the trial on the merits was scheduled for January or February 1969.

Container operators often claim that it is impossible for them to be specific as to which containers will be carried on deck and which will not, for their containers are similar as to weight and dimension and their stowage is calculated by computer once the containers destined for a particular vessel are all assembled in the terminal area prior to loading. This in turn poses a problem for the shippers and their insurers. Shippers are frequently unaware that their goods will travel on deck and sometimes insure them without disclosing the possibility to underwriters or alternatively, arranging for shipment on deck to be "held covered" at an appropriate additional premium. There seems to be no doubt that deck stowage of containers increases the insurance risk since heavy weather at sea is more likely to cause serious damage as well as the breaking adrift of the stow of the deck cargo.

### How Containers May Affect a Ship's Seaworthiness

Stowage of containers on deck also raises problems respecting a ship's seaworthiness. The force of wind and wave upon a stack of containers towering above the decks presents a considerable hazard to a ship's stability and already there have been vessels which have listed so badly that capsizing has seemed imminent. There is one example of a container ship which lost her rudder in the Atlantic as a result of increased wind resistance from the large deck cargo, and 22 containers were lost overboard. Estimates of the ship's roll varied between 40 and 60 degrees, and some believe that only the loss of the containers saved her from capsizing.<sup>21</sup> The legal implications of a ship rendered unseaworthy by her deck cargo of containers are evident.

Even if containers are stowed under deck, serious problems of stowage are encountered, particularly when the containers being carried are not of equal size. Damage might easily result at sea when containers of varying sizes are placed together and on top of each other. The possibilities of bad, improper or unseaworthy stowage are greater in older vessels whose cargo spaces are awkward and not designed for receiving such large units. Thus, a consignee who receives his containerised goods in bad order should not rule out the possibility of a successful recovery action against the ocean carrier based on breach of the stowage obligation of Article III(2) of the *Hague Rules*.

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<sup>21</sup> *Problems Posed By Containers, loc. cit.*, p. 21.

The container revolution, while effectively moving the dock side many miles inland to a warehouse door or a container's sill, has also moved the ship's hold ashore. Thus arises a further legal problem concerning stowage pertaining to stowage of cargo within containers themselves. In effect containerisation is removing from the ship operator his traditional control over the vital function of stowage. This in turn has led to a demand for a shifting to the shipper of the responsibility for safe, proper and seaworthy stowage of goods in containers.

The problem arises particularly when the shipper or a third party who intervenes between the shipper and the ship operator performs the actual stowing or "stuffing". The ship operator generally is familiar with the relationship of stowage factors to cubic space and is capable of achieving a good seaworthy stow. Thus, when he performs the stowage, his knowledge and experience will in most cases eliminate the danger of internal damage. Shippers and forwarders, however, are not always skilled in the proper methods of stowing cargo for sea voyages. Errors committed during the process of stowing cargo into a container could affect the very stability of the ocean vessel to say nothing of the security of the cargo and container while in transit and subjected to a multiplicity of handlings.

The legal implications are substantial. Once goods are stowed inside and the container locked and sealed, the ocean carrier's only means of checking loss or damage or the quality of the stow would be the external condition and appearance of the container. Should the ship operator be responsible for poor packing of a container over which he had no control? Who should have the burden of proof in claims for damage to such cargo when the actual source of such damage cannot be determined? How far does Article IV(2) of the *Hague Rules* go to protect the carrier in these circumstances?

The following are two clauses which have been used by ship operators in an endeavour to obviate these problems:<sup>22</sup>

The Merchant warrants that each item of goods shipped hereunder (and their contents, if any) and loaded at one and the same time as a single stowage unit shall on shipment be efficiently packed and in addition be properly and carefully secured so that no part of that unit shall be capable of movement save as a unit but shall remain firmly secured within the unit during the voyage and any operation to be performed by the Carrier hereunder.

Where goods are shipped inside containers the stowage of the goods inside the container shall be performed by or on behalf of the shippers and not

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<sup>22</sup> Quoted by Mr. Kaj Pineus in C.M.I. Document "Containers 3", p. 20.

by or on behalf of the Carrier. In such cases the Carrier, his servants and agents shall be under no liability for the manner in which the goods inside containers are stored or for any loss or damage resulting from such stowage.

Cargo underwriters have suggested as a safeguard that shippers insist upon surveys or inspections of the containers and their contents at the place where the container is first packed. This could result in the preparation of a certificate as to safe and competent stowage which will afford valuable evidence if a damage claim materializes after delivery at final destination.

Other legal difficulties accrue from the physical condition of the containers themselves. In the first place, if a container belonging to the shipper is damaged, should responsibility be considered on the basis that the container is part of the "goods" as contemplated by Article I(c) of the *Hague Rules*? If the answer is in the affirmative, the carrier might be liable under the bill of lading itself for loss or damage to the container. It has been suggested that carriers should take the precaution of protecting themselves in respect of preshipment damage to the containers by clausing the bills of lading "Containers used and damaged by wear and tear."<sup>23</sup>

The suitability of a container not only for the rigours of transit and handling it must withstand, but also for the type of cargo it will contain is most important. In the case of refrigerated containers, the refrigerating machinery must not be defective or there is risk of both container and ship being rendered unseaworthy. Then too, a container's lifting lugs or eye-bolts might be defectively attached to the container in such a way as to cause it to break loose from heavy lifting gear subsequently employed to load or discharge it to or from an ocean vessel. Here too the carrier can be sure he is protected by using suitable bill of lading clauses. Without such clauses there is considerable doubt as to what a court might hold. It is reported that a French court has held that when goods are loaded and stowed in a container by the ship operator, irrespective of who owns the container, the container must then be regarded as part of the ship's hold rather than as a package.<sup>24</sup> The legal implication here is that a ship operator's warranty of seaworthiness is extended to include containers, at least in cases where he loads them. In cases where he does not, the inevitable question is: must the ship operator be expected to stop the container before accepting it on board and check its contents, stowage and condition?

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<sup>23</sup> *Ibid.*, p. 21.

<sup>24</sup> Carl E. McDowell, *The Experience of Marine Underwriters with Containerisation - A Progress Report*, an address to the Bulk Packaging and Containerisation Institute, New York, January 25, 1966. Reprinted in *Fairplay International Shipping Journal*, February 10, 1966, p. 30.

### Unit Limitation of Liability : a Crucial Question

Of all the legal questions put into issue by containerisation, that which has prompted most discussion concerns unit limitation of liability. Article IV(5) of the *Hague Rules*, prior to the 1968 amendments, provided in part:

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pounds sterling per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.<sup>25</sup>

The equivalent provision in Canada's *Water Carriage of Goods Act, 1936*, states:

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding five hundred dollars per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.<sup>26</sup>

No clear cut rule exists as to whether or not a container is a package or a shipping unit and thus there has been dispute as to whether or not container operators, or ship operators carrying containers are entitled to invoke the unit liability rule with respect to containers. Important determining factors are place of loading the merchandise into the container, ownership of the container, responsibility for the packing and stowing of the container and stipulations in the governing bills of lading.

It is generally felt that when a shipper delivers a loaded and sealed container to the ship operator ready for loading, such that the ship operator has no control over the stowage of the container, the container would qualify as a unit or package and limitation would apply. It is not so simple when the opposite extreme occurs — namely when various shippers deliver their goods to the operator's depot where the operator consolidates all of the consignments into one container, doing the packaging and sealing himself, all possibly without the shipper's knowledge. It seems most likely that the carrier would not be entitled to unit limitation in such circumstances. If he were, and several packages within the container were damaged, which goods owner would get the \$500.00, or would all interested parties receive a proportion of \$500.00? Surely this is most unreasonable.

Between these two extremes is the case where the shipper brings his goods to the carrier's depot with the full knowledge that they

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<sup>25</sup> The *Hague Rules*.

<sup>26</sup> R.S.C. 1952, c. 291, Schedule, Article IV (5).

will be placed in a container along with merchandise belonging to other shippers. He might even supervise the packing of his goods into the container. In such instances, the sequence of facts would be most important and litigation would doubtless turn on the question of how far the individual shipper made the carrier aware of the value of his goods and of his desire to have the shipment treated as a separate package for limitation purposes.

As early as 1960, a prominent Norwegian maritime law authority wrote: <sup>27</sup>

The application of the per package limitation is sometimes difficult where a package, case, container, etc., actually contains several distinct items, which themselves might possibly be regarded as packages. Obviously, a case containing 100 cans of some food is to be considered one package within the meaning of the *Rules'* art. IV(5). On the other hand, the question is considerably more difficult if within the container there are goods of different kinds.

As a part of the rationalizing of the carriage of general cargo, the lines have recently introduced containers, which for instance are lent to important customers; the goods are then ordinarily placed in the containers before their delivery to the lines. Sometimes the lines themselves stow in containers goods of different shippers, but with the same destination. The situation may be further complicated, for instance, where the shipper delivers his goods to a forwarding agent, who subsequently on his own account stows in a container goods from different shippers, and arranges the carriage to the destination by contracting with a line.

From a legal point of view it is entirely clear that the carrier is not entitled to a limitation of liability per container where he himself considers it to be advantageous to stow the goods in containers, and such stowage takes place after the delivery for shipment of the goods by the shipper. Such independent acts of the carrier should not be allowed to decrease the recovery of the cargo owner below the statutory limitation amount of the *Rules'* art. IV(5) . . .

On the other hand, if the shipper himself has stowed different packages in a container, which subsequently is delivered to the carrier, it might be considered whether to hold that the container is not the relevant package or unit in which the goods are shipped. Sometimes the external appearance of a container does not differ from that of a normal package; the carrier has then no occasion to discover the actual contents or that the container in fact contains several distinct packages. Usually, however, the carrier is aware of the fact that he has to deal with a container, the contents of which consist of several packages or items. Frequently, the container has a particular form or colour. Especially where the shipper has borrowed the container from the carrier, he might anticipate that there actually are several packages therein. In accordance with the legislative reasons supporting the per package limitation of liability, the contention can be made that not the container, but the distinct packages or units therein stowed should be relevant in the computation of the maximum liability of the

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<sup>27</sup> Erling Selvig, *op. cit.*, p. 68.

carrier. The equity of this contention is apparent, especially because the shipper frequently does not obtain any freight reduction corresponding to an eventual decrease in the liability risk of the carrier. At least this is true in those cases where the freight is adjusted on a weight unit.

There have been few court decisions on the subject, but such jurisprudence as there is has only added to the confusion.

In *United Purveyors Inc. v. Motor Vessel "New Yorker"*,<sup>28</sup> a consignment of fish was shipped in two containers equipped with refrigeration units. On loading into the hold, these were to be switched over to electricity supplied by the ship. Some 29 hours after loading, the unit on one of the containers burned out causing the refrigeration to stop and the contents to spoil.

On the issue of liability, the United States District Court ruled that the shipowners were immune from liability, but added that, since no value had been declared to the shipowners, the liability of the carrier would have been in any event limited to \$500.00 in accordance with the unit limitation provision of the United States *Carriage of Goods By Sea Act*. Although this was *obiter*, it seems clear that the court had in mind the container being regarded as a package or unit. The case was not appealed, but it was generally considered at the time that a higher tribunal would not have reached a similar conclusion.<sup>29</sup>

In a 1958 French case, *The Perregaux*,<sup>30</sup> a "cadre de déménagement" (lift van) was not considered a package or unit, because it was "manifestement constitué, en effet, pour contenir de nombreux colis ou objets." In this case, the consolidation of goods into the container was effected by the carrier.

In *Standard Electrica, S. A. v. Hamburg-Sudamerikanische Dampfschiffahrts-Gesellschaft*,<sup>31</sup> the cargo in question was not containerised, but it was unitised. A number of television tuners in cardboard cartons had been shipped on nine pallets and seven of the pallets were not delivered. The issue was whether or not the

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<sup>28</sup> [1966] A.M.C. 321 (Fla. So. D.).

<sup>29</sup> Fairplay International Shipping Journal, January 11, 1968, p. 47.

<sup>30</sup> 1958 Droit maritime français 52 (Casablanca, May 25, 1957). See also: *Gulf Italia Co. v. Esiria*, [1958] A.M.C. 439; *Pannell v. S.S. American Flyer*, [1959] A.M.C. 935.

<sup>31</sup> [1967] 2 Lloyds L.L.R. 193, [1967] A.M.C. 881. The decisions both in first instance and appeal are reported together in the A.M.C. report. A subsequent petition for a writ of *certiorari* was denied, [1967] A.M.C. 2535. See also: *American President Lines Ltd. v. Richard A. Klepper, Delgado Brothers Inc.*, [1961] A.M.C. 509; *Aluminios Pozuelo, Ltd. v. Steamship Navigator and Cia. Mar. Unidad S.A. and Marina Mercante Nicaraguense, S.A.*, [1958] A.M.C. 741; *Middle East Agency v. The John B. Waterman*, [1949] A.M.C. 1403.

carrier could limit liability to \$500.00 per pallet. The United States Court of Appeals, affirming the District Court, held that the pallets were packages and the carrier was entitled to limitation. The principal reasons were: (a) the parties themselves considered the pallets as separate packages; (b) according to custom and usage in the trade, pallets had become known as individual units or packages; (c) the pallets in question have the physical characteristics of packages and were clearly bundles made up for transportation; (d) it was the shippers who made up the cartons on the pallets.

Chief Justice Lumbard remarked that there have been substantial technological changes since the enactment of the *Hague Rules* legislation which had changed the optimum size of shipping units. He doubted that the drafters of the *Hague Rules* would have foreseen the implications of palletisation and containerisation. He wrote:

If through the passage of time this statutory limitation has become inadequate and its application inequitable, a revision must come from Congress, it should not come from the Courts... only if "package" is given a more predictable meaning will the parties concerned know when there is a need to place the risk of additional loss on the one or on the other accordingly or adequately to insure against it.<sup>32</sup>

At the Stockholm Conference of the C.M.I. in 1963, a set of rules known as the Visby Rules was formulated as proposed amendments to the *Hague Rules*. These Rules reached the diplomatic conference stage in May, 1967 and February, 1968. The Visby Rule pertaining to unit limitation of liability stipulated in part:

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 10,000 francs per package or unit, each franc consisting of 65.5 milligrams of gold of millesimal fineness 900, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading.<sup>33</sup>

At least partly as a result of the container revolution, amendments to this rule were suggested between 1963 and 1968, and the new Article IV(5) adopted at Brussels on February 23, 1968 provides in part:<sup>34</sup>

(a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 10,000 francs (the equivalent of \$664.07 U.S.) per package

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<sup>32</sup> See pp. 890 *et seq.*

<sup>33</sup> The Visby Rules are reproduced in Tetley, *op. cit.*, pp. 369-370.

<sup>34</sup> Protocol to amend the *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, signed at Brussels on 25th August, 1924, Brussels, February 23, 1968.

or unit or 30 francs (\$1.99 U.S.) per kilo of gross weight of the goods lost or damaged, whichever is the higher.

(c) Where a *container*, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.

The 10,000 franc limitation is intended to cover light and especially valuable cargo and the 30 francs based on weight is intended to apply to heavier cargo. The new container clause, once the amended rules have been ratified and adopted by a sufficient number of countries, should go far towards clarifying the above-described confusion. At the same time, however, the clause could create new difficulties. The noted mercantile law authority, Clive M. Schmitthoff, has pointed out that if there is only one bill of lading referring to the whole container, but setting out its contents separately, the character of the bill of lading as a document of title is considerably reduced. In his words:

The seller of one of the packages included in the container cannot tender the buyer a bill of lading relating to that package, and, if the contract is a c.i.f. contract, thereby perform his contract. Moreover, the seller cannot retain his property in the package by retaining the bill of lading. For that reason, it may be more favourable to the seller to insist on a separate bill of lading for a package included in one container.<sup>35</sup>

### The Himalaya Clause and Containerisation

Until a uniform set of rules receives international approval and ratification, container trade will continue based on contractual arrangements reached between shippers and operators and disputes will have to be settled pursuant to *Hague Rules* legislation and relevant national laws pertaining to rail and truck carriage. Therefore, many of the traditional legal problems will continue with containerisation. Since combined transport operators will of necessity have a vast network of agents and sub-contractors, it will be interesting to observe the effect of containerisation on the use and interpretation of the "Himalaya" Clause.

In recent years, especially since the decisions in *Adler v. Dickson*<sup>36</sup> and *Herd & Co. v. Krawill Machinery Corp.*,<sup>37</sup> shipowners have attempted to extend the rights and immunities contained in their

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<sup>35</sup> Quoted in *Revision of the Hague Rules*, Fairplay International Shipping Journal, April 18, 1968, p. 23, at p. 24.

<sup>36</sup> [1955] 1 Q.B. 158.

<sup>37</sup> [1959] A.M.C. 879.

ocean bills of lading to protect the agents and sub-contractors they engage to assist them in performing the contract of carriage. The bill of lading clause employed by shipowners to effect this is known as the "Himalaya" Clause and a typical one provides:

*Exemptions and Immunities of all Servants and Agents of the Carrier.*  
It is hereby expressly agreed that no servant or agent of the carrier (including every independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee or owner of the goods or to any holder of this bill of lading for any loss, damage, or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, but without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the carrier acting as aforesaid and for the purpose of all the foregoing provisions of this clause the carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this bill of lading.<sup>38</sup>

The validity of such clauses has been upheld by the courts to extend, for example, the \$500.00 per package limitation in favour of stevedoring contractors who damage a case of machinery while discharging it from the ocean vessel. The most recent reported decision on this subject is *Cosa Export Company, Inc. v. Transamerican Freight Lines, Inc. (Henry W. Parke, Agt.)*.<sup>39</sup> In this case, defendant Northeast operated a terminal for defendant Mitsui and acted as its stevedoring contractor. At the material time, Northeast assisted a trucker, defendant Transamerican, in unloading its truck at the ocean terminal. In the process a precision machine was damaged. Northeast urged that it was entitled to benefit from the \$500.00 per package limitation in Mitsui's bill of lading and plaintiff's counter-argument asserted, (a) that Northeast was not a party to the ocean bill of lading; (b) that Mitsui was not authorized to contract for Northeast, and (c) that the loss did not occur while Northeast was performing an obligation of the ocean carrier.

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<sup>38</sup> M. R. Holman, *Handy Book for Shipowners and Masters*, 16th ed., (London, 1964), p. 81.

<sup>39</sup> [1968] A.M.C. 1351. Mitsui Steamship Company Ltd., Northeast Marine Terminal Company Inc., and Universal Terminal and Stevedoring Corporation were also defendants to this action.

The plaintiff's last argument was upheld by the Supreme Court, State of New York, and Markewich, J., wrote at p. 1356:

In unloading from the truck, the stevedore was an independent contractor with another independent contractor and, pursuant to the contract between them, the stevedore was not performing an obligation of the ocean carrier in loading or unloading, and it is therefore not entitled to the benefit of the bill of lading limitation provision.

The essential principles developed to date by jurisprudence concerning the "Himalaya" Clause are as follows:<sup>40</sup>

- 1) The parties to a bill of lading may extend a contractual benefit to a third party only by clearly expressing their intent to do so.
- 2) The benefits may be extended to agents and subcontractors only with respect to their actions in the performance and fulfilment of the principal contract.

The validity of the "Himalaya" Clause, at least for servants and agents of the carrier, was sanctified in the Visby Rule amendments to the *Hague Rules* signed at Brussels in February, 1968. The relevant new rule provides:

III(2). If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.<sup>41</sup>

### Standardization and Customs Problems

Another important legal aspect of containers relates to standards and sizes.<sup>42</sup> This is because the size of containers in use varies considerably, the cubic capacity ranging from 35 to more than 2,000 feet and the carrying capacity from one to 25 tons or more. Some

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<sup>40</sup> See: *Carle & Montanari Inc. v. American Export Isbrandtsen Lines Inc.*, [1967] A.M.C. 1637, aff'd [1967] A.M.C. 2529; *Virgin Islands Corp. v. Merwin Lighterage Co.*, [1959] A.M.C. 2133; *Berkshire Knitting Mills v. Moore-McCormack Lines Inc.*, [1966] A.M.C. 2651; *The Rothenstein*, 1967 Droit maritime français 742; *H. Raetz et Cie v. Agence Maritime Strauss*, 1966 Droit maritime français 675; *Gilbert Stokes & Kerr Proprietary Ltd. v. Dalgety & Co. Ltd.*, (1948), 81 Lloyd's L.L.R. 337; *Waters Trading Company Ltd. v. Dalgety & Co. Ltd.*, [1951] 2 Lloyd's L.L.R. 385; *Scruttons Ltd. v. Midland Silicones*, [1962] A.C. 446; *Carver's Carriage of Goods by Sea*, 11th ed., by Raoul P. Colinvaux, (London, 1963), vol. 3, pp. 1214-1218; Pierre Safa, *De certains aspects de la limitation légale de responsabilité du transporteur maritime*, 1965 Droit maritime français 643.

<sup>41</sup> See notes 34 and 35 *supra*.

<sup>42</sup> *Container - Handling Developments*, Fairplay International Shipping Journal, December 7, 1967, p. 39; Kaj Pineus, C.M.I. Document "Containers 1", p. 4; *Lloyd's Register and Containers*, Fairplay International Shipping Journal, January 26, 1968, p. 25.

are used for heavy bulk cargoes and others for general cargo or liquids. As we have seen, some are also refrigerated with self-contained freezer units. Still others are buoyant and are equipped with propellers. As the container revolution has evolved, the need for universal agreement on and adoption of standards for containers has become apparent.

The International Standards Organization (I.S.O.) spent considerable time and effort beginning in 1965 to prepare a set of recommended standards for containers. As a result, informal international agreement was reached in 1967 through I.S.O. to the effect that standard container sizes should be eight by eight by ten, twenty or forty feet (8 x 8 x 10/20/40). Lloyd's Register of Shipping has also contributed valuably in this area by drafting construction and certification requirements. The draft requirements were prepared with a view to allowing a degree of freedom as to materials used in construction while maintaining a degree of stringency in keeping with Lloyd's Register's standards for ship construction and survey.

Considerable debate resulted in the United States when the U.S. Government introduced the requirement that all carriers adopt the eight-by-eight, multiples of ten feet, standards if they were to be eligible for government aid such as construction subsidies and ship construction and reconstruction mortgage insurance.

The container revolution also has encountered troubles respecting customs laws and regulations. When large volumes of general cargo packed in containers arrive at a port, traditional customs clearance procedures are most cumbersome and a potential source of considerable delay. As a result, many countries have been streamlining their customs procedures. Japan, for example, has a new system which makes possible almost automatic clearance of import cargoes by a method whereby the importer is charged with the responsibility of preparing the import declarations, including the rate of duty which should be assessed, which permits the goods to be released without inspection.<sup>43</sup> In Canada, new regulations under the *Customs Act*<sup>43a</sup> waive the payment of customs and excise duty on containers used in Canada's export-import trade, provided containers entering Canada remain no longer than six months.<sup>44</sup> Such containers can only be transported within Canada by bonded carrier.

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<sup>43</sup> W. J. Young, *Containerisation - Panacea or White Elephant?*, Fairplay International Shipping Journal, February 9, 1967, p. 38, at p. 39.

<sup>43a</sup> R.S.C. 1952, c. 58.

<sup>44</sup> *Cargo Container (Customs) Regulations*, Canada Gazette, Part II, May 22, 1968.

## A Workable Negotiable Document Must Be Found

Perhaps the most essential element of a sound international commercial transaction is the existence of a single clear, clean, simple and workable document acceptable to the financial institutions. Obtaining such a document for international combined transport has proved most difficult because of the liability problems referred to above.<sup>45</sup>

The International Chamber of Commerce has been actively studying this problem in conjunction with other interested international organizations and has found that any standard document of title for the container trades must possess the features of:<sup>46</sup>

1. A document of title with the legal characteristics of negotiability;
2. A receipt for identified goods;
3. A contract of carriage.

As a document of title, the principal points to be resolved are which form it is to take, who is to have the right to issue it and how the title is to be transferred; as a receipt, it must contain a description of the goods, their apparent condition, and the physical point at which their receipt is acknowledged; finally, as a contract of carriage, the document must indicate the means of transport, whether or not there is to be on-deck stowage, who is to accept responsibility and according to what legal regime that responsibility is to be determined.

For centuries, the one controlling negotiable document in ocean trade has been the clean on-board bill of lading. International laws, customs and consular procedures, banking and letters-of-credit, marine insurance and claims are based on this document. Even if the goods are exactly as ordered and all other contract conditions are fulfilled, a defect in the ocean bill of lading can be cause for rejecting an entire shipment out of hand. In the container age, however, a bill of lading covering ocean transit only will be of no interest

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<sup>45</sup> See: *Containers - Implications For Banks*, Fairplay International Shipping Journal, December 8, 1966, p. 27; *The Container and The Bill of Lading*, Fairplay International Shipping Journal, September 19, 1968, p. 57; Roy G. Hill, *Developments in the Container Traffic Bill of Lading*, Fairplay International Shipping Journal, November 23, 1967, p. 35; N. H. Matthews, *O.C.L. - A.C.T. - The Combined Transport Bill of Lading And Certificate of Insurance*, Fairplay International Shipping Journal, September 26, 1968, p. 30.

<sup>46</sup> *Document of Title For Container Traffic*, Fairplay International Shipping Journal, December 14, 1967, p. 9. See also International Chamber of Commerce Documents 396/3; 396/4 and 396/5.

to shippers and consignees; therefore, if the full benefits of containerisation are to be enjoyed, the development of a through container bill of lading embodying the above-mentioned features is of paramount importance. It is obvious that the achievement of uniform rules of liability for combined transport shipments will facilitate this task.

During 1967 some of the British Protection and Indemnity Clubs worked out a suggested traditional form bill of lading for their container-minded members. Bills of lading based on this form are now in widespread use. These are essentially "received for shipment" bills of lading, acknowledging receipt for shipment by the ocean vessel for carriage between ports of loading and discharge and "for arrangement or procurement of pre-carriage from place of receipt and on-carriage to place of delivery." By endorsing these bills "shipped on board", they become "shipped" bills of lading.<sup>47</sup>

These new bills of lading stipulate that *Hague Rules* legislation will govern the water or sea stages of carriage and shall apply to cargo carried on deck as well as to cargo carried under deck. As regards the inland stages of the transport, certain specific laws are stipulated. One ship-operating consortium engaged in transatlantic container service uses a container bill of lading which provides, *inter alia*:

When either the place of receipt or place of delivery set forth herein is an inland point in the U.S.A. or Europe, the responsibility of \_\_\_\_\_ with respect to the transportation to and from the sea terminal ports will be as follows:

- (a) Between points in Europe, to transport the goods:
  - (1) if by road, in accordance with the Convention on the Contract for the International Carriage of Goods by Road, dated 19th May, 1956 (CMR);
  - (2) if by rail, in accordance with the International Agreement on Railway Transports, dated 25th February, 1961 (CIM);
  - (3) if by air, in accordance with the Convention for the Unification on certain Rules relating to International Carriage by Air, signed Warsaw 12th October, 1929, as amended by the Hague Protocol, dated 28th September, 1955.
- (b) Between points in the U.S.A. to procure transportation by carriers (one or more) authorized by competent authority to engage in transportation between such points, and such transportation shall be subject to the inland carrier's contracts of carriage and tariffs. \_\_\_\_\_ guarantees the fulfilment of such inland carrier's obligations under their contracts and tariffs.

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<sup>47</sup> Roy G. Hill, *loc. cit.*, p. 35.

The said operator's container bill of lading also provides:

When the goods have been damaged or lost during through transportation and it can not be established in whose custody the goods were when the damage or loss occurred, the damage or loss shall be deemed to have occurred during the sea voyage and the *Hague Rules* as defined above shall apply.

Under this bill of lading, a cargo claimant would have a recourse against the operator subject to the *Hague Rules*, or, if it could be shown that the loss or damage took place during inland transit, subject to the stipulated convention or tariff. In the latter event, the operator, who is the ocean carrier, would have a recourse against the guilty inland carrier.

### Insurance Issues in Containerisation

As the container revolution has progressed, some container operators have advanced to the stage whereby they are prepared to accept custody of a container filled with goods at an inland terminal in the country of origin and undertake full responsibility to deliver it to the consignee's terminal in the country of destination. These operators have in these circumstances shown a natural interest in also assuming responsibility for the insurance of the goods, and issuing "insured" or "guaranteed" bills of lading. The pros and cons of "insured" bills of lading have long been a subject of debate in the marine insurance and shipping world, but until the full-scale advent of containerisation such bills of lading were seldom used in practice.

An insured bill of lading imposes upon a carrier a liability commensurate with that of an insurer and he undertakes to insure this liability. In the normal course, an ocean carrier's liability is much less than that of an insurer. The latter must as a rule pay losses due to acts of God and losses due to the King's enemies, whereas at common law a carrier is liable for neither of these.<sup>48</sup>

Two major container consortia operating in the United Kingdom-Australia trade during 1968 attempted to introduce a mandatory combined transport bill of lading with certificate of insurance attached. The container insurance contract behind this proposed "insured" bill of lading was designed to cover all the insurable interests of the operator including those risks usually covered by a Protection and Indemnity Club entry, with the exception of crew and employer's liability. The introduction of this "insured" bill of lading set off bitter debate in marine insurance circles as to whether or not it would be practicable in operation

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<sup>48</sup> Arnold W. Knauth, *Ocean Bills Of Lading*, 4th ed., (Baltimore, 1953).

and what effects it would have on the centuries old and proven patterns of marine insurance.<sup>49</sup>

Those opposed to compulsory "insured" bills of lading argued that, by the use thereof, shippers would be totally deprived of their freedom of choice. For example, some experts asserted that if there were a uniform firm rate, shippers with excellent loss records would suffer at the expense of those with poor ones. At the same time, it was felt that the time-tested facilities provided by various individual insurers, including elaborate international survey and claims organizations, would fast disappear.

On the other hand, those in favour of "insured" bills of lading felt that shippers would benefit greatly through lower rates and uniform fixed costs for the movement of their goods without at the same time having to worry about proving their loss and engaging in recovery proceedings.

The opposition to the proposed scheme apparently outweighed the favourable aspects and in late October 1968, it was announced that the combined certificate of insurance bill of lading idea had been abandoned, at least temporarily.<sup>49a</sup> In commenting on the abandonment, *Fairplay International Shipping Journal* stated:

On reflection, it is difficult to see how a mandatory scheme could have been made acceptable, no matter how the negotiations were handled. For the time being, at any rate, it looks as if the deadlock will remain unbroken and that the consortia will have to resort to the conventional type of through bill of lading. This will result in the *Hague Rules* governing the sea carriage, with the land transit being subject to the appropriate road and/or rail regulations. Once again, the difficulty of determining when and where loss or damage occurred will pose a formidable problem, with the added difficulty of fixing the degree of liability. The importer will continue to be beset with general average formalities and involved in correspondence with his underwriters over recovery procedure — back to square one in fact.

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<sup>49</sup> See: *Containerised Cargoes*, *Fairplay International Shipping Journal*, April 11, 1968, p. 23; *All-in-One Container Insurance*, *Fairplay International Shipping Journal*, September 19, 1968, p. 10; *Container Insurance*, *Fairplay International Shipping Journal*, September 26, 1968, p. 25; *The Container and The Bill of Lading*, *loc. cit.*, p. 59; Matthews, *op. cit.*; *Container Consortia and Container Insurance*, *Fairplay International Shipping Journal*, July 4, 1968, p. 97; N.H. Matthews, *The Combined Transport Bill of Lading and Certificate of Insurance*, *Fairplay International Shipping Journal*, October 17, 1968, p. 21; *The Economist Supplement*, *loc. cit.*, p. xxi.

<sup>49a</sup> Donald A. Davies, *Uncertainty over Bills of Lading for Container Cargo*, *Lloyds List and Shipping Gazette*, December 24, 1968. *Container Scheme Abandoned*, *Export Management*, November, 1968, p. 565; *Withdrawal of Container Scheme*, *Fairplay International Shipping Journal*, November 21, 1968, p. 23.

It is indeed unfortunate that the admirable conception of matching through-transport with the acceptance of through-liability, and, in the process, simplifying the whole course of trade in the case of shipments to which the scheme would have applied, should have to founder on the rock of personal interest. But the fact cannot be gainsaid that everybody is in business for themselves, and altruism can hardly be expected to prevail over financial and other considerations.<sup>49b</sup>

Because containerisation has effectively moved the end of ship's tackle from seaboard to points further inland, the risks involved in shipments are no longer strictly maritime risks. Insurers must determine liabilities not only on the basis of the rights and immunities contained in *Hague Rules* legislation, but must also give consideration to the rules governing the various modes and stages of inland transport.<sup>50</sup> The effects of this have been of particular interest insofar as the third party risks of shipowners and operators engaging in through container transit are concerned. Traditionally, the third party risks of shipowners and operators have been protected by entry of the operator or owner in one or other of the large shipowners' mutual insurance associations or Protection and Indemnity Clubs.

In order to meet the changed conditions, a new mutual insurance association, the Through Transit Marine Mutual Assurance Association Ltd., was established in England during 1967.<sup>51</sup> This new "Container Club" was designed to insure the various risks incurred by any carrier who employs containers for the carriage of cargo by sea, on the one hand, and any through transit operator who enters into contracts for the carriage of cargo by methods involving the use of more than one means of transport by sea, land or air, on the other. Although the cover being offered by the "Container Club" of necessity differs from the cover afforded by the ordinary P. & I. Club Rules, it is, in many respects, complementary to it.

It is felt that the arrangement provided by the "Container Club", involving only one management, will simplify the machinery of claims procedures and recovery from such carriers. To those who have raised the question that an operator might not like having to deal

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<sup>49b</sup> *Withdrawal of Container Scheme, loc. cit.*, at p. 25.

<sup>50</sup> See: *Pattern of Container Insurance*, Fairplay International Shipping Journal, September 14, 1967, p. 6; Thomas F. Poole, *Container Insurance*, Fairplay Marine Insurance Review, September 21, 1967, p. 49; McDowell, *op. cit.*; *Problems of Container Insurance*, Fairplay International Shipping Journal, November 10, 1966, p. 35; Lorenz Zetterman, *Through-Transit Insurance — The Scandinavian Viewpoint*, Fairplay International Shipping Journal, October 24, 1968, p. 21.

<sup>51</sup> *P & I Review*, Fairplay International Shipping Journal, January 11, 1968, p. 73; *Through-Transit P & I Club*, Fairplay International Shipping Journal, June 27, 1968, p. 24.

with more than one club, it has been suggested that his entire cargo liabilities could be arranged with his own club which could then pass on the non-P. & I. liabilities to the Through Transit Association.

Another problem posed by containerisation is the insurance of the actual containers themselves. It has been pointed out that the life of a container might range from three to twenty years. Furthermore, despite the efforts that are being made at standardization, there are all sizes and shapes of containers. Also, as we have seen above, it is extremely difficult to concisely define what a container is. For insurance purposes, it is important to distinguish the rectangular steel containers from the other unit loads in widespread use. Some additional factors which must be considered in the insuring of containers are:

- a) Whether or not they form part of a specialized transit operation;
- b) What handling methods they are subject to;
- c) If they are refrigerated containers, whether or not regular and efficient surveys and inspections are performed of the refrigeration machinery.

The British underwriters' Joint Container Committee has recommended that containers should be insured with a full replacement value throughout their life and that if all-risks cover is granted, it should be based on the London Institute cargo clauses, suitably amended, and that a minimum deductible excess, each accident, should be applied in the amount of three percent or £50, whichever is greater.<sup>52</sup> It is also recommended that wear and deterioration should be excluded, that territorial limits should be clearly defined and that insurance should be written on an annual basis.

As far as the insurance of cargo shipped in containers is concerned, the experience of the past few years has been largely one of experimentation. While it was originally felt that the advent of containers would cause the risks of loss and damage to effectively disappear, many underwriters claim that this has not, in fact, occurred in practice. In this regard, the following excerpt from an address given in 1966 by the Executive Vice-President of the American Institute of Marine Underwriters is of interest:

Of course, it is popular to be with the "in" group, to join the chorus singing the praises and extolling the promises inherent in containerisation. In fact, it would be dangerous for a marine underwriter to say anything negative

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<sup>52</sup> *Insurance of Containers*, Fairplay International Shipping Journal, September 7, 1967, p. 27.

on the subject. He would be accused of blocking progress in the interest of preserving his business, which is to pay losses. (Surely you recall the golden promises that containerisation would stop pilferage, eliminate the need for export packaging, and lower the cost of insurance.) In fact, we were told why bother to insure cargo against such losses if they would be wiped out!

It would not be popular to tell you the story of the container carrying camera parts which was systematically pilfered at sea by a crew member who cut a hole in the container. Nor the story of the container off-loaded to a barge at a South American port, that had its padlock broken while on the barge, was pilfered, and arrived at destination bearing a new padlock. I am afraid pilferage has not been defeated by containers. Instead, containerisation has only challenged pilferers to invent new ingenious forms of larceny, petty and grand.<sup>53</sup>

In 1966, the Joint Container Committee representing Lloyd's marine underwriters and individual marine insurance companies was established in London with a view to devising coverages for container shipments carried under traditional contracts of carriage and generally to analyse the various insurance problems brought about by the container revolution. This Committee, in discussing insurance of containerised cargo, has recommended that premium should be charged on the value of the goods and not as a percentage of the freight charges, since a rate levied on freight receipts is neither accurate nor scientific over a series of risks. The Committee has also stressed that normal underwriting considerations still apply to cargo carried via containers.

### The Search for International Uniformity

As we have seen, containerisation has spot-lighted the urgent need for a uniform set of rules which would bring into harmony the disparities between the respective liabilities of land, sea and air carriers engaged in the process of international combined transport. Mindful of this, a number of international organizations have been at work studying the feasibility of having an international convention on containers or combined transport and there are several draft conventions presently under active consideration.

The International Maritime Committee — *Comité Maritime International* (C.M.I.), the principal international maritime law association with a membership comprised of national maritime law associations, has been at the forefront of the efforts to achieve uniformity of law in the field of combined transport.

Article 1 of the constitution of the C.M.I. provides:

The object of the *Comité Maritime International* is to promote, by the establishment of National Associations, by Conferences, by publications and

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<sup>53</sup> McDowell, *op. cit.*

by any other activities or means, the unification of international maritime and commercial law practice, whether by treaty or convention or by establishing uniformity of domestic laws, usages, customs or practices.<sup>54</sup> The C.M.I. meets periodically in international conference or upon the demand of not less than two-thirds of the various national maritime law associations for the purpose of discussing certain specific topics. Out of these international conferences, of which there have been 27 since 1897, come proposed international conventions on topics of maritime law. When such conventions have been ratified and approved by the General Assembly of the C.M.I., they are subsequently submitted to diplomatic conferences convened by the Belgian Government. If a convention is signed by members of the diplomatic conference, the result is an international convention. It depends on the legislatures of each contracting nation as to whether or not the convention is put into effect by such nation. At least 13 conventions originating with the C.M.I. have been signed to date.<sup>55</sup>

The last international conference of the C.M.I. was held at New York in September, 1965. At that conference the following resolution was passed:

Mettre à l'étude la question des containers pour voir, si étude opportune, ce qui peut être fait et s'il y a lieu d'étendre le sujet.<sup>56</sup>

As a result, a working group was set up under the chairmanship of Mr. Kaj Pineus, President of the Swedish Association of International Maritime Law and a prominent average adjuster. In the intervening period, Mr. Pineus and his working group, in conjunction with an international sub-committee, have studied and analysed the situation in depth and have produced no less than nine draft conventions on international combined transport.<sup>57</sup>

The nine drafts have varied greatly. Some have envisaged mandatory conventions while others contain optional rules. Some drafts

<sup>54</sup> For a description of the *Comité Maritime International*, its organization, development and objects, see: N. Singh and R. Colinvaux, *Shipowners*, in Vol. 13, *British Shipping Laws*, (London, 1967), pp. 154-163.

<sup>55</sup> These are: *Collisions*, 1910; *Assistance & Salvage At Sea*, 1910; *Limitation*, 1924; *Bills of Lading* (Hague Rules), 1924; *Liens and Mortgages*, 1926; *Immunity of State-Owned Ships*, 1926; *Civil Jurisdiction In Matters of Collision*, 1952; *Penal Jurisdiction In Matters of Collision or Other Incidents of Navigation*, 1952; *Arrest of Sea-Going Ships*, 1952; *Limitation*, 1957; *Stowaways*, 1957; *Carriage of Passengers By Sea*, 1961; *Nuclear Ships*, 1962.

<sup>56</sup> C.M.I. Document "Containers 1", p. 3.

<sup>57</sup> The Drafts together with Committee Reports and comments of various National Associations are contained in C.M.I. Documents "Containers 1", "Containers 2", "Containers 3", "Containers 4", "Containers 5" and "Containers 6".

have dealt only with "containers" and others have dealt with all forms of international combined transport. Some drafts have contained systems of strict and uniform liability and others have contained liability systems based on a multiplicity of legal regimes ("network" system).

The *Ninth C.M.I. Draft International Convention on Combined Transport* will be submitted to the next international conference of the C.M.I. which is scheduled to take place in Tokyo, Japan, March 30th to April 4th, 1969. This draft was finalized at a meeting of the C.M.I. International Sub-Committee on Containers which met under the chairmanship of Mr. Pineus at Brussels on June 10-11, 1968 and is presently under consideration by all of the national maritime law associations.

Because of the great importance which will attach to any convention on international combined transport which will come forth from the C.M.I. Conference at Tokyo in the spring of 1969, it is considered useful to reproduce certain clauses of the Ninth Draft Convention in full.

In this Convention the following words are employed with the meaning set out below :

#### ARTICLE I

- (a) "Combined Transport Operator" (CTO) means a person concluding a contract of International Combined Transport with a consignor.
- (b) "Contract of International Combined Transport" means a contract for the carriage of goods between two countries by at least two modes of transport of which one is by sea and at least one is not and in respect of which contract the CTO:
  - (i) undertakes to perform or to procure the performance of the entire transport;
  - (ii) assumes liability for the whole transport as prescribed in this Convention;
  - (iii) and issues a document called Combined Transport Bill of Lading (CT Bill of Lading).

Short range moving of the goods of an auxiliary nature does not for the purpose of this Convention constitute a separate mode of transport.

- (c) "Person" includes any corporation, company or legal entity.
- (d) "Franc" means a unit consisting of 65.5 mgs of gold of millesimal fineness 900.

#### ARTICLE 2

- 1) The provisions of this Convention shall apply to every CT Bill of Lading relating to the carriage of goods between places in two different States if:
  - (a) the CT Bill of Lading is issued in a contracting State, or
  - (b) the carriage is from a place in a contracting State, or

- (c) the contract contained in or evidenced by the CT Bill of Lading provides that the rules of this Convention or legislation of any State giving effect to them are to govern the contract, whatever may be the nationality of the means of transports, the CTO, the consignor, the consignee or any other interested person.

Each contracting State shall apply the provisions of this Convention to the CT Bill of Lading mentioned above.

This Article shall not prevent a Contracting State from applying the rules of this Convention to CT Bills of Lading not included in the preceding paragraphs.

- 2) This Convention shall, however, not apply to carriage performed under the terms of any International Postal Convention, to furniture removal and to transport of livestock or of nuclear substances.

#### ARTICLE 5

- 1) When the goods have been received into the charge of the CTO or any other person mentioned in Article 3, the CTO issues to the consignor a CT Bill of Lading, which shall among other things contain the following data:
  - (a) the heading "Combined Transport Bill of Lading";
  - (b) the name and address of the CTO;
  - (c) the date and place of issue;
  - (d) the place at which the goods are taken in charge and the place designated for delivery by the CTO;
  - (e) the leading marks necessary for identification of the goods or the containers as the same are furnished in writing by the consignor before such goods or containers are taken in charge, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the containers, cases or coverings in which such goods are packed, in such a manner as should ordinarily remain legible until the end of the transport;
  - (f) either the number of containers, packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the consignor;
  - (g) the apparent order and condition of the goods if uncovered, or of the containers, cases or coverings in which such goods are packed;
  - (h) a statement that the contract as evidenced in the CT Bill of Lading is subject, notwithstanding any clauses or stipulations to the contrary, to the provisions of this Convention.

Provided that the CTO shall not be bound to state or show in the CT Bill of Lading any marks, number, quantity or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

- 2) The consignor shall be deemed to have guaranteed to the CTO the accuracy, at the time of receipt of the goods of the marks, number, quantity and weight, as furnished by him, and the consignor shall indemnify the CTO against all loss, damage and expenses arising or resulting from inaccuracies in such particulars. The right of the CTO to such indemnity shall in no way limit his responsibility and liability

under the Contract of International Combined Transport to any person other than the consignor.

#### ARTICLE 7

- 1) The CTO shall be liable for loss of or damage to the goods occurring between the time when he receives the goods into his charge and the time when he delivers the goods at the place designated for delivery by the CTO.

The CTO shall, however, be relieved of liability for any loss or damage if it can be proved that such loss or damage:

- (a) arose or resulted from any cause or event which the CTO could not avoid and the consequence whereof he could not prevent by the exercise of reasonable diligence; or
  - (b) occurred during carriage by sea or inland waterways and arose or resulted from either fire (unless caused by actual fault or privity of the carrier by sea or inland waterways) or act, neglect or default of the master, mariner pilot or the servants of the carrier by sea or inland waterways in the navigation or in the management of the ship.
- 2) (a) When the CTO is liable for compensation in respect of loss of or damage to the goods, such compensation shall be calculated by reference to the value of such goods at the place and time they are delivered to the consignee in accordance with the contract or should have been so delivered;
- (b) the value of the goods shall be fixed according to the commodity exchange price or, if there be no such price, according to the current market price or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality;
  - (c) compensation shall not, however, exceed \_\_\_\_\_ francs per kilo of gross weight of the goods lost or damaged;
  - (d) the CTO shall not be entitled to the benefit of the limitation of liability provided for in (c) of this Article if it is proved that the loss or damage resulted from an act or omission of the CTO done with intent to cause damage or recklessly and with knowledge that damage would probably result;
  - (e) higher compensation may only be claimed when the consignor has, against payment of a surcharge to be agreed upon, declared in the CT Bill of Lading a value for the goods exceeding the limit laid down in the provisions in (c) of this Article. In that case the amount of the declared value shall be substituted for that limit.

#### ARTICLE 8

Unless notice of loss of or damage to the goods and the general nature of it be given in writing to the CTO or the persons referred to in Article 3 at the place of delivery before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the CT Bill of Lading or if the loss or damage be not apparent, within three days, such removal shall be *prima facie* evidence of the delivery by the CTO of the goods as described in the CT Bill of Lading.

ARTICLE 9

The CTO shall be discharged of all liability whatsoever unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

This period may, however, be extended if the parties so agree after the cause of action has arisen.

ARTICLE 10

Recourse actions by the CTO against such person may be brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall not be less than one year commencing from the day after the expiration of the one year period set out in Article 9.

ARTICLE 11

Notwithstanding anything provided for in Articles 7 - 10, if it can be proved where the loss or damage occurred the CTO and the claimant shall, as to the nature and the extent of the liability of the CTO, be entitled to invoke such laws and regulations of a mandatory nature, which would have applied had the claimant made a separate and direct contract with the CTO in respect of the particular stage of the transport, where the loss or damage occurred.

The principal characteristics of this Ninth Draft are as follows:

- a) It contains optional rather than mandatory rules, that is to say, the convention will apply only if and when a contract of international combined transport is issued, but will not apply when ordinary through bills of lading are used.
- b) It contains a "network" system of liability. This system, which is set forth in Articles 7 and 11, does not provide for a strict and uniform liability of the CTO over all stages of the transport. The advantage of the "network" system is that it tends to preserve entirely the existing European conventions governing rail, road and sea transport.<sup>58</sup> One of the C.M.I. Committee's earlier drafts, the "Genoa Draft", rejected the "network" solution and adopted a doctrine of strict and uniform liability in the following provision:

The Combined Transport Operator shall be liable for any loss, damage or delay incurred from the time the goods are taken in charge by him, until the time of their delivery to the Consignee at the final place of destination as provided in the Combined Transport Bill of Lading.

The Combined Transport Operator shall be relieved of liability for any loss, damage or delay arising or resulting from:

- (a) Insufficiency of packing where the shipper undertakes such operation;
- (b) Deficiency in a cargo container when such container is supplied by the shipper;

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<sup>58</sup> E.g. *The International Railway Convention*, 1961 (C.I.M.), *The Convention on Contract for International Carriage of Goods by Road*, 1956 (C.M.R.).

- (c) Inherent vice or nature of the goods;
- (d) Any other cause or event which the Combined Transport Operator could not avoid, or the consequences whereof he could not prevent either personally or through his servants, agents or independent contractors in the fulfilment of the transport.

Several of the national maritime law associations, including Canada's, prefer a strict liability system, considering such to be more in keeping with the revolutionary and progressive nature and spirit of containerisation.

- c) It deals with all forms of combined transport rather than simply containers, and this largely because of the difficulties encountered in attempting to define "container".

There is as yet considerable discussion amongst C.M.I. member associations as to what form the draft convention should take and, indeed, as to whether there should be a convention at all. One thing is certain, the discussion and debate at Tokyo will be lively and protracted. If the Tokyo conference succeeds in achieving agreement on the terms of a convention, such convention could possibly bear little resemblance to the Ninth Draft.

The International Chamber of Commerce (I.C.C.) and the International Institute for Unification of Private Law (UNIDROIT) in Rome have also been active in the quest for a set of uniform rules on international combined transport. As early as 1964, UNIDROIT produced a draft convention designed to apply when there is a principal carrier for at least two modes of transport and based largely on existing European through movement land conventions. This draft has been criticized for its complexity and overemphasis on liability systems well-known in European road and rail transportation, but not elsewhere.

Since the C.M.I. traditionally has confined its deliberations strictly to matters of maritime and shipping law, it was felt at the outset that it might be beyond its proper realm in exploring questions dealing with land and air carriage. However, the international organizations more customarily concerned with the air and inland movements have been content to let the C.M.I. proceed with its work and have contributed valuable advice and assistance by sending observers to the meetings of the C.M.I. International Sub-Committee and co-operating with Mr. Pineus and his working group. UNIDROIT has in effect been holding its draft convention in abeyance pending completion of the C.M.I. work, and plans a round table meeting on the subject for all interested parties following the C.M.I. Tokyo conference.

In conclusion, it should be underlined that the laws and customs of the shipping and marine insurance industries have been slowly and carefully developed over centuries. In the process a fine balance has been established as between all the relationships involved and it is upon this fine balance that the smooth flow of international trade in large measure depends. While it is clear that great benefits shall ultimately derive from the container revolution, the necessary changes in the system must be wrought patiently and not so as to disturb the said balance. Furthermore, history has proved that international conventions and standards take years to reach the diplomatic conference and subsequent ratification stages.

In the meantime, therefore, it is desirable that interim measures, not incompatible with established patterns, be taken to provide some degree of international uniformity which will permit the desirable rapid development of containerisation. As outlined above, such measures are under active study by the maritime industry and indeed some notable short-term solutions have already been determined.

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