THE PROBLEMS OF CONTAINERISATION IN LAW AND PRACTICE

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I hereby declare that this thesis has not been and will not be, submitted in whole or in part to another University for the award of any other degree.

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MASTER OF PHILOSOPHY IN MARITIME LEGAL STUDIES

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SUMMARY

This thesis questions how the recent development of containerisation has affected the liability of the carriers involved and whether we need new law to solve relevant problems that have occurred as a consequence. In my research, I will address questions such as whether law should be proactive towards technological advances and how commercial practice influences the current legal regimes dealing with this undertaking. Moreover, the problems of containerisation are analysed in practice and in law, the latter, which is often too slow for the developments in modern shipping. I will question the relationship of custom and law in relation to containerisation which both have an impact on maritime practice.

The work sets out to analyse some of the main practical and legal problems in relation to the transit of the cargo by containers and the different dimensions this undertaking can take. Many different ways have been used to improve international trade meanwhile new shipbuilding is thriving nowadays. The new era of containerisation has begun and many issues have been raised about the way shipping agreements are concluded and how consignors and consignees are to fulfil shipping contracts.

Exploring further this undertaking, the author would like to demonstrate the differences, both legislative and practical, in the procedures used by various states. Attention is drawn to the industry practices, such as sealing containers and deck cargo, which would be of particular use to those who are interested in the “what happens next” stage in the revolution of maritime trade and in particular, multimodal transport.

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Finally, I would like to thank all my friends and relatives[1] for their support.

[1] See Appendix 1.

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[2] Term adopted from the field of "Informatics," meaning the gap between the highest and lowest frequencies employed by network signals. More commonly, it refers to the rated throughput capacity of a network protocol or medium.

ABBREVIATIONS

Baltic & Marine Conference (BIMCO)

Committee Maritime International (CMI)
Currency Adjustment Factors (CAFs)

European Conference of Ministers of Transport (ECMT)
European Intermodal Association (EIA)
European Logistics Association (ELA)
European Transport Law (ETL)

Inter-Governmental Maritime Consultative Organisation (IMCO)
International Association of Maritime Economists (IAME)
International Chamber of Commerce (ICC)
International Chamber of Shipping (ICS)
International Commercial Terms (INCOTERMS)
International Federation of Freight Forwarders' Association (FIATA)
International Group of P&I Clubs (IG)
International Labour Organisation (ILO)
International Maritime Organisation (IMO)
International Scheldt Faculty (ISF)
International Union of Marine Insurance (IUMI)

Multimodal Transport Convention (MTC)
Multimodal Transport Operator(s) (MTO(s))

National Industrial Transportation League & World Shipping Council (NITL & WSC)

Organisation for Economic Co-operation and Development (OECD)

Shipping & Transport Law International (S & TLI)

Terminal Handling Charges (THCs)
Twenty foot equivalent units (TEUs or T.E.U.'s)

United Nations Conference of Trade and Development (UNCTAD)
United Nations Commission on International Trade Law (UNCITRAL)
International Institute for the Unification of Private Law (UNIDROIT)

20ft container (20 footer container, which measures about 20 feet long)

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INTRODUCTION

A.) INTRODUCTION

The recent development of containerisation has affected the liability of the carriers and the most important issue arising on this undertaking is whether we need new law. Moreover, specific matters in practice and law are demonstrated within the context of the thesis below which are various and of major significance in modern shipping trade.

Initially, the new era of containerisation has begun and important issues have been raised about the way shipping agreements are concluded and how consignors and consignees are to fulfil shipping contracts. Containerisation brought a revolution in trade and therefore, it is widely implemented by the shipping industry, as shown further below (Chapter I). This revolution affected society and economy, bringing serious changes in maritime trade. Also, issues, such as the legal and practical terms, which conquer container transport and container law, are analysed, since we need a stable legal term for this undertaking. These are important to be solved, in order to avoid confusion and further debate upon the major problems. Certain organisations are working upon the specific relevant problems and influence the undertaking of containerisation in maritime trade.

In Chapter I, the author felt right to act circumspection upon certain matters of technology, which are related to containerisation. This is important, in order for the reader to understand specific terms that may be encountered within the context of each chapter and in particular maritime legal cases. The evolution of technology in containerisation will bring advances in a global level in the future and this will be for the benefit of maritime trade.

Moreover, the significant matter of package limitation is analysed within the present thesis (Chapter II) and in particular as to who is liable for the loss of or damage to the cargo and how the liability of the carriers will be calculated within containerisation.

The technology and shipping today have been evolved via containerisation but unfortunately legislation is still inadequate to govern this undertaking. Here, certain legal regimes play their role, such as the Carriage of Goods by Sea Act. Therefore, the Hague and the Hague-Visby Rules are analysed in Chapter II in relation to the package limitation. A very important matter that arises at this point, while calculating the liability according to the package limitation that our current legislation of COGSA is enacting, is whether the container is a package or not. This is certainly serious to be defined in the legal maritime world which unfortunately, still till today has not taken place.

However, as demonstrated further (Chapter II), according to COGSA 1971, a new paragraph is coming forth to define what constitutes package. The author found appropriate at this chapter that certain approaches and case-studies are analysed to show the muddle upon the issue whether the container is a package or not, leading to the "metal package" approach, a term which might solve the relevant issue of what constitutes package in the future. Finally, in Chapter II, it is demonstrated why Containerisation and the evolution of the new technology in container-ships have affected the regimes governing maritime transport directly or indirectly for the limitation of the liability of the carriers. This is of major importance, since we might achieve to draft the new uniform container law especially for containerisation.

Furthermore, it is significant to discuss the matter upon containerisation in law and practice of liability and undeclared deck cargo or undeclared dangerous deck cargo, as demonstrated below (Chapter III). It is debated whether the courts should be strict towards undeclared deck cargo, when containers are carried on the deck of container-ships. This is an issue of major importance to be settled under a future legal regime, because it affects the liability or non-liability of the carrier for any loss or damage.

For the key issue of the undeclared dangerous deck cargo, a significant maritime legal case is discussed in chapter III. This is significant, because carrying dangerous goods and explosive substances on board without proper care can end up in severe health injuries of the crew and loss or damage of the cargo. Therefore, it is of major gravity that new container law is implemented to avoid accidents as such, shown in this Chapter.

Also, attention is drawn to the industry practices, and particularly, the relationship of custom and law in containerisation is discussed, both which have a high impact on maritime practice. Obviously, at this chapter (III), the major research question takes place whether we need new law to govern container issues, since custom may act by itself in certain circumstances. Furthermore, the shipping industry has their own methods of packing and unpacking goods within the containers, and on sealing the latter. Still, several issues, such as unsuitable containers, temperature within the containers, defective and sensitive goods within the containers and delay in delivery, remain the most casual problems within the undertaking of containerisation. These issues are analysed in Chapter III and they are important in the calculation of liability of the consignor and the consignee, because simply “if you acquire special treatment, you need to say so early in advance”. The point is not only to have a suitable container but to know how to use it and to know the requirements of your cargo.

Additionally, the implication of containerisation on INCOTERMS is important to be explored, since problems have been encountered, because the traditional FOB point has become totally inappropriate for the procedure of containerisation. The issue of bailment in container carriage is also demonstrated, since the notion of bailment is relevant to container carriage, as analysed below (Chapter III) followed by examples.

At this point, it is significant to comment on the “Himalaya” clause, which rules containerisation and especially, the relevant “multimodal transport,” as shown below (Chapter IV). This issue is important, because it regulates the limits of liability of the carrier for the conduct of the servant or agent and third parties as discussed in Chapter III.

The main purpose to the undertaking of containerisation, which leads to multimodal transport, as shown later (Chapter IV) is to achieve legal uniformity and have uniform laws throughout the world so that no matter where a suit is brought, the outcome will be the same. Therefore, we need new law, since the international convention framework in maritime law is not as uniform as it may seem to be. The creation of such a multimodal legal regime is debated in Chapter IV. Lack of uniformity may occur when a convention contains optional provisions, which allow the contracting States to provide otherwise in their respective national laws governing certain areas.

In this chapter (IV), the relevant multimodal liability systems in practice and law are discussed and an analysis is made of the kinds of transport arose with the advent of containerisation. The era of containerisation brought the era of multimodalism, a term which may govern in the future. Finally, the variety of terms and conditions of carriage are demonstrated (Chapter IV) on the way of creating the multimodal liability system and what we need is to be decided further ahead.

In conclusion, there are developments in container transport and there are two revolutions in the modern maritime trade; containerisation and computerisation. The issue of computerisation, which involves electronic commerce is interesting, but has been excluded from the current thesis, since it is adequate enough to create another thesis. After a thorough analysis within the current thesis, one can see that specific areas in law cannot be symbiotic with containerisation and that the latter has limits.

No international multimodal convention is in force for Containerisation and certainly we should be specific on what we actually need. It should be taken into account what the parties agreed to and as evidenced in the bill of lading.

On creating the future multimodal legal regime, the “pyramid method” might be a way to success, as further demonstrated in Conclusion. Consequently, amending the regimes that presently govern the carriage of goods is worthwhile, if international uniformity is achieved, with a benefit to all involved in the carriage of goods by sea and land. An appropriate legal instrument would be the one that embraces multimodal transport through all and any combined modes. Such scope is suitable to a project of uniformity in the international legislation on multimodal transportation.

B.) THE SCOPE OF THE THESIS

This project should be useful to people in the marine industry. To provide clarity, the author has adopted a helpful, practical method of analysis, using relevant academic material and results of in depth interviews. Meanwhile examples and case-law are implemented where necessary.

The facts of case law are used in explaining the practical investigations, which are significant to establish liability under the different rules. Furthermore, this thesis has concentrated on the problems of containerisation in law and practice, and specifically on the definition of what is a "package," thereby launching the "metal package" approach, and also terminology problems, which are encountered in practice throughout the spread of the documents.

It also refers to complex legal problems, such as identifying the set of rules applicable to the claim in concealed damage, stowage matters and creation of the ideal liability system in multimodalism. This reflected a perception, supported by others, that the growth in container traffic and the availability of capacity to deal with the ships employed on deep-sea trades are important catalysts for decisions by port operators about developments at UK container ports.

The question of cargo liability regimes for maritime transport is by its very nature an international issue, which is why any new standard in the area should entail substantive consultations with all industry representatives, as also the ICC suggests[3].

This thesis makes use of figures and photos, wherever applicable in order to show the revolution of technology in containerisation and compares the relevant legal regimes

[3] "Synopsis of the Responses of National Associations, Consultative Members and Observers to the Consultation Paper and Other Comments on the Draft Outline Instrument", part II - the work of the CMI, CMI Yearbook 2001, pp. 384-530, at p. 386.

that apply in each mode. Furthermore the labour implications in this evolution, though, are covered very briefly.

The author also takes into account academic material and law reports to support her argument. Sometimes, cases are analysed where appropriate and if needed case study is invented. This method is appropriate for this subject because it both expands legal knowledge and enables the practical application of this newfound knowledge.

The journals that specialise in the kind of research in which the author has researched are mainly maritime ones, like the "Containerisation International," the "Lloyd's Shipping Economist," the "Lloyd's Maritime and Commercial Law Quarterly" and periodicals such as "Ships." The bodies of research to which she wishes to add are IMO, IMCO, UNCITRAL and UNCTAD.

The experts in the field of research are maritime lawyers, ship-owners, shipbrokers, shipping agencies, freight forwarders, transportation companies and shipping lines. The Harvard System is used to cite authors of textbooks, journals and periodicals, although sometimes footnoting system is implemented for opinions and/or additional information. Case-law is cited in full each time in the same text, but only once for the same case.

Chapter I

DEFINING CONTAINERISATION…

A.) INTRODUCTION

With the advent of containerisation, important issues have been raised about the way shipping agreements are concluded. Containerisation brought a revolution in shipping. This revolution affected society and economy. Therefore, it is essential to define it and analyse further why it has conquered maritime trade. There are specific institutions that influence the performance of maritime trade globally and it is worth mentioning a couple of them within the current chapter.

Furthermore, certain matters of technology are to be discussed, related to containerisation. The evolution of technology in containerisation will bring advances at a global level in the future and this will be for the benefit of maritime trade. Containerisation has expanded so widely and universally that it is worth examining why it has been adopted so widely. For several reasons, I believe it is necessary to analyse the benefits trade gains from this undertaking.

Additionally, the amount of money involved in containerisation is huge. The fully cellular vessels and the containers as well as the handling equipment acquired are expensive. The cellular containership is a ship which is dedicated to the carriage of shipping containers: it is fitted with cell guides, uprights which provide a framework designed to accommodate standard size containers in such a way that the containers do not move in any direction (Brodie 1996, pp. 26-27). Moreover, it is important to demonstrate (sub-chapter C) the interaction among containerisation, economy and society, since the process of containerisation and its effect on the economy is closely linked.

Finally, a journey in time is also essential to show how containerisation has evolved in global shipping and what is bound to take place in the future.

B.) WHY CONTAINERISATION?

The undertaking of containerisation saves time loading commodities on to the vessel (Herman 1983, p. 132) and it minimises the stevedoring costs, since one single crane loads and discharges the large 'container' units. The containers themselves can be filled to capacity and with items of various types, shapes and sizes (Herman 1983, p. 133). Moreover, a significant amount of time is gained for the transit of this cargo, since fewer voyages are made and less labour is needed, because of the evolution of RO-ROs (Roll on/Roll off vehicles) while the turnaround times in ports are measured in minutes not in days (French S. /Rabey T. 2003, p. 1)[4].

When containerisation takes place, the goods are put into the containers by the shippers and instead of manually stowing hundreds of different parcels; the carriers mechanically place the containers on specially designed ships. With containerisation, numerous items are consolidated into one standard size unit which can be handled faster, stowed better, and moved more efficiently with the proper utilisation of container vessels, while risks of pilferage and damage are minimised, as Armstrong[5] also adds.

Moreover, by containerisation the container vessels save expensive time in ports waiting for all the different commodities to be placed in order on the vessel (Herman 1983, p. 135). According to Herman (1983, p. 135), actually, ship time in ports with containerships is reduced to twenty-five per cent a year compared to sixty per cent a year spent in ports by break-bulk, conventional ships.

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[4] See *FRENCH* S. */RABEY T.* (2003)
"Containerships for the 21st Century";
http://members.ozemail.com.au/~trabey/cship.html, (27 July 2004, at 19:00).

[5] See *ARMSTRONG T* (July 1981) "Packaging Trends and Implications in the Container Revolution" 12(4), Journal of Maritime Law & Commerce, pp. 427-465, at p. 427.

Break-bulk relates to dry cargo lifted on and off ships one piece or bundle at a time by means of cranes and derricks but not shipped on trailers or in shipping containers. Such goods may be described as break-bulk cargo; the ships which carry them are sometimes referred to as break-bulk ships (Brodie 1996, p. 13). The term "break-bulk" is often used to denote the opposite of containerised.

It has been suggested that, because the procedure is so quick, the captain of the ship does not have the time needed to check the containers that are loaded aboard. This is a suggestion that the author of this investigation does not agree with, because if something goes wrong within this procedure, then it is very likely that the captain is to blame. Therefore, time should be provided for the appropriate checking and the captain should be entitled to the necessary time to check the containers. Although combined container-breakbulk carriers, which can carry up to four hundred to five hundred (400-500) containers are in existence, they are not very common.

Moreover, the construction of special container terminals and assembly depots are needed for the procedure of containerisation[6]. The latter is one of the most important kinds of trade nowadays, but often its launch can create many problems in practice[7]. Containerisation came, technological advances took place, and certain states, including the USA, have made efforts for global unification, in contrast with other states, such as Japan. And, this is one more issue that must be discussed; the fact that some states resist unification efforts at a global level.

[6] See photo 4 in chapter 1; the port of Miami.
[7] See chapter 2.

C.) THE EFFECT OF THE REVOLUTION IN INTERNATIONAL TRADE

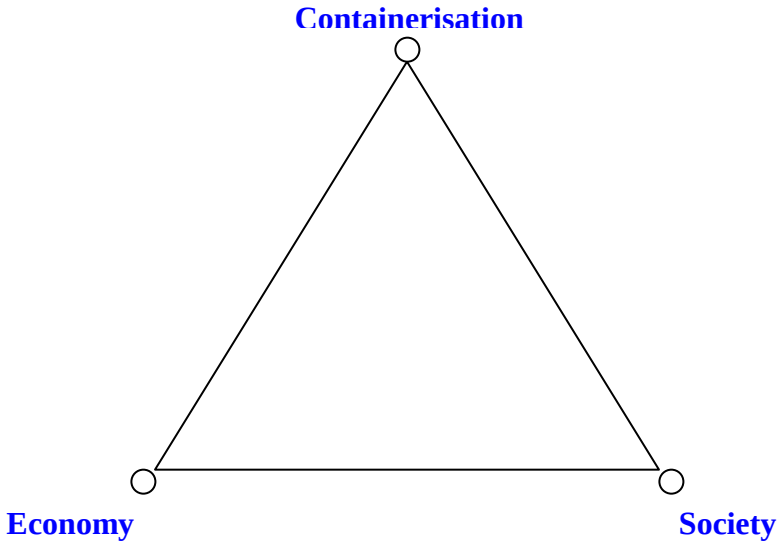
Containerisation has started a revolution in international trade. Issues raised by this revolution will be developed. How does this revolution manifest itself? Initially, in the manufacture of new types of ships; a single container-ship is faster than liners; the first sails at a speed over twenty five knots while liners at a speed of fifteen knots and containers can carry up to five times the amount of cargo that a conventional break bulk ship does (Herman 1983, p. 132). Refrigerated containers permit the carriage of perishable goods on the same vessel as non-perishable goods. This reduces the need for specialised non-bulk carriers, such as refrigerated vessels.

The modern faster ships are keeping pace with the current demands of international commerce and they are more efficient since they can deliver essential cargo within hours of when they are needed; rather than days or weeks. According to Giles' term, "like a moving warehouse" (Giles 1997), these new ships will possibly change society and life in the future. If, for example, a metal box of medicines has to be delivered by sea to a state in one of the Less Developed Countries (LDCs), this box should definitely be shipped in one of the modern, fast ships[8].

[8] See *GILES* (October 1997) "Faster Ships for the Future", Scientific American, *http://www.sciamdigital.com/browse.cfm?sequencenameCHAR=item2&methodnameCHAR=resource_getitembrowse&interfacenameCHAR=browse.cfm&ISSUEID_CHAR=55FFD523-BFC2-4006-87AB-B49A4B9B4A1&ARTICLEID_CHAR=521885C7-E82A-4885-B899-09929B75E5B&sc=I100322* (06/12/2004, at 11:30); *KOEHLE H.* (1985) All About a Container-Ship, West Germany, Hamburg, Schiffahrts -Druckerei Schroedter & Tauer Gmbh, Co. Kg, 1.

Moreover, if we are to speak in terms of the revolution, Institutional advances can be recognised in the evolution of transhipment arrangements and rules of payment. This revolution has affected both economics and society, since the process of modernisation demands various schemes, which have serious financial implications. Extending this thought, it is worth analysing the link between container transport and the economy, initially, and then containerisation and society.

This multiple interaction is demonstrated in the following diagram (1):



(Diagram 1)

- Containerisation affects the economy and the economy affects Containerisation.

- Containerisation affects society and society affects Containerisation.

- The economy affects society and society affects the economy.

- The economy affected by Containerisation affects society and

society affected by Containerisation affects the economy.

The economic revolution can be seen both in the way goods are handled and generally in the whole transportation of the cargo.

Further effects/influences on the economy can also be seen in the implementation of new projects in transportation management. People in the shipping industry are looking for ways of transporting the containers to ports, and then onboard that would not demand enormous sums of money.

Society is getting involved in the financial expenditure of this undertaking and any failure can harm an economy. A vivid example is the economy of Nigeria. Under certain recent guidelines, in order for a company to be eligible for status as a 'national' carrier and thereby, benefit from the cargo reservation provisions of shipping policy law, Nigerians are only required to own a minimum of sixty per cent equity interest in that company.

This makes joint venture arrangements between Nigerians and foreign investors possible, and this is actively encouraged by the National Maritime Authority (NMA), which was established by the National Shipping Policy Decree No. 10 of 1987 as the regulatory and implementing agency of the government's policy on shipping (Agbor 2000, p. 1)[9].

Moreover, the Ministry of Transport of Nigeria has also recently let it be known that one of its major shipping lines, the National Unity Line is looking to interest foreign investors in the company. The NMA runs the Ship Acquisition and Ship Building Fund, which has so far disbursed a total of $87.9m to a few Nigerian shipping companies. However, the latter was suspended in 1996 when beneficiaries were unable to repay the loans on schedule.

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[9] *AGBOR F*. (February 2000) "Wearing Shades in Nigeria, Nigeria", 10, Maritime Advocate, as in *http://www.maritimeadvocate.com/maritim1/maritim1/maritim1/i10_nige.htm* (21/10/2004, at 17:00); see also *SMITH A.* (1776) An Inquiry into the Nature and Causes of the Wealth of Nations, London, Strahan W.

The consensus has been that the fund may not have been properly managed and should be revived with the appropriate professional expertise obtained to manage the fund efficiently. Accordingly, containerisation cannot be properly operated without an adequate, financial system launched by the competent authority.

In conclusion, the process of containerisation and its effect on the economy is closely linked with the way each political nexus of the state manipulates the economy. Political institutions play a major role in this undertaking and an adequate economy or a damaged one are the result of their efficient or inefficient strategies, as Notteboom (June 2004, p. 1) also notes[10].

Furthermore, the effect of world containerisation in global economy can also be distinguished by the constant elimination of trade barriers and the liberalisation of markets. The financial sector has been affected since pressure on cost control may be created by the intensified competition at the supply side. The revolution in the supply chains and the new logistic models urge the container ports to revise their function in the logistic process and consequently this affects the finances of such ports.

Moreover, shipping itself is a capital-intensive industry where some material goods are owned and others are leased, which results in a variety of cost bases (Notteboom 2004, p. 3). The economy can be affected by this revolution in a positive way when, for instance, freight rates are pulled down with existing slot overcapacity, or in a negative way when there is instability in the shipping industry.

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[10] *NOTTEBOOM T.,* Institute of Transport & Maritime Management Antwerp (ITMMA), University of Antwerp (June 2004), "Container Shipping and Ports; an Overview", 3(2), Review of Network Economics, as in,
http://www.rnejournal.com/articles/notteboom-RNE_june_04.pdf
(22 November, at 13:00). Particularly, "the rise of world containerisation is the result of the interplay of macroeconomic, microeconomic and policy-oriented factors"; thence, the important role of the political institutions on it.

Additionally, one of the most significant factors of this revolution that signals a new era in economy is the large containership. Huge, more fuel-economic vessels result in the reduction of the costs by having a lower cost per TEU-mile than smaller units with the same load factor.

On the other hand, in order to build these ships, capital investment is necessary and this will be most crucial when a post-Panamax ship will need to be constructed. A post-Panamax ship cannot pass through the current Panama Canal since the critical maximum dimensions, based on the capacity of existing lock systems on the Canal are 32.31 m wide, 294.13 m length overall (LOA) and a draft of 12.04 m. Consequently, this will seriously affect its financial life since its current dimensions will not accommodate the new, larger ships. Therefore, the Canal must be rebuilt or otherwise upgraded, in order to maintain its economic importance and to serve the needs of containerisation -not just in the future, but now. Post-Panamax vessels have been developed and constructed, and are already in operation[11]. In order to emphasise this aspect, it should be mentioned that expansion programmes are on the drawing boards on the Baja Peninsula and at the Panama Canal. Such changes should be implemented with great care, however, and must take into consideration every social and financial aspect of the Canal[12].

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[11] Information taken from a DVD named, "The Panama Canal; 'Bridge' of Two Oceans", Eleftherotypia, Geotropio, Discovery Channel, 2004, Produced and Directed by *GILMOUR P & COSMAS B*; refer to the Panama Canal expansion referendum held on 22nd October 2006, when the citizens of Panama approved the Panama Canal expansion project, as in *http://en.wikipedia.org/wiki/Panamanian_Panama_Canal_expansion_referendum%2C_2006#Referendum_question* (19/10/2007, at 16:00).

[12] See Duluth News-Tribune "Building Boom at US West Coast Ports" TP International Publishing, Times Business Information Ltd. as in *http://www.cargonewsasia.com/cnx-asia/news_main.asp?id=5668&no=&src=1*, (18/01/2005, at 23:60); also *MacALISTER T* (Wednesday 26/12/2007) "Boatbuilders watch their Ship come in fuelled by Asian Commodities", The Guardian, England.

Similar construction projects are also taking place in Alaska, Canada and along the West Coast. In particular, the seaport of Anchorage, Alaska, is spending US$350 million to more than double its berthing spaces, and it plans to boost its cargo business from five hundred thousands containers in 2004 to one million within two or three years; hence the use of ice-strengthened container vessels[13]. Even though the revolution is only just getting under way with these giant ships and the international logistics revolution, a change has already occurred in Europe. The financial status of Rotterdam has altered since the latter decided to clear the deck to berth these mega-vessels in the Maasvlakte II. Meanwhile, the port of Algeciras can already receive mega-vessels[14].

In addition, land bridges have been used since the advent of containerisation. According to a successful definition by Herman (1983, p. 150) "a land bridge is an overland portion of a voyage which connects two sea legs". Although land bridges have been used since 1975, they are a revolutionary method for containerisation itself and an advantage, since they shorten sea voyages. Utilising land bridges means higher speed, saving of time and cost, since the containers can be moved very easily. The Siberian land bridge, for instance, shortens the voyage between Europe and the Far East by up to fifteen days compared to an all-water voyage via the Suez Canal[15] while the Trans-Siberian Land

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[13] See photo 2, chapter 1.

[14] See also *MOHANDAS MB* (Executive with IFFCO, Gujarat), (Monday, 15th July 2002) "Will Containerisation Put Port Reforms on the Fast Lane?" Business Line, Internet Edition, Financial Daily from THE HINDOU group of publications as in *http://www.thehindubusinessline.com/2002/07/15/stories/2002071500120600.htm* (22/11/2004, at 15:00).

[15] It is worth mentioning that the activities in the Suez canal were going on since 1924 and as numbers of transportation were increased the canal transit clearance service was added and every year the Suez Canal Authority announces the transit dues;
see *http://www.lethsuez.com/*;
http://www.lethsuez.com/SCA_Circulars/SCA_frames.htm (14/01/2005, at 18:00).

Bridge which also links cargoes moving between the Far East and Europe cuts the transit time by up to seven days compared to voyages via the Panama Canal. Moreover, issues related to its expenditure are also controlled. A voyage, for example, between Japan and Europe via the Siberian land bridge is twenty per cent cheaper than by ocean voyage.

Despite the fact that goods are transported in containers, trains and trucks, for instance, this can also be done by using *Freightliner*. However, when road transport is involved, the operation is more expensive, since the transport of each container needs one truck in combination with one driver. Therefore, extra cost is incurred for this task.

Another version of a land bridge is the mini-bridge, which includes only one sea leg. By virtue of this, the overland portion is either the first part of the voyage or the second and last. In the case of the Trans-Siberian Land Bridge, for example, mini-bridges are operated by the Trans-Siberian Container Service (the transit container service which provides container handling facilities) for cargoes moving between Europe and the West Coast and between the Far East and the East Coast. What is the financial cost of building them though? Is any environmental damage considered when they are built? Moreover, it is not only canals, lands and seas that are involved in this revolution, but also lakes.

It is worth adding that the Constantza water basin terminal development, although still small in terms of throughput, was estimated to handle around three hundred thousand TEUs in 2004. It is the Black Sea's largest container terminal and has the potential to become an important multi-modal transportation hub for the economic region[16].

[16] See The Shipping Times "Dubai Ports may well be force to reckon with" TP International Publishing, Times Business Information Ltd. as in (20/01/2005, 23:00 *http://www.cargonewsasia.com/cnx-asia/news_main.asp?id=5704&no=&src=1*; see News (Spring/Summer 1998) "New Load Centre for Black Sea?" International Container Review, p. 12.

Revolutionary advances are taking place at Constanza, existing container terminal facilities are being replaced and new marketing strategies are evolving to attract new container lines.

What is interesting about this port though, and has legal implications, is the fact that it is developing Free Trade Zone Activities. In order to function legally, bilateral agreements have been made, particularly with Russia, Central Asia and Tran-Caucasus, while co-operation agreements have been concluded with the Ports of Poti and Batumi in Georgia to start RO-RO and regular container services.

Furthermore, in October 2003, a New Container Terminal was constructed on the southern part of Pier II South, port of Constantza, which can accommodate Post-Panamax Container Vessels, which will handle 1.000.000 TEUs when it reaches its final stage[17]. It is worth mentioning that this is taking place in an era where in contrast, some ports physically restrict these vessels.

According to Mori[18], the size of vessels in some ports is physically restricted, especially in river-based ports in China. At this point, a new issue comes to light, since it is worth considering how we can harmonise the permission (the "green light") with the restriction (the "red light"). Efficiencies gained by larger vessels are cancelled in restrictive areas. A fair solution is the use of feeder ships.

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[17] For more information visit *http://www.constantza-port.ro/cached/cacheGenerator.jsp?a=o&menuFid2=6841* (22/01/2005, at 12:00); also as in *http://www.aries-shipping.ro/shipping-port-agency-news/article.php?article=12&title=Development-of-the-container-terminal* (31/10/07, at 18:00).

[18] See *MORI MITSUO* (Spring/Summer 1998) "Commentary: Optimum Scale?" International Container Review, pp. 25-27, at p.27.

Feeder-ring has taken different dimensions and it is developing, according to Georgiakis[19]. Feeder-ships provide a flexible way of transferring goods and certain individual requirements can be met. New feeder operators are entering in the regional networks of the Mediterranean Sea and Aegean; but, it is an issue whether it really provides a solution.

If we could imagine a Post-Panamax container vessel launching from the port of Constantza to reach its final destination in the ports of China, we should take into account not only the expenses for the particular ship's operation but also the cost of fuel consumption of the feeder ships. Furthermore, the legal cost of having multiple documents as against one MT Document, which covers the entire journey, should be carefully considered.

However, if we accept the words of the Director of Med Feeder Italia, Jol F. (1998, p. 79, quoted by Georgiakis above), it should be realised that feedering is not as flexible as it seems. For example, restrictions take place in certain ports, like the need for an Italian flag vessel between Sicily and Italy, changes in consortia and hub terminals, which can create problems. Therefore, a company must provide a variety of vessels. By applying Jol's initial query on how larger main line vessels affect the balance of feeder services, and then starting from a "lake legal framework" (law of inland navigation), going on to a maritime legal framework (the Hague-Visby Rules perhaps) and then to a "river legal framework" (law of inland navigation), gives some indication of the many issues to be resolved.

Shippers escape from this restriction somehow by assigning cargo to more than one line or consortium, so they do not necessarily have to send more cargo using only the Post-

[19] See *GEORGIAKIS G* Mediterranean Feeders LP /MFL (Spring/Summer 1998) "Handling Feeder Needs", International Container Review, p. 77.

Panamax vessels, unless freight rates decrease. Furthermore, ports may not be doing enough to handle large containerships. Perhaps, there should be discrimination against those ships themselves when deciding on the law concerning multimodal transport documents. Thus, an issue now arising is whether a Post-Panamax container vessel should follow the same legal regime as a feeder one.

How do huge containerships affect the economy? It should be explained that in order to increase market share, the carriers created significant overcapacity, resulting in price competition and, in so doing they depress the freight rates. Therefore, the market in its attempt to escape this pressure, pursues economies of scale and generally orders more vessels with even greater capacity; hence the manufacture of the Post-Panamax vessels[20].

Going even further when discussing the financial change, it should be mentioned that these giant containerships can be utilised profitably only if they are full. Yet, what happens when carriers cannot fill them on a regular and stable basis that would add to their revenues? Economies are obviously negatively affected under these circumstances. Definitely, it is not in the best interests of the financial sector for incomes to grow occasionally and sometimes to gain nothing. Obviously, the global economy should be stabilised and it is a matter for discussion how this can be achieved and what solutions society could render. On replying to this question, it is interesting to look at the attitude of the Select Committee[21] when discussing the contribution of ports to the British economy.

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[20] According to *BOYLES J /KOLLMAN J /BERT VAN LEEUWEN* (Spring/Summer 1998) "Funding Pandora's Box", International Container Review, p. 81-82, at p. 82.

[21] Memorandum by *Numast* (January 2001), "UK Port Inquiry", the United Kingdom Parliament, Select Committee on Environment, Transport and Regional Affairs, p. 17, as in *http://www.parliament.the-stationery-office.co.uk/pa/cm200001/cmselect/cmenvtra/244/244ap35.htm* (22/11/2004, at 14:00).

Containerisation urges improvement in ports and this should in the long run lead to additional economic and environmental benefits. It is logical that an effective port will provide economic gain.

Although the Modern Ports Policy document states that "it is not the Government's job to run the ports industry," the Select Committee argues that there are significant factors to be addressed on how the ports can be operated in the public (regional and national) interest, with strategic and planned investment and development. The most recent UNCTAD Review of Maritime Transport[22] points out that pressure is being exerted to reduce port costs and to provide adequate services for the new giant container-vessels. These factors are accelerating the development of transhipment hubs and feeder ports -all of which require substantial investment in infrastructure and highly efficient intermodal connections.

Moreover, the European Union has recognised its responsibility with regard to the revolution of the new technology which containerisation launches and is actively promoting several trans-European networks. According to a recent survey[23], twenty-six trans-European transport networks have been identified for an indicative total cost of eighty two thousand million euros and an additional thirteen thousand million euros should be invested in energy distribution networks.

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[22] See further UNCTAD (2002) "Port Development" 4, Review of Maritime Transport, pp. 69-76, at p. 75, as in *http://www.unctad.org/en/docs/rmt2002ch5_en.PDF* (07/12/2004, at 02:00).

[23] *Şókró Yórór*, Turkey, European Democratic Group, (29th March 2001) "Transport Technologies and European Integration," Report, Committee on Science & Technology, Doc. 9011, Council of Europe, Parliamentary Assembly, as in *http://assembly.coe.int/Documents/WorkingDocs/doc01/edoc9011.htm* (22/11/2004, at 16:00).

Therefore, it is definitely society's role and particularly the role of the government to render any financial aid to this undertaking. A port that would not keep up with the pace of change elsewhere in Europe, particularly at a time of increased globalisation and consolidation within maritime markets is obviously about to become "user-unfriendly," using the term, the Select Committee employs. So, attention should be paid to those ports which are not in the position to integrate their transport policy -especially when other countries are developing their own initiatives in this area.

Whilst taking into account the fact that port authorities do play an important role in economic development, it is clear that society is heavily involved in the strengthening the financial status of domestic and international shipping particularly containerisation; hence the existence, for instance, of the Indian Tariff Authority for Major Ports, which approved the proposal of the Nhava Sheva International Container Terminal Limited (NSICT) to revise its scale of charges. This Indian Tariff Authority had jurisdiction over shipping, by virtue of Section 48 of the Major Port Trusts Act**,** 1963 (38 of 1963).[24]

A dramatic intervention of society into the economy took place in South Africa, which created a significant amount of controversy concerning how restrictive society should be on its control monopolies in the cartage of containers[25]. More specifically, Durban experienced the monopoly of the South African Railway and Harbours Administration (the "Administration").

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[24] See analysis as in *http://www.tariffauthority.org/orders/jnpt_0018.htm* (22/11/2004, at 02:00); *SATHYAM S* (15th November 2000) "Tariff Authority for Major Ports," 143, Published in Part III Section 4 of the Gazette of India, Extraordinary, New Delhi, (Case No.TAMP/28/2000-JNPT).

[25] *PIKE A* (1997) "South Africa: a Recent Court Victory for Private Enterprise is Indicative of an Increasingly Restrictive Approach to Government Intervention in the Economy," 1(November), International & Trade Law Quarterly, pp. 60-62.

According to an amendment in 1976 to the South African Railways and Harbours Act 8 of 1957, the "Administration" was given the power to "undertake the business of cartage contractors or carriage agents to and from any container stacking area in Durban harbour to the exclusion of any other carrier." The successor to this Act was enacted in 1981 under the name of the South African Transport Services Act (No. 9) which created SATS, which in 1989, under the terms of this Act was legally succeeded by Transnet Limited.

Furthermore, the companies themselves found their own solution by collaborating and creating mergers and joint ventures. Co-operation has a main advantage of keeping costs under control. The costs of negotiation and contract can be regulated more efficiently when there is co-operation. Merged firms can transact at much lower costs than one company itself and the high level of risk linked with the investment of capital in ships is shared and handled by many instead of one, as is further demonstrated by Slack (et al. 2002), securing thus the economies of scale[26].

Nevertheless, there is still a drawback in this situation that might keep the market unstable, as Midoro and Pitto (2000)[27] discuss. The lack of differentiation of the partner's roles and the absence of harmonisation of marketing and sales still prevent alliances from playing a major role in the alleviation of market instability.

The figure (1) below, taken from Notteboom (2004, p. 6)[28], demonstrates the situation nowadays in relation to the alliances.

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[26] See *SLACK B. /COMTOIS C. /McCALLA R.J.* (2002) "Strategic Alliances in the Container Shipping Industry; a Global Perspective," 29, Maritime Policy & Management, pp. 65-75; *supra* n. 8, p. 7, 21.
[27] See *MIDORO R. /PITTO A.* (2000) "A Critical Evaluation of Strategic Alliances in Liner Shipping," 27, Maritime Policy & Management, pp. 31-40; *supra* n. 8, p. 7, 20.
[28] *Supra*, n. 8.

By alliances, shipping companies are somehow protected from financial risks while the economy is affected by the existence of different tariffs. For example, a shipping line might have a different tariff for independent customers than it has for those in the alliance[29].

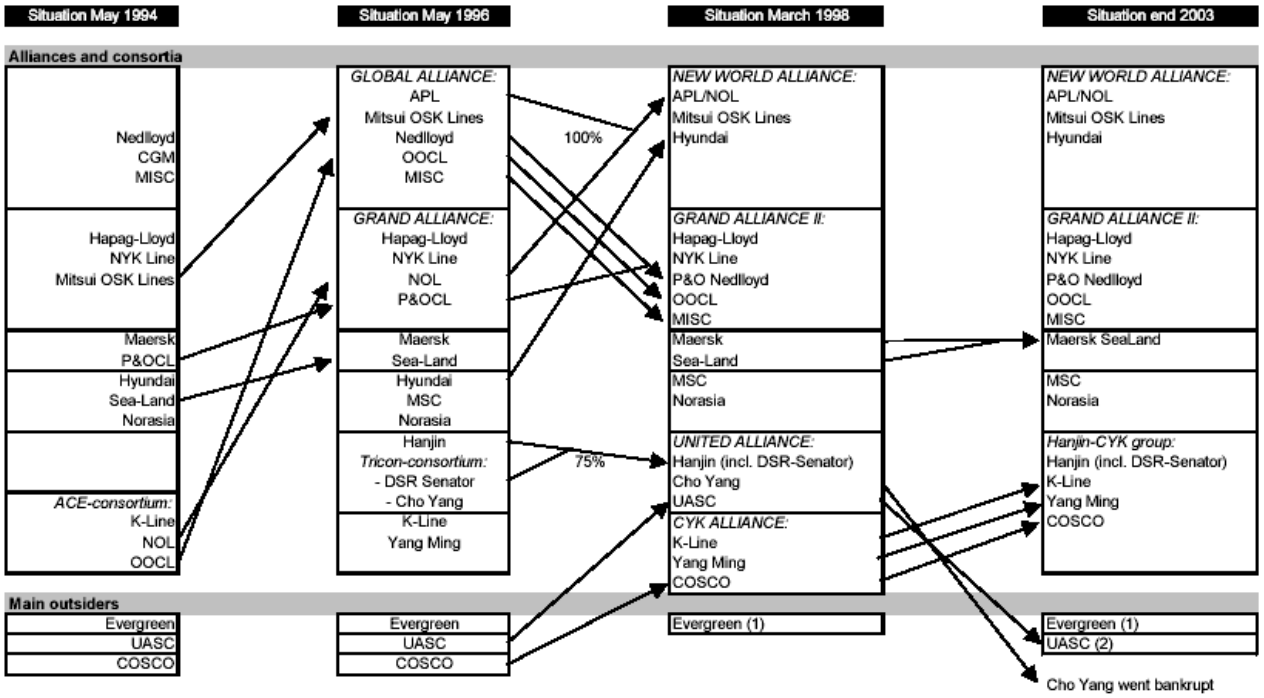

Figure 1: M&A and strategic alliances on the trade Europe – Far East (Source: ITMMA-UA)

Moreover, Poon[30] supports the "joining alliances" approach, because of additional potential cost savings including container handling costs, feeder costs and equipment.

On describing the figure (1) and according to Poon, the New Grand Alliance is the world's biggest shipping alliance and OOCL Netherlands is currently operating with it in Europe/Asia[31].

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[29] Interviewed by an ex-employee of Hanjin Line in Tokyo, Tomoko Oto.

[30] See *POON J.* the chairman of OOCL Ltd., (Spring/Summer 1998) "Commentary; Expansion & Alliance", International Container Review, p. 23.

Additionally, the economy is affected by transactions among shippers and carriers and their competitiveness growth on the one hand and on the other those who eventually bear the shipping costs. For instance, in order to tranship from the mother ship to a feeder ship many factors need to be considered. Carriers might be attracted to the sophisticated "sea-sea hub-and-spoke network system" (Notteboom 2004, p. 10) but it also depends on who is paying for this. Usually, it will be for the shipper to bear transhipment costs via extra Terminal Handling Charges (THC) (Brooks 2000)[32].

Under the "sea-sea hub-and-spoke network" system, containers are transhipped from mother vessels to smaller feeder ships in the defined centre (hub) port and then the containers are delivered to regional ports by feeder ships. THC can be defined as a tariff, charged by the shipping lines to the shippers and which should cover part or all of the terminal costs, paid by the shipping lines to the terminal operators (Notteboom 2004, p. 10, n. 8). As it seems, the economic development and the implementation of the ports mainly depend on the balance of power among shippers and carriers.

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[31] A supportive example is the Atlantic Container Line, the major European Containership Line (ACL) (Mahoney 1985, p. 18), which is a consortium of six (6) European lines operating within the new environment.

[32] See *BROOKS M.* (2000) "Sea Change in Liner Shipping: Regulation and Managerial Decision-Making in a Global Industry," Pergamon; *BROOKS M.* (2001) "Good Governance and Ports as Tools of Economic Development: Are They Compatible?" Proceedings of the *IAME 2001* Conference, Hong Kong, pp. 1-19; *supra*, n. 6, p. 10; also *cf. LUIS ORTIZ BLANCO* (2007) Shipping Conferences under EC Antitrust Law; Criticism of a Legal Paradox, Hart; liner conferences are among the oldest surviving cartels in the world and the United Nations Code of Conduct for Liner Conferences (1974) granted them global recognition and prompted the EC to recommend Member States to join the Convention on Liner Code (1979) and to grant them the most generous and extraordinary block exemption from EC antitrust rules ever (1986); also refer to *KREIS HWR* (1997) "Liner Services; the Block Exemptions & Intermodal Transport," Nordic Maritime Law Conference, EC Shipping Policy, 17th ed., 1996.

Therefore, when implementing this system there is a cost advantage on behalf of the carriers but not necessarily on behalf of the shippers, a matter which may lead to the instability of the shipping economy.

Moreover, governments can get involved when the THC are not fair. For example, the government of Hong Kong has pledged to increase pressure for a resolution to the on-going dispute over the THC and to reduce the price differential between Hong Kong and Shenzhen ports. This differential is US $100 per container, a substantial sum considering that moving a 20 feet equivalent unit box across the Pacific from Hong Kong costs about US$2,140. The container handling charge levied by the shipping line represents about eighty per cent of the overall THC[33].

The shippers might be cautious about cartel abuse and they can complain of a lack of transparency in THC settling but it is difficult to get more information since contracts among shipping lines and terminal operators are deemed confidential agreements. This is where the problem starts and where global economy can be affected in a critical negative way. The Deputy Secretary for Economic Development and Labour of Hong Kong, Raymond Fan Wai-min strongly suggests that the governments should take a tougher line in seeking information on the charges when urgency calls.

But, the port of Hong Kong did not only get involved in the THCs. It set another record, handling almost twenty two million TEUs, although it had to confront its rival, the port of Shenzhen. When discussing how ports can affect the economy, it is worth mentioning the impact of Associations in Container Terminals.

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[33] See South China Morning Post "HK Vows to Shed Light to Shipping Charges," TP International Publishing, Times Business Information Ltd.
as in *http://www.cargonewsasia.com/cnx-asia/getNews.asp?id=5376*,
(24 November 2004, at 17:45).

The economy of ports would improve if lower costs, particularly in trucking fees, were involved and direct shipments increased. A throughput growth is feasible, as long as careful handling takes place. Implementing international transhipments and cargo shipping via barges to the port of destination are sensible ways of enriching a port, since both are of low economic cost[34].

Containerisation has also affected society, initially by the creation of a new road and rail infrastructure, and the expansion of ports. As a result of the launch of containerisation, new transport policies have been implemented taking into account the needs of containerisation. Therefore, many factors and indicators throughout this process transform the characteristics of society[35].

The container revolution did not happen at once though, nor did it happen unnoticed. For instance, in East London between 1960 and 1985, when many social changes were taking place in England, all the docks of the biggest port in Britain were closed to cargo shipping as containerisation led to relocation downstream at Tilbury, Felixstowe and Rotterdam. This directly affected the infrastructure of the British society[36].

The sequence of transport improvement needs to be examined as much within the socio-economic context as in the stricter field of trade evolution. Meanwhile, the canal revolution has started to affect containerisation and its processes (Freeman 1983, p. 25).

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[34] See South China Morning Post "Top Port Sets Record despite Stiff Contest," TP International Publishing, Time Business Information Ltd. *http://www.cargonewsasia.com/cnx-asia/news_main.asp?id=5704&no=&src=1* (20/01/2005, at 23:00).

[35] See *PANAGOPOULOU* (7th June 2001) "Indicators Needs for a Transport Policy Information System: Results of Research," Best Conference, as in *http://www.bestransport.org/conference03/Panagopoulou3b.PDF* (27/11/2004, at 14:17).

[36] See *SMITH G.* "Networking for Urban Mission; a Case Study of the UK in the 1980s," as in *http://www.astoncharities.org.uk/research/socialnetworks/urbmnet.htm* (27/11/2004, at 17:45).

In practice, ports did not usually choose which goods they would handle and which they would not.

Technological developments brought about huge changes, not only in the modes of loading, carrying and discharging of cargo, but also in the institutional structure of maritime transportation and certainly the infrastructure of ports. Containerisation has brought a revolution to international trade meanwhile, if the term “revolution” may be so defined. Nowadays, there is a revolution also in containerisation itself. So, it might be relevant to mention that the notion of revolution can be seen in the way that containerisation is a revolutionary method in international trade since the containerships and the Ro/Ros are used, the door-to-door transportation is recommended, and the piling of the goods in the containers is implemented.

“Door-to-door” is an expression that the market has understood to refer to a carriage of goods from a place situated inland outside the port of loading to another place inland outside, even far away from the port of destination (Alcantara 2002, p. 401). It involves transportation by more than one mode, which normally are land and sea or railway and sea. However, that is not necessary always the case, as “door-to-door” may also fit with land transportation only (Alcantara 2002, p. 401), though using one or several carriers and with two or more modes of transportation without involving a sea leg.

We may also mention the “revolution” in containerisation itself. The notion of “revolution” derives from the new methods that are used nowadays and will be used in the future in containerisation, so as to improve this kind of undertaking technically and to support it financially. For example, the manufacture of containerships was a revolution in the earlier years in international trade though the manufacture of Post-Panamax vessels is a revolution in containerisation itself.

Furthermore, we could also refer to the revolutionary methods in the legal regime of container law, which one day might exist, at an international level. Therefore, the term "revolution" in international trade may take different dimensions. Containerisation brought a revolution in international trade and the new modern shipping methods are bringing a revolution in containerisation itself while revolution also lies in the international law that governs this kind of trade. The legal side is falling behind compared to the technical side. A new international legal regime that can adequately and globally govern containerisation is needed. When and if this legal regime is established, this will truly be a "revolution" and will "save" the process of this undertaking.

Finally, Herman (1983, p. 145) has observed an important aspect of the container revolution, namely the integration of land transportation with sea carriage, often described as Intermodalism. According to Mahoney (1985, p. 1), intermodality is "the science that deals with the movement of goods between and among various modes of transport". In combination with Alcantara's view (2002, p. 402)[37], intermodal transport can take place when the carriage of goods is done in one and the same loading unit or road vehicle, which uses successively two or more modes of transport without man's interference when modes are changing.

Intermodality is connected with the integration of logistics[38], since shippers demand value-added services. These include intermodal inland coordination between shipping, rail and trucks, and in this way containerisation is linked with intermodalism and the economy.

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[37] See *ALCANTARA MJ* (August 2002) "The New Regime and Multimodal Transport," 3 Lloyd's Maritime & Commercial Law Quarterly, pp. 399-404; on issues for intermodal improvement in ports visit;
http://www.marylandports.com/Intermodal/intermodaladv.htm
(14/01/2005, at 14:00).

[38] See chapter 1.

Flexibility on feeder-ring (Jol 1998, p. 79) might also take an intermodal aspect at sea. If, for example, a feeder service operates between ports for three times per week, then this should not be considered as a feeder connection but as an intermodal connection by sea.

Nevertheless, entering on the rail industry and combining it with the world of containerisation, ports may strengthen their rail connections so as to promote intermodality and attract new customers. What happens in this situation is that the port increases the volume of business moved to and from the port by rail and an on-dock rail facility is established which expands this process[39]. Therefore, in order to achieve better intermodal rail results, the truck and barge rates should be comparable with rail and it is useful that shipping lines have three modes of transport, on wise rates.

This issue also occupies the European Commission which attempts to develop a pan-European railway system capable of competing more effectively with other transit modes and actually in 2001 international freight services for intermodal cargo became obligatory at its first package[40]. The EU has gone even further apart from considering rates, so that a new draft directive deals with the certification of locomotive drivers, the creation of internationally acceptable "drivers' licences" and minimum quality standards for rail freight services on intermodal transport.

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[39] See *DORTO J (*April 2004) "The Port of Virginia: Rail Results," Containerisation International, pp. 93-96, at p. 93.

[40] According to EC (April 2004) "Further Boost for Pan-European Rail," Containerisation International, p. 25.

According to Double[41], the strength of the euro should have an adverse effect on westbound trade while the decline of the dollar has been encouraging growth in the opposite direction.

What happens in this field is that even if the euro is strengthened, the recovery of economies in the EU is still slower than in the US and could take the edge off eastbound volumes as European companies source from Asia instead. Carriers add that while the exchange rate factor is improving eastbound volumes, it has not caused a decline in westbound traffic. Exports from Eastern Europe, which are forecast to become an important market, could also be offsetting the stronger euro. Although the weakness of the dollar means a fall in profits, as freight rates are paid in dollars, still some operational costs and profits are reported in local currencies.

Finally, on commenting about the dawn of the US dollar, it should be added that non-US shippers might have an advantage, since despite the 18% decline in the dollar's value merely over the last year, ocean carriers were only asking for 20% increases and this could be seen as reason for negotiations. As a shipping expert foresaw "even if shippers pay more in dollars, they will still pay less in real terms." Therefore, carriers are in a strong position to charge CAFs (Double 2004, p. 39). The Currency Adjustment Factors (CAFs) is quite an issue that occupies the maritime industry.

[41] See *DOUBLE Z* (April 2004) "Money, Money, Money!" Containerisation International, pp. 34-39, at p. 34.

D.) DEFINITIONS

Containers may be described as metal boxes of 20 feet long and 20 feet high[42]. This kind of transport needs a stable legal term (multimodal, intermodal, combined) and a unified international legal regime, which will harmonise the national and regional different "laws". Terminology in containerisation is quite varied. Two names may exist in the same document (Combined/Multimodal Transport Document). Additionally, it is still unsettled how the legal cases will be solved and according to which legal regime liability will be judged and what will be the legal role of the different states.

A new trend that is emerging, and is increasingly accepted, is "integrated logistics." It is important to define what "integrated logistics" is. Integrated logistics is about considering the supply-chain from raw materials to the final customer, even if they are in a foreign country and making sure that it works effectively and efficiently. Working in "functional silos," the purchasing departments obtain raw materials, the manufacturing ones make the products, the sales departments sell them and the shipping ones despatch them[43]. When small exporters cannot achieve this in the normal course of business, they create business relationships, the already mentioned alliances, so they can satisfy the customers who are in a foreign country.

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[42] See sub-chapter 1c.

[43] See *CANADINE C.* (Spring/Summer 1998) "The Importance of Integrated Logistics," International Container Review, pp. 9-10, at p. 9.

E.) THE INFLUENCE OF THE INSTITUTIONS

Many associations are getting involved with Containerisation meanwhile some of them are introducing new terms and there are also non-governmental organisations[44] that play an efficient role.

Accordingly[45], the Zentrum fur Logistik und Unternehmensplanung GmbH is responsible for all ground transport investigations and the logistics consultancy. The International Scheldt Faculty (ISF) is responsible for all shipping regional enterprises and governmental departments. The European Intermodal Association (EIA) is a non-governmental association which promotes intermodal freight transport and is responsible for the provision of the practical experiences of their members. Furthermore, the KRAVAG-LOGISTIC, Germany's leading insurance company for truck and carrier liability insurance, is responsible for all liability questions. The European Logistics Association (ELA) is a federation of about thirty national logistics associations and responsible for the contact with logistics service providers.

Apart from them, the IMO[46], the International Maritime Organisation, is primarily concerned with the safety of shipping and the prevention of marine pollution, but the organisation has also introduced regulations covering liability and compensation for damage, such as pollution, caused by ships. Furthermore, the Legal Committee is empowered to deal with any legal matters within the scope of the Organisation. It was established in 1967 and consists of all the Member States of the IMO.

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[44] See *WILLETS P.* (4th January 2002) "What is a Non-Governmental Organisation?" UNESCO Encyclopaedia of Life Support Systems, Output from the Research Project on Civil Society Networks in Global Governance, City University, London; also *http://www.staff.city.ac.uk/p.willetts/CS-NTWKS/NGO-ART.HTM* (7th December 2004, at 12:30).

[45] *Supra*, n. 23, p. 3.

[46] Visit *http://www.imo.org/home.asp*.

The Legal Committee is also empowered to perform any duties within its scope, which may be assigned by or under any other international instrument and accepted by the IMO. The IMO was established in 1948 when an international conference in Geneva adopted a convention for this organisation, which entered into force in 1958. The original name actually was Inter-Governmental Maritime Consultative Organisation, or, the casual IMCO that we find in journals, which was changed in 1982 to IMO.

With the launch of Containerisation, social problems can arise. An organisation that specialises in social care and labour is ILO[47], the International Labour Organisation, which seeks the promotion of social justice and internationally recognised human and labour rights. It was founded in 1919 and is the only surviving major creation of the Treaty of Versailles, which brought the League of Nations into being, and it became the first specialised agency of the UN in 1946. The ILO, the International Transport Workers Federation and the European Transport Workers Federation can also influence labour legal rules.

These organisations can for example fight EU Directives, as recently happened in the case of the EU Directive on market access to port services, which could affect the work of seafarers and dockers[48]. It should be added that Containerisation encountered labour union objections. According to Mahoney (1985, p. 16) the labour unions did their part to retard the progress of containerisation, because they were afraid it would lead to longshoremen losing their jobs.

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[47] See *http://www.ilo.org/public/english/about/index.htm*.

[48] Visit *HASTINGS P.* (24th November 2004) "Unions to Oppose EC Proposal to Port Labour," TP International Publishing, Times Business Limited, as in *http://www.cargonewsasia.com/cnx-asia/getNews.asp?id=5376* (24th November 2004, at 17:42:45).

One of the main organisations that influence the legal procedure of containerisation, apart from the European Union, is the United Nations Conference of Trade and Development. UNCTAD[49] has made a recent survey on how the legal problems could be solved. It is researching on problems such as the liability of Multimodal Transport Operators, the appropriate legal regimes that should be adopted and the mandatory scope of these instruments[50].

Moreover, the second major body that is involved is the International Chamber of Commerce (the ICC), a Paris-based body that has recently revised the INCOTERMS. "INCOTERMS" is an abbreviation of international commercial terms, which are trade terms and basic elements for contracts of sale, since they inform the consignors and consignees how to cope with respect to the carriage of goods from the sellers to the buyers. They also advise on export and import licence when needed (Ramberg 1999, p. 10)[51].

INCOTERMS are written in plain language for inexpert people and therefore they are not as difficult to understand as the more complicated statutory rules but they must also be incorporated into the contract (Bridge 1999, pp. 8-9). This also happens with UNCTAD/ICC Rules 1992, which act as the present multimodal transport legal regime[52]. UNCTAD and ICC also co-operate for the economic development of international trade in poorer countries. They have set up an Advisory Investment Council for the least-developed countries.

The ICC has also been involved with the Uniform Customs and Practice for Documentary Credits.

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[49] See chapter 4.
[50] See chapter 4.
[51] See chapter 3.
[52] See Chapter 3(D).

The UCP Rules are a detailed collection of rules relating to letters of credit (Bridge 1999, p. 9). They also have to be incorporated in the contract, but sometimes are implied, adding a touch of uncertainty. The ICC does not only influence containerisation, but also the global economy, since its activities cover a broad spectrum and it has direct access to national governments internationally through its national committees[53].

Moreover, the Committee Maritime International (CMI) made an attempt by its Draft Instrument on Transport Law 2001 to provide a solution. This Draft was prepared in advance of the CMI Conference in Singapore in February 2001 and a Revised Draft Outline Instrument dated 31st May 2001 ("the May Draft") was circulated for comment to all national associations and a number of international organisations, including consultative members of the CMI. The preparatory work of the CMI on Issues of Transport Law came to an end with the submission of the CMI Draft Instrument on Transport Law to the Secretariat of UNCITRAL on 11th December 2001. The revised Draft Convention of Contracts for the International Carriage of Goods [wholly or partly] [by sea] was formally approved by UNCITRAL, in its forty-first session, on 3rd July 2008, in New York. The Legal Committee of the General Assembly also adopted this Draft Convention on 14th November 2008[54]. This Draft Convention is open for signing in Rotterdam in September 2009 and will be known as "the Rotterdam Rules."

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[53] Visit *http://www.iccwbo.org/home/menu_what_is_icc.asp* (28th November 2004, at 02:37).

[54] See *http://www.comitemaritime.org/draft/draft.html* (28th November 2004, at 04:20); also *http://www.un.org/ga/sixth/63/UNCITRAL.shtml* (27th August 2009, at 10:14). The text of the Convention is to be found on *http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/2008rotterdam_rules.html* (27th August 2009, at 10:29).

The United Nations Commission on International Trade Law (UNCITRAL) is the main legal body that is occupied with the harmonisation and unification of the law of international trade. UNCITRAL had prepared the main draft according to which the members of the United Nations at Hamburg adopted the United Nations Convention on the Carriage of Goods by Sea, 1978, known as the Hamburg Rules. The UK is not a party to the Hamburg Rules[55]. Meanwhile UNCITRAL with the collaboration of the International Institute for the Unification of Private Law (UNIDROIT) responded with a draft for the preparation of the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade adopted on 17th April 1991 and opened for signature on 19th April 1991 by a conference at Vienna.

Furthermore, the OECD, the Organisation for Economic Co-operation and Development, established in 1960 currently consists of thirty member countries but up to ten countries are expected to join in the near future as part of an enlargement and enhanced engagement initiative. The OECD works on territorial economic surveys and focuses on the benefits of economic growth and sustainable development. Recently, in collaboration with the European Conference of Ministers of Transport (ECMT), the OECD carried out a survey on container terrorism. Generally speaking, after the September 11th, 2001 terrorist attack in New York, the security of international trade has been the concern globally of these institutions and new measures have been taken[56].

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[55] Visit *http://www.uncitral.org/en-index.htm*.

[56] Quiet a lot of controversy was created as to whether September 11th, 2001 could act as a turning point in international and domestic law. Additionally, Singapore is responding to international terrorism and action is taken in co-operation with IMO and the US to strengthen maritime security by joining the US Container Security Initiative; *FAIRPLAY* (2002) "Singapore Takes Decisive Steps," 346 (6193), Fairplay, pp. 22-23; *cf. BOCKO R. /RAY H.* (2002) "United States: New Challenges for Shipping" 3(4), S & TLI, pp. 7-9.

Additionally, the OECD recommends that the ECMT Ministerial Declaration on Combating Terrorism in Transport, the 2001 Ministerial Conclusions on Combating Crime and the ECMT Resolution No 97/72 on Crime in International Transport contain regulations, which should be taken into account. Ultimately, the States should apply the recent ISPS Code and the amended SOLAS Convention, both of which deal with security measures for international ocean-going vessels.

Finally, an association that influences the financial aspects of *containerisation* is the International Association of Maritime Economists (IAME)[57] which is an international forum for the exchange of information and views among those interested in the economic aspects of shipping, ports and other related issues.

[57] See *http://www.staff.vu.edu.au/iame/* (7th December 2004, at 12:48)

F.) CONTAINERISATION & TECHNOLOGY

In order to understand *containerisation* many factors need to be taken in account.

Firstly, *containerisation* cannot take place without the use of containers[58]. Defining a container, the United States Supreme Court stated in *Japan Line v. County of Los Angeles* [1979] 441 US 434 that "a container is a permanent reusable article of transport equipment durably made of metal and equipped with doors for easy access to the goods and for repeated use. It is designed to facilitate the handling, loading, stowage aboard ship, carriage, discharge from ship, movement and transfer of large numbers of packages simultaneously by mechanical means to minimize cost and risks of manually processing each package." A widely acceptable definition of it was given in *Co v. Caputo* [1977] 432 US pp. 249-271, when the Court adopted northeast marine terminology explaining that "a container is a modern substitute for the hold of the vessel."[59] However, one of the main characteristics of containers is that they are movable and portable and this is one of the most important elements in multimodal international transportation.

Accordingly the definition given in *Caputo* may be open to debate.

Nowadays technology has evolved greatly, not only in the manufacture of containerships, but also in the development of the containers themselves. Thus, the more sophisticated ones are insulated, heated, refrigerated and ventilated (1HVs) and cellular pallet wide containers, 20 or 40 feet serve containerisation. Additionally, "container - like" items are employed such as portable tanks and flats, which share the basic container frame in order to facilitate handling by standardised equipment.

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[58] The containers are metal boxes usually 20 feet high and 20 feet long. There are also containers, which are 40 feet high and 40 feet long; see *BRODIE (*1996, p. 35).
[59] Also *supra,* n. 5, p. 428.

The cellular pallet wide containers are shipping containers designed to carry an optimum number of euro pallets. This can be accomplished because of their dimensions; they are 2.5 metres wide, wider than standard containers, which are 2.44 metres. It is to be questioned why their shape is so significant. Technology intervened at this point and deliberately cut this type of metal box away at the corners to reduce the width. By modifying their corners, they are effectively allowed to be fitted in the cells of the ships specially designed for them, the cellular containerships, as Brodie (1996, pp. 26-27) vividly demonstrates. The "cell" of a vessel is a compartment in the hold of a container ship into which the shipping containers can be fitted exactly. The cells are also known as "slots." The latter term is used, when referring to the number of such compartments on a ship and the arrangements made between different shipping lines to pool capacity or between a shipping line and a groupage operator or non vessel operating carrier (NVOC) to make use of space on the ship; hence, the "slot charter parties."

In reality, the containers are sent from the manufacturers to the Multimodal Transport Operators, who are usually the charterers, according to Harrington (1982, p. 4[60]). Then, the MTOs send them to the shippers empty and clean at central depots, the Container Freight Stations (CFS) inland. In order for door-to-door or house-to-house transportation (Harrington 1982, p. 2) to take place, the MTOs or the freight forwarders load the containers on the shippers' chassis and a receipt is issued showing the containers' apparent good order and condition.

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[60] See *HARRINGTON S.* (1982) "Legal Problems Arising from Containerisation & Intermodal Transport," 17, European Transport Law, pp. 3-27. The modern term used is "door-to-door;" Harrington refers to some more variations of carriage like "house-to-house," "pier-to-pier," "pier-to-house," and "house-to-pier." If the MTOs load and unload the containers the transit is named "pier-to-pier;" if they only stuff or de-stuff, the carriage is "pier-to-house" or "house-to-pier" accordingly.

The shippers return to their warehouses and they fill the containers with the commodities, seal them and return them to the depot where another interchange of receipts takes place.

The MTOs or the inland carriers remove the containers from the shippers' chassis and then transport them by rail or road to a seaport where they are delivered to the terminal operators against yet another interchange of receipts. The terminal operators load them onto the ship, which is designed to satisfy containerisation needs, particularly for on-deck carriage. At the port of destination, a similar process is followed and a variety of interchange receipts change hands once more until the receiver finally returns the empty container to the MTOs' central depot at the place of final delivery and the leasing contract is concluded.

Containerisation has also had an effect on world shipbuilding. The latest Capesize container vessel is the most vivid evidence of the evolution in technology. How is it different from normal ships? A sophisticated example of recent new building is the Hapag-Lloyd's "*Hanover Express*" which was built according to the company's "ship operation system." "*Hanover Express*" has special areas for working and living and it is handled from a forward projecting "pulpit" at the starboard side of the ships operation centre. From a traversing seat, the "multi-purpose" officer can reach all necessary ship and machinery controls and view displays. Back-up positions and chart tables are positioned elsewhere in the centre, which also oversees all safety matters.

This ship can carry 1,000 TEUs more than comparable sized vessels in her hull and in all 4,407 units can be carried, despite the fact that the beam was restricted to allow Panama Canal navigation. The vessel has seven cargo holds fitted with cell-guides to accommodate 2,282 TEUs and a fifth one designed to carry refrigerated containers, 452 of

which may be loaded either in that hold or on deck, as Lingwood[61] describes (1992, p. 29). Its deadweight is 55,590 tonnes on a design draught of 12.50m at which service speed is 23.80 knots.

What is even more interesting about this particular ship, and should always be taken into consideration when manufacturing new ones, is the fact that it has been equipped with strict environmental controls, ensuring that clean and oily bilge[62] water are separated. It also has special storage tanks to contain any leakage to the bilges from dangerous cargoes. Furthermore, dry refuse is baled for off-loading ashore and wet (galley) waste is crushed and discharged overboard in accordance with MARPOL rules[63].

Container vessels are not only used for just ocean trade. New building is also taking place for short-sea shipping and inland navigation. Technological equipment is also provided for container trade in lakes and rivers[64]. For instance, a German Operator ordered three 3,200dwt vessels designed specifically for trade with the Finish Saimaa Lakes from Paatje Shipyards of Waterhuisen.

These have a container capacity of two hundred and nineteen TEUs and a new feature of these ships is that they are ice-strengthened, which means their shell plating is thicker and their bows are reinforced, so as to be able to navigate in ice conditions (Brodie 1996, p. 84).

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[61] See *LINGWOOD J* (January 1992) "New Ship News," Ships, Burton-On-Trent, Waterway Productions Ltd., pp. 29-31.

[62] The "bilge" is defined as the area at the lower part of a hold where liquids collect and are pumped out at regular intervals (*BRODIE P* 1996, p. 7).

[63] International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78) as in *http://www.imo.org/Conventions/contents.asp?doc_id=678&topic_id=258* (05/07/2005, at 14:00).

[64] See *MacDONALD M* (May 1999) "Coastal & Short-Sea Commentary," Ships, Burton-on-Trent, Link House Magazines Ltd., pp. 16-19, at p. 19.

These ships have the maximum level of ice-strengthening possible. The maximum deadweight of the vessels when operating in the Saimaa Canal will be 2,270 tons.

Ice-strengthening was also carried out the "Hansa Lubeck," designed for unrestricted service including navigation on the River Rhine[65].

These are recent ice-strengthened ships:

Photo 1

[65] See *LUCAS J* (June 2000) "Specialised Vessels for Intensive Paper Service," 74 (654), Sea-Breezes: the Magazine of Ships and the Sea, Braddan, Print Centres Ltd., p. 226.

Photo 2

Technology has ensured that they can meet the increasing needs for shipping between North Africa and Europe, challenging traders to choose short-sea shipping rather than road transport. These ships have a capacity of 506 TEUs, and their dimensions are 114m in length x 20m beam x 6.5m (draught) and most significantly, their holds are constructed with technical ventilation in order to be useful in carrying unripe fruit and vegetables. They are powered by Bassoon MAN/B & W 8L40L45 geared diesels driving controllable-pitch propellers and are designed to operate with a crew of twenty.

At this point, some of the terms that are specific to the shipping industry and are encountered frequently when discussing *containerisation* should be explained. The "deadweight" of a ship is the difference between the ship's loaded and light displacements, consisting of the total weight of cargo, fuel, fresh water, stores and crew which a ship can

carry when immersed to a particular load line, normally her summer load line. This "deadweight" is expressed in tons or tonnes (Brodie 1996, p. 43).

Furthermore, when the term "draught" of the ship is used, it means the depth to which a ship is immersed in the water; this depth varies according to the design of the ship and will be greater or lesser depending not only on the weight of the ship and everything on board, such as cargo, ballast, fuel and spares, but also on the density of the water in which the ship is floating. A ship's draught is determined by reading her draught marks, a scale marked on the ship's stem and stern. The term "draught" is also used to describe the depth of water (Brodie 1996, p. 51).

Accordingly, the draught marks can be viewed on this ship, shown below (Photo 3).

Photo 3

Additionally, when we refer to the "ship's beam" we mean her maximum breadth. As Brodie indicates (1996, p. 7) this is sometimes a factor in determining whether a ship is suitable for a particular port and, consequently, whether it can be used on a particular voyage. The beam may need to be measured against the width of locks and the outreach of cargo-handling equipment.

Technology has led to a number of further improvements on these ships such as the strengthening of the hatch-covers to support containers, as Lucas indicates (2000, p. 225) when referring to the "Polar Star," although he points out that consideration must also be given to the manoeuvrability of these ships, when describing the "Spaarneborg" (Lucas 2000, p. 224). As the name suggests, hatch covers cover, or close the hatchway of a ship. There are various types, such as wooden boards laid across the hatchway, or steel sections which roll to one side or to one end (Brodie 1996, p. 78). They are very important in the construction of a container vessel since they keep out rain and water breaking over the ship and they are installed on the weather deck and tween deck. The weather deck is the uppermost deck exposed to the weather, extending the length of the ship (Brodie 1996, p. 185). The tween deck is the deck which separates the hold of a ship into two, making an upper hold and a lower hold. Its purpose is to provide two separate levels of stowage for the cargo, giving ease of access and helping to avoid compression of cargo caused by direct over-stowage (Brodie 1996, p. 177).

Modern technology has played an important role in the design of special vehicles and equipment used in the container industry. The metal boxes, or containers, are transported empty by specially designed trucks to container freight stations where they are stacked before continuing their journey by road or rail to the container terminals. At these terminals, the containers are placed on container berths.

Specially designed equipment is used to load the containers onto the container ships. Then, the containers are moved from the warehouse to the loading bay along a moving strip, known as the conveyor belt. Moreover, when the containers reach the container berth, modern transit methods are used to transfer them to the ship.

In relation to conveyor belts, an upgrading in the port of Miami took place and is demonstrated below:

Photo 4

This photo shows the job of the conveyor belts within a modern bay. Each horizontal bar is a conveyor belt. The conveyor belt is a moving strip along which goods are moved to deliver them from one area, such as a loading bay, into a warehouse (Brodie 1996, p. 41).

Moreover, special machines have had to be designed to lift and move heavy weights. These are called cranes and they can be mobile, floating or fixed either to the shore or the deck of a ship. Each crane has specific operating features such as the maximum allowable lift, known as the Safe Working Load (SWL) and the outreach or maximum distance, which the crane can reach to pick up or put down cargo (Brodie 1996, p. 43). There are many types of crane. The main ones are: the "bridge crane," the "cantilever jib crane," the "crawler crane," the "floating crane," the "gantry crane," the "heavy lift crane," the "jib crane," the "multi-purpose crane," the "portal crane," the "stacker or straddle crane" and the "transporter crane."[66] However, containers can also be "rolled on and rolled off," with the aid of special self-propelled vehicles used for towing trailers. Ports employ special machinery to move road trailers onto and off RO-ROs. New technology has led to the invention of the "straddle carrier." This is a wheeled vehicle specially designed to lift and carry shipping containers and is used for moving and sometimes stacking containers at a container terminal.

Obviously, the evolution of modern shipbuilding does not stop here. Technology was first used to modify existing ships in the 1960's, as it was the most economical solution. However, technology soon took the lead by developing giant container-vessels[67], as *containerisation* entered the 21st century. Economies of scale led to the construction of the Panamax (in 1985), the Post-Panamax vessels, and the 5th generation vessels, the Post-Panamax Plus which serve *Containerisation* nowadays and have a capacity of 5000-8000 TEUs.

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[66] See *BRODIE P* (1996), pp. 13, 21, 43, 57, 67, 79, 87, 108, 125, 155 & 161.
[67] See "Five Generations of Containerships," *http://people.hofstra.edu/geotrans/eng/ch3en/conc3en/containerships.html* (03/01/2005, at 17:00).

The fifth generation vessels of the 21st century encounter many problems, which are serious but not insoluble. Initially, the ports that can handle these giants are few and far between. A Post-Panamax ship requires deep-water ports and the initial cost of creating the necessary high-efficiency transhipment infrastructure is extremely high. But, even if the transhipment issues can be resolved, money still remains an important issue since increases in speed cannot be increased without increases in energy consumption. This means that those speeds are on average between twenty and twenty-five knots, something which Herman (1983, p. 135) has also referred to in the past. So, perhaps increases in speed are not gained by these giants in the end, but their capacity is what sells compared to the smaller ones.

When considering speed, size, and the scope of fast ships, there are also implications alongside the quays; for example, berth length, lift height, outreach of the cranes and the size of the terminal, and definitely in the inland waterway. Technology should find a way of speeding up the larger vessels, so that terminal operators will not be under pressure to turn the ships round as quickly as current safety procedures allow[68]. Technology could be used to solve this problem devising faster cranes and ground-handling equipment fleets to facilitate faster turn-around times.

Accordingly, NASSCO has provided its ships with cargo configurations and how they can be upgraded, and most importantly, how uniqueness can be combined with cost-effectiveness[69].

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[68] See "Drive to Bigger Containerships," *http://www.worldcargonews.com/htm/n2001107.041922.htm* (14/01/2005, at 14:00).

[69] See *http://ww.nassco.com/cdc/cs.html* (03/01/2005, at 15:30). For an illustration of a recent low-cost design which adds to the new era of containerships visit *http://www.nassco.com/cdc/pfeiffer.html* (03/01/2005, at 16:00);
cf. *http://www.shumsw.tripod.com*.

The illustration that follows shows the development of shipbuilding in containerisation in the five generations[70]:

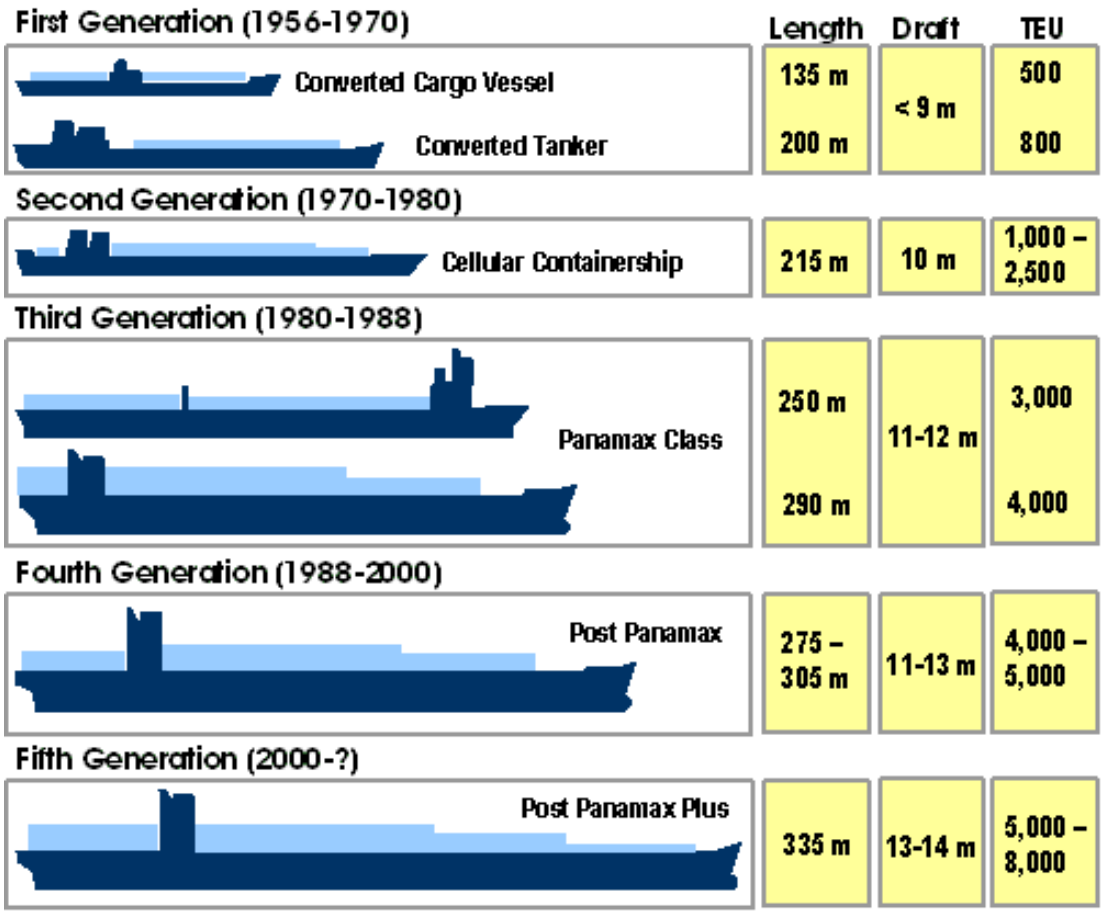

Figure 2

[70] *Supra*, n. 67.

Moreover, RO-ROs can help here since they are the safest and most inexpensive way to handle, and transport, oversized or special project cargo. They are extremely useful in door-to-door transportation, as shipments often move as one unit using specialised trailers from origin to port of destination. What should be considered when manufacturing containerships is the securing of garage decks for the entire voyage so no exposure to water can take place, especially when they are designed for RO-RO shipments.

The modern multipurpose RO/RO Containerships, also known as CON-RO ships (Brodie 1996, p. 139), were designed to carry shipping, wheeled, palletised and unitised containers and have cell guides within which accommodate them. They also provide decks to fit roll-on/roll-off cargo and they may also be used for heavy weights such as special projects and unusual shipments. On demonstrating how powerful and dynamic these ships are it is worth mentioning that the Atlantic Container Line (ACL)[71] has carried out two shipments so far with these kinds of ships; the first was in June 2004, when the ACL transported aboard its "Atlantic Compass" a powerboat set to break the Round Britain World Record.

[71] Visit *http://www.acl.com* (27/12/2004, at 01:00).

G.) A JOURNEY IN TIME

a. The Past…

Once upon a time, in 1992 "the world's first Panamax size open hatch' container ship was classed with Lloyd's Register;" her name was *Nedlloyd Asia* and was scheduled to begin its maiden voyage on the 10th December, sailing from Kobe to Singapore (Shaw 1992, p. 8). Her ancestors and successors were and are being designed for carrying containers whereas these metal boxes themselves go back a lot further than 1992. A container service was running in the USA as early as 1906. A little later, in the 1920's Seatrain Lines launched the rail wagon service (Greenman 1992, p. 14). An argument took place recently concerning the evolution of the new trade methods as to which was the first "purpose-built" container ship. According to Greenman (1992, p. 14), the first container-ship was *Clifford J. Rogers*[72], owned by the British Yukon Navigation Co. Its voyage was between Vancouver and Skagway (Alaska) and in 1966 was joined by a larger ship, carrying larger containers. Furthermore, on this journey in the evolution of *containerisation*, the ex-Sealand (new joint venture known as Maersk-Sealand[73]) company promoted the first waterborne containers in April 1956[74].

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[72] It had cellular compartments designed to carry one hundred and sixty eight (168) steel boxes, but the small size of these boxes, 5ft square, might create a second argument as whether they were truly "containers" in they way we know them nowadays (Greenman 1992, p. 15).

[73] As interviewed by an ex-employee in Hanjin Shipping in Tokyo, Tomoko Yi.

[74] As Mahoney also completes (1985, p. 13), on April the 26th, 1956, a converted tanker carrying fifty-eight trailer vans on its specially adapted decks, sailed from Newark, New Jersey to Houston, Texas -touching off the container revolution- a landmark in history of intermodal transportation, since the expansion to major shipping routes is beginning and to routes throughout the world. It is in 1956, when the commercial revolution starts, since it is publicly demonstrated that standard containers can move cargo successfully on a land-sea intermodal journey; about container technology and history view *WOOD S.* (2000, p. 244).

The first service using a fully containerised vessel, the "C2" conversion *Gateway City*, was established in 1957 followed by the first offshore service in 1958 (Greenman 1992, p. 15). Further back in time, *Elizabethport,* one of Sealand's largest container ships, was the first container vessel to cross the Panama Canal. As it seems in the past, the problem of the new Post-Panamax Container Vessel did not exist[75].

The beginning of the container ship era is usually regarded as dating from 6th May 1966[76]. However, I submit that there is ample evidence that 'container' ships were used in ancient times. It can also be argued that a type of containerisation existed even in ancient times. Research[77] shows that in the Classical World, people in the shipping industry were using amphorae as containers. So, the concept of containerisation might not be as new as we are often led to believe. It is interesting to note that the problems, which existed in ancient times, have still to be resolved.

Later, in the medieval period, trade took place on or near navigable water. The economic growth of the 17th or 18th centuries was never so explosive that improving and extending river navigation could not meet it. Nature was utilised as long as possible, with some inconvenient transhipment breaks being tolerated surprisingly late into the canal age. Certainly, one should take into account the fact that eras are changing, *containerisation* is taking on different dimensions, and the needs of transport vary depending on the various

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[75] Information about the Post-Panamax Container Ship's issue is taken from the Greek DVD, where it draws the line up to which point the Panama Canal can be rebuilt to fit the 21st Century's container vessels; *supra,* n. 11.

[76] See *DINGER F.* "What Shall We do With the Drunken Sailor? EC Competition Law & Marine Transport," 61, BASLERSCHRIFTEN Zur Europaischen Integration, EUROPAINSTITUT der Universitat Basel, as in *http://www.europa.unibas.ch/fileadmin/pdf/BS61.pdf*.

[77] See photo with ancient amphorae and comments at Appendix 2.

methods of transport. It is worth remembering that since World War II, this kind of trade has been defined as “revolutionary.”

Meanwhile, containerisation and mostly intermodal transport also brought changes to highways (Freeman 1983, p. 49). It was in 1727 when ‘turnpike trusts were set up to provide better roads but the age lacked experience in engineering, especially since technology saw no substantial advance until the nineteenth century. While canals and railways were more expensive, turnpikes did not usually cost huge amounts of money’. The demands of the building industry gave rise to an entire range of coastal shipping cargoes.

Timber from the Baltic was transhipped into coasters at Hull and goods were sent by coaster rather than by land because it was decidedly cheaper. Water carriage was to a certain degree cheap because the capacity of a canal barge or coasting vessel was so very much greater than that of a wagon (Freeman 1983, p. 160). Inland waterway transport was more frequently complementary to, rather than competitive with, coastal shipping.

As containerisation started to develop, shipping agreements and contracts were produced. In 1979, a busy year for bilateral shipping agreements and negotiations (Herman A. 1983, p. 213), many agreements were inspired by the UNCTAD Code[78] as developing countries established the administrative and legislative procedures to govern the operation of their maritime trades. The Ivory Coast, for instance, negotiated agreements with Belgium, Spain, and Italy. The protectionist policies adopted by countries such as South Korea, Morocco, and Brazil also provoked a spate of negotiations meanwhile Denmark

[78] The United Nations Convention on Trade and Development (UNCTAD) was established in 1964 as a permanent organ of the UN General Assembly. The UNCTAD’s Code stresses the importance of consultations between shippers and conferences and tends to disregard the role of shippers’ councils when it comes to choosing the carriers.

concluded a Maritime Agreement with Korea. The United States and China engaged in a series of negotiations for a bilateral agreement.

When exploring the intermodalism of the early 1800s, it is worth mentioning that intermodal containerisation developed as part of the solution for moving people and goods between the water and land portions of a journey. The Pennsylvania Canal between Philadelphia and Pittsburgh, which opened in 1839, involved both water and overland segments. Barges carried a mixed load of passengers and cargo which operated as intermodal containers since they were moved as a unit sequentially aboard horse-drawn wagons, railroads, canals, cable railways and additional canals to provide city-centre-to-city-centre transportation (Mahoney 1985, p. 5). Later, after World War I, a number of railroads developed LCL container service (Mahoney 1985, pp. 5-6).

Carriage of freight by intermodal truck trailers on railroad flatcars took place initially in 1926 on the Chicago North Shore and Milkwaukee Railroad. Piggyback services grew slowly but steadily until the mid 1950s when the pace got faster. After the mid 1950's, three prominent companies developed the piggyback rail truck intermodal transportation; the Railway Express Agency, the Flexi-Van and the Trailer Train (Mahoney 1985, p. 9).

b. The Present…

Nowadays container transport continues to evolve resulting in efficient international trade, since exporters can load container vessels with different types of cargo (in bulk, metal boxes, or even heavy equipment, like forestry products on flat-racks). The most current legal framework is a combination of the ICC/UNCTAD Rules in the Multimodal Transport. However, this does not constitute the essential legal framework, necessary for the future of containerisation.

According to Fogel's thesis[79], which is supported by Freeman (1983, p. 18), the railroad is not such a vital ingredient of the American economic growth and, as is the case today, transport demands can be satisfied by other means, such as an improved and extended inland waterway system. Inland waterways and canals are constructed to ease container transport and thus lessen traffic congestion. The only international legal framework that exists today for inland waterways is the Convention on the Contract for the Carriage of Goods by Inland Waterway (CMN)[80], which is not yet in force.

Finally, the CMI Instrument on Transport Law, known as "The Rotterdam Rules," is a recent attempt at unification but it has not been considered as container law yet as it supports mainly the carriage of good by sea, as further analysed (chapters II & IV).

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[79] See *FOGEL RW* (1964) *Railroads and American Economic Growth: Essays in Econometric History*, Johns Hopkins University Press, Baltimore.

[80] The CMN (Convention Relative au Contrat de Transport de Marchandises en Navigation Interieure) was originally signed at Geneva, on the 6th February 1959 and modified by so-called Regles de Strasbourg, February 1973.

c. The Future …

The technical methods and support of containerisation will continue to develop. Regarding the legal aspect, the future seems murky, because of the continuing existence of legal technicalities. As the containers become bigger, the means of transport used to transport them must also become bigger, which means that more of the natural environment will be destroyed to accommodate containerisation.

Problems may exist in many fields of Combined Transport in practice, and are sometimes difficult to resolve when law comes to play its role. Comparing the variety of national legislation, and exploring overseas schemes that are being applied to ameliorate some of the major difficulties created by containerisation (which will probably be multimodal, intermodal and/or combined) might be a good starting point.

What should always be taken into account is the fact that the successful future of shipping companies will be decided on their ability to satisfy the demands of their customers, particularly the customers who are based in a foreign country, since this is the precise aim of containerisation. Besides, as suggested below (chapter III) "if you need special treatment, you must tell us in advance." Therefore, it is the customers' job to tell shipping lines what they want, so that customers' requirements will receive the "special treatment."[81]

In terms of the types of goods being shipped, it seems logical to assume that feeding services will change and be able to survive by amalgamating. However, it is possible that new joint services might arise a new era. This may lead to the formation of new global alliances, something that will dictate further changes.

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[81] See *HOWARD B., CEO Safmarine & SMBT Lines (SCL)* (Spring/Summer 1998) "Commentary" International Container Review, p. 43.

H.) REMARKS

As already discussed, the effect of world containerisation in global economy is distinguished by the constant elimination of trade barriers and the liberalisation of markets. This also led to calculations in costs to take place on certain projects upon containerisation meanwhile solutions and patterns are provided by national authorities, when it is necessary for a national authority to interfere.

Moreover, alliances have been created since the advent of containerisation which brought a new era in shipping trade, since they lead to potential cost savings in the future including handling costs, feeder costs and equipment under a global level. Technological developments brought huge changes about, not only in the modes of loading, carrying and discharging of cargo, but also in the institutional structure of maritime transportation and certainly the infrastructure of ports.

Furthermore, the future revolutionary container law should be universal and under a uniform level. Therefore, the term “revolution” in the international trade takes different dimensions. Containerisation brought a revolution in international trade and the new modern shipping methods are bringing a revolution in containerisation itself, as also stated above, while the revolution also lies in wait for the container law that will govern all aspects of container traffic in the future. Nowadays, however, it has fallen behind compared to the technological developments. When and if this future container law is established, the notion of a “revolution” will be truly justified.

Chapter II

LIABILITY AND PACKAGE LIMITATION

A.) INTRODUCTION

With the advent of Containerisation, many problems were created in the field, particularly as to who is liable for the loss of or damage to the cargo. The implications of the modern carriage of goods by sea and the development of the multimodal transport greatly affected the calculation of the liability of the carriers. Here, certain legal regimes play their role, such as the Carriage of Goods by Sea Act (COGSA) and especially the Hague and the Hague-Visby Rules in relation to package limitation which is an important issue, because it affects the calculation of the liability. This, therefore, raises the important question, whether the container is a package or not.

At the outset it may be useful to describe the background to the enactment of the Hague and Hague-Visby Rules. Therefore, the role of the COGSA 1971, and the discussion of what constitutes a package will follow. On the latter a case-study has been conducted and relevant approaches, which derived from certain jurisdictions, have been formulated, leading to the “metal package” approach, a term which will have much significance for the remainder of this thesis.

Finally, it will be demonstrated, why Containerisation and the evolution of the new technology in container-ships have affected the regimes governing maritime transport directly or indirectly on the issue of the limitation of the liability of the carriers. This is of major importance, if we are to achieve the draft of a new uniform container law especially, for containerisation. Moreover, the definition of the tonnage limitation will be considered in sub-chapter C (c.).

a. Historical Background

In the 14th century, the bill of lading appeared as a non-negotiable receipt for cargo received, issued by a ship-owner, to merchants who did not intend to travel with their goods[82].

By the 18th century, the bill of lading had acquired its third characteristic, the one of being negotiable[83] while the incorporation into the document of the terms of the contract of carriage in order to resolve the disputes inevitably arose between cargo owners and carriers. In actual fact the traditional ocean bill of lading has been an important commercial document for many centuries.

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[82] See *BORL M.* (1997) The Bill of Lading - A Document to Title of Goods, London, LLP, pp. 1-19; *GASKELL N. /ASARIOTIS R. /BAATZ Y.* (2000), pp. 145-151; *SEALY LS /HOOLEY RJA* (2003) p.14; *PAMPOUKI* A. (1995), pp.197-216 as in Ocean Bills of Lading, edited by Yiannopoulos AN; the document issued for a multimodal transport is sometimes termed "document" and at others "bills of lading." The term "bill of lading" is used mostly for documents drafted by associations of professionals and great enterprises (for instance FIATA BL, Combiconbill) while the term "document" fits better to multimodal transport (Pampouki 2000, p. 49). The term "document" avoids confusion with bill of lading, which is usually connected with sea carriage, or anyhow it may be issued only in cases provided by the law. For example, the Hague-Visby Rules are applicable in principle to contracts, which are covered by a bill of lading or any other document of title. A bill of lading as a written instrument may have certain very important functions -namely those of a negotiable instrument and document of title- the question is whether or not a document for a multimodal transport. According to Pampouki (2000, p. 51) this "document" will serve as a document of title and it will be negotiable.

[83] See *JI MacWilliam Co Inc v. Mediterranean Shipping Co SA; the Rafaela S* [2005] 2 ALL ER 86; per *Lord Bingham of Cornhill*, "where, however, the court is considering a bona fide mercantile document, issued in the ordinary course of trade, it will ordinarily be slow to reject the description which the document bears, particularly where the document has been issued by the party seeking to reject the description. This document called itself a bill of lading. It was not a bill transferable by endorsement, and so was not "negotiable" in the somewhat inaccurate sense in which that term is used in this context (*Kum v. Wah Tat Bank Ltd.* [1971] 1 Lloyd's Rep 439 at p. 446);" *cf.* Non-negotiable sea waybills (*GASKELL* 2000, pp. 727-733).

As a contract, it has given the ship owner the means to qualify duties and mitigate liabilities, which could otherwise be imposed upon him under stringent common law rules[84].

At the time, the liability of the carrier under a bill of lading contract to transport the cargo safely to its destination was strict, subject only to what were known as the common law exceptions, namely, acts of God, public enemies, or inherent vice. Sometimes these exceptions might cause debate. For instance, a peril of navigation might not be an act of God or a public enemy. As shown in *Liver Alkali v. Johnson* [1874] LR 9 Exch 338, *per Blackburn J*, a fog might be a peril in navigation but it could not be called an act of God or a public enemy. In this case, the question raised was whether the defendant was under the liability of a bailee for hire to take proper care of the goods, in which case he was not responsible for this loss. Also, it was questioned whether he had the more extended liability of a common carrier to carry the goods safe against all events, but acts of God and the enemies of the Queen.

In *Nugent v. Smith* [1876] 1 CPD 423, a mare was being carried on the deck of a ship and in the course of the voyage the ship encountered rough weather and the mare received such injuries that she died. The court held that the carrier does not insure against the irresistible act of nature, nor against the defects in the thing carried itself. Therefore, the carriers may discharge themselves from liability, if they prove that either the act of nature or the defect of the thing itself or both taken together formed the sole direct and irresistible cause of the loss[85].

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[84] Refer to *Crutcher BM* (June 1971) "Admiralty Law Institute: Symposium on Carriage of Goods by Water; the Ocean Bill of Lading - a Study in Fossilization," 45, Tulane Law Review, pp. 697-732.

[85] Refer to sub-chapter 2B (f).

Accordingly, if the carrier is guilty of any neglect to take precautions against the processes of nature, then the loss ceases to be by act of God, since human action has contributed to the loss.

But, in *Nugent v. Smith*, the carrier was clearly not answerable for a loss occasioned either by an inherent quality of the item itself or by the act of God. Consequently, the carriers remained liable if their negligence or other fault had contributed to the loss or damage to the cargo. At this point in time, the carrier's liability under a bill of lading contract for safe custody of the cargo was identical to the ship owner's corresponding liability under a charterparty.

By the 19th century, however, the carrier was able to take advantage of his superior bargaining power under the bill of lading, by introducing clauses into the contract of carriage, which, to an increasing extent, excluded common law liability. Until 1855, limited liability was the exception, not the rule. Debate was raised on whether it was desirable to prohibit, by law, persons from dealing together "on the terms that liability of one or more or all" should be limited. As *Lord Bramwell* stated[86] limited liability would impose no compulsion and would merely remove a restriction in the law. He also said "for the purpose of protecting the parties themselves, (…) the State ought not to interfere, but to leave every man to the most zealous and best informed of all protectors, himself" (Atiyah 1979, p. 565).

This could easily result in the jeopardising of cargo-owners' rights, since the carriers sought to exempt themselves from liability, or even from liability for losses

[86] See *ATIYAH P* (1979), pp. 230, 564-565; also, "First report of the commissioners appointed to inquire and ascertain how far the mercantile laws in the different parts of the United Kingdom of Great Britain and Ireland may be advantageously assimilated and also whether any and what alterations and amendments should be made in the law of partnership as regards the question of the limited or unlimited responsibility of partners." P. 468; 1854 (1791) XXVII.445 House of Commons *Parliamentary Papers*.

resulting from their own negligence in the care of cargo. This led to the drawing up of certain rules such as model bills of lading and the introduction of legislation designed to control this power. The first example was the draft of the Harter Act 1893 in the USA[87].

The Harter Act was enacted to prevent the carrier from avoiding its common-law responsibilities by the device of securing agreements that included exculpatory clauses, such as those relieving vessel owners from liability for damage due to their negligent actions transporting cargo.

The object of the Harter Act was to modify the relations between the vessel and the cargo. This targeted the exclusion of carrier liability for loss resulting from errors in the care and custody of the cargo. Similar legislation was passed in some Commonwealth countries[88].

[87] February 13, 1893 ch. 105, 46A, ch. 8, section 190-126; also read *Mannesman Denmark Corp. v. M/V Concert Express,* 200 A.L.R Fed. 699 (5th Cir. 2000).

[88] The Australian Carriage of Goods by Sea Act 1904, the New Zealand Shipping and Seamen Act 1908 and the Canadian Water Carriage Act 1910 (*Wilson JF* 2008, p. 114, n. 1); *per Lord Bingham, supra*, n. 83, at n. 8.

b. The Role of the COGSA; the Hague and the Hague-Visby Rules

Despite all these efforts, legislation was still inadequate to curb excessive freedom of contract. So, abuse of the carrier's stronger bargaining position during the 19th century resulted in the formulation of the Hague Rules in 1924. In particular, the Maritime Law Committee of the International Law Association at a meeting held in The Hague drafted the Hague Rules in 1921 which were incorporated in an International Convention signed at Brussels on 25 August 1924 by the major trading nations[89]. It is remarkable though that even from that time concerns about the rapid development of trade and the legal protection of the consignors and the consignees had begun to surface. Crutcher[90] captured the spirit of this when he remarked that we "have no notion what ocean transportation will be like fifty years from now, except that it will be very different from anything described."

The International Convention marks the beginning of efforts to unify rules relating to bills of lading, and to establish a minimum degree of protection for the cargo-owner from the widespread exclusion of liability by sea carriers. Consequently, both parties retained the power to negotiate their own terms as regards those aspects of the contract not specifically covered by the Rules.

The major maritime nations introduced legislation to give effect to the Hague Rules which, in the case of the United Kingdom, took the form of the Carriage of Goods by Sea Act 1924[91]. The Hague Rules appear as a compromise between the interests of the ship-

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[89] See *Wilson JF* (2008, pp. 114, 173); *De Wit R* (1995, p. 76, n. 416); *Tetley W* (1998, pp. 573-581). According to *De Wit*, actually, although reactions against the use of such clauses had already come by way of statutory intervention in the United States with the 1893 Harter Act, 46 USC, App. 190-196 (still in force today), the Hague Rules were a compromise between shipping and cargo interests which put an end to an era of incredibly wide-ranging exclusion clauses in bills of lading.

[90] *Supra*, n. 84.

[91] See Scrutton on Charterparties 20th ed., pp. 404-417.

owners and the cargo-owners (Selvig 1961, p. 140). The Hague Rules reflected a view, widely shared among cargo interests that carriers, in issuing bills of lading[92] containing or evidencing the terms of carriage contracts, had routinely, included conditions exonerating themselves from liability to an extent which was unacceptably prejudicial to the other parties to such contracts. However, there was still a need for greater uniformity internationally.

Over the years, dissatisfaction grew with the limited nature of the protection afforded to cargo owners by the Hague Rules. Criticism mainly centred on the narrow area of operation of the Rules, since in the majority of countries they only applied to outward bills, while in US and Scandinavia relevant legislation was also applied to inward bills, and covered only the tackle-to-tackle period. They were only applicable to certain aspects of the contract of carriage rather than providing a comprehensive code, and cargo owners alleged that the underlying philosophy of the Rules was still biased in favour of the carrier.

Opinions were, however, divided as to how progress could be achieved. On the one hand, the major ship-owning nations were opposed to any radical change in the framework. Instead, they favoured selective adjustments to the Hague Rules in order to remove the most obvious 'blemishes'. This approach resulted in a series of draft amendments to the Rules, which were incorporated into a document known as the Brussels Protocol, the text of which was agreed at an International Conference held in Brussels in February 1968. The revised rules incorporating the amendments contained in the Brussels Protocol are known as the "Hague/Visby Rules."

Subsequently, some leading cargo providing countries, the majority of whom are drawn from the so-called Third World, drafted a new comprehensive Code covering all

[92] About the Bill of Lading, see *The Rafaela S; supra*, n. 83.

aspects of the contract of carriage by sea. This Code was incorporated in a Convention (known as the "Hamburg Rules"), which was signed at an International conference held in Hamburg in March 1978. However, the United Kingdom and some of the Western countries have adopted the Hague/Visby Rules. Belgium ratified the Visby Protocol on the 6th of September 1978, France on the 10th of March 1997, the Netherlands on the 26th of April 1982, the United Kingdom on the 1st of October 1976, and Germany on the 14th February 1979 (De Wit R. 1995, p. 85, n. 479).

In the case of the United Kingdom, the Carriage of Goods by Sea Act 1924, which gave effect to the Hague Rules has been repealed and the Carriage of Goods by Sea Act 1971 now gives effect to the Hague-Visby Rules. As Sec 1(1) COGSA 1971 reads 'in this Act "the Rules" means the International Convention for the Unification of certain Rules of law relating to bills of lading signed at Brussels on the 25th August 1924 as amended by the Protocol signed at Brussels on 23rd February 1968 and by the protocol signed at Brussels on 21 December 1979'.

Despite this, there are still some countries, such as the USA (De Wit, p. 85), which give effect to the Hague Rules and it is common still to see the Hague Rules incorporated into charterparties by express contractual agreement in the form of a "Paramount Clause." Unfortunately, all these efforts are not sufficient to control liability limits when it comes to *containerisation* and multimodal transport, since there is a great deal of debate regarding which convention is applicable. This hinders the development of international trade and a greater degree of uniformity would be desirable. This though may imply that we should produce new law in order to cover gaps.

The single most important purpose of international conventions is to have uniform laws throughout the world so that no matter where a suit is brought, the outcome will be the

same. However, such uniformity of approach will not be achieved simply because of the existence of a convention. The uniformity is dependent first of all upon the level of uniformity that has been achieved by the convention itself. Secondly, it is dependent upon the particular convention's interaction and consistency with other international conventions on similar or related matters. Thirdly, it is dependent upon the national implementation of the convention and its relationship with other national laws (Xia Chen 2001, p. 129).

The international convention framework in maritime law is not as uniform as it may seem to be. In the area of limitation of liability, although there are international conventions, a number of factors exist that may adversely influence the effectiveness and uniformity of the conventions. It is true that international law with respect to ship-owners' limited liability is not as uniform as it should be (Xia Chen 2001, p. 130), since one source for lack of uniformity comes from the fact that there are several conventions on global limitation of liability currently in operation.

The initial international effort to unify laws concerning limitation of liability resulted in the 1924 Convention. Although this convention never achieved its goal of uniformity of approach in the area of limited liability, it was adopted at the time by some countries, e.g. Brazil. The other two Conventions on global limitation of liability are the 1957 and 1976 Conventions, both of which reached a high level respectively (Xia Chen 2001, p. 130). Most recently, the 1996 Protocol to the 1976 Convention has been adopted by the International Maritime Organisation and has been open for signature since September 1997. Lack of uniformity may occur when a convention contains optional provisions, which allow the contracting States to provide otherwise in their respective national laws governing certain areas.

Such options are usually the results of certain compromises which are reached in order for the majority of the convention provisions to be accepted by the international community. Therefore, any attempt for uniformity of approach may be inherently unsuccessful. Additionally, uniformity of international law may also be impaired by national implementation of international conventions (Chen 2001, p. 131).

c. Statutory Provisions; the Hamburg Rules.

However, from 1970 onwards, there was movement towards the replacement of the Hague Rules by a totally new convention. In 1971, it was decided to have such a convention drafted under the auspices of UNCITRAL, a United Nations agency. The new cargo convention was signed at Hamburg on 31st March 1978 and subsequently became known as the Hamburg Rules. These new Rules have been met with both acclaim and criticism (De Wit 1995, p. 89). These Rules recently entered into force after having been ratified by the required twenty countries. The problem is that these Rules were ratified by states which represent only a negligible interest in international shipping, which may create conflicts within global trade. The fact that these states adopt these Rules, while the others are adopting the other legal frameworks may cause confusion, although a number of shipper-oriented states are currently planning to ratify the Hamburg Rules[93]. But that does not mean the problem is solved. However, many of the provisions in the Hamburg Rules were later copied into the new Multimodal Convention 1980.

After a lot of debate, it had become clear by mid-1972 that no convention on multimodal transport was to be expected. This prompted a number of private organisations to start working again on standard terms or model rules regulating multimodal transport. The International Preparatory Group (IPG) consisted of sixty-eight states which had been appointed according to customary UN methods and which worked according to the customary UNCTAD principle of groups of countries.

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[93] See *Herber R* (1992) "Gedanken zum Inkrafttreten der Hamburg – Regeln," Transport Review, pp. 381-390, as in *De Wit R.* (1995, p. 89, n. 505); *Waldron AJ* (1991) "The Hamburg Rules- a Boondoggle for Lawyers?" Journal of Business Law, pp. 305-319.

The IPG started its work in October 1973 and after six laborious sessions and a total of fifty-three meetings, it produced a draft convention in March 1979 under the name of United Nations Conference on a Convention on International Multimodal Transport.

Negotiations were extremely difficult in the light of such completely different points of view. At the third session of the proceedings the IPG's President, the Norwegian Professor Erling Selvig, advanced a so-called Common Understanding which outlined the subject areas that the various groups could agree to include within the Convention, such as the scope of Convention's application and the multimodal transport operator's liability for loss of, damage to or delay of the goods. The Draft Convention was presented at a diplomatic conference, which took place in two sessions from 12 to 30 November 1979 and from 8 to 27 May 1980 and was attended by eighty-three states. The Convention was finally concluded in Geneva, on the 24th of May 1980. The structure of the UN Multimodal Convention 1980 and the Hamburg Rules only differed where it was necessary to include specific provisions for multimodal transport[94].

Two more Conventions were drafted to attempt to settle the multimodal muddle.

Initially, the UN Convention on the Liability of Operators of Transport Terminals in International Trade was concluded in 1991. The aim of this Convention was to facilitate the movement of goods by establishing uniform rules concerning liability for loss of or damage to, or delay in the handling of such goods while they are in the charge of operators of transport terminals and are thus not covered by the laws of carriage arising out of conventions applicable to the various modes of transport.

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[94] See *SELVIG E*. (1978) "The Influence of the Hamburg Rules on the Work for a Convention on International Multimodal Transport," in *The Speakers' Papers for the Bill of Lading Conference,* London, Lloyd's of London Press, at p. 10.

This Convention under ideal circumstances would cover the last element of the transport chain (the other elements being the Hamburg Rules and the Multimodal Convention). However, it has been signed only by five states (France, Mexico, Philippines, Spain, USA) and ratified by Egypt, Gabon, Georgia and Paraguay, and has not yet entered into force[95].

Secondly *"the Rotterdam Rules,"* as demonstrated above (Chapter I), is a recent attempt at unification. This new Convention covers a limited perspective of multimodal carriage involving sea carriage and raises difficult issues of how this Convention will interact with existing carriage conventions such as CMR (Baughen 2009, p. 151).

[95] See Maritime Transport *http://www.oecd.org/document/27/0,2340,en_2649_34367_1866267_1_1_1_1,00.html*, (12/11/2005, at 21:20); further *http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/1991Convention_status.html* (27 August 2009, at 10:42).

B.) WHAT CONSTITUTES "PACKAGE"?

When it comes to limitation of liability in carriage of goods by sea, two interlinked methods seem to appear; initially, the "package" limitation and secondly the "tonnage" limitation[96]. Article IV Rule 5 of the Hague Rules and the Hague-Visby Rules and art. VI of the Hamburg Rules restrict the right of limitation to claims for loss or damage incurred in connection with the goods carried and the limit is calculated with reference to particulars of the cargo (Griggs/Williams 2005, p. 132).

Thus, "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 per package or unit…" Since the current legal regime is not adequate to satisfy modern trade needs, we need new law; the current problems and a lot of controversy have arisen as to the "package" limitation. The debate has centred more on whether or not such a cargo or part of it can be described as a "unit."

The problem though is less acute in the United States where the Carriage of Goods by Sea Act 1936, section 4(5), provides that the carrier can limit his liability to: "…$500 per package…or in case of goods not shipped in packages, per customary freight unit."[97] In the United Kingdom, the COGSA 1924 reads "…£100 per package or unit…" That was up to 1971, since the draftsmen of the Hague/Visby Rules abandoned the pound sterling in favour of the Poincare franc in an attempt to devise a "currency" which would retain its value during a period of inflation. The franc was defined in Art. IV Rule 5(d) as 'a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900' and it was further

[96] See below sub-chapter 2C.
[97] See *GRIGGS/WILLIAMS* (2005, p. 140).

provided that the date of conversion of the sum awarded into national currencies should be governed by the law of the court seized of the case. So far as the United Kingdom was concerned, the problems of conversion were simplified by s 1(5) of the COGSA 1971 which empowered the Secretary of State periodically to specify the conversion amount in sterling by statutory instrument.

Now, the Poincare franc has in turn been replaced as the unit of account by the SDR; Special Drawing Right. The SDR was defined by the International Monetary Fund, as the result of s 2(4) of the Merchant Shipping Act 1981, giving legislative effect to the Brussels Protocol of December 1979 to which the United Kingdom and twenty-one other nations are parties. The SDR has been preferred since the unit is based on a basket of currencies, the value of which is probably more sensitive to the trends of inflation that the fluctuating market price of gold.

According to art. IV Rule 5(a) of the Hague/Visby Rules, "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 666.67 units of account per package or unit or 2 units of account per kilogramme weight of the goods lost or damaged, whichever is the higher." In the USA, the COGSA reads "...$500 per package… or in case of goods not shipped in packages, per customary freight unit."

When the US COGSA was passed in 1936, it essentially adopted the Hague Rules of 1924. Although the Hague Rules were amended in 1968, their influence is evident in COGSA, and contracts for carriage continue to incorporate them as their governing regime. The Hague Rules, like COGSA, fail to define the term "package" and the package problem plagues the Hague scheme as well (Leary M. 2003, p. 191).

However, according to COGSA 1971, a new paragraph (par. c) in art. IV Rule 5 of the Hague/Visby Rules provides that "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."

But, despite the existence of this paragraph, the problem persists. Furthermore, some other countries do not have similar wording as in the US COGSA[98], and the word "unit" might be interpreted differently, either as the physical unit received for shipment or the "freight unit" despite the absence of the word "freight." In the case of containerised or palletised cargo there would seem to be no reason in principle why the container or the pallet itself should not be considered a "package" or "unit."[99]

[98] *Cf*. the US Approach.
[99] *Cf*. the *"River Gurara"* [1996] 2 Lloyd's Rep. 53.

a. The US Approach; the New US COGSA

Many States have now developed their own systems. The Scandinavians, as Ramberg[100] reveals have opted for a kind of merger between the Hague Rules and the Hamburg Rules systems so that they could still continue to adhere to the Hague Rules (as amended by the 1968 and 1979 Protocols, the so-called Hague/Visby Rules with the "SDR"-addition) but with added provisions taken from the Hamburg Rules. The Scandinavian strategy differs greatly from the proposed US COGSA[101].

The US COGSA seems wiser, since it entails a good objective. All the parties engaged in the movement of goods from point to point are in principle subjected to the same legal framework, which may facilitate claims handling for the shipper, but complicate recourse actions for the parties in the expanded family of carriers. Still, one may ask if it is possible or indeed prudent to shelter all these different trading partners under the same model. Difficulty to meet this objective also shows when exceptions have to be made in view of the particular frameworks applying to US rail and road carriers. And, the problem grows bigger when parties to a service contract may agree on different limit from that suggested for the US COGSA, which is equivalent to the liability under the Hague/Visby Rules. Meanwhile such exceptions would not apply to overseas carriers who, quite surprisingly, have to follow rules contrary to their respective mandatory rules (like the CMR carriage of goods by road in the EU).

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[100] See *RAMBERG J* The Proposed US COGSA - an Outsider's View, as in *http://www.forwarderlaw.com/feature/ramart.htm*, (at 22:00, 11/04/05).

[101] The proposal of the US COGSA was drafted in 1996 by a steering group of the US Maritime Law Association (MLAUS) and it has been rewritten along the lines of a similar proposal by the Canadian Maritime Law Association.

Although the Hague/Visby Rules framework is not absolutely perfect, mainly because it was the result of a compromise reached amongst the various interest groups in the maritime field, still, because it is a compromise, it has gained increasing support from all sectors of industry that recognise the urgent need for the US to modernise its laws on carriage of goods in foreign trade[102]. Accordingly, bold steps need to be taken in regard to other proposals, like the Hague-Visby and Hamburg Rules, since these are out-of-date with today's technological advances, such as *containerisation*.

Therefore, the proposal for the US COGSA may not be perfect but it is probably what the modern industry wants to see in an up-to-date legal framework that will serve such technological advances. Moving a step forwards, the new US COGSA removes the defence of Error in Navigation and Management, despite its historical significance. It is true that with the modern container vessels and the technological evolution of equipment the ship-owners can be in instant contact with their vessels and crew. Therefore, this defence is ineffective if raised today. It seems the new US COGSA wants to bind the ship-owners so they are not absolved from liability if their crew was negligent.

Also important is the fact that the US COGSA will also provide for land and generally intermodal carriage of goods. It is to be queried whether we should assume at this point that the US COGSA is probably wiser than the CMR (Art. 2) [103] and/or the recent *"Rotterdam Rules,"* which is introduced to cover the sea leg initially, within limits for other modes, as shown in Articles 5 and 82.

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[102] See *VINCENT DE ORCHIS, of DE ORCHIS, WALKER & CORSA* in New York (February 2000) "The New United States COGSA Proposal: Facts & Fallacies," 10, The Maritime Advocate, as in *http://www.maritimeadvocate.com/i10_usco.htm* (11/04/2005, at 15:00).

[103] Also Koppenol-Laforce 1996, p. 226.

Usually, the cargo interests pursue those participating in the land carriage by pleading the claim in tort, since cargo interests are not in direct privity of contract with the sub-contractors selected by the ocean carrier to perform different aspects of the through carriage. Furthermore, since many shipments involved in domestic carriage either originate from or are destined for overseas destinations, the legislators requested the US Department of Transport (DOT) to study intermodal and Multimodal transportation liabilities. How is it possible to achieve "Multimodal Harmony" since shipper interests collide with the carrier interests? Shipper interests (particularly, The National Industrial Transportation League) were not willing to adopt a fixed-value liability system and preferred full-value liability on the part of carriers. Carrier interests (The American Trucking Association) advocated a statutory liability standard of US$2.50 per pound for LTL (less than trailer loads) and US$1.10 per pound for TL (trailer loads), citing *Canada's National Transportation Act and Europe's CMR Convention as models*[104].

Nevertheless, it should be mentioned that the US COGSA sidesteps a conflict with laws governing land carriage by truck, such as Canada's *Transportation Act* and Europe's *CMR,* by exempting the actual land carriers from its application. Instead contractual carriers (Multimodal Transport Operators and Freight Forwarders), whose liabilities are not governed by any statutory national law, are subject to the COGSA carrier liability framework, i.e. the greater of 2 SDR (C$4.00) per kilo or 666.67 SDR (C$1,334.00) per package, during the entire transport, including any land leg.

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[104] See "Multimodal Liability: Extracts from a Statement by the CIFFA Sea-Freight Committee," Multimodal Transport: Canadian International Freight Forwarders Association Position Paper, as in *http://www.forwarderlaw.com/feature/multim.htm* (19/04/2005, at 23:00).

Canada seems very concerned with the new COGSA as it governs intermodal traffic to and from Canada through US ports as well as traffic to and from the United States through Canadian ports. Its intermodal liability conflicts with provincial jurisdiction over road transport liability and federal jurisdiction over rail transport liability. In this regard, CIFFA has identified this conflict as one of three fundamental objections to US COGSA.

On the other hand, the freight forwarders or MTOs -as "contractual carriers" arranging a "chain of transport"- should be liable for the actions of the individual carriers. It is only reasonable that such assumption of liability by a contractual carrier does not impose a greater liability than that of the individually sub-contracted carrier, or actual carrier, whose liability is governed by national law or international convention. This is where the new US COGSA fails, since it evolves a liability framework, which applies only to the contracting carrier and its subcontractors called "performing carriers," despite the fact that there are relevant national laws that govern the carriage. Nevertheless, this is what we need; a mandatory convention that will unify transport.

The drawback created is that the new US COGSA works against harmonising inland liability frameworks of trading partner nations. Therefore, two identical shipments damaged in a truckload will have two different claims settlements if one is under an international contract of carriage subject to COGSA, and the other under a domestic waybill. Moreover, it would subject US freight forwarder to an inland liability framework different from its own existing law. The United States seems to have traced an easy way to satisfy the cargo interests. Accordingly, they impose an increased uniform limitation upon the "contracting carrier" for the land segment of the transport.

In the US, the cargo interests are not happy with the relatively lower limit of liability under the national laws and seek paths to extend the higher limits set by the Hague-

Visby Rules for inland loss and damage. It is remarkable that the cargo interests in the USA actually want the CMR Convention, as well as for Canada's provincial trucking regulators to increase their liability frameworks to that of the Hague-Visby Rules in order to "achieve" uniformity.

In the USA**,** it is debatable whether a container can be a COGSA package and limit the carriers' liability accordingly, since this technological development was never foreseen by COGSA drafters. Terminology problems in the interpretation of law appear if the container was damaged in transit, since there is not a unified legal regime to control containerisation and the outdated COGSA does not serve these needs nowadays[105].

Nevertheless, it seems the USA does not want to abandon the old and out-of-date Hague Rules and even nowadays some other States also continue to apply these Rules[106]. But, this problem might be eliminated if the USA adopted the latest version of the Hague/Visby Rules where an effort is made to identify the container as a package in relevant circumstances, since the package limitation is a "Hague Rules" problem and not a "Hague/Visby Rules" one.

Generally, the American Courts accept that "package" is each package inside the container of the number of packages listed on the face of the bill of lading (Tetley W. 1988, pp. 642-643)[107]. However, in *Mitsui & Co., Ltd. v. American Export Lines, Inc*. 636 F. 2d 807 (2nd Cir. 1981), the court notably relied on the 1968 Visby Rules, which state that when the bill of lading does not show how many separate packages or units there are, then the

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[105] Meagan Leary (Winter 2003) "Say What You Mean and Mean What You Say: Edging Towards a Workable Container Solution," 28, Tulane Maritime Law Journal, p. 191.
[106] See *US Department of State* (1995) Treaties in Force, at p. 381; *TETLEY W* (1988, pp. 1130, 1138); *KINDRED HM/ BROOKS MR* (1998, ch. 5).
[107] See *SCHOENBAUM* (2001, p. 635, n. 14).

article of transport - the Container - shall be deemed the package, to reinforce its holding[108] and to promote international uniformity.

In *Mitsui*, the problem was that stacks of ingots, though described as bundles on the bill of lading, did not conform to the usual meaning of the term "package" and, in the exact wording of the courts decision, stacks of ingots consisting of fifteen ingots each weighing seventy-five pounds did not constitute "packages" as defined by COGSA, although they were described as "bundles." That was due to the fact that the shipper had done nothing to hold them together, as being the custom even after containerisation, notwithstanding that piling ingots reduced ground and facilitated loading and unloading. Many ships, including the Red Jacket[109] are so constructed that shipments must be made in containers. Therefore, in the case of *Mitsui*, the container is characterised as "functionally a part of the ship." The Supreme Court, though, has further observed, "the container is a modern substitute for the hold of the vessel."

As demonstrated, the "said to contain" clause was established to solve the package problem. What is important here is the fact that the items contained in the container should be considered as "COGSA package." As listed in the bill of lading in question, "two containers *said to contain* thirty bundles of ingots." However, since the ingots were not banded or strapped together, there is no "bundle" and no item inside the container, but, according to *Mitsui*, that does not finally mean that the container should be defined as package[110].

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[108] "Its holding" means the court's decision and so as the court to promote international uniformity.

[109] See also chapter 3; *Houlden & Co Ltd & Others v. SS "Red Jacket" & American Export Lines Ltd; Metal Traders Inc, Third Party; United States Fourth Party ("The Red Jacket")* [1978] 1 Lloyds Rep. 300.

[110] See *SCHOENBAUM* (2001, p. 635, n. 14).

It is true that the shipper is in a better position to be able to estimate the value of the cargo than the carrier; therefore the shipper can decide whether to shift the risk to the carrier by declaring a higher value for its goods in the bill of lading, or to place the risk with a third-party insurer (Leary M 2003, p. 191). This seems to be an alternative to dealing with possible conflicts of interest since again it is up to the parties concerned to decide how the damages will be compensated. The only disadvantage is that if the shippers declare a higher value for their goods on the bill of lading, they will necessarily pay a higher rate for shipment of the goods[111].

This was the outcome in *Fishman & Tobbin, Inc v. Tropical Shipping* (not reported in F.Supp.2d) (SDFla 1999), where the District Court of Florida held that neither the term "unit" nor the term "dozen" could be construed in any way as preparation for transportation, thus effectively making the container a package for COGSA purposes. In this case, there were two bills of lading; the first listed the contents as "One forty feet container said to contain 5,000 units of men's jackets." The second bill of lading listed its contents as "dozens" of pairs of pants; more specifically, it stated, "*one forty feet container said to contain 39 big packs containing 27,908 units of boys' pants."*

The container with the 5,000 jackets was lost overboard in transit from the Dominican Republic to Florida. It was asserted that each individually wrapped jacket constituted a package, and that the Tropical Shipping was liable for the shipment to the tune of $231,557.96. However, the Court concluded that the container holding the jackets is the COGSA package with respect to the shipment. What was really striking in this case is that *Fishman and Tobbin* were asserting for each bill of lading whatever was most to their

[111] *Cf. New Hampshire Ins. Co. v. Seaboard Marine Ltd. 1992 WL 33861.*

advantage in terms of possible compensation for the loss, rather than following a coherent line on what constitutes a package.

Since they were affirming that each individual wrapped jacket[112] was a package - because each jacket was placed on a separate hanger and individually enclosed in plastic wrap inside the container according to the first bill of lading- then they should have been consistent and affirmed that each pack inside the container was the package for the second bill of lading.

The Court followed the precedent that had been established in previous cases, for example, in the *Binladen BSB Landscaping v. M/V Nedlloyd Rotterdam* 759 F. 2d 1006 (2nd Cir. 1985), where a bill of lading described the quantity of packages as "1" and the goods as "one 40 feet container said to contain "7,990 live plants." In this case, it was held that the plants were not separate packages, even if some of the plants might have been prepared in ways entitling them to treatment as packages.

They were happy with the fact that *Binladen* initiated the rule of uniformity for vessels that often travel between different jurisdictions[113].

Furthermore, the problem of interpretation increases when the container contains smaller physical units. In the US, the Court of Appeal has ruled that, for purposes of the $500 package limitation under the Carriage of Goods by Sea Act, the number of packages was not the total number of boxes in a container, but the number of pallets into which those

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[112] *Cf. Houlden & Co Ltd & Others v. SS "Red Jacket" & American Export Lines Ltd; Metal Traders Inc, Third Party; United States Fourth Party ("The Red Jacket")* [1978] 1 Lloyds Rep. 300, where it was held that the defendants had not exercised due diligence to make the vessel seaworthy as required by the US COGSA 1936, s. 4(1) (46 USC, s. 1304 (1)) for they should not have permitted the container, which was part of her equipment, to be loaded on board (see p. 310, cols. 1-2, p. 311, col. 1) and they were solely responsible for the loss and damage.

[113] For unification efforts, refer to chapter IV.

boxes were packed. However, the decision in the words of court involves navigation through "muddy waters" to determine the meaning of the word "package" under COGSA as shown in *Group Chegaray v. P &O, Sea-Land and others* 251F. 3d 1359 (11th Cir. 2001).

In this case, it was the shipper's insurer that paid for the loss under a cargo insurance policy and brought a subrogation action against, among others, P&O and Sea-Land[114]. Accordingly, it was held that the number of pallets within the shipping container, rather than the container itself or number of cartons contained on each pallet, represented the accurate number of "packages" for which the shipper was liable under the COGSA limitation of liability provision, despite the fact that the bill of lading referred to the fact that the pallets contained 2,270 cartons. The bill of lading described the pallets as "packages" and the decision to wrap cartons onto pallets was made by the shipper.

If a bill of lading is ambiguous regarding what constitutes a "package" under the COGSA, then the ambiguity is resolved against the carrier, by virtue of the COGSA, 46 App. U.S.C.A. "section" 1304(5). The *Group Chegaray* case, already mentioned above, involved an eight-ton, 40ft container filled with perfumes and cosmetics shipped from France to Florida that mysteriously disappeared between December 26 and 28, 1992, while deposited in a marine terminal at Port Everglades, Florida. Although subsection 1304(5) of COGSA may limit the carrier's liability to $500 "per package", it fails to define the term "package". Therefore, the district court deemed each of the 2,270 cartons, all but two of which were wrapped onto a total of forty-two pallets, a "package" for the purposes of liability under sub-section 1304(5).

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[114] For insurance purposes, refer to *The Choko Star* [1990] 1 Lloyd's Rep. 516 CA.

In addition to the lack of statutory guidance, unforeseeable technological strides in the shipping industry since 1936 have contributed to the frustration of many courts attempting to define a COGSA package.

When goods are shipped in containers, courts usually consider the inner contents of the container, instead of the container itself, to be the package [115].

In *Commonwealth Petrochemicals, Inc. v. S. S. Puerto Rico* 607 F. 2d 322, 327-28, the court enforced a contractual provision that defined "package" more broadly than it is defined by COGSA and extended COGSA's $500 per package or per unit limitation to that definition of "package." In *Mori Seiki USA, Inc. v. M/V Alligator Triumph* 990 F. 2d 444, 447-48, the court allowed the extension of COGSA's $500 per package or per unit limitation to the period after a lathe was discharged from the ship but before it was released from the carrier's custody.

The two parties are merely parts of the same whole and should be treated as such. If the owner is entitled to liability limitations under COGSA, but the in-house vessel

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[115] See *Sharp N*. (1993) "What is a COGSA "Package"?" 5, Pace International Law Review, p. 115, at 117-18; *Amy S. Parigi* (February 2001) "*Sabah Shipyard Sdn. Bhd v. M/V Harbel Tapper* 178 F.3d 400, 403 (5th Cir. 1999): Once again COGSA's $ 500 Limitation on Liability Proves to Be the Biggest Bargain in the Shipping Industry," 75, Tulane Law Review, p. 811; the 5th circuit's decision in the noted case was expected in the light of the Harter Act, COGSA and case law interpreting these two statutes. The duties of the carrier to exercise due diligence to make a ship seaworthy and to properly handle cargo are fundamental to our system of cargo carriage, but the current COGSA limitation on liability allows a carrier to ignore these responsibilities by sampling paying $500; *cf. Vistar, S. A. v. M/V Sea-Land Express* 680 F. Supp. 855, 857(S.D. Texas 1987), where it was held that a large varnishing machine enclosed in a wooden box was a package for COGSA purposes; *Monica Textile Corp. v. S. S. Tana* 952 F. 2d 636, 643, 1992 AMC 609, 621, where each of the seventy-six bales of cotton inside one container was a COGSA package. The history of the package problem with respect to containers is recounted in this case; unhappily, neither the statute nor its legislative history provides any clue as to the meaning of "package" in the Act. Despite the difficulties, this lack of guidance engendered, courts managed to muddle through this oft-litigated issue by generally deferring to the intent of the contracting parties when that intent was both clear and reasonable. This approach later became strained by technological advances in the shipping industry.

manager is not, then the cargo interests have an essentially unlimited claim against the same party, the shipowner that COGSA seeks to protect[116]. As the wording in the Bill of Lading is important in order to decide the limits of liability, in the particular case the US Court of Appeal held that the forty-two pallets described as "packages" in the bill of lading for the missing container, plus the two loose boxes were the COGSA packages. Moreover, although accepting that the wording in the Bill of Lading is what decides the package limitation, the US Court of Appeal listed five more matters that should be taken into account when dealing with such cases.

Among the matters to be taken into account were what the parties agreed to as indicated in the bill of lading. A COGSA package should be the result of some degree of preparation to facilitate its transport and handling. Additionally, a container can be considered a COGSA package only if there is clear agreement to that effect. Unless otherwise agreed, when goods are placed in containers without being described as separately packaged, they would be regarded as goods not shipped in packages.

Finally, when a bill of lading is ambiguous, then, in view of the widely accepted understanding that the original purpose of the limitation was to protect shippers against carriers, the ambiguity would be resolved against the carrier.

During the debate about what a "package" is, the container took many terms. As further demonstrated in the *Leather's Best, Inc. v. S. S. Mormaclynx* 451 F.2 d 800, 815 (2nd Cir. 1971), a container is usually supplied by the carrier and was characterized as "functionally a part of the ship". This case involved a shipment of leather packed in cartons strapped together, and shipped in a container. The court held that each "package" was a

[116] As in *Charest D.* (February 2004) "A Fresh Look at the Treatment of Vessel Managers under COGSA," 78 Tulane Law Review p. 885.

carton, since the bill of lading described one container with ninety-nine bales of leather. Moreover, in *Northern Marine Terminal Co., Inc. v. Caputo* 432 U.S. 249, 270 (1979), the US Supreme Court characterised the container as "a modern substitute for the hold of the vessel." Criteria, like the functional economic test (analysed in sub-chapter 2B (b)), were also established and theories, which still do not solve the problem since in some cases these criteria might be too narrow[117].

The existence of the Hague/Visby Rules has not deterred attempts by carriers and ship-owners to lessen, or limit their liability for loss or damage to goods, by inserting various forms of "limitation" clauses into bills of lading. Nevertheless, the consensus among courts from Canada, England, France, and the United States, which have confronted such limitation clauses, has been remarkably uniform. Recognising that the Hague/Visby Rules set forth minimum standards of liability for carriers, these courts have been universally reluctant to permit a carrier to prescribe a lower standard for himself. Hence, courts have not hesitated to invoke article III Rule 8 of the Hague/Visby Rules, to invalidate any clause that has the effect of relieving, or lessening the carrier's responsibilities under the Rules.

In certain circumstances, the carriers themselves are able to define the container as a package, by simply describing the shipment on the bill of lading as "one container." However, they should be careful not to insert such a clause in the general clauses of the bill

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[117] *Cf. Complaint of Norfolk, Baltimore & Carolina Line* 478 F. Supp. 383 (DCVa 1979) where *Clark J* concluded that the determination whether a particular container is a COGSA package cannot be controlled by a talismanic formula but necessitates analysis of the facts of each case in light of congressional policy, when commenting that containerised shipping was "but a gleam in the eye of maritime technology when Congress enacted COGSA; see *Paul Edelman* (Winter 1982) "Cargo Claims and Limitation Liability," 17, Forum, p. 719; also *supra*, n. 5, p. 447.

of lading, since this would result in the clause being declared null and void according to art. III Rule 8 of the Hague or Hague/ Visby Rules. Such a clause would be invalid even if the container was packed by the shipper.

There is also controversy about whether or not it should be left to the will of the parties to decide how their liability will be calculated[118]. Actually, some parties, usually forwarders, often attempt to claim that they are carriers within the definition of COGSA. In determining whether a forwarder can be considered a carrier under COGSA, courts have distinguished two types of forwarders:

- Forwarders who consolidate freight and act for the shipper to secure carriage.
- Forwarders who contract with shippers to carry the goods to their destination and subsequently contract with a carrier for the carriage-namely Non-Vessel Operating Common Carriers (NVOCCs). Courts have uniformly held that the first type of carriers is not COGSA carriers, but some have held that the latter type is. Liability is limited to 17 SDR per kilo under CIM-COTIF and 8.33 SDR per kilo under CMR; unless the shipper can establish that the loss was caused by the carrier's gross negligence or wilful misconduct[119]. The liability under COGSA is limited to 17 SDR and $500 under the US COGSA.

It is worth noting that nowadays the intention of the parties is seriously considered in certain circumstances and sometimes private settlements between the consignor and

[118] *Cf. Pannell v. United States Lines Co.* 263 F.2d 497 (2nd Cir. 1959); in this case a yacht on deck was lost. The parties have defined what "package" meant within a clause in the bill of lading which was declared void.
[119] As *per Parigi, supra* n. 115.

consignee take place. This is reasonable, since the law does not yet govern containerisation, but, the parties must be careful not to insert clauses concerning the package issue that may be void in the bill of lading.

It is a general phenomenon in practice that the various courts of appeal develop rules of interpretation in order to apply the original COGSA standard to containers and other unitised cargo (Schoenbaum T. 2001, p. 635). In order to deal with this matter they are guided by practical considerations of the parties' expectations when entering into a contract of carriage, as well as the desirability of principles that correspond closely to international practice. Furthermore, as established in *Stolk Containers, Inc. v. Evergreen Marine Corp.* 962 F.2d 276 (2nd Cir. 1992), a container can also be a package when the cargo is not capable of being stored in smaller sub-units.

However, in *St Paul Fire & Marine Ins. v. Sea-Land Service, Inc.* 745 F. Supp. 186, 189 (SDNY 1990), the Court called for a re-examination of the view that the $500 per package, or per customary freight unit, should not apply to a container said to contain packages. Carriers have drafted bills of lading using a wide range of terms relating to its applicability to container shipments. The resulting variety of language, and the fact that certain circumstances applied to the issuance of bills of lading, introduced additional problems of interpretation in this matter. For reasons of reduction of cost and prevention of theft or damage, containers have become a "customary freight unit."

What the Court actually suggested during the *St Paul* case was that if carriers pack and seal the containers themselves they should not seek to use a beneficial interpretation of the terms of the bill of lading to apply the $500 per package COGSA limitation to containers.

However, this limitation should apply if shippers like the NVOCCs pack the container. A distinction on this basis would eliminate fraudulent claims, reduce litigation costs, allow shippers of goods to select carriers offering the lowest rates of carriage, and encourage shippers of high value goods to pack carefully and insure accordingly; although, that would be between the insurers of the shippers and the carriers.

b. The Canadian Approach

In *Royal Typewriter Co. v. M/V Kulmerland* 483 F. 2d 645 (2nd Cir. 1973), the Canadian Court held that the ocean carrier was entitled to limit its liability to $500, for the theft of three hundred and fifty packages of adding machines from a container, because the container was loaded and sealed by the shipper, who described the shipment in the bill of lading as "one Container said to contain Machinery." Since the bill of lading mentioned only the container, then the container is deemed the package for limitation purposes.

In this case, *Oakes J* developed a new approach, the "functional economics test." Under this test, the courts initial inquiry is "whether the contents of the container could have feasibly been shipped overseas in the individual packages or cartons in which they were packed by the shipper." If the shipper's own packing units are functional, there is a presumption that a container is not a package. This presumption may be overcome by evidence supplied by the carrier that the parties intended the container to be a package. When the shipper's own units are not suitable for safe transportation, there is a presumption that the parties intended the container to be a package. This results in a shifting of the burden to the shipper to show why the individual units within the container should be considered packages.

The Second Circuit also applied the functional economics test in *Cameco Inc. v. S. S. American Legion* 514 F 2d 1291 (2nd Cir. 1974) by assessing that this test is not conclusive since it merely affects the burden of proof. In this case, a cargo of tinned hams was packed in corrugated cartons. Some of these cartons were strapped on pallets. All of the cartons were put in a refrigerated container, which was loaded aboard the S.S.

"American Legion," a containership with no internal refrigeration system[120]. The problem here was that the refrigerated container was not shipped in the proper ship, such as a reefer. It was customary for canned hams to be shipped in corrugated cartons, whether the cartons are shipped in containers, on pallets or breakbulk.

Furthermore, corrugated cartons were the form of packaging for breakbulk shipments before the use of containers became widespread. It is one of the exceptional situations where the burden of the proof is put on the carrier to supply evidence that the parties intended to treat the container as a package. But according to the court's decision here each carton was held to be the package.

However, if the carriers are not involved in the packing or piling and stuffing of the container then they should not be liable. Indeed, as shown in *Rosenbruch v. American Export Isbrandtsen Lines* 543 F. 2d 967 (2nd Cir. 1976) the shipper's agent alone loaded the container which he got from the carrier. The metal box was loaded with the shipper's goods only, and not those of any other shipper.

The shipper's agent was also the one who selected the voyage and the vessel for the shipment. He stated on the bill of lading that one package or container was involved and described the contents as "used household goods."

The carrier was not involved at all in packing the container and perhaps, in these situations, the carriers should not be liable. According to Armstrong (1981, p. 441), when deciding who to blame for the loss or damage in the undertaking of containerisation and

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[120] As interviewed by *TSARDAKAS J.,* representative of Maersk in Volos, Greece (10/10/2008) this is one of the most major practical problems that freight forwarders and less developed ports meet since there is lack of financial support to provide them with the appropriate equipment. About "the functional economics test," refer also to *STILL CRAIG* (September 2001) "Thinking outside the Box; the application of COGSA's $500 per-package limitation to Shipping Containers," 24, Houston Journal of International Law, pp. 81-138.

when deciding if the carriers are indeed liable, it should be taken into account whether the carrier's representative (i.e. the shipper and not the shipper's agent) had an opportunity to supervise stuffing. Also, it should be taken into account whether the carrier's representative had an opportunity to view or tally the container's contents. This should occur, particularly, if the carrier was present[121].

Traditionally, the North American courts have approached the question on the basis that the manner in which the cargo is described in the bill of lading is "entitled to considerable weight," as also held in *Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts -Gessellschaft & Columbus Lines, Inc.* [1967] 2 Lloyd's Rep. 193, where the shipment consisted of nine pallets, each pallet comprising six cartons of forty tuners strapped to pallet boards. But, in this case, was the "package" the carton or the pallet[122]? The Court accepted that a "package" is what was stated on the dock receipt, which in this case was the bill of lading, and also what was stated on the libellants' claim letter. The libellants-appellants were *Standard Electrica, S.A.*

This was an appeal by the libellant, *Standard Electrica, S.A.* where *McLean J* dismissed its claim against the defendant, *Hamburg Sudamerikanische Dampfschiffahrts-*

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[121] For issues of rendering liability when the employees of the shipper had stuffed the containers and "the Himalaya Clause" see chapter III; *cf. Matsushita Electric Corp. v. S. S. Aegis Spirit* 414 F. Supp. 894 (W.D. Wash. 1976); as it was held in this case, *per Beeks J,* "the undoubted objective of 46 USC par. 1304 (5) was to establish a minimum floor below which carriers subject to the act could not reduce their liability for cargo damage. If carriers alone, or even carriers and the shippers together, are allowed to christen together something "package" which distorts or belies the plain meaning of this word as used in the statute, then the liability floor becomes illusory and negotiable." What remarkably *Beeks J* states in this case, we should discern whether it is the parties' characterisation of the shipment or the court's interpretation of that statute that counts. Or if I may go even further what if the parties themselves give a fair characterisation on this issue and the courts agree with them or the other way around they disagree. *Beeks J* concludes "it is not the parties' characterisation of the shipment, but the court's interpretation of the statute, that controls."

[122] See *TETLEY W* (1988, pp. 882-883).

Gesellschaft for $13,300 as additional damages in respect of the loss of seven pallets comprised of cartons of television tuners shipped from New York to Rio de Janeiro. *McLean J* held that each pallet was a "package" within the meaning of the U.S. Carriage of Goods by Sea Act, 1936, Sect. 4(5), and that the libellant could not recover more than $500 in respect of each pallet. Since the parties had agreed each pallet as a package that characterisation was entitled to considerable weight.

What is remarkable about this case is how the court applied the statute and suggested its future modification. *Per Chief Judge Lumbard,* since the word "package" fairly included the pallets as made up for shipment in *Standard Electrica, SA* it was not deemed important that the drafters might not have foreseen this precise application at the time that this provision was enacted thirty years ago[123]. If through the passage of time, this statutory limitation has become inadequate and its application inequitable, a revision must come from Congress, and it should not come from the Courts.

Besides, it was accepted in *International Factory Sales Service Ltd. v. The Ship "Aleksandr Serafimovich" and Far Eastern S.S. Co. ("The Aleksandr Serafimovich")* [1975] 2 Lloyd's Rep. 346, *per Smith J,* that the $500 limit on each package had become unsatisfactory, since those who set the $500 per package rule had no doubt had in mind the

[123] *cf. Cain v. Bowlby* 114 F. 2d 519, at pp. 522 and 523 (10th Cir 1940); as held a statute relating to a person engaged in transportation by motor vehicle applied to companies operating high-powered and capacious busses catering to long distance transportation, despite the fact that such transportation was unknown at the time of the enactment of the statute. See also *Bruce Transfer Co. v. Johnston* 227 Iowa 50, 287 N.W. 278 (1939), where it was held that a statute providing that an action might be brought against any railroad corporation, the owner of stages, or other line of coaches or cars in any county through which such road or line passed or was operated, applied to a company engaged in the operation of freight trucks of semi trailer type upon a fixed schedule and over a regular route, although that kind of transportation came into being long after the statute was enacted.

types, sizes and shapes of packages in common use at that time, and now technological changes had completely altered the situation. Accordingly, it appeared that pallets, of the kind with which this case was concerned, were not in use at that time and more particularly the large metal containers only appeared on the scene in fairly recent years.

In this case, one hundred and fifty cartons of sewing machine heads valued at U.S. $43.05 each were shipped at Kobe, Japan, on the vessel *Aleksandr Serafimovich,* for delivery at Vancouver. The cartons were strapped to three pallets, each of which contained fifty cartons. The cartons were numbered from one hundred and fifty-one to three hundred. The bills of lading included a heading "Packages" containing the words and figures "3 pallets (150 cartons)." Whilst being discharged at Vancouver one pallet containing fifty cartons was dropped over the side of the vessel.

It can be seen that the problem was becoming more serious even then. As *Smith J* continues in the relevant case, several judges had expressed the opinion that shipping methods had changed and were changing so greatly that the $500 rule should be thoroughly reviewed and that a solution should be reached by international agreement. Such a solution might well come from a quite different approach to the problem of providing a modicum of protection to cargo-owners.

However, an international solution, even if sought with good will and energy, is scarcely possible in the future[124]. In the mean-time, the courts must wrestle with the situation, as it continues to develop. But, they cannot change the statutory figures of $500, since this can only be done by the legislature. It is always difficult to apply a rule designed

[124] And as *PAMPOUKI* stated in our interview (26/12/2006, at 12:30), this will never take place, although I prefer the quotation of the judge; it is scarcely possible in less than a period of years, but as sometimes accepted "never say never" and "nothing is impossible."

for an existing set of known circumstances to a very different set of circumstances that were not even conceived of at the time of its enactment, but have developed over the intervening years. This is one of the functions of the Courts.

Moreover, there is a good deal in Judge Hays' point in his dissent in the *Encyclopaedia Britannica, Inc. v. The "Hong Kong Producer" & Universal Marine Corporation* [1969] 2 Lloyd's Rep. 536, "that considering the container as the package promotes uniformity and predictability" -at least where it contains goods of a single shipper.

Once more, in "*The Aleksandr Serafimovich"* above, importance is given to the intention of the parties as indicated by what is stated in the shipping documents, and things said by the parties in the course of dealings between them. The court though in the particular case decided that the pallet is not a package. This was decided, since the description of the goods, the numbering of the cartons and their visibility from outside the pallet in this case indicated the governing factor in the minds of the parties. Thus, for the package limitation purposes the court considered the goods described to have been one hundred and fifty sewing machine heads, each packed in a separate protective carton, rather than the wooden pallet on which fifty of them were stacked and to which they were strapped. And, accordingly, the defendants were not entitled to limit their liability.

Moreover, the COGSA was enacted[125], but the metal containers were unknown at the time it was enacted. However, a small container, approximately three-by-three-by-three-feet, is much closer to the pallets involved in *Standard Electrica*, than the huge

[125] *Cf. Mallory v. Pioneer South-Western Stages* 54 F. 2d 559, where motorbuses were unknown at the time the statute was enacted; *cf.* Appendix 2.

container considered in *the Mormaclynx*, as shown in the *Sperry Rand Corp. v. Norddeutscher Lloyd*, 1973 A.M.C. 1392, 1398 (SDNY 1973) (not officially reported).

The Canadian courts also appear to have concluded that either the container or their contents could be limitation packages, as also accepted in *J. A. Johnston Co. Ltd. v. The Ship "Tindefjell," Sealion Navigation Co. S. A. and Concordia Line A/S ("The Tindefjell")* [1973] 2 Lloyd's Rep. 253[126]. Accordingly, a shipment of shoes was carried on board *the Tindefjell* from Bilbao to Montreal and on discharge of cargo in the latter port, some of the shipment was found to be damaged. It is true that the problem demands a better solution than the courts can afford, since nobody in 1936 foresaw the change in the optimum size of shipping units that has arisen as the result of technological advances in the transportation industry[127].

Per Collier J (p. 257), it is proper in such a case as this to determine if the cargo-owner and the carrier intended that the container should constitute a package for purposes of limitation, or whether the number of packages in the container was to be the criterion and it is immaterial, how many packages the container includes, if we accept the fact that the container is indeed a package.

In this case, priority is given to the intention of the parties in respect of the contract of carriage, which seems fair. Consequently, where the shipper knows the goods are to be shipped by container and specifies in the contract (usually by means of the bill of lading)

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[126] *Cf. Lufty Ltd. v. Canadian Pacific Railway Co. (The "Alex")* [1974] 1 Lloyd's Rep. 106; for transportation of containers by rail, where 400 pieces of knitted nylon piece goods were stowed in a container and loaded on to a railway wagon. When the goods were delivered to the plaintiffs were in a damaged condition due to water damage as a result of holes in the roof of the container. In this case, the container loaded on to a railway wagon is not deemed to be a package; see *HARRINGTON S.* (1982, pp. 6, 24-26).

[127] See *RAMBERG J.* (1980) "The Implications of New Transport Technologies" 15 ETL, p. 119; *HARRINGTON S* (1982, p. 3, n. 1).

the type of goods and the number of cartons carried in the container**,** and where the carrier accepts that description and that count, then the parties intended that the number of packages for purposes of limitation of liability should be the number of cartons specified.

A clause, which is invalid in some circumstances, may not revive in other circumstances. In *Leather's Best, Inc. v. S.S. Mormaclynx* [1971] 2 Lloyd's Rep. 476 (2nd Cir. 1971), a clause that was invalid during carriage is not permitted to revive after discharge. Specifically, the court found that when a carrier includes an invalid clause in a bill of lading, it should not properly expect the shipper to interpret the clause as sometimes invalid and sometimes valid. If a carrier seeks the benefit of a different measure of liability before loading or after discharge, fairness requires that it specifies that the limitation clause relates only to the periods not covered by COGSA. The judgment was upheld on appeal by a divided panel of the Second Circuit. It is possible nevertheless that an invalid clause may revive, depending on the wording of the clause and the circumstances of the case.

Clauses that lessen the responsibility of the carrier are null and void as being contrary to article III Rule 8. According to Judgment of November 14, 1984, Cour d' Appel, Paris, 1986 DMF 282, a container clause, which attempts to stipulate that a container is a package, was held to be without effect. Valuation clauses are invalid in two distinct instances: (1) when the clause sets the limit of liability at a specific amount per package which is lower than the amount specified by article IV Rule 5; and (2) when the clause purports to base the limit of liability on the invoice value of the goods.

c. The Australian and the Nigerian Case

Unlike the Hague-Visby Rules, Article IV, Rule 5 of the Hague Rules does not state expressly that the "package" limit is to be calculated "per package or unit…lost or damaged" but merely "per package or unit" (Griggs 2005, p. 140). The question that arises is whether the limit to be calculated with reference to the total number of packages enumerated on the bill of lading or with reference to the number of packages actually lost or damaged. If the whole cargo described on the bill of lading has become a total loss, the question is academic, but the question is relevant if, for example, four of ten packages enumerated on a bill of lading have been damaged. It appears that both the Hague and Hague/Visby Rules will be construed in similar fashion and that the Hague Rules limitation will be calculated with reference to the number of packages which have in fact been lost or damaged.

On the other hand, when settling the limit of liability, according to the Art. IV Rule 5 of the Hague-Visby Rules, under sub-paragraph (a) the package limit is to be calculated with reference to the goods "lost or damaged." This term does not differ much from the Hague Rules. As a result, it is the weight or quantity actually lost or damaged which is relevant, not the quantity or weight described on the bill of lading. In the case of a total loss, the distinction will normally be irrelevant, whereas in the case of partial loss or damage, the distinction will be highly relevant.

However, the provisions of sub-paragraph (c) appear to create some confusion in relation to containerised cargo, since they seem to indicate that the details of quantity enumerated on the bill of lading are to predominate.

As an example, if the number of packages enumerated in the bill was, say, twenty but only ten packages were in fact damaged or lost, then it would appear possible to say

that the relevant number of packages for limitation purposes was ten. On the other hand, if the goods were a total loss, then the number of packages for limitation purposes would appear to be twenty, even if in fact the container contained twenty-four packages. This seems to follow from the principle that the claimant cannot claim for more packages than the number deemed to have been shipped, but this may be unfair.

Since the bill of lading is concerned with the enumeration, then that enumeration should entail the twenty-four packages lost because that is the actual number of packages. It seems that at this point the law should play its role and state that the actual total loss must be calculated and not what is superficially recorded on the bill of lading. If, for example, at the port of destination it is obvious that the container- when opened- included twenty-four packages, all of which were damaged and not twenty as the bill of lading enumerated, then the former number should be taken into account.

Besides, it is not bulk cargo we are concerned with or transportation of layers of bricks which break when the container is damaged and no-one can discern how many bricks there were inside that metal box, but in cases of packages that can be identified -e.g. Cartons of Chinese vases all broken- then the actual total loss should be the total amount of the packages inside the containers that were found to be damaged.

Alternatively, should it be concluded pursuant to the last sentence of sub-paragraph (c) that the container itself is to be the “package,” it would then appear to follow that even if it were ascertained after an incident that twenty packages inside the container had been damaged, they would be available to the claimant. But, as can be seen from the above example, the lighter the cargo, the less benefit the claimant can gain from this alternative. Therefore, it is of the utmost importance that there exists a precise description of the cargo on the bill of lading.

Additionally, it would appear that the container would be treated as the package for the purposes of limitation if, for example, the bill of lading evidenced the shipment of "one container." Where a ship laden with container cargo was stranded on the coast of Portugal and broke up with loss of life and total loss of cargo, the consignees sued on the cargo, which was subject to the Hague Rules. The contention that loss was to be calculated in terms of the Hague Rules Art. IV Rule 5 by reference to the number of items within the containers rather than by reference to the number of containers was accepted in the *Admiralty Court Owners of Cargo Lately Laden on Board the River Gurara v. Nigerian National Shipping Line Ltd, the "River Gurara"* [1996] 2 Lloyd's Rep. 53[128].

However, in *PS Chellaram & Co Ltd. v. China Ocean Shipping Company; "The Zhi Jiang Kou"* [1989] 1 Lloyd's Rep. 413, (1990) 28 NSWLR 354, it was argued that the container was the relevant package or unit for the purposes of Article IV, Rule 5 of the Hague Rules. On researching the appropriate construction of the "package," Mr. Justice, *Carruthers* held that where the carrier had provided the container and was made aware of its contents by the shipper, then the packing units within the container and not the container itself constituted the relevant "packages" for the purposes of calculating limitation of liability – notwithstanding that the container was packed by the shipper[129]. Since it is the "number of packages enumerated in the bill of lading" which is relevant, the same conclusion would seem to apply if the bill evidenced shipment of "one container containing boxes of clothes" or "one container containing sugar," as demonstrated in "*the River Gurara.*"[130]

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[128] *Cf. DYASON J.* (July 2001) "South African Maritime Law -an Overview of some Developments," 32, Journal of Maritime Law & Commerce, p. 475.
[129] See also *WILSON* (2008, pp. 196-198).
[130] *Cf. supra,* n. 128.

Furthermore, an important issue that arises through COGSA is that according to the Hague-Visby Rules, under Art. III Rule 3, the carriers of an FCL container may wish to utilise the right given to them to refuse "to state or show in the bill of lading any…number, quantity…which…they have had no reasonable means of checking." They may therefore wish to issue a bill which records shipment merely of "one container" in which case this will probably be the "package or unit" for the purposes of Article IV, Rule 5(c). On the other hand, the shippers might not accept this since they will require a bill of lading describing the contents of the container as one of the documents necessary for the sale of their goods (Griggs/Williams 2005, p. 143).

A solution to this problem is that the parties may often agree on a compromise by the issuance of a bill of lading recording the shipment of "one container said to contain" a number of packages or units. Still, it is debatable whether the inclusion in the bill of the number of packages qualified by the words "said to contain" amounts to an "enumeration" in the bill of lading for the purposes of Article IV Rule 5(c), since it would otherwise state that the container itself has to be "the package or unit."

According to Griggs/ Williams (2005, p. 141), it is arguable that the provisions of Article IV Rule 5(c) are intended to complement the obligations placed on the carrier by Article III, Rules 3, 4 and 5. These provisions clearly envisage an unqualified enumeration in the bill of lading of figures provided by the shippers. It has, however, been repeatedly held in this context that by the addition of words such as "said to contain" or "weight unknown" the number or weight of goods inserted in the bill of lading is not even prima facie evidence of the shipment of such goods and the onus is on the cargo claimant to prove by other evidence how much cargo was shipped. A bill of lading qualified in this manner is

not "such a bill of lading" as will provide prima facie evidence for the purpose of Article III Rule 4.

The Hague-Visby Rules are intended to be construed as a whole and the provisions are intended to complement each other. It would therefore appear strange if a qualified enumeration, which would not be binding on a carrier under Article III Rule 4, would nevertheless be binding on him for the purposes of Article IV Rule 5(c). However, this is the conclusion reached in "*The River Gurara"* and accordingly it seems that the qualification "said to contain" does not in any way dilute or undermine the value of the bill of lading as "enumeration" for the purposes of defining the "package."[131] Additionally, the limitation of liability under the Hague Rules must be calculated by reference to the individual items within a container and not by reference to a container alone. It would strain the normal meaning of the word "container" to describe it as a "package."[132]

Sections 1(2) and (3) and (6) of the Carriage of Goods by Sea Act 1971 provide that the Hague-Visby Rules as set out in the Schedule to the Act shall "have the force of law" in the United Kingdom in the circumstances described in the Act and the Schedule, so when the UK COGSA applies as a matter of law it is not possible for the carrier to impose a package limitation or weight limitation, which is more beneficial to him than that imposed by such Rules. This provides a good solution for the protection of the cargo-owners.

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[131] See about the clarification of the status of containers in *Nicoll CC* (July 1995) "Significant Carriage of Goods by Sea Reform in New Zealand," 26, Journal of Maritime Law & Commerce, p. 443.

[132] Also in Court of Appeal –Civil Division (1998) "Limitation of Liability Package Container," 33(3), European Transport Law, p. 383.

However, when COGSA applies as a matter of contract[133], then it is a matter of construction of the whole contract, whether the effect would be given to a clause lessening the carrier's liability to a sum lower than that in the Rules.

Concerning the matter of who is going to pay the cost of the cargo damage and particularly the limitation of liability of insurers, shippers and ship-owners, it is true that whoever drafted the Hague or Hague-Visby Rules on package limitation would be unable to achieve the uniformity demanded by containerisation. The development of technology has raised several issues that occupy maritime lawyers. Problems of what is a "unit" or "package" existed but the advent of containerisation brought a new dimension to this matter[134].

Accordingly, as recently held in *El Greco (Australia) Pty Ltd. v. Mediterranean Shipping Company SA* [2004] 2 Lloyd's Rep. 537, [2004] FCAFC (Federal Court of Australia - Full Court) 202, the enumeration of the bill of lading should show how the "units" were packed and how many there were. Under Art. IV R. 5 of the Hague-Visby Rules, the words "package" or "units" cannot extend to mean individual pieces of cargo said to be in the container.

The case of the *El Greco* concerned a claim for cargo damage. On the bill of lading, under the description of cargo, the container was said to contain "200,945 pieces of posters

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[133] For instance, by virtue of the inclusion of a clause paramount.

[134] See further "I say "package," You say "unit"- UK Insurance Article in association with KENNEDYS, as in *http://www.legal500.com/devs/uk/is/ukis_102.htm* (26/04/2005, at 22:30); see further Case Comment (1989) "A Container is not a Package," 6(5) Cargo Claims Analysis, p. 75; additionally, in *Mitsui* at p. 816; also relevant *SCHMELTZER & PEAVY* (1970) "Prospects and Problems of the Container Revolution," 1, Journal of Maritime Law & Commerce, p. 203.

and prints" but in the column entitled "no of pkgs," the number one was entered. It was common knowledge that the 200,945 pieces had been put in "approximately" 2000 packages -though there was no reference to this on the bill. The number of pieces shipped was not precise. When the parties state something on the bill of lading, whether it be the shipper or the carrier, they should be precise of what they mean and not, for example, what they wanted it to mean.

The defendant argued that it was entitled to limit its liability under the Hague-Visby Rules, which refer to "damage…per package or unit."

The trial Judge decided that the mention of 200,945 individual pieces of cargo on the bill of lading amounted to an enumeration of "units" under the Rules. But on appeal, the majority of Judges (*Black CJ* and *Allsop J*) held that the reference to 200,945 pieces of posters was not an effective enumeration of contents "as packed" and that, for limitation purposes, the single container was to be regarded as the package or unit. *Beaumont J* dissented, holding that the relevant number was the "approximately" 2,000 packages that had actually been shipped. The issue was to see what the bill of lading has enumerated by way of packages and units as packed in the container, as the Federal Court noted.

There are cases where despite the will of the parties and their clauses inserted in the contract, the Judges will follow their own interpretation according to the current legislation and they are able to declare certain clauses void, even if both parties have agreed to them. For instance, as was accepted in *the River Gurara*, the parties agreed that The Hague Rules, as incorporated into the legislation of the country of shipment, should apply -together with a provision to the effect that "notwithstanding any provision of law to the contrary, the container shall be considered a package or unit…"

Although the Hague Rules seem to have applied as a matter of contract, *Colman J* held that the latter clause was void under Article III, Rule 8 of the Hague Rules. In reaching this decision, the judge was clearly influenced by the fact that he was following similar conclusions reached by US and Canadian Judges. However, it appears likely that such judges were considering cases in which The Hague Rules applied as a matter of law under the US and Canadian legislation. It does not appear to have been argued that the situation could be different if the Hague Rules applied as a matter of contract.

Similarly, a bill of lading provision including containers within the meaning of "package" was invalidated in *Cia. Panamena de Seguros, SA v. Prudential Lines* 416 F. Supp. 641 (DCZ 1976). In this case, the Canal Zone District Court concluded that containers were not COGSA packages. Each container had been loaded with as many as 5,000 smaller packages. Since these smaller packages would have been made into larger packages if the merchandise had been shipped break-bulk, the court found that they were not COGSA packages. The court alternatively based the carrier's liability on customary freight units.

d. The "Said to Contain" Clause

Consequently, where the bill of lading gives the number of "packages or units" in the container or pallet clearly and without qualification the relevant "package or unit" is likely to be the "smallest category of separately packed items so described" in the bill of lading (Griggs/ Williams 2005, p. 143). However, bills of lading are often qualified by provisions such as "weight unknown" or "quantity unknown" or "said to contain (STC)" and it is necessary to consider the effect of such qualifications. Still, a STC clause would not clarify things. Actually, the issue is further complicated by the uncertainty whether the words "said to contain" or "STC" which are normally found on container bills of lading have the same effect as "weight unknown" or "quantity unknown" (Griggs/ Williams 2005, p. 144).

How much does the content of the bill of lading affect the court decision when judging liability issues as such? It should be stated that if the bill of lading acknowledges receipt of the contents of the container, without reserve, then the burden is upon the defendant. But if it makes reference to the contents of the container, couched in such terms as "said to contain," "shipper's load, stow and count," it will probably go on to specifically provide that it acts as a receipt only for the number of containers received, and that the contents thereof, their weight, and number, are not known[135].

As was demonstrated in *Ace Imports Pty v. Companhia de Navegaca Lloyd Brasileiro; The Esmeralda I* [1988] 1 Lloyd's Rep. 225, the FCL/FCL formula was used in combination with "the said to contain" formulation which enabled the carrier to deny the cargo-owners' entries on the bill, thereby placing the burden on the cargo claimant to prove

[135] See *HARRINGTON S.* (1982, pp. 5, 10-11); a bill of lading may describe the goods invariably and indeed there may be a bulk cargo within the container.

the contents of the bill were true. Interestingly in this case an extra clause appeared for the condition of the cargo.

When there is a statement "receipt in apparent good order and condition," it is clear that the carrier cannot possibly comment on the apparent good order and condition of a package (and, of course, the quantity) already packed and sealed in a container. Certainly, a statement as such would not be nonsense, as it is presented for the defence of the carrier. It also shows that one cannot rely on the receipt mentioned, but definitely it is not the fault of carrier about defects of the goods.

For example, the carrier of an FCL container (a container packed and sealed by the shipper before presentation to the carrier) is unlikely to agree to the inclusion of cargo details without such qualification since he has no means of checking the contents of the container. But, he may wish to utilise the right given to him by the proviso to Article III, Rule 3 to refuse "to state or show in the bill of lading any … number, quantity… which… he has no reasonable means of checking."

Therefore, he may wish to issue a bill which records shipment merely of "one container" in which case this will probably be the "package or unit" for the purpose of Article IV Rule 5(c). Nevertheless, this may be unacceptable to the shipper who will require a bill of lading describing the contents of the container as one of the documents necessary for the sale of his goods. As a result, the parties may agree on a compromise by the issuance of a bill of lading recording the shipment of "one container said to contain" a number of packages or units[136].

Furthermore, as was accepted in *"the River Gurara"* the "said to contain" clause is not different to a qualification such as "contents unknown" or "weight, number, quantity

[136] See *D'ARCY* (2000, pp. 322-323).

unknown" in that the description does not constitute *prima facie* evidence of the cargo loaded.

However, Lord Justice *Phillips* felt it was at least arguable that "said to contain" does not prevent the description from being relied upon as providing *prima facie* evidence[137].

Accordingly, it remains uncertain whether the qualification "said to contain" dilutes or undermines the value of the bill of lading as "enumeration" for the purposes of defining the "package" to the same extent as "weight unknown" or "quantity unknown."

Besides, according to the Hague-Visby Rules, the wording of the bill of lading issued by the sea carrier is *prima facie* conclusive. If the bill only refers to "one container said to contain (specified merchandise)," then the container itself shall be considered as the package or unit, but if it enumerates the cargoes included in the container separately, each of those cargoes shall constitute a package or unit. If the bill mentions specifically one or two cargoes but not the other contents of the container, the separately mentioned items are regarded as separate packages for the purposes of maximum limitation of liability and the rest of the container falls under the general limitation (D'Arcy 2000, p. 322).

The "said to contain" clause is the clause that gives emphasis to the matter of what the package is. When, for example, the bill of lading describes the goods as "a container said to contain (specified merchandise)" then the container is the package and to be more specific the container and its contents is the package. It seems that this clause is a powerful one in order to decide and define the container as a package. Under this clause the container is defined either to be a package or not, since this clause is the place that reveals how the container is being ascertained; either with general cargo inside or separate packages.

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[137] See *CARVER* Carriage by Sea, 12th ed. pp. 236.

But, what happens if the shipper ascertains "a container said to contain rice," for example, but when the container is opened, this rice is already pre-packed in nylon bags, which are inside smaller cartons. If that is the case, then the onus should be on the shipper to prove that he did no wrong, stating this on the bill of lading for reasons of customs. Often the insertion of such clauses into bills of lading does not reveal the whole truth of what it is actually contained, rather than what it is said to be contained, till the metal box is opened, which is when the confusion begins. The question that arises is to whether phrases such as "STC" ("said to contain") or "FCL" ("Full Container Load") are to be regarded as nullifying any enumeration. What happens here is that these clauses simply mean that the carrier does not acknowledge the contents, with the result that the claimant must prove what was shipped if a dispute arise, and particularly in cases where the container was lost overboard.

Therefore, the shippers must be very careful with the enumeration in the bill of lading and very precise, because if the enumeration is wrong, the liability must be calculated up to the maximum enumerated only, though if fewer goods are shipped than are enumerated, the enumeration should only apply to what was actually shipped.

It is obvious that if the container can rank as a package, the carrier's liability could, unless a higher value is declared, be very severely limited. This is illustrated by the *PS Chellaram & Co Ltd. v. China Ocean Shipping Company; "The Zhi Jiang Kou"* [1989] 1 Lloyd's Rep. 413, (1990) 28 NSWLR 354, stated above. There, the bill of lading stated "1 container (20') FCL/FCL, Shipper's Load Count and Seal, said to contain: 900 ctns blank cassette tapes."[138]

[138] Refer to UK MISC (1989) "A container is not a package," 6(5), Cargo Claim Analysis, p. 75.

Additionally, the "per package" limitation can be nullified by virtue of a geographic deviation, as demonstrated in *Spartus Corp. v. S/S Yafo* 590 F. 2d 1310 (5th Cir. 1979). The court reviewed a claim for damage to clock movements, which the shipper had packaged in small cartons and loaded into a container furnished by the carrier. When packing had been completed, the shipper sealed the container. The carrier then issued a bill of lading describing the cargo as "1 CONTAINER STC 385 CARTONS ELECTRIC CLOCK MOVEMENTS."

Later the container was placed on-board the S/S "Yafo" for transport to New Orleans. The vessel was diverted to Mobile pursuant to Israeli Government instructions. There the container was offloaded. It remained on unsheltered docks in Mobile and later New Orleans for more than a month. When the container was opened, inspection disclosed holes in its roof and partial wetting of its contents. The District Court held that the offloading in Mobile constituted an unreasonable deviation, but the COGSA package limitation was available to the carrier. This limitation became ineffective, however, because the trial judge applied it to the individual cartons rather than the container.

After reviewing the historical development of deviation, the 5th Circuit concluded that the offloading of the clock movements in Mobile breached the contract of carriage and rendered the $500 per package limitation a nullity. Because of this holding, it is unnecessary for us to consider Zim's contention that the district court erred in finding that each of the three hundred and eighty-five cartons of clock movements constituted a package for the purpose of applying the limitation. As a result, the Court in the particular case refused to enforce the package limitation in both geographic and non-geographic deviation situations.

Whether the court would negate other limitations in an unreasonable deviation case remains for future decision[139].

Therefore, there is need for international uniformity and its accordance with common sense or current rational commercial arrangements. Additionally, as held in *Canada and Dominion Sugar Company Ltd. v. Canadian National (West Indies) Steamships, Limited* [1947] A.C. 46 (J.C.P.C.), although article III, Rule 3, requires the carrier to issue the shipper a Bill of Lading showing either the number of packages or quantity, or weight, as the case may be, as furnished in writing by the shipper, he is not bound to do so unless required by the shipper[140].

Additionally, what should also be stated is that inside the Hague-Visby Rules omissions occur which might also create debate. For example, in Article IV Rule 5(e) and Article IV *bis* Rule 4 there is no mention of "loss." Throughout its other provisions the Hague-Visby Rules speak consistently of "loss or damage", like in Article IV, Rule 5(a). It seems that Article IV Rule 5(e) is intended to restrict the general application of Article IV, Rule 5(a), since it apparently applies only to "damage" and not "loss" (Griggs/Williams 2005, p. 138).

Conclusively, a container is a package (Tetley 1988, p. 882), and actually a metal package designed specifically by technology to hold cargo, and since there is not a specific

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[139] *Supra*, n. 5, p. 461.

[140] *Cf. Daewoo Heavy Industries Ltd. v. Klipriver Shipping Ltd. (The Kapitan Petko Voivoda)* [2002] 2 ALL ER (Comm) 560 (Comm); see *Wilson J* (2002) "The Kapitan Petko Voivoda" 3(4), Shipping & Transport Lawyer International, pp. 4-6.

legal regime to identify it at a global level, it rests on the agreement of the parties to decide how to declare it on the bill of lading. A pallet may be a package as well[141].

Beeks J in *Matsushita Electric Corp. v. S. S. Aegis Spirit* 414 F. Supp. 894 (W. D. Wash. 1976) concluded that a ruling, under which containers are packages, would distort the word's plain, ordinary meaning. Also, he concluded that recognising the container as a ship's transport equipment rather than a COGSA package negates the possibility of an unacceptable result where a container holds the packaged goods of many shippers[142].

Still, it is to disagree that containers are not packages, or, even complete the definition, in the future, by a ruling that containers are metal packages. The latter would serve for clarity in the whole problem. Furthermore, on the question what constitutes the "package" under the Hague Rules, Abdulrahim[143] argues that the term refers to any items of cargo which have been sufficiently packed for the purposes of being held and protected during transit. Still, such an assertion does not clarify this particular issue, since "any item" can be everything or nothing in metal, given that metal or steel is a container and such an assertion can easily exclude the container. Besides, it should be stated that containers are not packed; the correct term is that "containers are piled."

But, it still leaves open the question as to whether "any items of cargo" may exclude the containers.

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[141] Also, see *HARRINGTON S* (1982, p. 16); he agrees that the container does fall indeed within the definition of a package and most bills of lading will purport to define the container itself as the limitation package, especially if the container was stuffed by the shipper.

[142] *Supra*, n. 121; *supra*, n. 5, p. 443.

[143] As in *ABDULRAHIM HANI MS* (1994) Maritime Carriers' Liability for Loss of or Damage to Goods under the Hague Rules, Hague-Visby Rules and the Hamburg Rules; compared with his Liability as an Operator under the relevant Rules of the International Multimodal Transport Convention, DPhil thesis, University of Glasgow, pp.1-350, at pp. 146-148.

Consequently, even if the language and purposes of COGSA left us in doubt as to whether carrier-furnished containers whose contents are disclosed should be treated as packages, the interest in securing international uniformity would thus suggest that they should not be so treated as held in the case of *Mitsui*. Expensive litigation will increase until a solution acceptable to shippers, carriers, and insurers is developed. It is true that if we accept that the containers are modern substitutes for the hold of the vessel, then we should not equate them with "packages" in the COGSA sense.

Certainty and predictability become more easily attainable if adjustments in industry practices take place. For example, shippers and freight forwarders could be more careful in drafting bills of lading and other shipping documents- and in noting revisions and objections made by carriers.

Carriers have and should gauge their rates to accommodate containerised shipments. Insurers must review and revise policies and premium structures to meet changing conditions. The industry remains young, and definitive pronouncements now seem impractical. Thus, periodic review and analysis of developments in the container revolution is vital[144]. What seems clear, however, is that, absent special circumstances, equation of containers with packages has become anachronistic.

[144] *Supra,* n. 5, p. 465.

e. The New Zealand Approach

Furthermore, as established in *Dairy Containers Ltd v The Ship "Tasman Discoverer"* [2002] 3 NZLR 353 (New Zealand Court of Appeal), *per Williams J* since a contract is signed by the parties, it is up to them to contract on whatever terms they wish, meaning that they can incorporate any legal regime they prefer, such as the Hague Rules but they should be careful when drafting the contract to avoid what has been referred to as "the golden clause trap", according to Article III Rule 8 (par. 9)[145]. A carrier that tries to use extra words to reduce the limits of liability will have to confront article III rule 8 which may declare these words null and void. In particular, any extra clause does not replace the combined application of art 4(5) and 9 of the Hague Rules and is otherwise not applicable by virtue of art. 3(8) of the Rules. Here is where the confusion in law stands, precisely because we do not have "the specific legal regime" which would handle things more evenly[146].

It is argued that the shipper should have an opportunity to declare a higher value[147]. Under the US COGSA provisions, the shipper may take advantage of the opportunity to declare a higher value on its cargo, and have such higher value placed on the bill of lading, thus avoiding any $500 limitation. This though will subject a shipper to a higher traffic rate, a gamble the shipper takes in these cases.

However, if the parties are allowed themselves to define what a "package" is, this might allow them to limit liability to a level even less than that defined under the terms of COGSA (Tetley 1988, pp. 237-238)[148].

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[145] See also *The Halsbury's Laws of England* (31 January 2003) "Shipping and Navigation."
[146] *Cf. The Tindefjell* [1973] 2 Lloyd's Rep. 253.
[147] *Supra,* n. 117, per *Paul Edelman*.
[148] Quoted by *Walsh J*, in *"The Alex," supra*, n. 126.

This would take place, since a carrier could always limit its liability to $500.00 by merely extracting a stipulation from the shipper that everything shipped, no matter in what form, would be deemed a package for the purposes of limitation of liability.

If it is a matter of construction of the whole contract whether the effect would be given to a clause limiting the carrier's liability to a sum lower than that in the Rules, then, the parties can be free to agree that the Rules shall apply. But, a lower figure should be substituted for the figures in the Rules themselves, since both provisions would have equal force as contractual terms. In particular, with that clause the parties may agree on a lower sum, even if the Rules still may be applied and this lower sum will be valid, if contracted.

However, a dispute could still arise as was also shown in "*The River Gurara,*" where the parties agreed that the Hague Rules as incorporated into the legislation of the country of shipment should apply, in combination with a provision to the effect that "notwithstanding any provision of law to the contrary, the container shall be considered a package or unit…" Despite this clause, *Colman J* held that the latter Clause was void under Article III (8) of the Hague Rules[149].

What one can observe through this legal procedure is the fact that it is permissible to declare the container to be a package on the face of the bill of lading, but it is not permissible to enter a clause in the bill of lading since there is a possibility that this clause could be declared void. But, should that clause be declared void the moment that the bill of lading deems the container to be a package?

Shippers may be liable for the value that they may declare, if they follow the route of the Hague Rules by virtue of section 4(5) which provides that a package limitation exceeding $500 may be fixed by agreement between the carrier, or the master, or the agent

[149] See also *Griggs/Williams* 2005, pp. 137-139.

of the carrier, and the shipper (as in 46 US COGSA par. 1304 (5)). This route though is an impractical one since the shippers will be called upon to pay freight on an ad valorem basis which is likely to be something like 3% of the declared value (Harrington S 1982, p. 19). Therefore, the shippers can profit more by spending their money on cargo insurance which covers more perils at less cost. In comparison, in Canada, for instance, it is incumbent upon the shipper to declare the higher value.

As held by the Canadian court in *Anticosti Shipping Co. v. Viateur St. Amand.* (1959) S.C.R. 372 (Supreme Court, Canada), *per Rand J, "the responsibility for seeing that the value of the thing shipped is declared and inserted on the Bill is on the shipper and any consequential hardship must be charged against his own failure to respect that requirement."*

Still, it is under discussion whether the size of a container remains immaterial in such matters[150]. *Friendly J* does not agree so in *the Mormaclynx*, since he compared the sizes in this case and the pallets of *Standard Electrica,* ignoring as such *Moore J.* And, it is debateable whether we should distinguish between the container and pallet in order to define the package. A pallet is a package as well and since a pallet is a package as well, then the container is also a package or otherwise, if a container is deemed a package, then the pallet should be also deemed a package. Still, in the most recent *"Rotterdam Rules,"* the term "package" (of shipping unit when goods are carried in containers) is treated in Art. 59, par. 2, which reads like in the Hague/Visby Rules without any further additional explanation[151].

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[150] See *WILSON (*2008, p. 195).

[151] *Cf. supra,* n. 5, pp. 433-435; *cf.* http://www.comitemaritime.org/news/pdfiles/2007-2.pdf; http://www.mcgill.ca/files/maritimelaw/UNCITRAL_Draft_Convention_Feb_2007.pdf.

f. The "Metal Package" Approach; a Term for the Future.

The container is a big metal box, if not carton and since it is constructed from metal element, it should be termed a "metal" package. If new law dealing with containerships ever comes in force, that term should be used for liability purposes and new legislation should deal strictly with the carriage of goods in containers. Moreover, it would be fairer, if we had one legal regime, which deals with the carriage of good by sea with containers, the carriage of goods by rail with containers and the carriage of goods by road with containers. This legal framework should be accepted as mandatory worldwide.

Furthermore, before containerisation, the package was easily identified; as the carton in which, for example, fifty boxes of pens are included. But still, problems regarding the package may also arise, if it is asserted that the carton is not the package, but the package is the tiny box of cacao included inside the carton. That is why we need a new law which defines the container as a "metal package" and assesses the limits of liability accordingly. But, we should not ignore The Hague or Hague-Visby Rules as they can be used for normal cargo transport. In support of this though, it is asserted in *Japan Line v. County of Los Angeles* 441 US 434 (1979) that a container is a permanent reusable article of transport equipment, durably made of metal and equipped with doors for easy access to the goods and for repeated use.

However, when the parties decide that goods be carried in a container, using the modern shipping methods then a law must be drafted to reduce package limitation problems and the wording of the Hague-Visby Rules could be modified as follows:

"Where a container is used to consolidate goods then the container itself will be deemed the "metal package" for the purposes of this paragraph" and accordingly this article should be amended calculating the limit according to the weight of the container which is

more reasonable or fixing a certain tariff for this metal package irrelevant of weight. An acceptable formula must be found to set a certain tariff for a damaged container or for damaged goods inside the metal package.

And, perhaps, the package limitation problem would be resolved if that new law did not place emphasis on the contents or the weight of the container. This tariff would generalise the issues. If the container is defined as the "metal package" then the tariff is calculated according to the metal and the package. Metal is an expensive element to carry cargo and a heavy one. Therefore, since cargo is agreed to be carried inside the container made of steel or any other metal material then the amount of limitation for this particular package should not be low and it should be fixed.

Since a customer accepts that his goods are carried via this modern method, quickly and on time, he should also accept that in case of cargo damage or loss the container would be the "metal package" for limitation purposes under the new law that would be produced to govern multimodalism[152]. The law that we actually need should be drafted solely for this kind of transport and thus avoid the troublesome conundrum, when is a package not a package and how this package should be treated, either as a sophisticated or an esoteric term of art[153].

In addition, we should not neglect the later paragraph in the Hague-Visby Rules which does refer to a container as a package as long as it is enumerated as such in the bill of lading. It seems that the United States do not want to consider the container as a package, but exactly the opposite. Amazingly in *Belize Trading Ltd. v. Sun Ins. Co. of New York*, 993 F.2d 790 (11th Cir. 1993) the court went even further, holding that COGSA requires a

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[152] See chapter 4.
[153] *Supra,* n. 5, pp. 430-431.

carrier to issue a bill of lading showing the number of cartons and not merely the numbers of containers.

Therefore, we cannot achieve uniformity if one states that the container is not a package, despite the enumeration in the bill of lading and the other states that the container is a package precisely because of this enumeration.

Moreover, it should not be forgotten that at least as far as the United Kingdom and the other states implementing the Hague/Visby Rules are concerned it is generally accepted that "…except as aforesaid such article of transport shall be considered the package or unit," by virtue of the new Art. IV Rule 5(c). The container should be regarded as a package and even if we suppose that a convention might be drafted one day particularly for Containerisation and multimodal transport then the idea of defining it as a "metal" package would not be far away.

Suppose we accept the container, this large metal object, as a "metal" package. Metal is a heavy element, much heavier than a carton or consolidated paper, although in *Standard Electrica* the pallet was held to be the relevant COGSA package. The solution here might rank among the package and customary freight unit. We need a definition in the middle of these two terms. By virtue of this, the "metal" package may adequately fit, but it is significant to view its fiscal dimensions. For instance, the financial package limitations may be converted.

Schoenbaum (2001, p. 636) may be of the opinion that "absent a clear agreement of the parties so long as [the] contents and the number of packages or units [inside] are disclosed," large metal shipping containers, since they are functionally part of the ship, are normally not COGSA "packages." But there is more to be stated when technology will go even further than just a Post-Panamax container-ship.

And, we should not go far, since in *Orion Ins. Co. v. The M/V "Humacao*," 851 F. Supp. 575 (SDNY 1994) the court held that a shipping container of resin in bulk would be treated as a COGSA package.

Although the *Mormaclynx* held the position "that a container rarely should be treated as a package" and it was suggested that it would be inconsistent with congressional intent, in *Kulmerland* the container is presumptively the package where the units inside are not suitable for breakbulk shipment. Furthermore, law should keep pace with the technological advances. Also, taking for granted the evolution of the Post-Panamax container-ships, of which some are the successors of the transformed general purpose cargo ships to container-ships, then the position that a container is a "functional part of the ship" or a "portable hold" of the ship might not be entirely correct.

Indeed, recent advances in technology places the container on the deck of the ship[154] as an individual metal object which carries cargo and not in the hold. A carton package is portable as well as the container. If the container is deemed a "portable hold," it is to question why technology does not place it in the hold, then. Therefore, it should not be deemed as such, or the carton package. The carton package and the container are portable, but they are not holds.

[154] Also chapter 3.

C.) ARE THE CONTAINERS "CUSTOMARY FREIGHT UNITS"?

a. Case - Study

Also open to debate is whether a container is a "package" or "customary freight unit." The phrase "customary freight unit" has been read by most courts to mean the freight unit by which the freight was calculated in that particular case. In so-reading the phrase, they have relied on the bills of lading and tariffs as it was accepted in the past[155]. It was added by the Visby Protocol and hence does not appear in the Hague Rules. A gap in law may be shaped though between the Canadian Act and the US COGSA. In the former, the limitation provided amounts to $500 "per package or unit" while in the COGSA, it is $500 "per package or in case of goods not shipped in packages, per customary freight unit." "The customary freight unit" serves, when neither the container nor the items within are packages. In such circumstances limitation of liability in the USA would be calculated in accordance with the customary freight unit (Harrington S 1982, pp. 17-18).

Furthermore, the question arises whether the term "unit" intended to refer to a shipping unit, such as a crate, package, or container, or it would equally apply to a freight "unit", i.e. the unit of measurement used to calculate the freight (Wilson J 2008, p. 195) while the conflict between "shipping" and "freight units" has been resolved by a clear statement that the unit at issue is a "package or other *shipping* unit" (Wilson J 2008, p. 220).

There are cases where the courts found that entire shipping units constitute the customary freight units. For example, in *Eaton Corp. v. S. S. "Galeona"* 474 F. Supp. 819 (SDNY 1979) a tractor and parts were shipped under a bill of lading to which COGSA

[155] *Freedman & Slater, Inc. v. M/V Tofevo*, 222 F. Supp. 964 (SDNY 1973).

applied. The tractor, unboxed, was damaged and the issue became what was the customary freight unit.

It was accepted that the freight charge was based on a lump sum of $2,000 for the first 2,400 cubic feet and $30 per each 40 cubic feet of some 674 cubic feet remaining in fixing the space taken up by the units. The court found that the customary freight unit was 40 cubic feet, and that this unit would better fulfil the purpose of COGSA. Limitation of liability was not to be favoured, and the larger unit proposed by the carrier was not consistent with its tariff, which was ambiguous.

It seems that the "customary freight unit" reflects a compromise between those who thought that the package or unit limitation was obsolete and should be replaced by a weight limitation entirely, and those who wished it retained. There are several factors in favour of the weight limitation, while the package or unit limit is deemed as no more than a lesser alternative, preserved for cases where the packages or units have a very low weight. Since the United States have the word "unit" in the phrase "package or unit," this is replaced by "customary freight unit" which provided a limit for bulk cargo described by tonnes and so forth. Furthermore, England would never accept that the word "unit" standing by itself could have this effect and the result would be no limit in the case of cargo shipped in bulk to which the words "packages" or "units" could not be applied.

The Visby Protocol now is set forth to provide such an alternative limit. But difficulties can still arise where the goods are partially damaged when it comes to deciding whether the limit should be calculated in reference to the weight of the damaged goods or by reference to the weight of the whole consignment.

The question that arises is whether the container is a "package" or "customary freight unit". This may receive a positive reply, particularly in cases where it is stated that "the container said to contain machinery."

Indeed, as Harrington (1982, p. 5) states, a bill of lading may describe the goods in more general terms and it may not itemize the contents or indicate if they are packaged in any way. There may be a bulk cargo within the container and thus the container may be considered as "package."

As decided in *"The Alex,"*[156] the "unit" mentioned in Art. V of the Hague Convention to serve as a base of calculation of the limitation of responsibility of the maritime carrier, applies to merchandise which in current language is not usually called packages, such as bales of wool or cotton, casks of wine, bags of produce. Furthermore, in *the Aleksander Serafimovich,* the American sub-section is very similar to the Canadian, but not identical therewith. The most significant difference is found in the expression "customary freight unit" in the American statute. Similarly, the Canadian statute uses simply the one word "unit," which means a unit of goods, not a freight unit.

According to Schoenbaum (2001, p. 641), the customary freight unit limit applies to bulk cargo as well as machinery and equipment shipped uncrated or unpackaged. Still, it is odd that the American court in *Kulmerland* did consider the container that carried machinery as a package and not as a customary freight unit, since the U.S. does not abide by the Visby Protocol and does not define the container as a package.

To summarise, the "customary freight unit" has also been considered as the basis on which freight had been calculated. However, as held in *Gulf Italia v. American Export*

[156] *Supra,* n. 126.

Lines 79 S. Ct. 1285 (Mem)[157] on many occasions the cargo owner will find it more profitable to invoke the "freight unit" alternative, as, for example, in circumstances where the freight units exceed the number of shipping units, although according to *Petition of Isbrandtsen Company, Inc. Co. Inc. v. US* "*the Edmund Fanning"* 201 F.2d 281 (2nd Cir. 1953), this is not invariably the case.

As also held by *Atkins J,* in *Inter-American Foods, Inc. v. Co-ordinated Caribbean Transport, Inc. and M/V Freight Consolidator, and M/V Freight Transporter,* 313 F. Supp. 1334 (Miami Division), each cardboard carton of frozen shrimps placed on a freezer trailer in Nicaragua for shipment to Miami -not the trailer- constituted "package" for purpose of limitation of liability provision of COGSA, since the carrier prepared and issued its own bill of lading a day or two after transportation had commenced and the shipper did not deliver a sealed trailer to the carrier but to the contrary the carrier dispatched its trailer to receive the cargo for which its driver gave a receipt.

Finally, the "customary freight unit" has also been considered as the basis on which freight had been calculated. However, as it was held in *Gulf Italia v. American Export Lines* [1958] AMC 439 on many occasions the cargo-owner will find it more profitable to invoke the "freight unit" alternative, as, for example, in circumstances where the freight units exceed the number of shipping units, while according to *the Edmund Fanning* [1953] AMC 86, this is not invariably the case.

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[157] *Cf. Gulf Italia Company Co. v. The Exiria,* 263 F.2d 135; see also *EDWARDS JE* "What Constitutes "package" or "customary freight unit" within limitation of liability provision of Carriage of Goods by Sea Act (46 USCA par. 1304(5))," 27, American Law Review, Fed. 661.

b. Containers and Estoppels

According to section 1304(5) of the US COGSA, carriers may limit their liability under certain circumstances. The estoppel may be a valid method of avoiding the $500 limitation of liability provision of the US COGSA.

Estoppels can be essential to the final outcome of a case. As mentioned in *Primary Indus, Corp. v. Barber Lines A/S* 78 Misc. 2d 603, 357 N.Y.S.2d 375 (1974), since the shipper had described each bundle as a package, there was an estoppel which lay against the consignee as the shipper's "agent." Thus, the "bundle" which was not a bundle, since it was not strapped, was the package unit. The lower court decision that the $500 limitation applied to each bundle was affirmed, although the reason given was different.

Therefore, it is very important for shippers to be cautious in their statements in the bills of lading since an estoppel may also arise from statements about the condition of the goods. But if there is additional wording in the margin of the bills of lading, this estoppel may be enforced. For example, the bill of lading may include the extra clause, "signed under guarantee to produce ship's clean receipt" as demonstrated in the *Canadian National Steamships Ltd.* case. The estoppel stands as the most important exception to the common law exceptions for present purposes, preventing the shipper from denying the truth of the appearance thus created[158].

[158] About the estoppels by conduct and generally their function, see *BRIDGE M* (1999, pp. 77-78, 97, 127-128, 263-264, 316-317, 323-325, 430, 434, 438); also refer to *SEALY LS & HOOLEY RJA* (2009, pp. 152-154, 349-363).

c. The Tonnage Limitation

In addition to the method of the package limitation, the so-called "tonnage" limitation is available to the carrier under any statute "relating to the limitation of liability of owners of seagoing ships[159]. In particular, this form of limitation is applied to claims arising not only in connection with the carriage of goods, but to the many other forms of claim which may arise out of a maritime occurrence as well, for example, hull and property damage. There is no separate limitation fund for cargo claimants.

A claimant against the "tonnage" fund is entitled to insist on the application of the "package" limit where applicable. This takes place, since the proportion which each claimant is entitled to recover from the "tonnage" fund should be calculated with reference to the legal liability, which each claimant has established against the "tonnage" fund[160]. In conference[161], the Drafting Committee introduced a specified minimum liability for ships below a certain tonnage. It was considered that this change would be necessary in order to reduce the need for the HNS Fund to intervene in respect of damage caused by small ships,

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[159] The use of "tonnage" limitation is a useful means of distinguishing this form of limitation from the "package" method of limitation. However, it should be appreciated that whilst in those countries which give effect to the 1957 Brussels Convention or the 1976 London Convention this form of limitation is calculated with reference to the tonnage of the vessel in question, in other countries such as United States, this form of limitation is calculated by reference to the value of the ship and any freight to be paid on completion of the voyage. Accordingly, this form of limitation is sometimes described as "global" limitation (*Griggs/Williams* 2005, p. 134).

[160] See also case *Glaholm v. Barker* (1866) LR 2 Ex 598.

[161] See further for the definition of the tonnage, IMO (1993) Official Records of the International Conference on Liability and Compensation for Damage in Connexion with the Carriage of Certain Substances by Sea, 1984 and the International Conference on the Revision of the 1969 Civil Liability Convention and the 1971 Fund Convention, 1992, London, IMO, pp. 161-165, at p. 163;
see also *http://www.imo.org/inforesource/mainframe.asp?topic_id=831*;
http://www.imo.org/includes/blastDataOnly.asp/data_id%3D6505/HNSconventionoverview.pdf (26/04/2009, 02:11).

while also ensuring that victims would be fully compensated for damage caused by such ships.

With regard to the wording of a provision on this point, several delegates expressed support for the proposal contained in the report on the informal meeting held in Stockholm from 7-11 December 1981 (Document LEG 48/2/2, par. 61). Others supported a somewhat simpler text which would follow more closely the existing text of Article V 1 of the 1969 Civil Liability Convention, which reads that "the owner of the ship shall be entitled to limit his liability under this Convention in respect of any one incident to an aggregate amount of X *units of account* for each ton of the ship's tonnage. However, this aggregate amount shall not in any event be less *than Y units of account and shall not in any event exceed Z units of account."*

Moreover, in the light of the decision taken at the forty-seventh session in respect of the definition of "tonnage" in the draft HNS Convention, the committee agreed on the text that would be appropriate in the present context. That text was based on the 1976 Convention and would be finalised subject to any changes in terminology that might be appropriate as a result of decisions taken by the Assembly and the technical bodies of the IMO.

Several international conventions may contain provisions on identical or similar matters. The Hague Rules 1924, the Hague-Visby Rules 1968, the Hamburg Rules 1978 are all concerned with maritime liability and limitation regime. The system of limitation of liability as provided in these Conventions on carriage of goods by sea is very different from that under the Conventions on global limitation of liability (Xia Chen 2001, p. 130).

The limitations scheme under the law for carriage of goods by sea is based upon per package limits in accordance with the tonnage of the limiting vessel. When a ship owner is

held liable for cargo damages, his right to limitation of liability may be subject to both legal regimes.

Agreeing with Xia Chen (2001, p. 131), these conventions on carriage of goods by sea all provide that their limitation frameworks do not affect the rights and duties under any convention relating to global limitation of liability concerning sea-going ships. In other words, should any conflict of laws arise with respect to limitation of liability, the conventions on global limitation of liability shall take precedence over limitations on carriage of goods by sea.

Prior to September 1, 1997, South African package limitation was based on the gold Franc value, following Article IV (Rule 5) of the Hague-Visby Rules, which comprises Schedule 1 to COGSA. The South African Shipping General Amendment Act (No. 23 of 1997) changed the calculation of package limitation as well as that of tonnage limitation to a calculation expressed in SDR, reflecting the 1997 Protocol[162].

Consequently, there is nothing to prevent a carrier from relying on rights given by the Rules to limit his liability to the particular claim and then on the relevant "tonnage" statute to limit his liability to a sum which is lower than the "package" limitation available to him under the Hague or the Hague-Visby Rules and the Hamburg Rules. Such a right is expressly reserved to the carrier by article VIII of the Hague and Hague-Visby Rules and art. 25(1) of the Hamburg Rules. This in turn may constitute a further problem; why should the ship owners have the freedom to limit their liability twice?

[162] *Supra,* n. 128, p. 475.

D.) TO SUM UP…

The system of the carrier's liability under the Hamburg Rules has been simplified compared to that of the Hague/Visby Rules. The liability of the carrier under the Hamburg Rules is based on the principle of presumed fault or neglect.

The Hamburg Rules, which provide an express rule of limitation in the case of delay (Article 6(1)(b)), are not accepted internationally while in some countries the Hague Rules are adopted and others opt for the Hague-Visby Rules. Still, this does not cover the current needs of trade. That is why Containerisation and the evolution of the new technology in container-ships have affected the regimes governing maritime transport directly or indirectly for the limitation of the liability of the carriers. Since the current regimes are not adequate to cover problems as such, there is an urgent need for a new legal framework. What is needed is a new law that will be accepted internationally, that will be independent similarly by different courts and universal[163].

It should also be said that under the Hague-Visby Rules, omissions occur which might also create debate. For example, in Article IV Rule 5(e) and Article IV *bis* Rule 4 there is no mention of "loss." Throughout its other provisions the Hague-Visby Rules speak consistently of "loss or damage" (e.g. Article IV, Rule 5(a)). It seems that Article IV Rule 5(e) is intended to restrict the general application of Article IV, Rule 5(a), since it apparently applies only to "damage" and not "loss" (Griggs/Williams 2005, p. 138).

Finally, it should be stated that so far as container limitation is concerned, the Hamburg Rules have adopted the Hague-Visby solution preferring to construe the shipping

[163] Also, *supra*, n. 140.

units as the individual items listed in the bill of lading or other document evidencing the contract of carriage.

If the contents of the container or pallet are not separately listed, then the container or pallet together with its contents is treated as a single shipping unit. In the case of loss or damage to the container or pallet itself, this will be treated as a separate unit for limitation purposes, provided that it is not owned or supplied by the carrier (Wilson 2008, p. 220).

What is somewhat surprising is the fact that the Hamburg Rules adopt the Hague/Visby Rules in this important issue which means there is no serious development in this legal framework since it has the same wording as in the Hague/Visby Rules. The fact that they are ratified by most of the countries remains irrelevant, since the Hague/Visby Rules also apply and they have been ratified by England where the Hamburg Rules have not.

In conclusion, a container is a package (Tetley W 1988, p. 882), and more particularly a metal package designed to hold cargo, and since there is not a specific legal regime to identify it on a global level, the onus is on the parties to decide what they need and how to declare it on the bill of lading. The issue is further clouded by the fact that, as we have seen earlier, a pallet may be also considered to be a package. The container is a "metal" package.

Chapter III

LEGAL ISSUES & CONTAINER TRANSPORT

A.) INTRODUCTION

Argument has arisen as to whether the courts should be strict when containers are carried on the deck of container ships but no specific instructions are stated in the Bill of Lading (BL), while deck cargo is duly declared if its stowage on deck has been specifically stated in the bill (e.g. by a "stowed on deck" stamp). With the growth of containerisation[164], some courts have recognised that the carriage of containers on the deck of a specially adapted container ship does not constitute a breach of a contract of carriage, (see eg. *Du Pont de Nemours International S.A. and E.I. du Pomt de Nemours & Co. Inc. v. S.S. Mormacvega* [1973] 1 Lloyd's Rep. 267). This is still to be discussed in this chapter, under sub-chapter B (a. & b.). Additionally, it is important to analyse the issue on undeclared dangerous deck cargo, as demonstrated by virtue of *Northern Shipping Co v. Deutsche Seereederei* (*The Kapitan Sakharov*) [2000] 2 Lloyd's Rep. 255 CA case further below (sub-chapter B (c.)). This is significant, since specific regulation regarding dangerous substances within cargo sealed in containers must co-exist with or be replaced by the ideal future new container legal regime that might be created one day to govern multimodal transportation.

Also, within this chapter, the relationship of custom and law in containerisation is discussed, both which have a high impact on maritime practice and it is important particularly on the deck cargo issue. As the consignors are shipping the goods, then they should acknowledge the fact that their cargo will be shipped by containers and if they acquire speed, technology and modernisation in shipping, then their containers are to be

[164] See *Wilson J* (2002) "Unauthorised Deck Carriage; the Kapitan Petko Voivoda," 3(4) Shipping & Transport Lawyer, pp. 4- 6.

stowed on board the modern containership. At this point, custom is acting as a major factor to perform the voyage without legal violations.

Moreover, the shipping industry has their own methods of packing goods within the containers (see further sub-chapter C (a.)). The fact that potentially dangerous goods are sealed within the containers remains one of the most important problems in containerisation. Additionally, the affect of containerisation on INCOTERMS needs to be explored, since problems have been encountered, because containerisation has rendered the traditional FOB point as inappropriate (see further sub-chapter D).

Finally, the issue of bailment in container carriage is also explored, since the notion of bailment is relevant to container carriage (see further sub-chapter E). It is also important to deal with the "Himalaya" clause, in the context of containerisation. Although many of the issues discussed pre-date containerisation, other issues have emerged subsequently.

B.) LIABILITY AND DECK CARGO

a. Unauthorised Deck Carriage

Belgian law has always been very severe on carriers when damage or loss is caused to undeclared deck cargo. Verguts and Gossieaux (1998, p. 193) and Stevens (2001, pp. 263-271) have criticized this jurisprudence and also for some time there has been doubt in the jurisprudence as to whether it also applied to containers carried on the decks of container ships. In particular, the Belgian Court of *Cassation* on the 1st December 2000, in two decisions, closed the discussions by confirming the existing jurisprudence and specified that "undeclared deck cargo" also applies to containers on the deck of specialised containerships. Under the Belgian law a third party holder (including a named consignee) who receives a "clean" BL, which does not specifically state that cargo is stowed on deck, can expect that cargo to be carried in the hold (i.e. under deck) where it is not exposed to the risks it would run were it stored on deck[165].

The ruling stands even if the ship is a specialised container-ship. Such ships store containers subject to higher risks (e.g. waves, proximity to dangerous deck cargo) than those stowed in the hold. A carrier cannot escape this liability: an exception will be made only if the ship is a rare open "full container ship" without a deck as technically none of the containers can then be considered as having been stored "on deck," thus no deck stowage is to be declared[166].

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[165] See further *Clive Van Aerde* (August 2003) "Belgian Jurisprudence & Carrier Liability," 17(8), P & I International, pp. 13-15; *Cassation*, 1 December 2000, RHA, 2000, 99 (ms KINTAMPO); *Cassation*, 1 December 2000, T.B.H., 2001 (ms OOCL EUROPE V).

[166] Although the best terminology to demonstrate the way the modern container ships are manufactured is that they do not have a hold, but a deck. The hold is what is missing from them and not the deck. The deck is the covering of all or part of the hull of a ship into which hatchways are cut to give access to the holds (*Brodie* 1996, p. 47). Therefore, the new container-ships do not have a hold.

In Belgium, the only way for a carrier to escape liability, vis-à-vis a third party holder of the BL when the cargo is stowed on deck, is to specifically state this in the BL (e.g. by a stamp stating *"stowed on deck"*). The reasoning is that only then the BL duly warns the third party holder of the higher risk and they can act upon it (by, for example, seeking insurance for the higher risk, refusing the BL, etc.). Merely a *"deck option clause"* on the BL, stipulating that the carriers are allowed to stow the cargo on or below deck at their discretion, is insufficient because it does not inform the third party holder that the cargo has in fact been stowed on deck.

With regard to declared deck cargo, the implication is that to escape liability, the carrier must overcome an extremely heavy burden of proof. They must show that the lashing equipment provided was in perfect condition, that the lashing (if undertaken by the carrier) was completed perfectly and that the weather conditions causing the damage or loss were unforeseeable and unavoidable.

If a carrier can show, for example, that the cargo was damaged by waves during an exceptionally heavy storm (that was not, or was much heavier than, forecasted) and without any defects to the lashing equipment, the carrier will escape liability[167]. It is clear that the burden of proof is very heavy and should be reduced by having exemption and/or limitation clauses and an evidence reversal clause inserted in a BL. According to the Belgian Courts, which are very strict towards undeclared deck cargo, when this occurs without being specifically stated in the BL, the carrier is fully liable for any loss or damage.

However, the evolution of technology and containerisation particularly, has shaped these giant containerships for container deck cargo.

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[167] Comm. Antwerp, 28 January 1985, E.T.L., 1985, 117 (ms BRITTA ODEN).

Since one knows that cargo will be carried on a containership when the BL does not specify either on deck or not, the consignee should recognise that it is very likely the containers in these modern ships will be carried on deck, and probably this is where the law should act. If you are putting your cargo in a container, you should accept that it will be loaded on board a specialised containership with cells on the deck designed for this purpose.

For clarification, the Belgian courts judged that when the containership has a hold, then the containers should be carried in that hold, if not stated otherwise (Van Aerde, August 2003, p. 14).

Wilson (2008, pp. 177-178)[168] has also asserted that stowage on deck should be clearly stated in the BL, but this, in my view, fails to take account of the nature of specialised containerships. Also relevant here is dangerous cargo[169]. When dangerous or toxic cargo is carried on containers, the temperature in the hold is an issue, especially when the vessel is not mechanically ventilated. In such cases, containers should be carried on deck to avoid overheating and explosions. According to Wilson (2008, p. 178), it is customary in maritime trade for timber or inflammable goods to be carried on deck.

According to Belgian courts, when a negotiable BL is to be issued and the cargo concerned has been stowed on deck to be carried to or from a Belgian port, or, if there is a risk that cargo claims will be heard by a Belgian Court or that Belgian law will be held to apply to the contract, it is necessary for the carrier to specifically state this deck stowage on the BL.

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[168] *Cf. Encyclopaedia Britannica v. Hong Kong Producer* [1969] 2 Lloyd's Rep. 536; *cf.* The Australian Carriage of Goods by Sea 1991; also *HETHERINGTON SW* (1999) "Australian Hybrid Cargo Liability Regime," 1 (February) Lloyd's Maritme and Commercial Law Quarterly, pp. 12-15.

[169] See below *"The Kapitan Sakharov."*

This can be achieved by stamping the BL with the words “carried on deck” and preferably with the addition of “at shipper’s risk,” but that may be contrary to article III Rule 8 of the Hague/Visby Rules. Such an inserted clause in the BL will exempt the carrier from liability.

i) Practice & Custom

In practice, deck stamps are sometimes used that state "shipped on deck at shipper's risk" without there being any other clause in the bill of lading that exempt, reduce or limit the carrier's liability or reverse the burden of proof. In such cases, the addition "at shipper's risk" in the deck stamp implies that the carrier is liable only for damage or loss caused by his negligence but that may be contrary to Article III Rule 8 of the Hague/Visby Rules and should not be permissible. This is also applicable if the cargo is carried on the deck of a specialised and well-equipped container vessel and this is where the law must allow for the development of containerisation and modern trade.

Custom does provide for such cases, but the question is whether the law so provides and whether it is necessary for the law to provide when custom adequately satisfies the needs of modern maritime trade. It should be questioned as to whether the custom is law or should be considered as law[170]. In *Nelson Pine Forests Ltd. v. Seatrans New Zealand Ltd.* ("*the Pembroke")* [1995] 2 Lloyd's Rep. 290, a vessel loaded expensive machinery in open-top containers for carriage from Bremen, Germany to Nelson, New Zealand, the issue being whether the carrier was reckless within the meaning of Article IV Rule 5(e) Hague/Visby Rules, so as to be deprived of the benefit of package limitation. The court, in this case, held that there was a contractual obligation to carry the containers below deck and that the obligation was met on loading.

However, when the vessel called at an intermediate port to load more cargo, one of the plaintiff's containers was discharged and reloaded on deck. The vessel then proceeded to New Zealand via the Straits of Magellan and encountered severe gales during which machinery parts in the container in question suffered corrosion damage, which the court

[170] See further *PAPANTONIOU* (1983, pp. 23-24 & 41-44).

held to be caused by contact with salt water. The court held that the Master would have known with certainty that the vessel would encounter very rough weather on the passage through the Straits of Magellan, and that there was an obvious risk that cargo on deck would be water-damaged. The court held that the Master was reckless within the meaning of Article IV Rule 5(e) to disregard this risk.

The carrier argued that it had not personally acted recklessly in any way, but the court held, without elaboration, that it was the recklessness of the Master of the vessel that was in issue; recklessness for the purposes of the rules was not limited to the management of the carrier. Moreover, the Master had been in contact with the carrier by fax at the time of the intermediate port call and it seems that the court would have inferred that the carrier was in fact party to, and aware of the risks inherent in, the reloading of the container on deck. As a result, the carrier was found liable for the damage to the plaintiff's machinery in full.

Elsewhere in the judgement, the court confirmed that the doctrine of fundamental breach was not part of the law of New Zealand, so as to deprive a defendant of the right to limit its liability only if it could be shown that its actions were, as a matter of construction, outside the protective clauses of the governing contract. The judgement is of some assistance in determining whether conduct is reckless within the meaning of Article IV Rule 5(e) of the Hague-Visby Rules, since by custom a container may be placed on deck[171].

[171] *Cf.* Belgium Approach.

ii) Belgium v. Mormacvega

It was accepted in the case of *The Mormacvega* [1973] 1 Lloyd's Rep. 267, that when goods are shipped under a "clean" Bill of Lading on the deck of a container ship built for the purpose of carrying deck cargo, such shipment does not constitute an "unreasonable deviation" from the contract of carriage and the shipowner is therefore not prevented from limiting his liability under the United States Carriage of Goods by Sea Act (46 US Code, sect 1304 (5)), in the event of the goods being lost.

In this case, the plaintiffs shipped thirty-eight pallets of synthetic resin liquid, which were packed in a container, on the defendant steamship *Mormacvega*, for a voyage from New York to Rotterdam. The vessel, which had originally been built for the carriage of general cargo, had been converted to a containership so that containers could be carried on deck and also in the hold. The container on deck was lost overboard. A "clean" BL had been issued to the plaintiffs, who claimed damages for the lost cargo. The defendants abandoned any defences which they might have, the sole issue remaining being whether the defendants could limit their liability under the United States Carriage of Goods by Sea Act (46 US Code sect 1304(5)), to $500 in respect of each pallet, i.e. $19,000 in total.

The plaintiffs contended that they were entitled to $109,000 (i.e. the market value of the goods at Rotterdam) because of the custom rule that the carriage of cargo on deck, where a "clean" BL was issued, constituted an unreasonable deviation from the contract of carriage, thus preventing the defendants from relying on the limitation provisions of sect 1304(5). The defendants, however, maintained that the plaintiffs, who had acted through a professional freight forwarder, were bound by the trade custom of stowing containers on deck, and such stowage would therefore not be an unreasonable deviation.

Moreover, in any event there could be no question of an unreasonable deviation because the vessel had been purposely constructed to carry deck cargo.

It was held that the plaintiffs, although not having actual knowledge, did have imputed knowledge through the freight forwarder of the practice of shipping containers on deck. The practice, however, was not sufficiently customary to make it a trade custom and there was no oral contract requiring the plaintiffs' container to be shipped under deck. Furthermore, the carriage of the container on deck was not an unreasonable deviation because the deck of a container ship was exactly where containers were reasonably intended to be carried. Consequently the defendants were entitled to limit their liability to $19,000.

It is worth questioning what occurs when dangerous cargo is undeclared and is carried on deck, and which is also unauthorised according to the contract, and, therefore, a breach of the carriage for the undeclared dangerous goods is constituted. According to the Belgian approach, if a container is loaded on deck, it would normally constitute a breach for undeclared or unauthorised deck cargo but if that cargo contains undeclared dangerous goods, then a breach is not committed but, in fact, the opposite: the loader should be praised for saving the ship, the cargo and the crew from explosion.

In *Wibau Maschinenfabric Hartmann SA v. Mackinnon, Mackenzie & Co. (The Chanda)* [1989] 2 Lloyd's Rep. 494, which was a case of deviation in the form of unauthorised carriage on deck, *Hirst J* held that since the provisions of the Rules were intended to apply to under-deck carriage, Article IV, Rule 5 and the words "in any event" were to be construed purely in relation to such carriage and not to the loss or damage resulting from un-contemplated deck stowage. As *per Hirst J*, "clauses which are clearly intended to protect the shipowner, provided he honours his contractual obligation to stow

goods under deck, do not apply if he is in breach of that obligation" and according to his view the package limitation in the Hague Rules fell within that category with the result that "being repugnant to and inconsistent with the obligation to stow below deck was inapplicable."

According to Griggs (2005, p. 151), historically, unauthorised carriage of goods on deck has been treated as a deviation and it has been repeatedly held that the carriers guilty of such conduct are not entitled to rely on any exemption or limitation clause in the contract of carriage but are liable as a common carrier. However, nowadays containerisation has developed the use of the deck carriage and these views are out of date, resulting in the fact that COGSA may no longer serve current needs.

Although unauthorised deck carriage was a deviation in the past, law should provide for the current situation since containers are now also loaded on deck. As was further demonstrated, in the case of *Daewoo Heavy Industries Ltd. and another v. Klipriver Shipping Ltd. and another; the Kapitan Petko Voivoda* [2003] 2 Lloyd's Rep. 1, [2003] EWCA Civ. 451, an important issue is the effect on a contract of carriage on deck without the knowledge or authority of the cargo owner. This case serves as an example of the doctrine of fundamental breach under which exclusion and limitation of liability clauses would cease to be applicable (Wilson 2008, p. 21). In *"The Kapitan Petko Voivoda*," the Court overruled "*The Chanda"* above, ruling that in a contract of carriage incorporating the Hague Rules 1924, Art. IV Rule 5 applied even where the effective cause of loss was unauthorised deck cargo.

Under the English COGSA, Article IV Rule 5(e), a carrier may lose the benefit of the limitation of liability if their conduct was intentional in the sense that they had

knowledge that damage would probably result[172]. This article differs from that under Article III Rules 1 and 2 where the carrier is in breach of his obligations to exercise due diligence to make the ship seaworthy and to "properly and carefully carry" the goods. In the latter case, where there is only negligence on the part of the carrier or his agents, the carrier has failed to exercise due diligence.

In imposing on the carrier an obligation to exercise "due diligence" the draftsmen of the Hague Rules adopted a term first used in the US Harter Act in 1893. The standard imposed by this obligation has been interpreted by the courts as being roughly equivalent to that of the common law duty of care, but with the important distinction that it is a personal obligation that cannot be delegated. As Tetley (1988, p. 391) confirms, "the carrier may employ some other person to exercise due diligence but if the delegate is not diligent, then the carrier is responsible". As a result, the carrier will remain liable if the person to whom performance of the obligation is delegated is negligent, whether that person be a servant of the carrier or even a Lloyd's surveyor as was accepted in *Union of India v N.V. Reederij Amsterdam (The Amstelslot)* [1963] 2 Lloyd's Rep. 223. It will be no defence for the carrier to argue that he engaged competent or reputable experts to perform the task or that he lacked the necessary expertise to check their work.

It is perhaps not surprising to discover that carriers have frequently claimed that their liability under the Rules differs little from that at common law, which imposed on them an absolute duty to provide a seaworthy ship. Nevertheless, as shown in *The Kapitan Sakharov* [2000] 2 Lloyd's Rep. 255, where there was a shipment of undeclared dangerous cargo in a sealed container[173], an important distinction arises where the carrier will not be

[172] See *WILSON* 2008, p. 202.
[173] See chapter 3, sub-chapter Ac.

liable under the Rules if neither he nor his delegate has been negligent. As per *Auld J*, there is nothing in the Hague Rules or common law to make a carrier responsible for the un-seaworthiness of its vessel resulting from a shipper's misconduct of which it, the carrier, has not been informed.

iii) Remarks

As already mentioned, if lashing equipment is adequate, there should be no problem for deck cargo; declared or undeclared, by custom. Belgian courts should consider that safety arrangements are in some ports poor and work is frequently performed in dark, windy, rainy or icy conditions. There is a necessity to standardize lashing equipment and this must be carried out within the International Standardization Organisation (ISO) in order to achieve the necessary international impact[174]. Standardization work within the ISO is on-going. ISO published the Standards Handbook about Freight Containers in January 2007, detailing over thirty ISO International Standards. This will, it is hoped, result in safer working conditions for stevedores and will reduce cargo losses significantly.

According to Andersson[175], lashing equipment is needed equal to adverse weather conditions which often prevail when containers are to be handled and secured. For example, problems arise with mixed equipment and especially twistlocks[176] with different locking directions, one of the biggest problems on board a ship that could create danger.

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[174] See *ANDERSSON LD* (1999) "Container Lashing," 4, Technology, Law & Insurance, Taylor & Francis Ltd., pp. 191-196; also, *ISO* (23 January 2007) "Freight Containers," ISO Standards Handbook; more on *http://www.iso.org*.

[175] *Ibid.* at p. 194.

[176] Twistlocks are used to take up forces in all directions. The horizontal forces are taken up by the collars which fit into the corner fittings. The compression forces are taken up by the intermediate plate and the tensile forces by the lock itself; see figure below from Andersson's; also *BRODIE* (1996, p. 177).

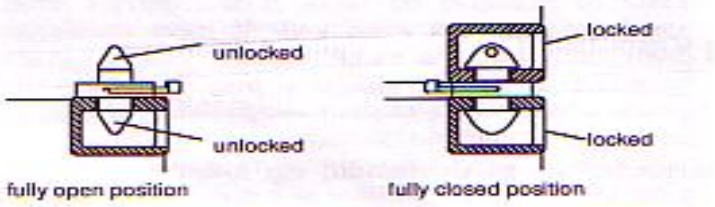

Figure 3 Manual twistlock, with double-locks, two positions

Certainly, problems exist related to semi-automatic twistlocks when a container is unevenly[177] settled, the twistlock then locks and the container is fixed. The crane becomes blocked and the semi-automatic twistlock must be released manually. If some semi-automatic twistlocks are unlocked by mistake some of them cannot be locked again without discharging the containers. Low quality lashing equipment sometimes creates problems, because of intolerance and inadequate contact surfaces which may damage the corner fittings of the container.

The strength of the lashing equipment is a matter of widespread discussion (Andersson 1999, p. 195). Should it be stronger than the corner fittings of the container with consequent damage to that container or should it be weaker and leave the containers unharmed but perhaps create alternative dangers? Ideal equipment would withstand any forces to which it may be subjected during transport and handling.

In the case where it is known that a container is required to be stowed below deck in an open-top container (with higher risk of exposure and naturally inclined to receive rust and damage) it should be placed under cover. Technology and law should co-operate to

[177] See front cover photograph; it could be assumed that this is what occurred.

resolve this issue. For example, when the vessel is a Post-Panamax, or modern container vessel without a hold, then naturally the containers are carried on deck and that should be accepted by law, as a valid discharge of the carrier's obligations. However, if the container vessel provides a hold, then the open-top containers should be placed in that hold, particularly if that is the contractual obligation. There is still need to modernise the law at this point, since technology requires the containers to be carried on the deck of the containerships.

There appears to be no compatibility between technology and law on these issues and it is questionable if there ever will be. This is due to the fact that the safest way to load an open-top container cannot be decided upon. The cargo of an open-top container will always remain at higher risk than cargo in closed-top containers. Certainly, the placement of an open-top container in the hold seems more secure in many respects but it should also be taken into account that the new modern containerships do not have a hold as such; they are single plat-formed. Therefore, the law should provide for this technological advancement, and certainly custom or commercial practice should be made law for the smoother operation of this undertaking.

b. Undeclared Dangerous Goods; Undeclared Dangerous Deck Cargo

The situation worsens when undeclared cargo is also dangerous as shown in the case of *The Kapitan Sakharov* [2000] 2 Lloyd's Rep. 255 CA. The trial Judge clearly found that the vessel was unseaworthy because of the undeclared dangerous cargo in a DSR container on deck. There was no warrant for extending a carrier's duty of due diligence as to the structure and stowage of its ship to a physical verification of the declared contents of containers or other packaging in which cargo is shipped unless put on notice to do so. Besides, the containers were in any event closed with a custom's seal and were not capable of internal examination by the carrier or his agents (see p. 272, cols. 1 and 2).

Furthermore, the question arising is whether ship-owners are entitled to be indemnified by shippers where the shipped goods include undeclared dangerous cargo and if they exercise due diligence in connection with such shipment. This was the case with *The Kapitan Sakharov*, where it was common ground that the explosion resulted in the cracking open of hatch three and a fire which despite vigorous fire fighting by the ship's crew spread down into hold three in the aft[178] section of which there were eight CYL tank containers of isopentane. Isopentane is a liquid more flammable than petrol having a flash point well below zero (0) deg C and a boiling point of about twenty-eight (28) deg C.

Ambient temperatures in the Gulf, where *The Kapitan Sakharov* was sailing would have been well above that boiling point so the isopentane would have been under pressure and any escape of it would have been in the form of vapour.

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[178] Defining the aft, one could say it is at or towards the stern or after end of a ship: see photo in Appendix 3, as *per Brodie*, pp. 1, 184; according to *The Kapitan Sakharov*, DSR (first and second defendants) & CYL (third defendants) operated together a world-wide container service in which one or other of them shipped containers for carriage of good on ocean vessels; in the particular case, on NSC's (the plaintiffs) container vessel *The Kapitan Sakharov*.

The degree of risk of such vapour combusting and contributing to a fire in the hold depended on how well it was ventilated. There was no mechanical ventilation in the holds of "T*he Kapitan Sakharov,"* something which technology must still resolve. The intense fire that developed in the ship's hold led in turn to overheating of diesel fuel in her tanks causing one or both of them to explode and breach the bulkhead separating holds three and two thus allowing them to flood. The fire-fighting water directed into hold three by the crew and the fire-fighting vessels passed into and accumulated in hold two as well, causing the vessel to sink. The trial judge stated the explosion and resultant fire on deck caused damage to part of the ship and the cargo and they were an effective cause of the sinking and loss of the vessel and most of the cargo. However, those further losses would not have been caused if NSC had not stowed CYL's isopentane below deck.

The Court of Appeal held there was no basis on which this Court could disturb the trial judge's finding that the explosion and fire on deck was caused by an undeclared and dangerous cargo in a DSR container and also that the explosion resulted from a dangerous cargo, probably an unstable chemical, and that none of the containers stowed at or near the point of explosion had declared the cargo to be dangerous.

On a balance of probabilities, the undeclared cargo responsible for the explosion was in a DSR container and the trial judge was entitled to infer that the contents of SENU or another DSR container caused the explosion (see p. 263, col. 2; p. 275, col. 2).

Besides, there was no sensible basis on which it could be said that the carriage under deck of highly flammable liquid in containers was less dangerous on container ships than on any other type of ship especially where the holds were unventilated. Also, the equipment of the vessel with cell guides to hold the containers secure was no protection

against the activation of pressure valves by heat or against the resultant accumulation of highly combustible vapour in the holds (as *per* p. 265, col. 2).

The general provision in "*The Kapitan Sakharov's"* technical certificate relating to the transportation of specific hazardous cargo in tank containers, dealt only with whether the vessel might carry dangerous cargo in certain types of package, not where on the vessel they might be carried; the technical certificate did not qualify the general prohibition in MOPOG (the Russian version of the International Maritime Dangerous Goods Code) from carrying tank containers of isopentane in an unventilated hold whatever the nature of the vessel (see p. 266, col. 1). The clear purpose of MOPOG was to reproduce without distinction the provisions of SOLAS (International Convention for the Safety of Life at Sea, 1974) and IMDG (International Maritime Dangerous Goods Code), its preamble expressly stating that it complied with them. Like SOLAS and IMDG, it regulates the carriage by vessels of dangerous cargo, including that in tank containers.

It provides that specified dangerous cargoes, including isopentane, may be carried in tank containers and that if dangerous cargo is carried in a hold there must be a mechanical ventilation system. Particularly stringent provisions are made for highly inflammable liquids, including and without distinction, those carried in tank containers, and for the dangers of escape and ignition of flammable vapour in unventilated conditions (art. 13).

It prescribes, by reference to an attached document called a "KTRP sheet" where particular types of cargo unit (i.e. packages and open and closed containers etc.) should be stowed on different types of ship. The certificate, towards its end, did refer specifically to tank containers in the following standard provision applicable to various types of vessel: "Transportation of specific hazardous cargo in tank containers, special liquid and solid bulk

containers, and in rail containers on ferries is permitted if the cargo in question is indicated in Appendix 17 (which includes isopentane) or Section 8 of the Regulations on Transportation of Hazardous Cargoes by Sea."

Moreover, according to Richardson[179], if the goods to be shipped are dangerous or hazardous, it is essential that they are not presented to P&O Nedlloyd for carriage until written instructions are presented to P&O Nedlloyd by the shipper. These instructions must detail the International Maritime Organisation (IMO) Classification and United Nations (UN) Number, together with a full description of the goods (including the correct technical name as well as any trade name). Afterwards, P&O Nedlloyd agrees to carry the goods and give instructions for their receipt. Special documentation is also required if dangerous or hazardous goods are to be carried. A Dangerous Goods Note (DGN) and Container Vehicle Packing Certificate are required in lieu of a Standard Shipping Note (SSN) if the goods are of a hazardous nature. In the UK, the SSN (Richardson 1998, p. 26) must always accompany the goods.

Additionally, the Container/Vehicle Packing Certificate section must be completed for any Shipper-packed FCL[180] containers and must be signed by the Shipper. For FCL containers, the driver must present to the packing point four labels of the appropriate class in accordance with the U.K. road regulations, (on occasions additional labels may be supplied).

It is a legal requirement that the labels are affixed to the container. LCL[181] requires no further action by the shipper, provided a completed DGN accompanies the goods.

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[179] See *Richardson JF /Wheble BS* (1998) The Merchants' Guide, p. 27.
[180] FCL; Full Container Load.
[181] LCL; Less than Container Load.

Similarly, dangerous/hazardous goods are subject to the same international regulations and controls on the continent as in the UK.

On the inland transport document and on the transport emergency (TREM) card, which is accompanying the goods, the Accord European relation du transport international des merchandise Dangereux par Route (ADR) classification and UN number must be shown as well as the description of the goods. These cards are prepared by the European Chemical Industry Council (CEFIC) of Brussels according to the regulations of the ADR.

The stowage of the tank containers of isopentane under deck clearly contravened SOLAS, IMDG and MOPOG[182] and was not permitted by the technical certificate. The consequences of the introduction of isopentane to a fire in a poorly ventilated hold are particularly serious, not only because of its high flammability and volatility, but also because the fire is likely to become a general vapour fire not readily extinguishable by water. Therefore, *Clarke J* correctly found that the stowage of isopentane below deck rendered "*the Kapitan Sakharov"* unseaworthy (see p. 266, cols. 1 & 2; p. 275, col. 2) and it was due to NSC's lack of due diligence (see p. 269, col. 2; p. 270, col. 1).

[182] According to Richardson (1998, p. 30) all shipments of dangerous/hazardous goods must conform to current International Maritime Organisation's (IMO) IMDG regulations. A complete reprint of these regulations (27/94) became effective w.e.f. 1st January 1995. For international shipments IMDG regulations supersede the US Department of Transportation regulations that apply to domestic moves. The IMDG Code number must be shown on all shipping documents for dangerous/hazardous goods; SOLAS stands for the International Conventions for the Safety of Life at Sea, 1974, as further information in *http://www.imo.org/Conventions/contents_asp?topic_id=257&doc_id=647* (03/12/2004, 18:00).

i) The isopentane unseaworthiness as a novus actus interveniens

As to NSC's contention for DSR's undeclared deck cargo, the Judge began by referring to the improbabilities of anyone shipping an undeclared cargo of a dangerous chemical like calcium hypochlorite from China, via Hong Kong, to the Arabian Gulf. Briefly, these were: that there was no evidence why anyone might have wished to ship such an undeclared consignment to Saudi Arabia. There were no restrictions on the importation of such chemicals into that country. The savings, if any, in freight charges for the carriage of declared dangerous cargoes were insignificant. There was no evidence that calcium hypochlorite or similar chemicals were manufactured in China or any evidence of any trade in them between that country and Saudi Arabia.

In addition, that the documentation relating to container SENU, on which NSC focused its case at trial, indicated, that unless there had been an elaborate and widespread conspiracy, a perfectly legitimate sale and shipment of rubber hose and nothing else. Certainly, nobody can judge such cases one hundred per cent and not all relevant facts are known and there is not, therefore, an exhaustive list of options from which, logically or as matter of common sense, a choice of improbabilities may be made, having regard to the burden of proof.

The vessel was not reasonably fit to withstand the ordinary incidents of the voyage with isopentane stowed under deck. Obviously, it was unseaworthy in that respect, because the master and cargo officer permitted the isopentane to be stowed under deck in circumstances in which, if they had exercised reasonable skill and care, they would not have done so. Therefore, the plaintiffs were in breach of Article III, Rule 1 of the Hague Rules.

Art. III, Rule 1 of the Hague Rules requires a carrier, before and at the beginning of a voyage, to exercise due diligence to make the ship seaworthy. Article IV, Rule 6 of the rules renders the shipper of inflammable, explosive or otherwise dangerous goods, who gives no notice of their nature and dangerous character, liable to the carrier "for all damages and expenses directly or indirectly arising out of or resulting from … (their) shipment". The shippers are so liable irrespective of their knowledge of the dangerous nature of the goods[183].

Moreover, in *Mediterranean Freight Services Ltd. v BP Oil International Ltd (The Fiona)* [1994] 2 Lloyd's Rep. 506, the explosion was caused by the unseaworthiness and (at least indirectly) by the shipment of dangerous cargo. Here the sinking (as opposed to the explosion) was caused by the unseaworthiness and (at least indirectly) by the shipment of dangerous cargo.

Since the Court of Appeal held that Article IV Rule 6 could not be construed as giving an indemnity to the ship owners in respect of the consequence of the explosion in *The Fiona*, it follows that it cannot be construed as giving an indemnity to the plaintiffs in respect of the consequences of the sinking here. It makes no difference that it was held on the facts of *The Fiona* that the dominant cause of the explosion was unseaworthiness.

The principle is the same as that applicable to a breach of art III, Rule 1, resulting in damage to or loss of cargo where the ship owner pleads an excepted peril under art IV, Rule 2, where it is for the ship owner to establish that the whole or a specific part of the damage or loss was caused by the excepted peril[184].

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[183] *Cf. Effort Shipping Co. Ltd. v. Linden Management SA (The Giannis NK)* [1998] 1 Lloyd's Rep 337; [1998] AC 605.
[184] *Cf. the Torenia*, [1983] 2 Lloyd's Rep 210, *per Mr Justice Hobhouse* at p.219.

As the House of Lords held in the pre Hague Rules' case of *Smith Hogg & Co Ltd v Black Sea & Baltic General Insurance Co Ltd.* [1940] 67 Lloyd's L Rep 253, the obligation to furnish a seaworthy ship is the "fundamental obligation."

The unseaworthiness will in all or most cases precede other causes, since it must exist at the commencement of the voyage. As *Lord Wright* put it in *Monarch Steamship Co. Ltd. v. Karlshamns Oljefabriker* (A/B) [1942] 82 Lloyd's L Rep 137 at pp. 155-156, from one point of view, unseaworthiness must generally, perhaps always, in a sense be a "remote" cause. To satisfy the definition of unseaworthiness it must exist at the commencement of the voyage. It must, however, still be in effective operation at the time of the casualty, if it is to be a cause of the casualty, and from its very nature it must always operate by means of and along with the specific and immediate peril. That is because the essence of unseaworthiness as a cause of loss or damage is that the unseaworthy ship is unfit to meet the peril. In other words, the vessel would not have suffered the loss or injury if she had been seaworthy.

This issue would only have arisen for decision in the double event of upholding the Judge's finding that DSR is liable for the initial explosion and fire and if *The Fiona* had been distinguishable as to render DSR liable under that rule for the loss of the ship and all its cargo. In that event DSR would have contended that the total loss of the vessel is still the responsibility of NSC because its wrongful act in stowing the isopentane under deck was a novus actus, so entitling it to recover the whole of its loss from NSC.

Bad stowage endangers a ship and renders it unseaworthy. Certainly, though, bad stowage was not the cause of the danger here, but the presence in an otherwise good stow of concealed, dangerous cargo. As held in *Ingram & Royle Ltd v Services Maritimes Du*

Treport, [1913] 1 KB 538, *per Mr Justice Scrutton* at p. 543, bad stowage endangering a ship may take the form of stowing an otherwise harmless cargo in a place which renders it dangerous, because of its weight and the effect of that on the stability of the ship or because of its nature which may be adversely affected by the place of stowage, or simply because it is dangerous wherever and however it is stowed.

Unseaworthiness is a physical state. The shipper's knowledge or ignorance of characteristics of the cargo which make it dangerous if stowed in the wrong place or anywhere on its ship cannot determine that state. But, it is material to the question whether the carrier has exercised due diligence and, therefore, of his responsibility for the unseaworthiness. The present case is concerned with the application of Art. III, Rule 1 of the Hague Rules and not with principles of English, or even Scottish, common law. On the other hand, principles of common law very often coincide with principles of common sense and the present case affords no exception, given the potential scale of the catastrophe if, as a result of a breach of MOPOG, vapour from isopentane stored below deck in unventilated conditions catches fire.

C.) LIABILITY & DEFECTIVE GOODS

a. Unsuitable Containers, Defective & Sensitive Goods

The European Council, being aware of the problems associated with the cargo of dangerous goods, adopted a directive to make sure that adequately trained drivers perform the carriage of dangerous cargo by road. According to the directive, Council Dir 89/684/EEC, drivers (other than in the armed forces) involved in the national or international carriage of dangerous goods by road are required to hold the appropriate vocational training certificate[185].

The order party to the contract is usually called the "merchant" a term designed not only to include the shipper, but also the cargo owner, consignee and Bill of Lading holder (Harrington 1982, p. 5). The "merchant" is frequently a freight forwarder who consolidates separate cargoes into a sealed container. Meanwhile, where there is a bailment of the container by a carrier to a shipper, for example, FCL stuffing, then there is an implied term as to its fitness for purpose under the United Kingdom Supply of Goods and Services Act 1982. The application of this statute is not usually expressly excluded by the terms of typical liner Bills of Lading (BL). However, other BL terms that address the liability of the carrier for defective or unsuitable containers[186] are inconsistent with any current legislation, and so may, by implication, exclude any duty on the ocean carrier to supply a container fit for the purpose of carrying the merchant's goods. If one packs a container, one is liable for any injury or damage caused by one's failure to do a good job and insurance against this potential liability is therefore essential[187].

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[185] See *Law Society's Gazette* (December 1989) "Carriage of Goods," 87 (14) European Update, p. 49.
[186] Sometimes there is delivery of containers for food carriage- milk- and the containers are not properly clean for this purpose.
[187] *Supra*, n. 179, at p. 33.

It is usual, according to the terms of the bill of lading, for the shippers to be blamed and not for the carriers for any loss or damage to the contents of a container and the former should cover any loss or expense, if negligent filling, packing or stowing of the container has caused such loss or expense. Nevertheless, even if there is an applicable and effective exclusion of any implied duty imposed by the Statute, the exclusion will be unlawful if the damage occurs within the ambit of the Hague/Visby Rules[188].

When the damage occurs outside the ambit of these rules- before loading or after discharge- or outside the ambit of the contract of carriage, the exclusion may be valid, subject to the application of the United Kingdom Unfair Contract Terms Act 1977, section 1. A problem here, though, is that the Unfair Contract Terms Act is not applicable where the contract is made between two parties in different countries (Art 26, subsections 1, 3 & 4 of the Act as amended up to date to 01/10/2003). A solution might be the Consumer Protection Act 1987 which has a wider application.

The case differs, though, when it comes to defective containers. Even if it is established that the container was defective when received by the carrier, the carrier will still be responsible for the consequences of not putting right, reasonably obvious defects in the container that cause damage to its contents. Therefore, a carrier (or any other bailee such as a port authority) may not be happy to simply blame the defective nature of a container supplied by a third party.

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[188] See *BUDGEN P*. "What if a Container is Unsuitable for the Intended Cargo?" Liability of Unsuitable Containers, as in *http://www.forwarderlaw.com/Feature/consuit.htm* (26/04/2005, at 00:00); also, as interviewed by Ouri Vainio (export Assistant of the biggest finish manufacturer VALIO, *http://www.valio.com*), when manufacturers are signing up contracts with shipping lines to receive empty clean containers, in order to ship milk and the containers they receive are not clean; the shipping line has to send another one to fully perform the contract. The dirty one is sent back under the expenses of the shipping line. Special kinds of documents are necessary when food is shipped.

A bailee has as obligation to care for the goods[189]. This is a positive duty. It may involve the bailee taking steps to rectify any problems noticed, even if these did not originally arise through the fault of that bailee. A container may have been originally defective or have been damaged as a result of an incident occasioned in the course of transit. There is often little evidence as to the position either way. Where the carrier alleges a defective container for the purpose of reliance upon an exclusion clause in the BL in its favour then, in the ordinary manner, the carrier must prove that the damage falls within the terms of the exclusion clause. It is not for the merchant to prove the contrary.

Similarly, a carrier is not liable at common law for loss or damage which results exclusively from some inherent quality or defect of the cargo carried. The exception is most frequently invoked in the case of perishable goods such as fish as shown in *Albacora v. Westcott & Laurence Line Ltd.* [1966] 2 Lloyd's Rep. 53, which in the normal course of events are likely to deteriorate in quality during transit. Liability in such inherent vice cases may well depend on the contract. If the contract requires refrigeration, then there is no inherent vice. If special treatment is necessary for the carriage of the shipper's goods, the shipper must stipulate as much. Therefore, in the contract, the use of a refrigerated container should be mentioned when requisite and its temperature should be checked[190].

By the advent of the Hague/Visby Rules, the common law exceptions of inherent vice and Act of God were included in Art. IV Rule 2 and many issues were encountered regarding the development of the technology while the liability of the carriers was naturally affected. According to Art. IV Rule 2(m) of the Hague-Visby Rules neither the carrier nor the ship shall

[189] See sub-chapter 3(D).

[190] A refrigerated container is an insulated shipping container used for the carriage of goods requiring refrigeration in transit, such as fruit, vegetables, dairy products and meat. The refrigerated container is also known as a reefer container, reefer box or simply reefer.

be liable for loss or damage arising or resulting from wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods.

Under normal circumstances, fit cargo can bear the ordinary incidence of the voyage, under reasonable human care. But, if the cargo is not fit for an ordinary voyage and it acquires special treatment in order to travel safely, but it has not been stated earlier in advance, then, the carriers/MTOs can be free from liability for the unfitness of the cargo. This may take place, even if reasonable human care is taken. It is true that if exporters and cargo-owners require special treatment, they must state this so in advance to the MTOs as these in-experts are not likely to know if the cargo has an inherent vice and it is not fit for an ordinary voyage.

In cases of the exception noted above, involving perishable goods such as fish, the carriers, when accepting the delivery of this kind of cargo, are expected to exercise the degree of care which the nature of the goods demands. They are not obliged to accept the goods for carriage but if they do so, they are required to "adopt a system which is sound in the light of all the knowledge which the carrier has, or ought to have, about the nature of the goods," as accepted *per Lord Reid* in the *Albacora* case. The degree of care expected of the carrier will of course vary depending on the extent of this knowledge of characteristics of the particular cargo.

Thus, in this case where a consignment of wet, salted fish was shipped at Glasgow for Genoa, the carrier was not held liable for the deterioration in quality of the goods during transit since the shipper had not told him that the fish required refrigeration[191]. Furthermore, the same implications hold about Belgian chocolates melting inside containers due to inappropriate temperatures.

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[191] As accepted in the *Albacora per Lord Pearce* (p. 62, col. 2) ship owners had no reason to suspect special risks attending carriage of this fish and were entitled to carry it in the ordinary way, and that, therefore, there was no breach of Art. III, Rule 2; see also *the Austrean and Shipping Orp I India v. Gentle Chemini Co.* (1980) 55 ALJR 88 (HCA).

i) Be Aware of the Heat

In *Mayhew Foods Limited v. Overseas Containers Ltd*. [1984] 1 Lloyd's Rep 317, *Mr Justice Bingham* held that the contract here was for the carriage of goods from Uckfield to the numbered berth at Jeddah and the rules regarding cargo care did not apply to inland transport prior to shipment on board a vessel, because under section 1(3) of the 1971 Act they were to have the force of law only in relation to and in connection with the carriage of goods by sea.

In contrast, the contract here clearly provided for shipment at a United Kingdom port and from the time of that shipment the Act and the rules applied. The parties clearly expected and intended a Bill of Lading to be issued and, when issued, it duly evidenced the parties' earlier contract. Since the bill was issued in a contracting state and provided for carriage from a port in a contracting state, the rules applied once the goods were loaded on board the vessel at Shoreham (at p. 320, cols. 1 and 2).

The shippers (Mayhew) and the carriers (OCL) entered into an oral contract for the carriage by OCL of a refrigerated container of Mayhew's products from Uckfield in Sussex, UK to Jeddah in Saudi Arabia. The goods were to be carried in a refrigerated container at a temperature of minus eighteen (18) deg. C. on the vessel Benalder. On 11th December, the container was loaded on Benalder and carried to Jeddah arriving there on 21st December. Permission to discharge the container was refused because the contents had decayed and offensive juices were reported to be dripping from it. The reason for this was that the temperature control on the container instead of being set at minus eighteen (18) deg. C. had been set at plus two (2) deg. C. to plus four (4) deg. C. The goods had in fact been subjected to some heating while in the container. The goods were eventually sold for animal food.

OCL accepted that as a result of this failure to refrigerate the goods in the container, they were in breach of their contract and duty as bailees and at law in failing to take reasonable care of the goods and to carry, keep and care for the same properly and carefully. They sought to limit the damages recoverable against them in reliance on the terms of a standard clause in their BL.

It is true that the temperature appeared in Credits and might cause problems, since it is not foreseen by the UCP. For instance, in the case of the temperature clausing, increasingly strict food regulations have led to an increase in ill-conceived requests for temperature clausing on Bills of Lading. As Richardson notes (1998, p. 22) "what is the problem?" ask many Merchants, "why can't you clause my Bill; to be carried at -18C?" The problem, indeed, is not as simple as it seems.

For example, most reasonable shippers would accept that carriers should only be asked to insert in their Bill of Lading purely factual clauses giving undertakings which can be controlled and the effect of which can be monitored. This being the case no carrier could clause a Bill: "To be carried at -18C". Virtually all refrigerated goods shipped in containers are FCL packed so the carriers never have the opportunity to ascertain the temperature of the goods (as they would have done conventionally by taking spear temperatures during loading of the vessel). Accordingly, they cannot warrant a temperature of the goods.

Furthermore, the carriers' information comes via monitoring air delivery and/or return temperatures. In different places, different types of refrigerated containers are controlled in different ways. To carry at a set temperature is impossible as there will always be minor fluctuations (during defrosting for instance). Thus, any undertaking regarding temperature during carriage must always be a range of temperatures (e.g. -18 C to -20 C) or colder than a set temperature (e.g. colder than -18 C).

Taking such criteria into account, it is difficult for a carrier to decide what type of temperature clausing may be offered to shippers. The matter may become more complicated if a clause is required evidencing temperature maintenance throughout combined transport. Before a carrier could consider applying such clauses the shipper would have to pay a door-to-door freight reflecting the provision of refrigeration throughout, including during inland transit.

The design and capabilities of refrigerated containers are advancing rapidly. The latest containers are capable of a far more sophisticated performance that those manufactured just a few years ago. The latest integral refrigerated containers employ Data Loggers, which record both air delivery and air return temperatures electronically whereas earlier models monitor Partlow Charts which are only capable of recording air return or air delivery. As the life of a refrigerated container is approximately twelve years, a diminishing number of Partlow Chart models will continue in service, and a substantial part of the P&O Nedlloyd fleet is already of the Data Logger variety.

Firm rules for temperature clausing is made difficult by the existence of integral refrigerated containers of varying control performance and a fleet of insulated "port-hole" containers that must rely on an external source of cold air and monitoring from the vessel, shore-based refrigeration facilities or "clip-on units." The basic rule must always be that, when required, such clauses must be factual and unambiguous; evidencing requirements which carriers can control and monitor.

Finally, shippers should ensure that their loaded containers are made available to the carrier at the agreed place of receipt with the goods at the required carriage temperature. Given the increasingly strict regulations applying to refrigerated foodstuffs, shippers must be prepared for rejection of containers if the initial monitoring of the container by the carrier suggests that the

goods are not at the required temperature (Richardson 1998, p. 24). However, traditionally carriers have preferred not to clause the Bill of Lading to reflect carriage temperatures.

If there must be a temperature clause for refrigerated goods it should be reasonable and feasible. If goods are refrigerated they must be at the correct temperature at the time of shipment and FCL packing must be such as to permit free circulation of cool air to avoid “hot spots.” Circulation channels must be so constructed as not to collapse during transit. The future legalities of containerisation should provide for these kinds of issues, temperature, amongst other factors such as shipping delay.

b. Delay

In the past, claims were arising for delay in the processing of shipment (Richardson 1998, p. 22). Delay predates containerisation, since containerisation has changed people's expectations about delay. The COGSA does not provide specifically for any limitation to apply in relation to claims for delay (Griggs 2005, p. 145). In so far as delay results in physical damage to the goods, e.g. by deterioration in quality (Wilson 2008, p. 219), there seems little doubt that such loss is recoverable under Art. III Rule 2 which imposes a general duty of care in handling the cargo.

Since current law is not adequate to solve issues or be compatible with modern trade, it should be amended. For example, difficulty arises, in the case of the Hague/Visby Rules, since the limit is to be calculated with reference to particulars of "the goods lost or damaged." But, how is it possible to state that "delayed goods" are "lost" or "damaged?" And, if it is not possible to calculate the limit, then it would not seem to be possible in fact to limit liability for delay. On the other hand, this might not appear in the Hague Rules since the equivalent provision does not include the words "lost or damaged". It would seem that no obligation is to be found in either of those two legal regimes when it comes to matter of delay.

But still this solution might not be adequate.

The Hamburg Rules (art. 5.3) and the MT Convention (art. 16.3) though contain provisions converting pending delay into a right for the claimant to treat the goods as lost, but these both regimes have not been ratified. The most recent *"Rotterdam Rules"* (art. 17(1) & art. 21) provide for delay in delivery.

Finally, it should be discerned that delay might not be a casual phenomenon in advanced containerisation in the future. This is due to the speed evolved in maritime trade by the implementation of specialised containerships. When the containership enters a port in order to

load cargo, the procedure is very rapid. It embarks, it loads or unloads, it departs, and all these are happening upon ultimate speed. Therefore, people's expectations have changed.

c. Liability of the Consignor

In the Hague/Visby Rules, art. IV Rule 6[192], the consignor is obliged not to ship dangerous goods. Therefore, the consignor has a duty to mark or label such goods in accordance with international standards. Furthermore, the consignor must inform the transport operator (or its agent or delegate) of the dangerous nature of the goods, and if necessary, the precautions that need to be undertaken in handling, storage shipping and use.

In case the consignor fails to do so, and the transport operator does not otherwise have knowledge of the goods' dangerous character, the former shall be liable for all loss resulting from the shipment of the goods and the goods may at any time be unloaded, destroyed or rendered innocuous by the multimodal transport operator without payment of compensation[193].

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[192] See *Effort Shipping Co v. Linden Management Co. (The Giannis NK)* [1988] 1 Lloyd's Rep. 337; *Senator Lines GmbH v. Sunway Line, Inc and Others* 291 F. 2d 145 Court of Appeals (2nd Circuit, 2002); *cf. BAUGHEN S* (Match 2000) "The Legal Status of the non-Contracting Shipper," part. 1, The International Journal of Shipping Law, pp. 21-29.

[193] *Supra*, n. 174, p. 6.

D.) THE IMPLICATION OF CONTAINERISATION ON INCOTERMS

For two decades, certain, particularly small, manufacturing companies in North America, have opted to convey the responsibility for managing transport, and the accompanying insurance, to the buyer or, if required to provide product on a delivered basis, to a freight forwarder. On the other hand, larger companies or those with in-house expertise have tried to gain competitive advantage by controlling the distribution in-house and garnering distributive efficiencies. Others only wanted to control the insurance arrangements in order to minimize the challenges faced in cases of cargo damage and so required CFR terms in the sale contract (Kindred/Brooks 1997, p. 17). Under the CFR, the shipper's price includes the cost of transport but not insurance[194].

Moreover, under containerisation, the goods are prepared and stowed in containers before the arrival of the ship. This has created difficulties since it has made the traditional FOB point totally inappropriate. Therefore, FOB, CFR and CIF are appropriate only when there is delivery to the carrier by handing over the goods to the ship- specifically across the ship's rail-, which simply does not take place when the goods are containerised.

The consignees who have solid relationships with insurers or insurance brokers find CFR terms meet their needs for a delivered product but leave them free to control the insurance arrangements. But, still, this is not ideal. According to Ramberg (1999, p. 15), the seller should take care not to remain at risk after the goods have been handed over to the carrier that the buyer nominates.

This is particularly important when the seller has no possibility to give instructions with respect to the care and custody of the goods, which occurs, for example, when the

[194] See further *Ramberg Jan* (2000) International Commercial Transactions, 2nd ed. De Hague, Kluwer, pp. 108-110; *Ramberg Jan* (1999) ICC Guide to Incoterms 2000, Understanding and Practical Use, pp. 15-18.

carrier is obliged only to take instructions from his own contracting party, the buyer. Consequently, if the sellers wish to avoid being at risk after handing over the goods for carriage until loading on board the ship, they should refrain from using CFR and CIF and instead use CPT or CIP where the risk passes upon the handing over to the carriers. With regard to container traffic, such handing over will normally take place in the carriers' terminal before the arrival of the ship.

If the loss of or damage to the goods occurs during the carriers' period of responsibility, it may, in practice, become impossible to ascertain whether it has occurred before or after the passing of the ship's rail. This is another reason for choosing a trade term, such as FCA, CPT or CIP[195], where risk of loss of damage to the goods passes from the seller to the buyer when the goods are handed over.

It is true that the parties may think the differences really do not matter and may believe that things will resolve themselves but this is not always the case. Unfortunately, commercial practice is not the same in all parts of the world and INCOTERMS can do no more than reflect the most common practice. In many cases, it is impossible to reflect in INCOTERMS what actually happens in connection with the loading and unloading of the goods to and from the means of transport.

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[195] "INCOTERM" is an abbreviation of International Commercial Terms and the chosen INCOTERM is a term of the contract of sale (N.B. not the contract of carriage); furthermore, FOB free on board, CFR cost & freight, CIF cost insurance & freight, CPT carriage paid to, CIP carriage & insurance paid to; also *supra*, n. 179, p. 10, where INCOTERMS are defined as a set or uniform rules codifying the interpretation of trade terms defining the rights and obligations of both Buyer and Seller in an international transaction, thereby enabling an otherwise complex basis for a Sale Contract to be accomplished in three letters.

The ICC Model International Sale Contract[196] lists all INCOTERMS in A3 of the specific conditions. This model contract is also helpful for multi-modal transport. In addition, there is a particular box and space for delivery terms other than INCOTERMS. However, as indicated, the parties should carefully consider whether it is appropriate to use a term other than an INCOTERM. If they do so, they should ensure that no misunderstandings could arise with respect to its interpretation.

Furthermore, normally the buyer does not risk having to pay the seller demurrage[197] when the goods are carried by liner shipping companies. In this case, the goods are normally discharged by these companies and stored in cargo terminals until they are received by the buyers (Ramberg 2000, p. 21). This is particularly true with respect to containerised cargo. But, the problem of matching the terms of the charter party with those of the contract of sale is particularly important with respect to commodities carried in bulk. Because commercial practice differs in different ports and changes from time to time, a failure to match the terms of the contract of sale with the terms of the charter party may result in unpleasant and expensive surprises for the contracting parties.

Moreover, in practice, problems frequently arise because sellers and buyers fail to ensure that the instructions given to the issuing or opening bank conform to the terms of the contract of sale. To assist sellers and buyers in understanding the documents required in different situations under the contract of sale – and to enable the seller to check that the

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[196] See extract from ICC publication No. 556, pp. 8, 15; Appendix 4.

[197] The issue of the liability of the consignee for demurrage is not presently dealt, but it should be added that, as it was demonstrated in *Malaysian International Shipping Corp Bhd v. Visa Australia Pty Bhd* (Unreported, July 27, 2001) (Sup Ct (Vic)) the consignee failed to return the empty container on time. Therefore, it is arguable whether there is liability for demurrage under the MISC Bill of Lading, if the container was not unpacked in the consignee's premise; see further *TULLOCH A.* (2001) "Australia: Container Detention Charge Challenged," 8(1) International Maritime Law, p. 36.

documents required under the contract conform to the ones he has to present under the documentary credit- the ICC Model International Sale Contract in the Introduction, Article 8, lists the most common documents, one of which is the Multimodal Transport Document[198]. So, the problem might be solved temporarily with the ICC.

Also, in the case of documentary credits, even if the credit prohibits transhipment, a very common phenomenon in containerisation, a bank will accept a bill of lading which indicates that transhipment will take place as long as the relevant cargo is shipped in Container(s), Trailer(s) and/or "LASH" barge(s) as evidenced by the bill of lading, provided that the entire ocean carriage is covered by one and the same bill of lading and incorporates clauses stating that the carrier reserves the right to tranship (Richardson 1998, p. 20).

[198] *Supra,* n. 196.

E.) BAILMENT & TORT; FAULT IN CARRIAGE

According to Art. IV *bis*, Rule 1 of the Hague-Visby Rules, the limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort. The purpose of Article IV *bis* Rule 1 was to ensure that a claimant was not placed in a better position by framing his claim in tort rather than in contract. If the MTO has been held liable to cargo interests for loss or damage to goods and decides to pursue a recourse action against one of the other parties involved in the transportation, they may have the right of action in bailment, tort or contract (Faber 1997, p. 31).

Bailment is relevant to container carriage. For example, when a part of the carriage of cargo is entrusted to a carrier other than the MTO and the actual carrier issues its own terms of carriage, those terms bind the cargo owner so long as he has given his express, implied or apparent authority to the MTO to sub-contract on those terms. Implicit in this, if the original Bills of Lading include the expression "on any terms," then it is sufficient to allow the MTO to bind the cargo owners to the terms of the actual carrier's BL. If these critical words are omitted, then the sub-bailment would have been authorised by the cargo owners but not necessarily on terms materially different from the terms that they had agreed with the MTO.

It is crucial, therefore, that MTOs get their contractual chain at the outset. As demonstrated in *KH Enterprise v the Pioneer Container (The Pioneer Container)*[1994] 2 AC 324, the plaintiffs had each engaged carriers to ship goods by sea under Bills of Lading

"on any terms"[199] where following a collision in fog, the vessel sank with all her cargo off the coast of Taiwan.

It was held that the goods had been sub-bailed with the authority of the owner, the obligation of the sub-bailee towards the owner was that of a bailee for reward and the owner could proceed directly against the sub-bailee under the law of bailment. According to this case, one difficulty that arises is that there is no contractual relationship between them and the ship-owners. Here is a ship, upon which goods are loaded in a large number of containers; indeed, one container may contain goods belonging to a number of cargo owners. One incident may affect goods owned by several cargo owners or even (as here) all the cargo owners with goods on board.

The question that arises concerning containerisation is how bailment operates when no contract takes place. Palmer indicates (1991, p. 4) that this may arise from the operation of a multipartie situation, so that it is possible to have an almost infinite chain of head bailors, sub-bailors and sub-bailees. The owner need never have taken possession of the goods before the creation of the bailment. Modern authority has affirmed in a wide variety of contexts that a valid bailment may exist without contracts inter parties (Palmer 1991, pp. 19-20)[200].

Bailment might also take place despite the lack of intention to create legal relations. The fact that certain terms in the bailment are unenforceable because the parties had no intention to enter a binding contract does not detract from the fundamental character or

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[199] For the doctrine of "bailment on terms," read further comment in *KOROTANA MS* (November 2000) "New Privity Law; Its effect on the Law of Carriage of Goods," 14(11), P&I International, pp. 259-261, at p. 261; for problems created by the pilferage of cargo by stevedores, see West of England, P&I Association (November 2000) "Stevedoring Firms Face Pressure in Algeria," 14 (11), P&I International, pp. 262-263.

[200] *Cf. Bentworth Finance Ltd. v. Lubert* [1968] 1 QB 680.

status of those parties as bailor and bailee (Palmer 1991, p. 24). Therefore, when a bailee or sub-bailee is accused of negligence, it is upon them to establish that they were not negligent or that their negligence was not causative of the damage, as further judged in *Coopers Payen Ltd. and Sanwa Packaging Industry Co Ltd. v. Southampton Container Terminal* [2003] EWCA Civ 1223[201].

As held in *Morris v. CW Martin & Sons Ltd.* [1966] 1 QB 716, the primary duties of the bailee at common law were to take proper care of the chattel bailed and to refrain from converting it[202]. Obviously, the interrelationships between contract, tort and bailment are highly complicated as demonstrated in *KH Enterprise v the Pioneer Container (The Pioneer Container)* [1994] 1 Lloyd's Rep. 593.

Similarly, as held in *Nugent v. Smith* [1876] 1 CPD 423, the court might discharge the carrier if he can show that either an act of nature or a defect of the property itself or both taken together formed the sole direct cause of the loss. Since in this particular case rough weather conditions caused the loss, which is an act of God[203], the carrier does not insure against the irresistible act of nature, or against defects in the items carried. A ship-

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[201] *Cf. Bullen v. The Swan Electric Engraving Co* (1887) 23 TLR 258; also *Palmer,* (1991, pp. 49, 782-785) as in Lawtext Publishing (2003) "Container Terminal Damage to Goods, Liability of Terminal as Bailee," 9(5), Journal of Maritime Law, pp.433 - 438, at 434.

[202] 2 Halsbury's Laws of England, paras. 1801-1833, pp. 830-899; see also *McMEEL G.* (2003) "The Redundancy of Bailment," 2 (May) Lloyd's Maritime and Commercial Law Quarterly, pp. 169-200, under which the relevance of the concept of bailment by sea and retention of title clauses is analysed.

[203] If the goods are lost by an operation of nature to which no act of man contributes, the loss is by the act of God and falls within the well-recognised exception to the liability of a carrier as insurer. Damage to the goods by leakage and ordinary incidents of sea transit are matters against which man can provide and consequently are not the act of God while an unusually violent storm is. An act of God should not allow space for human intervention between itself and the damage caused. The rule as it applies to carriers derives from the Roman law which was not in terms applicable to the case of carriers by land but of ships navigated by their owners; *cf. Transcontainer Express v. Custodian Security* [1988] 1 Lloyd's Rep. 128; *cf. Liver Alkali Company v. Johnson* [1874] LR 9 Exch 338.

owner who is not a common carrier, is not subject to the liability of a common carrier. Consequently, he does not insure the goods bailed to him for carriage. As far as the protection of the goods against an act of God is concerned, the mere duty of the carrier is to show due diligence and the plaintiff bears the burden to show the absence of such diligence.

a. The "Himalaya" Clause

According to Art. IV *bis*, Rules 2, 3 and 4, if a claim is brought against a servant or agent (but not an independent contractor) of the carrier, such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke and the aggregate amount recoverable from the carrier, servant and agent shall not exceed the limits provided by the Rules. However, art. IV *bis*, Rule 4, makes it clear that if the servant or agent is guilty of intentional or reckless misconduct, whereas the carrier is not, the carrier can limit his liability but the servant or agent cannot (assuming he can be made legally liable to the claimant).

Nevertheless there are cases relevant to the context of containerisation where the Himalaya clause is not adequate to solve liability issues. As it was demonstrated in the United States, the Supreme Court had an opportunity with *James N. Kirby, Pty Ltd. v. Norfolk Southern Railway Co.*[204] to move the law governing the multimodal carriage of goods into the 21st Century, as reviewed further by the past President of the Maritime Law Association of the United States and a member of the United States Delegation to the UNCITRAL Transport Law Working Group, Hooper Chester (2004, p. 8).

In the *Kirby* case, the damage was traced to the railroad. Ten containers of machinery were shipped by the cargo interest, Kirby, from Sydney, Australia to Huntsville, Alabama, United States.

[204] 300 F. 3d 1300, 2002 AMC 2113 (11th Cir. 2002), cert. granted 124 S.Ct.981 (2004).

It (the cargo interest) had arranged carriage of the goods with an Australian freight forwarder/ NVOCC (Non-Vessel Operating Common Carrier[205]) International Cargo Control Pty Ltd. ("ICC"). ICC, acting as a NVOCC, issued a Bill of Lading to carry the cargo from Sydney (Australia) to Huntsville (United States) via multimodal carriage. ICC retained a VOCC (Hamburg Sud) to perform the same Sydney (Australia) to Huntsville (United States) multimodal carriage. The VOCC's Bill of Lading, issued to the NVOCC, did specify that its terms and conditions would extend to railroads but the court did not accept this extension.

The cargo interest, *Kirby* in this case, claimed that it was not bound by the contract and could sue the railroad in tort. In this case the United States Court of Appeals for the Eleventh Circuit approved this theory and directed the railroad to pay cargo damages of about $2,000,000 without the benefits of the limitation that was contained in either the NVOCC (ICC) BL or the VOCC (Hamburg Sud) BL. Thus, it seems the railroad was not entitled to limit its liability to $500 per package by relying on a Himalaya clause in the Hamburg Sud (VOCC) BL. Hooper introduces a new wave of calculating liability and promoting defences of NVOCCs and third parties.

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[205] The Non-Vessel Operating Common Carrier (NVOCC) is regulated by the Interstate Commerce Commission in respect of inland activities and by the Federal Maritime Commission in respect of activities at the water's edge. "Non-Vessel Operating Common Carrier" (NVOCC) means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier, by virtue of the Sect. 3(17) of the Shipping Act of 1984 provides a definition of the NVOCC- 46 U.S. Code App. 1702(17). The NVOCC acts in dual capacity as a common carrier in relation to its shipper and as a shipper in relation to the underlying carriers; see Tetley 1988, pp. 697-698; also in *http://www.mcgill.ca/maritimelaw/mcc4th*.

i) The Doctrine of Sub-Bailment

Griggs/Williams (2005, p. 146) asserted that these sub-bailment rights benefit only a servant or agent who is not an independent contractor. The rights will probably therefore be of limited application in practice since most of the agents who are likely to be held liable, for example, stevedores, will normally be independent contractors and not employees of the carrier. Accordingly, it may not benefit carriers to whom a sector of through-carriage has been delegated as demonstrated in *KH Enterprise v the Pioneer Container (The Pioneer Container)* [1994] 1 Lloyd's Rep. 593. These independent contractors may nevertheless be able to limit their liability by virtue of a Himalaya clause in the Bill of Lading.

The doctrine of sub-bailment on terms has its foundation in an *obiter dictum* of *Lord Denning MR* in *Morris v. CW Martin & Sons Ltd.* [1966] 1 QB 716, 729. The doctrine is contrary to the fundamental principle of law that a person cannot be bound by the terms of a contract to which he was not a party, as accepted in *Midland Silicones v. Scruttons Ltd.* [1962] A.C. 446. If there is a sub-bailment of goods to which the bailor has not (expressly or impliedly) consented, the bailee will be liable for any loss which occurs, but if consent for sub-bailment has been given it does not follow that the bailor has agreed to be bound by the terms of the sub-bailment.

The consent of the bailor can only be relevant to the position between the bailor and the bailee. To hold that the terms of a sub-bailment are binding as between the sub-bailee and the bailor can only be legitimate in principle if the bailor has consented to the bailee agreeing to those terms not (or not only) for himself but on behalf of the bailor. In many cases, a BL issued by a carrier will include a Himalaya clause conferring on the carrier's sub-contractors the benefit of all terms benefiting the carrier by providing that, to the extent

of those terms, the carrier enters into the Bill of Lading contract not only on his own behalf but also as agent for the sub-contractors.

As it was accepted in *New Zealand Shipping Co. Ltd. v. AM Satterthwaite & Co. Ltd.* [1975] AC 154, such a clause is capable of protecting a sub-contractor in appropriate circumstances by giving rise to a contract between the owner of the goods and the sub-contractor whereby the sub-contractor receives the benefit of clauses contained in the Bill of Lading.

There is, therefore, no conceptual difficulty arising wherein a right being exercisable against a person with whom the repairer has no contractual relationship. This is not the case with an exemption or jurisdiction clause. There is no good reason for requiring a bailor to refer a dispute with a sub-bailee for determination in a forum, which the sub-bailee has selected unilaterally when there is no collateral contract between them to that effect (Palmer 1991, pp. 1326-1327, 1338 et seq.).

Even if a bailor can, in principle, be bound by a jurisdiction clause to which he has not agreed, the clause relied on by the defendant has no application because it applies only to “any claim or dispute arising” under “this BL contract.” The doctrine of sub-bailment does not bind the bailor to a contract to which he was not a party. He is bound by reason of a separate relationship based on privity of bailment.

A contract is formed by agreement while a transfer of possession independently of contract forms a bailment. Ship-owners should not be deprived of the protection they sought in return for carrying the goods merely because the plaintiff is not in a contractual relationship with them.

The concept of bald bailment with unrestricted liability to claims framed in bailment or tort is unjust and commercially inexpedient[206]. There is no reason for the defendant to be deprived of the protection against claims for which they have stipulated.

The doctrine of sub-bailment on terms provides the most attractive commercial solution because the sub-bailee has the benefit of his own terms, especially his choice of his own law and of a single and convenient forum for disputes, not those that have been negotiated by others.

[206] See *Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd.* [1954] 2 QB 402, 426-427.

ii) CHFs

The liability of a Cargo Handling Facility (CHF) (Faber 1997, p. 41) for the loss or damage to cargo may also arise under contract, tort or mandatory law (statute). Since in England there is no statutory law regulating a CHF's liability in respect of cargo, liability in tort arises if the CHF has been negligent. Tortious liability cannot be limited in amount, although the CHF may escape liability for certain unforeseeable types of loss such as for a cargo owner's extraordinary profit under a contract for the sale of the cargo.

A cargo handling facility may seek to protect itself by asserting that it is a bailee on terms: i) if a body created by charter, by publishing a tariff, ii) by relying on the principle of bailee on terms. Cargo interests may seek to avoid the limitations of liability in the contract of carriage by claiming against the CHF at fault with the aim of obtaining an unlimited recovery unfettered by contractual conditions.

To protect the CHF, the contract of carriage normally includes a Himalaya clause enabling the CHF to rely on the exclusions and limitations in the contract of carriage. A Himalaya clause, in this context gives the CHF the benefit of the exclusions and limits of liability in the contract of carriage. In addition, the legal principle of bailee on terms has developed so as to enable the CHF to rely on its own contractual terms as against the cargo interests with whom there is no direct contract. If the carrier is authorised to use sub-contractors (such a term is often found in contracts of carriage) and the contractual conditions of the sub-contractor are not extraordinary, recent cases have held that the sub-contractor can rely on his own contractual conditions against the cargo claimant (Faber 1997, p. 46).

Sometimes, multimodal transport takes the form of combined transport (Faber 1997, p. 9) whereby cargo interests contract with a party who accepts responsibility as principal

for the whole movement. Consequently, cargo interests will not find themselves bound by limitations and exclusions in the standard terms of business on which other carriers involved in the movement operate. Cargo interests need only look to the combined transport operator for recompense for loss, damage or delay to the goods (although that party may itself operate on the basis of standard terms).

Any restrictive provisions in a carrier's standard terms will not be a matter of concern to cargo interests; they will be of relevance only insofar as they affect rights of recourse by the combined transport operator against the responsible carrier. However, if the party who contracts as principal with cargo interests proves to be of poor financial standing, cargo interests would face issues pursuing a claim against the responsible carrier in bailment or in the tort of negligence.

It is worth noting, however, that cargo interests might find that the carrier's liability in bailment is subject to provisions in the carrier's standard terms of business, by virtue of sub-bailment on terms. This arises when the head bailor has expressly or impliedly consented to the inclusion of the relevant terms in any sub-bailment made by his bailee (if the CMR Convention were to apply, cargo interests would, of course, have a broader range of targets to sue).

F.) REMARKS

Refrigerated containers play a vital role in the life of maritime trade and in the evolution of technology that will change the carriage of goods by sea, but this also stresses what difficulties may be encountered when drafting contracts in this kind of transportation arrangement. The *Albacora* case is only the beginning concerning the inherent vice exceptions.

Definitely, the economic evolution of ports leads to their further technological development; there will be more cases as such, especially if goods are carried within a container and liability may occur even if the contract reads expressly about inherent vice. Also, it is more important that ports are very well equipped than that they are very large.

One more point that arising from the *Albacora* case is whether the problem is that of the unsuitable container, or that of the inherent vice. It is uncertain from which ever angle the matter is viewed. The relevant question here is whether we judge the unsuitability of the container or the inherent vice of the goods, or both. The point is not only to have a suitable container; the point is to know how to use it and to know the requirements of your cargo. The modern trade that has technologically evolved nowadays could be assisted by the application of COGSA's terms to the party issuing a BL against any party even if that party were not privy to the BL (Hooper 2004, p. 8). In the same vein, COGSA's terms should be extended to any party who helped perform a contract evidenced by the BL.

Moreover, the application of COGSA can also be discerned for damages at sea by the use of Article III Rule 1. On package limitation issues, many courts characterise a carrier-supplied container as being part of the equipment of a specially designed cellular container ship, as Harrington (1982, p. 12) states.

Even apart from the Hague Rules, the MTO by bailing the container has impliedly warranted that it is reasonably fit for the purpose for which it was let out, that is to say as a receptacle for the safe carriage of goods. Although bailment does not exist as such in the continental law systems, where it presupposes a contract, according to De Wit (1995, p. 28), in the common law systems, the law of carriage of goods is a branch of the law of bailment. Bailment is a typical common law notion and results from the simple fact that the possession of goods has been transferred to someone who knowingly and willingly receives these goods for a particular purpose, such as carrying or warehousing them. The law of bailment has evolved to a point where the bailee is liable if he fails to take sufficient care of the goods.

In order to escape this liability, the bailee must prove either that he took the appropriate care of the goods which were lost or injured while in his possession, or that his failure to do so did not contribute to the loss. English law places upon the common carrier a liability for loss or damage to the goods carried which is usually described as strict, that is liability without fault. As further accepted in *London & Northwestern Railway Co. v. Richard Hudson & Sons Ltd.* [1920] AC 324 (HL) *per Lord Atkinson,* (p. 340), a common carrier is an insurer.

Nevertheless, it is a condition precedent to his liability that goods, if liable to damage unless carefully and properly packed, should be so packed. Even if the operation of stuffing the container should be characterised as stowage rather than as packing, the carrier should not be responsible for cargo damage to the shipper who stuffs the container. The shipper of the cargo was in a much better position to know of the likelihood of it being damaged by this particular method of stowage than the ship-owner or the master and it appears to me to be logical that in such a case a shipper who knows or ought to know the

special characteristics of his own cargo and who approves of it being stowed in a manner which is obviously likely to expose it to damage cannot hold a ship-owner responsible for the damage which ensues.

Damages may arise from insufficient packing within a container and are not necessarily limited to that cargo within the container. The container, the ship and other cargo may be damaged as well. The fact pattern of *the Red Jacket*[207] provides a useful illustration if we attribute the loss to improper stowage. Certainly cargo interests are neighbourly enough that one has an action in tort against the other for damage to one cargo caused by insufficient packaging of another.

It is true that the Hague Rules impose minimum liabilities on ocean carriers; they changed the regime of liability from that of a common carrier to a regime based on fault, the burden of proof on the carrier. If, as it is submitted, the carrier has the right to assume that those with whom he does business also carry out their obligations, *The Red Jacket* goes too far.

According to this case, the shippers or consignees of cargo stowed in 50 containers which were loaded on deck on the steamship *Red Jacket*, at New York for delivery at Yokohama. She sailed from New York on Dec 26, 1973. On Jan 10, 1974 she encountered heavy weather in the North Pacific and at one point rolled between 35 deg and 40 deg to port. Container CMLU 122590 which was supplied by the defendants and was eight years old and had been on 20 to 30 voyages already had been loaded with tin ingots by the fourth party in accordance with a contract between it and the third party. It broke

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[207] *Houlden & Co Ltd. and Others v. SS "Red Jacket" and American Export Lines Ltd; Metal Traders Inc, Third Party; United States Fourth Party (The "Red Jacket")* United States District Court, Southern District of New York [1978] 1 Lloyd's Rep. 300; also chapter 2.

loose and forty-three of the containers containing the plaintiffs' cargo were swept overboard. The other seven were damaged.

It was held, by the District Court for the Southern District of New York, that although the third and fourth parties had caused the ingots to be stowed in a negligent manner, this was not the proximate cause of the loss and damage. Additionally, the container by reason of its major structural damage was un-seaworthy and its condition was the proximate cause of the loss and damage. And, the defendants had not exercised due diligence in making the vessel seaworthy as required by the United States Carriage of Goods by Sea Act, 1936, s 4(1) (46 USC section 1304 (1)) for they should not have permitted the container, which was part of her equipment, to be loaded on board and they were solely responsible for the loss and damage.

CHAPTER IV

THE ATTEMPT TO CREATE

A MULTIMODAL LEGAL FRAMEWORK

A.) INTRODUCTION

The problem of multimodal transport was first dealt with UNIDROIT in the 1930s and then the Committee Maritime International (CMI) in the late 1960s resulting in the so-called 1969 CMI Tokyo Rules. These constituted the basis for FIATA's (negotiable) combined transport bill of lading (FBL), which first appeared in 1970 and the corresponding COMBICONBILL sponsored by the Baltic & International Maritime Conference (BIMCO) in Copenhagen (Faber 1997, p. 26). The practical importance of multimodal transport has, certainly, been enhanced by the advent of containerisation, since the container can move from one mode of transport to another.

Liability issues can arise in many fields of multimodal transportation. All the successive carriers that become involved can be liable in one way or another. While the liability and responsibility of each transportation mode is governed by various conventions and national laws, the liability of the freight forwarders or Multimodal Transport Operators itself is not currently subject to any convention or national law. The problem is that national freight forwarder associations around the world have devised their own local standard trading conditions (STC) as the underlying contract of engagement between the freight forwarder and the shipper.

Furthermore, according to the UNCTAD/ICC Rules 1992, the liability limits would be calculated either:

a) according to mandatory law or convention, providing another limit of liability, had a separate unimodal contract been made,

or

b) 2SDR/ 666.67 SDR/kg if no convention would have applied and the contract includes carriage of goods by sea or water,

or

c) 8.33SDR/kg if no unimodal convention would have applied and contract includes no carriage by sea or water. However, if the UNCTAD/ICC Rules 1992 are not incorporated in the contract, the liability of the MTO might be further excluded or limited contractually.

However, in a recent report from the Department of Transport, it is stated that marine cargo insurance companies have been able to recover on average only about twenty per cent (20%) of claims paid out; indicative of the difficulty in proving that loss was attributable to the ocean leg of carriage. CIFFA accepts the "**network**" liability principle and argues that a framework which already exists and has proved itself in the market place should be promoted as opposed to a regime that causes disharmony and conflict.

According to the study, a solution to the conflict between shipper/insurance interests and carrier interests should not lie in a new multimodal framework but in a new insurance regime[208].

In approaching the formulation of a set of regulations to govern multimodal transport, two alternative multimodal liability systems have been advanced. Proponents of

[208] See "Multimodal Liability: Extracts from a Statement by the CIFFA Sea-Freight Committee," Multimodal Transport: Canadian International Freight Forwarders Association Position Paper, as in *http://www.forwarderlaw.com/feature/multim.htm* (19/04/2005, at 23:00).

the "**uniform or unified**" liability system advocate that a single uniform framework of liability should govern the contract from the point of dispatch to the final destination. Supporters of the alternative "**network**" liability system take a more pragmatic (Wilson 2008, pp. 246-247) approach. While the former is obviously the more rational solution, the "network" approach avoids any potential conflict with existing mandatory unimodal conventions (Wilson 2008, pp. 246-247).

The **"network" approach** is governed by an informal/ indirect convention, conceived under the basis of the existing conventions. By virtue of this approach, when the leg of the damage or loss is identified, any unimodal convention or mandatory national law applicable to that leg will operate to define the carrier's liability. When it is not known on what stage the damage or loss occurred, no unimodal convention will be applicable and the parties will have the freedom to draft their own contract.

The interaction between these two categories; the "**pure network liability system**" (**"pure"**) and the "**modified network liability system,**" is demonstrated in Figure 4 below. Under the **"pure"** head, the liability regime governing each mode of transport is preserved. It co-exists with the other liability frameworks governing the rest of the constitutive parts of multimodal transport. For instance, CMR will apply if damage has occurred along the road carriage; the Hague or the Hague/Visby Rules will apply if damage has occurred during the sea transport leg, and so on. The advantages and drawbacks of these multimodal liability systems are analysed in the sub-chapter C below.

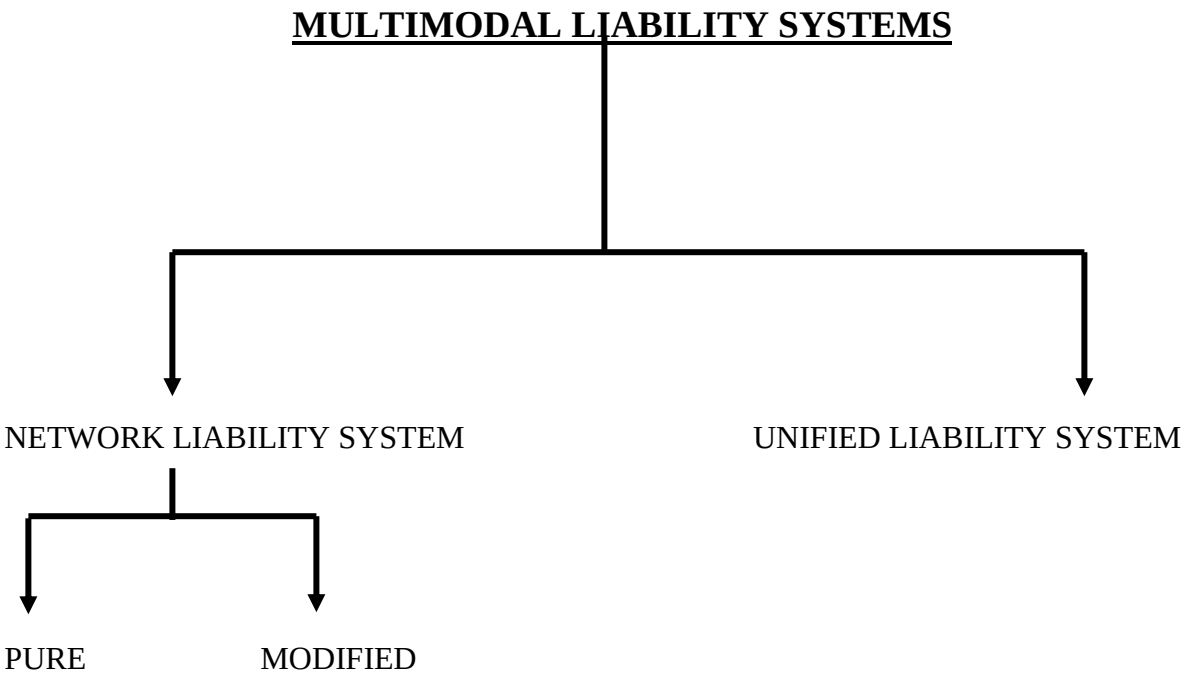
MULTIMODAL LIABILITY SYSTEMS
NETWORK LIABILITY SYSTEM
UNIFIED LIABILITY SYSTEM
PURE
MODIFIED

Figure 4

B.) THE ERA OF MULTIMODALISM

i) Kinds of Transport

Legal regimes refer to “successive carriage,” “through transport,” “multimodal,” or “combined transport,” “unimodal” and “intermodal transport.” Significant distinctions occur amongst different countries. It is also important to discern what type of carriage damage or loss takes place, since each carriage is governed by its own legal regime or combination of legal regimes.

Generally speaking, **“multimodal transport”** is defined as the carriage of goods from one place to another, performed by at least two different modes under a single contract and document. It is a necessary feature of multimodal transport that at least two different modes of transport should be used from the depot at which the goods are taken in charge to the place designated for delivery (Alcantara 2002, p. 402). When this takes place between different states, it could be defined as **“multimodal international transport;”** a more appropriate term, according to Alcantara (2002, p. 402). Certainly, it becomes more complicated when a range of means, modes, and states are involved.

Agreeing with Alcantara (2002, p. 402) and Pampouki (2000, p. 7), apart from the international scenario, multimodal transport can also be discerned as **“national multimodal transport,”** when the carrier undertakes to transport goods from one place to another, where both places are situated in the same country and at least two different modes of transport are involved.

For geographical, political, and historical reasons, Europe, of course, can contribute unmatched experience in assessing the development of law in relation to multimodal transport[209].

Because Europe's geography demands multimodal transport, the legal problems that inherently arise in relation to multimodal transport arose earlier here than elsewhere. Therefore, the legislation that Europe has developed for multimodal transport may be a good guide for the development of multimodal transport law on a worldwide level (see Herber 1989, p. 611, in the next sub-chapter).

According to the general report of Pampouki (2000, p. 9), "multimodal transport" is distinguished from "successive and through carriage", although this distinction is not always clear since "multimodal transport" may assume the guise of "successive carriage."

In comparison with "multimodal transport," **"successive carriage"** of goods is where the transportation is performed by more than one carrier, each succeeding the other. "Successive carriage" takes place particularly when one carrier comes after another and undertakes to perform a separate part of the same carriage under a single contract by virtue of a single document. The succession of the carriers is effected in such a way that each of them undertakes to carry out a part of the carriage, accepting the terms of transport agreed to by the first carrier and consignor.

And, this implies that[210] all subsequent carriers as well as the first one bear joint and several liability[211] for the performance of the carriage of goods. At this point, it should be

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[209] See further *HERBER R.* (December, 1989) "The European Legal Experience with Multimodalism," 64, Tulane Law Review, pp. 611-629, at p. 612.

[210] *GOLOGINA-ECONOMOU E.* (2000) "Multimodal Transport Carrier Liability & Issues Related to the Bills of Lading," Multimodal Transport: Carrier Liability & Issues Related to the Bills of Lading edited by Kiantou-Pampouki A, Brussels, Bruylant, pp. 131-147.

mentioned, that Greece does not provide a definition of "multimodal transport," either because of the complete absence of any statutory provision concerning this term or because of the incomplete legal regulation of such a transit mode; thus, it is expressed as any carriage of goods that takes place under a single contract, performed by more than one means of transport in any combination whatsoever.

Additionally, another term makes compounds this confusion[212]. "Multimodal Transport" contrasts with "Mixed Transport," both of which are sometimes but not always interchangeable.

"Mixed transport or carriage" is the carriage of goods when the vehicle carrying the cargo for a segment of the carriage is itself loaded - with its cargo- onto another (different) means of transport (on land, by sea or by air). Consequently, in such a carriage, the second segment of transport is comprised of both the first means of transport (the road vehicle) and its cargo. As Gologina-Economou[213] points out, this transport is performed by virtue of a single contract and a single document and is subject to Article 2 CMR[214] governing international road transport in Greece.

The essential difference, though, between multimodal and mixed transport, as opposed to successive carriage, lies in the fact that multimodal transport is accomplished by at least two different means of transport. Meanwhile successive carriage is performed by one means of transport, although involves different carriers.

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[211] Although it does not mean that this is what we actually need, since it can cause confusion and instability.

[212] This confusion appearing in doctrine and jurisprudence is also discerned in Greek Law Review; see Decisions 4517/1983 issued by the court of Appeal of Piraeus E.E.D. (= Epitheorissis tou Emporikou Dikaiou= Commercial Law Review), 1983, 405, 1062/1985 issued by the Three Member District Court of Piraeus Pir. Nom (= Piraiki Nomologia= Law Review), 1985, 238, as mentioned by Gologina-Economou E. (*supra*, n. 210, p. 131).

[213] *Supra,* n. 210, pp. 134-135.

[214] CMR is the international convention that covers carriage of goods by road.

Besides, a multimodal transport operator will be liable for the entire carriage, while the successive transport carrier shares liability with all the other subsequent carriers who enter into this agreement[215].

Furthermore, **"through transport/ carriage"** is considered as the transportation in which more than one carrier participates and, in practice, it can be regarded as multimodal transport since it is almost always performed by two or more carriers. However, Pampouki (2000, p. 9) argues that through carriage of cargo can take three variations[216]:

- The first variation is when more carriers may undertake to advance the same goods from one place to another based on a common contract, generally concluded by a common agent, so that every carrier performs a part of the carriage.
- The second is when the first (contracting) carrier undertakes to perform part of the carriage and, acts as a freight forwarder, forwarding the goods to their destination by other carriers.
- The third variation is when a carrier under an exclusive contract, undertakes to perform the entire carriage and to deliver the goods to the consignee at the destination. In such a situation, if the transport is effected by the same mode of transport, through carriage is distinguished from multimodal transport. Otherwise, if different modes are used, then through carriage is barely distinguishable from multimodal transport. Therefore, in the latter case, it is difficult to distinguish between the two types of transport.

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[215] *Supra*, n. 210, p. 135.

[216] See relevant information *PRUSSMAN-RARE* (1992) "Seehandelsrecht" (= The Law of Carriage of Goods by Sea), 3rd ed.; *ANDROUTSOPOULOS* (1963) "The Through Bill of Lading," quoted by *PAMPOUKI-KIANTOU (*2000, p. 9, n. 21).

Multimodal transport in the USA is the third form of transportation, while the other "ancestor" forms are cargo transportation and through transportation[217]. **"Cargo transportation"** appeared in the past as a form of transportation that involved two or more transit modes and could be divided into segments, hence the origin of the term **"segmented transportation."**[218] Due to the evolution of container technology, the successor of the "segmented transportation" came into being under the name **"through transportation."** In this form, one carrier, acting as the shipper's agent, arranges the transport for the other segments[219].

Another term that enters into this muddle is intermodal transport. According to Bissell (1971)[220], **"intermodal transport"** is based theoretically on the consolidation of several break-bulk units into a single interchangeable transportation unit; the container. The container is carried via a combination of several modes of transportation, under a single shipping document and a single freight charge, from the shipper's warehouse to the consignee's warehouse. The container is the integrating element of an intermodal transportation system. Mahoney (1985, p. 2) states that containerisation and intermodality are not synonymous, because intermodal movements can take place without the benefit of containerisation.

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[217] *WOOD S.* (2000) "Multimodal Transportation: an American Perspective on Carrier Liability & Bill of Lading," Multimodal Transport: Carrier Liability & Issues Related to the Bills of Lading edited by Pampouki-Kiantou, Brussels, Bruylant, pp. 235-267, at p. 235; also in p. 46, The American Journal of Comparative Law, p. 403, section III.

[218] *Ibid.*, pp. 235-237.

[219] See also Tetley (1988, pp. 934-935); see *http://www.mcgill.ca/files/maritimelaw*.

[220] See *BISSEL T.* (1971) "The Operational Realities of Containerisation and their Effect on the "Package" Limitation and the "On Deck" Prohibition: Review and Suggestions," 45, Tulane Law Review, pp. 902-910, by Armstrong; *supra*, n. 5, at p. 427; see also introduction, sub-charter (b).

A variety of means is used in intermodal transport, such as ocean vessels, rail freight trains, highway trucks, pipelines, and belt conveyors. Thus, when a container has to be transported, it is loaded on to a truck and when the truck reaches the port, it is transferred by means of a conveyor belt to the deck of the container ship[221]. In this type of carriage, problems can arise because the vehicles are shaped differently with "unlike means," as Mahoney puts it, of loading and unloading, with the result that the goods are subject to "different stresses" and conditions in each mode.

It is worth speculating whether intermodal transport came first and later, with the development of technology and rapid growth of containerisation, it evolved into multimodal transport. Until 1985 authors, like Mahoney, write about intermodal transport and although multimodal transport had started to develop by then, they make no reference to it.

According to Pampouki (2000, p. 6), intermodal transport is a form of multimodal transport. It may have its own contract terms, but it may not be greater than "multimodalism." On the other hand, Jervell defines "intermodalism" as greater than "multimodalism."[222] Actually, the term "multimodal" was the successor of the term "combined," although Pampouki states that all three terms are considered synonymous and used in a parallel manner without any distinction.

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[221] Mahoney (1985, p. 1) adds that intermodal transport in remote areas takes place by the use of beasts of burden and human beings. That might have been an option in the earlier years in order to save money but not necessarily in the 21st century when containerisation is flowing. Besides, the US and the EU with the support of big maritime organisations and shipping lines provide special funding to upgrade where possible remote areas and less developed countries (LDCs).

[222] See *JERVELL JBK /PERL A /SHERRY P /SZYLIOWIEZ JS* (Summer 2000) "Intermodal Education in Comparative Perspective," 27, Transport Law Journal, p. 419; also, *WYATT MJ* (1991) "Contract Terms in Intermodal Transport: COGSA Comes Ashore," 16, Tulane Maritime Law Journal, p. 177.

Although the Multimodal Convention took place in the 1980s, the term "multimodal transport" was only used much later. It, thus, remains an issue for discussion, how rapidly the maritime world comes to accept terms and trends adopted by relevant legal frameworks. Furthermore, it should be analysed what the consequences of their delayed acceptance are, such as the transaction costs involved in the legal uncertainty. The lack of agreed terminology is symptomatic of the difficulty in achieving a multimodal transport framework.

This may be linked with what Mahoney (1985, p. 14) says: although managements of ocean carriers were well aware of the technical feasibility of loading land containers on the decks of sea-going vessels, they were reluctant to adopt the practice because it interfered with their preconceived notions of how shipping ought to work and with the practices and procedures that had evolved over centuries. This is where the broad-mindedness exhibited by Malcolm McLean[223] (credited as being the initiator of the land-sea container revolution) is essential.

The opposite of multimodal transport is **"unimodal transport,"** which is the transportation of cargo performed by only one mode of transport, either by one or more carriers (Pampouki 2000, p. 9).

[223] Quoted by Mahoney 1985, p. 14.

ii) It should be called Multimodalism

Maritime commerce has evolved along with the development of transportation and is often inseparable from some land-based obligations. The international transportation industry "clearly has moved into a new era; the age of multimodalism,[224] identified as door-to-door transport based on efficient use of all available modes of transportation by air, water, and land." Increasing volumes of cargo move under multimodal "through" bills of lading issued by ocean carriers and intermediaries, such as freight forwarders and non-vessel owning common carriers (NVOCCs), providing the shippers with an efficient, stream-lined method of moving goods from "door to door." The cargo liability regime covering carriage of goods by sea, however, is outdated and unsuited to deal with multimodal carriage.

Many call this "multimodal transport." It has now become the dominant term following on from the Convention of 1980. Several authors, such as Crowley[225] and Herber (1989, p. 612) use the term "multimodalism." Inappropriately, some even use the term "multimodality," but suitable terms are "multimodal transport" and "multimodalism." Furthermore, Palmer R and DeGiulio FP[226] say that although the term "multimodalism," has thus far escaped inclusion in most dictionaries, it is a term now extensively used in the

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[224] *Supra*, n. 209, p. 612; also *COFFEY WJ* (December 1989) "Admiralty Law Institute Symposium: Terminal Operations & Multimodalism; Multimodalism & the American Carrier," 64, Tulane Law Review, p. 569, at p. 570.

[225] See *CROWLEY ME* (June, 2005) "Admiralty Law Institute Symposium, the Uniqueness of Admiralty & Maritime Law; the Limited Scope of the Cargo Liability Regime Covering Carriage of Goods By Sea: The Multimodal Problem," 79 Tulane Law Review, 1461; also KNEBEL JG /BLOCKER DS (December 1989) "Admiralty Law Institute Symposium: Terminal Operations & Multimodalism; United States Statutory Regulation of Multimodalism," 64, Tulane Law Review, p. 543.

[226] See further *PALMER RW/ DeGIULIO FP* (December 1989) "Admiralty Law Institute Symposium: Terminal Operations & Multimodalism, Terminal Operations & Multimodal Carriage: History & Prognosis," 64, Tulane Law Review, 281, at p. 283.

transportation industry to describe the idea of an integrated system of through transportation of goods over land and water.

On the surface, multimodalism merely suggests transportation of a particular shipment of cargo by different modes of transportation. It is characterised by the integration and co-ordination of various modes of transportation, commonly by means of a metal shipping container. I have to say that I have reservations about the term "multimodality", since this may fit other functions and fields of science as well. What we need here is not a general term, but something more specific.

"Multimodal" is defined, in part, as "composed of several distinct types of activity."[227] Although the term "multimodalism" is encountered, other terms such as "intermodalism" and "combined transport" are commonly used in the transportation industry. The three terms seem to be synonymous. Therefore, this phenomenon should be called "multimodalism."

From a legal standpoint, the development of multimodalism is significant because the laws determining the rights and liabilities of carriers and shippers were developed separately for each mode of transportation during the decades when those transportation segments were viewed as distinct. The technological advances associated with multimodalism outpaced changes in the law, often resulting in the implementation of disparate legal and regulatory frameworks to a single cargo movement. Changes in the liability regime applicable to interstate common carriers, which occurred contemporaneously with the legislation in multimodalism, further confused issues.

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[227] According to Webster's Third New International Dictionary (1986) 1485; also quoted by Palmer/ DeGiulio, *ibid.*, p. 283, fn. 1; the prefix "multi-" means "many" and derives from "multus," as in The Oxford Reference Dictionary, Oxford University Press, p. 550. The term "modal" (p. 537) means "of mode." Therefore, "multimodal" means "many modes."

Different types of contracts and different liability systems that govern multimodalism appear on the scene as well. Some authors (CMI 4.3) call these types of contracts **"mixed contracts,"** others (Androutsopoulos 1963) speak of **multimodal "through" bills of lading issued,** or **single bills of lading,** or **multimodal transport documents**, but what matters most is that they are talking about the same thing; the contracts that govern more than one transport leg at an international level.

Shippers and forwarders make widespread use of contracts, such as FIATA FBL and BIMCO's, Multidoc95[228] and BIFA STC, which are based on *the Model Rules for Freight Forwarding Services* adopted in 1996 by the Federation Internationale des Associations de Transitaires et Assimiles (FIATA). Although these Model Rules give the impression of simplicity, they mask the precedence of the international Conventions and the contracts adopting these Rules are effectively private contracts. Although economists[229] are in favour of these private contracts, they are inevitably subject to different interpretations by different courts (Crowley 2005, p. 1480) and unfortunately, that hinders uniformity. This can, of course, be common to all international contracts which cross borders. Even the European Court of Justice (ECJ) may create confusion, as it develops its own jurisprudence which may also hinder uniformity (Goldman D. 2007, p. 265).

Finally, on interpreting "multimodalism" in the USA, it should be noted that it is characterised by the integration and co-ordination of various modes of transportation, commonly by means of a metal shipping container, providing point-of-origin to point-of-destination transit under a single set of shipping documents, based on a single through-

[228] Appendix 5.
[229] As interviewed by Dr Peter Holmes on 13/06/2006.

freight rate charged to the shipper, regardless of how many modes of transportation are involved or how many carriers participate[230].

[230] *Supra,* n. 217.

C.) CREATING THE MULTIMODAL LIABILITY SYSTEM

Under this sub-charter, the advantages and drawbacks of the "network liability system," discerned in the two categories of the "pure network" and the "modified network," and the "uniform" liability system are discussed.

The main problem encountered by the parties to a multimodal contract stems from the potentially wide variety of terms and conditions of carriage in operation between the different modes (Wilson 2008, p. 247). The problem is aggravated by the existence of a series of mandatory transport conventions, imposing different liability frameworks on the operators of the various modes of transport. Attempts to provide a uniform multimodal regime have so far been unsuccessful, but the gap has been partially filled by the production of a set of Rules for a combined Transport Document by the International Chamber of Commerce ("ICC"), which is available to be integrated by the parties into their individual contracts. In the absence of any agreement on an international uniform framework, modified versions of the ICC rules have appeared in a variety of standard forms of bill.

Attempts to pinpoint the most suitable legal advice for particular cases are made by examining the existing ratified and non-ratified international, national, and regional legislation. In fact, the miscellany of the regulations pertaining to the network system does not allow for an accurate presentation of the national laws and a comparison with each other, in respect of the MTOs' liability (Pampouki 2000, pp. 63-64). This, of course, causes unpredictability in modern transactions.

The question of the localisation of the loss or of the damage is crucial in any multimodal liability system. According to Hans Carl[231], container claims usually involve hidden damage, so there is little proof as to whom or what caused the damage.

[231] *HANS C.* (1999) "The Spread of Multimodal Transport Legislations," *IMMTA Bulletin*, p. 6, quoted by *Alcantara* (2002, p. 404, n. 16).

i) Pure Network Liability System

Historically, most ocean carriers have issued bills of lading that provide for liability of carriers based on a "network system" of applicable liability frameworks (Palmer RW/ De Giulio FP, December 1989, p. 284). Under this scheme the legislation applicable to each section of the transportation (i.e. COGSA or the Carmack), governs the liability of each connecting carrier. In addition, the rights of indemnity and contribution among carriers are governed similarly. Under these circumstances, each carrier limits its liability to the segment that it performs, and the applicable law is said *"to travel with the cargo."* The implementation of the network system to determine liability has created much concern about the lack of uniformity resulting from the application of Carmack[232] and COGSA to different segments of shipments.

The **pure network liability system** has been articulated in the UNIDROIT convention drafts of the years 1961 and 1965 (Pampouki 2000, p. 35)[233]. According to this system, where the location of the damage or loss can be identified, any unimodal international convention or mandatory national law applicable to the leg will operate to define the carrier's liability. Such international conventions may be applicable either by statute as, for example, the Hague/Visby Rules implemented by the Carriage of Goods by Sea Act 1971, or may be incorporated into the contract by the use of an appropriate paramount clause.

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[232] The Carmack Amendment, the predominant source of law in USA governing carriers' liability for cargo loss or damage during transit, prohibits the carriers from limiting or exempting themselves from liability. They may limit liability, if that limit is reasonable, depending on circumstances. It is not specific as to who determines reasonableness. This issue may be left to the courts to determine, *supra*, n. 217, p. 411.

[233] See also *FABER* (1997, p. 27).

Should no international convention or national law be applicable, however, the parties are then free to contract on their own terms and a wide range of solutions is available within the standard forms. But, arguing with Wilson (2008, p. 248), at this stage perhaps we do not need a wide variety of solutions that may lead to ambiguity, but something more specific and "singular." This is the reason we require new law or even further we need specific law to govern multimodalism.

Some bills provide that a specific convention shall be applicable to a particular leg (Combicon bill 11(2), Combidoc 11(i) (b); others include a formula to restrict the liability of the combined transport operator to the amount recoverable from any sub-contractor to whom he has delegated performance of the particular stage in question, such as Tranzstas bill 5(B)(2)(e). The ICC Rules, and many bills based on them, aim at achieving consistency by providing that the same framework of carrier liability shall be applicable as if the location of the damage had not been identified (see ICC Rules 1975, Rule 13(d)[234]).

However, in the circumstances when it is likely to not be known at what stage damage or loss occurs, when no unimodal convention is applicable, the parties are likely to exercise their freedom to draft their own contract. Once again, a range of different solutions is evident from an examination of the standard forms. In order to gain the maximum protection for the carrier, some bills assume that the loss occurred during the sea leg and thus invoke the Hague or Hague/Visby Rules as appropriate, as in ACL bill clause 3IV. Other carriers devise their own code of liability, while many adopt the ICC Rules for a Combined Transport Document.

Thus, when the damage is not identified, the parties will decide. But, when the damage is identified, then the convention is mandatory. Therefore, the parties cannot

[234] Appendix 6.

contract out of the terms of an otherwise applicable convention. So, the convention, if one applies, applies mandatorily. In the case of concealed damage which is not traceable, the parties can contract out of the terms of an otherwise applicable convention and actually can contract to implement the convention or not.

If there is not a mandatory set of international rules, there might be mandatory rules in the appropriate national law, eventually chosen by the parties, which should then also apply. For those segments of transport for which no compulsory rules exist at all, the parties may either agree to particular rules being applied to their contract or they may apply internal legislation supplementarily or by analogy (Pampouki 2000, p. 28).

The "pure network" system has the drawback that it can apply only where the stage, in which damage has occurred, is known. Locating the damage, though, is difficult and sometimes impossible (Pampouki 2000, p. 29), particularly when the goods are sealed within a container. Furthermore, this system proves inadequate, even in cases of localised damage for example, when damage occurs in the intervals in passing from one to another international convention's scope of application. In any case, the multimodal transport operator ("MTO") may be held liable for damage arising in these intervals. Then there will have to be recourse to the local law of the place of damage; and this law may well be unknown, both to the consignor (or the consignee) and to the carrier as well.

The MTOs are favoured by this system since they may exclude or reduce their liability for damage caused during the intervals between the various transportation stages, given that there is no applicable international convention to govern multimodal transport to attach liability to the MTOs. These intervals are subject to common law rules and are not covered by mandatory law. Thus, the carriers may insert clauses in the contract releasing them from liability or limiting their liability.

The shippers on the contrary in this system can have no such predictability. They are quite uncertain as to the liability framework governing the contract entered into, and as to the scope of application of various international conventions (Pampouki 2000, p. 30). The pure network liability system is conservative and incomplete, leaving many problems unresolved. Consequently, it is not suitable to satisfy the demands of multimodalism. Another problem with the network system is that the various networks have varying liability limits.

De La Garza points out that[235], for non-maritime conventions, the limits are significantly greater- at one point nearly nine times that of the maritime liability limits: "the CMR limit is 8.33 SDRs per kilogram, the COTIF-CIM limit is 17 SDRs per kilogram…" and this problem clearly leads to another: the application of a maritime convention to non-maritime activities. Therefore, we need a new uniform multimodal legal framework to govern situations such as this as well. In this case, the pure network system is inadequate to resolve the situation. Furthermore, according to the explanation of the UNCTAD/ICC for their Rules (1992, p. 6, Rule 4), the terms "within the scope of his employment" and "for the performance of the contract" might limit the vicarious liability of the MTO.

The difficulty with these Rules, as stated above, is not only that they are contractual in nature and therefore open to a variety of interpretations in different jurisdictions, but they are also, by definition, subject to any applicable mandatory law, and thus not necessarily an effective means of achieving international uniformity. If the loss can be localised to a particular stage of transport and a regional, sub-regional or national mandatory multimodal

[235] See further *DE LA GARZA N.* (Fall 2004) "UNCITRAL's Proposed Instrument on the International Marine Carriage of Goods," 32, Transportation Law Journal, p. 95, at p. 103.

liability framework, then the liability of MTO is estimated in accordance with the recognised applicable regime.

By contrast, if no mandatory unimodal convention applies, the liability is rendered in accordance with the standard form contractual terms, which may incorporate the UNCTAD/ICC Rules 1992. These provide for fault-based liability with presumption of fault. These rules only apply if the parties so agree. However, as established in *Hartford Fire Insurance Co., a/s/o Trek Bicycle Corp. v. Orient Overseas Containers Lines* 230 F. 3d 549, a carrier and a shipper can extend the Carriage of Goods by Sea Act (COGSA) prior to loading and subsequent to discharge of goods from a ship, but the extent of any application beyond the scope of the statute is a matter of contract (COGSA par. 7, 46 App. USCA par. 1307).

In the case above, a containerised shipment of bicycles moving under a through bill of lading from Wisconsin to the Netherlands, via Chicago, Montreal, and Antwerp, was stolen when the inland trucker left the container unattended in Belgium. The bill of lading extended COGSA to cover the entire shipment, but also contained a network liability clause relating to "any law . . . applicable to such stage," which in this case meant the CMR Convention. When the shipper sued the carrier in the federal court in New York, however, the lower court refused to apply the CMR limitation, because in this instance it lessened the carrier's liability under COGSA.

The Second Circuit reversed and held that the carrier was entitled to the CMR limitation. In doing so, the court held that this was a mixed contract, with no admiralty jurisdiction, and therefore applied New York's choice of law rules to uphold the parties' contractual choice of law provision (i.e. the CMR limitation). The case was remanded for further proceedings on whether the carrier was entitled to a limit of its liability under the

CMR, considering the shipper's allegations of wilful misconduct. Other courts, following this rationale, have applied state choice-of-law rules in examining a bill of lading's choice-of-law provisions, in some instances upholding the parties' agreement, and in other cases making the agreement void.

The defendants had selected DeBrock Gebr. Transport, NV ("DeBrock") as their trucker between Antwerp and inland destinations in Europe, but DeBrock subcontracted with N.V. Groeninghe ("Groeninghe") to transport Trek's container from Antwerp to Spijkenisse. On 29th October 1996, a Groeninghe truck picked up the container from the defendants' ship at Antwerp. Later that evening, thieves stole the truck, together with the container of Trek's bicycles, after the truck had been left on a public road without any supervision or guard near the driver's home in Deurne, Belgium.

The police were able to track down approximately thirty of Trek's three hundred and one stolen packages, but the remainder were never recovered. It was held that in a situation of potential contract ambiguity, an interpretation that gives a reasonable and effective meaning to all terms of a contract is preferable to one that leaves a portion of the writing useless or inexplicable. In any event, contracting parties are able to reduce uncertainty that rises by drafting a bill of lading that provides for the application of a single law during all stages of transport, but in this particular case that had not been done.

Sometimes, although it may be a matter of jurisdiction, is that the general rule for exercising admiralty jurisdiction in a contract case "jurisdiction arises only when the subject-matter of the contract is "purely" or "wholly" maritime in nature." In this case, the record did not reveal the exact mileage that the cargo would travel by land or sea under the bill of lading, but the land segment of the carriage was clearly more than "incidental" in relation to the water segment.

Even if the parties' choice of law is not an issue, some US courts have applied the chosen law only to the extent that it does not conflict with the substantive state law. In situations where the selected law and state law yield the same result, this is not necessarily a problem. For instance, in *New York Marine & General Insurance Co. v. S/S Ming Prosperity*, 920 F. Supp. 416, 420 (SDNY 1996) a containerised shipment of footwear carried under a multimodal bill of lading from Hong Kong to New York, via Los Angeles, was destroyed because of a train derailment in Arizona.

The shipper sued the ocean and rail carrier in the federal court in New York, and both carriers claimed limitation of damages, the ocean carrier under COGSA, and the rail carrier under its circular. The court held that this was a "mixed contract" with no admiralty jurisdiction, and therefore, state law governed the shipper's claims. Applying New York law, the court concluded that the ocean carrier was entitled to benefit from the bill of lading's provisions limiting damages to invoice value: "Parties may contract to limit the liability of a carrier, even for gross negligence, provided the language of the limitation is clear, the shipper is aware of the terms of the limitation, and the shipper can change the terms by indicating the true value of the goods being shipped."

The international treaty terms which would apply can be excluded by agreement between the parties, as this occurs in the concealed damage. The issue of choice of law clauses in these contracts, which concerns the applicable law, is related to this. In case the damage is localised, the parties may incorporate the relevant law clauses which will apply mandatorily, but if the damage is concealed the mandatory relevant applicable law may be excluded.

Finally, in some jurisdictions such clauses may not be respected in full or may be declared null and void[236]. In fact, in the *Hartford* case, the court granted the shipper's motion for summary judgment, but limited its recovery, dismissing its claims for lost profit and consequential damages. The same result was reached concerning the rail carrier under the bill of lading's Himalaya Clause. On the other hand, state law has served to nullify an ocean carrier's or inland carrier's otherwise valid contractual right to limit. In *Mitsui Marine & Fire Insurance Co. v. Hanjin Shipping Co*., now reported in SE 2d 2004 WL 106678 (GA State Ct.), 2004 AMC 577, a shipper brought suit against the ocean carrier, inland rail carrier, and inland trucker in state court for damages arising out of a containerised shipment of yarn carried under a through bill of lading from Japan to Decatur, Alabama, via Savannah, Georgia.

The goods were loaded in Japan, taken by vessel to Savannah, by rail to Huntsville, Alabama, and then by truck to Decatur. When the container was opened at the consignee's premises, the goods were found to be damaged. In this case, the shipper had contracted with an NVOCC, who in turn contracted with the ocean carrier. The ocean carrier's bill of lading extended COGSA inland and also contained a Himalaya Clause protecting inland carriers. The ocean carrier moved for summary judgment to limit its liability in accordance with the COGSA $500 per package limitation.

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[236] See *RIC FELDT, et al., Plaintiffs and Respondents, v. MAR INVESTMENTS, LLP Defendant and Appellant,* 2004 WL 2069067 (Cal. App. 2 Dist.) (Division 8, California), (Appellate Brief); *HANS SMIT* (2004) 'Manifest Disregard of the Law in The New York Supreme Court, Appellate Division, First Department,' 15, American Review of International Arbitration, pp. 111-131 ; *GAITIS M. JAMES* (2004) 'International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards,' 15, American Review of International Arbitration, pp. 9-105.

The Georgia state court denied the ocean carrier's motion for two reasons. Firstly, relying extensively on the Eleventh Circuit's decision in *James N. Kirby, Pty Ltd. v. Norfolk Southern Railway Co*. 125 S. Ct 385, 2004 AMC 2705 (2004), which involved similar facts, the court held that a shipper who contracts with an intermediary (such as an NVOCC) is not bound by limitations contained in the ocean carrier's bill of lading. Secondly, the court concluded that even if the ocean carrier's extension of COGSA bound the shipper, the limitation would still fall under Georgian law. Under Georgia's common carrier statute, a common carrier is prohibited from limiting its liability by language in a bill of lading. Accordingly, in the absence of an express agreement negotiated between the carrier and shipper, the carrier was not entitled to any limit based on the pre-printed portion of the bill of lading.

When composing a proper multimodal legal framework, it should be taken into account that a contract to transport goods over both sea and land is obviously not a traditional maritime contract[237]. Therefore, what should be targeted is the harmonisation of the CMR or COTTIF with COGSA, if possible. Many of the standard form contracts are drafted under the Standard Conditions of FIATA (FBL) and the Combined Transport Document published by BIMCO and INSA (COMBIDOC) are based on the original ICC Rules.

In some countries, such as Japan, the network liability system applies which seems to be satisfactory. What is interesting here is that Japanese banks paying insurance settlements according to documentary letters of credit, accept documents issued under this system and insurers seem to have no problem with this. It seems therefore that in Japan,

[237] *Cf. Kuehne & Nagel V. Geosource, Inc V. Panalpina Welttransport G.m.b.h* 874 F. 2d 283.

there is not much space for unification efforts. Moreover, the fact that contracts currently used under validity in Japan might not be regarded valid under the domestic laws of other nations still remains insoluble.

Therefore, the extent to which these contracts are valid is debatable.

In Japan, in one case on multimodal transport, *Amatsu Keiko v. Japan Schenker K.K.* [1991] Tokyo District Court, the defendant was held to be a contractual carrier (multimodal transport operator) and the claim was accordingly dismissed; hence, the validity of the contract is not clear. Nor is the standard of care required of the multimodal transport operator evident. This explains the fact that there are no cases reported in Japan in which the multimodal transport operator claimed a recourse action against its servants or agents or against actual carriers and this may create further problems. Generally, the recourse claim of the employer against his/her employee is sometimes limited so that the damage is shared between the employer and the employee in an equitable manner (Pampouki 2000, p. 155).

Technology has evolved in such a way that modern multimodal carriage is not performed by a single entity, since efficient multimodal carriage depends on many different parties performing many different transportation modes, acting together to accomplish the carriage. Having to meet the specific requirements of law in a Himalaya Clause, as already mentioned in chapter 3 (Da), tends to lower the efficiency of the network system (Hooper 2004, p. 8).

As discussed by the US Supreme Court in *James N. Kirby, Pty Ltd. v. Norfolk Southern Railway Co*. 125 S Ct. 385, the following issues apply:

a) whether a cargo owner is the one who contracts with a freight forwarder, under a house bill of lading, and whether they are both bound by the

terms of contracts the forwarder later makes with carriers to transport the goods

b) whether the freight forwarders are acting as agents of the shipper, when the former enter into a contract with an ocean carrier, and if the freight forwarder is considered as the shipper on that bill of lading[238].

The multimodal system is shown (Hooper 2004, p. 9), by the decision of the Eleventh Circuit in *Kirby* case, as having many different legal provisions, which no longer fit together. Though, Professor Ramberg (Hooper 2004, p. 9) favours the network system, describing the evolution of a freight forwarder as that from a shipper's agent to a carrier.

FIATA publishes documents that permit a freight forwarder to act as either the agent of a shipper by using a Forwarder's Certificate of Transport or as a carrier by issuing a Forwarder's Bill of Lading. Many continental European Members of FIATA initially strongly opposed to the assumption of a carrier's liability by a freight forwarder, but they now agree that a freight forwarder should be able to assume that liability. Doing away with the network system, Ramberg contends (Hooper 2004, p. 9), would be as beneficial to the transportation system as was the assumption of carrier status by freight forwarders. Uniformity is clearly what we need for this undertaking.

Commenting on the *Kirby* Case, it should be added that a new era is coming which will depend on the way this case will be interpreted by the Supreme Court. If it interprets the NVOCC's Himalaya clause liberally to extend the contract of carriage terms to all its participants, it will have gone a long way towards putting the contract of multimodal carriage together again. If, on the other hand, it concludes that all participants in the

[238] See *COOKE J. /GOOLEY T.* (2004) Supreme Court hears Multimodal Liability Case, as in *http://www.logisticsmgmt.com/article/CA479204.html* (08/11/2005, at 23:00).

carriage should be entitled to the protection of the contract of carriage without the need of a specific Himalaya Clause, a giant step would be taken towards uniformity in the law concerning multimodalism.

The limited scope of the Hague Rules (and US COGSA) has left the sea carriage framework unable to deal efficiently with the increasing number of claims involving multimodal bills of lading where the loss or damage occurs inland. For the past several decades, parties to multimodal bills of lading have been compensated by including choice of law provisions (network clauses and Clauses Paramount), to govern the rights and liabilities of the carrier and shipper outside the tackle-to-tackle period, and Himalaya Clauses, to extend coverage to persons not otherwise covered by the framework.

These clauses, however, have been subject to different interpretations by different courts, as evidenced by the *Kirby* case; even the most carefully drafted bills of lading have not prevented the application of state law on significant issues of liability and damages. The result has been low predictability and high litigation costs. The *Kirby* decision has helped matters somewhat by expanding admiralty jurisdiction and thus the application of federal maritime law, as opposed to state law, to all aspects of multimodal contracts and by offering some guidance as to the interpretation of Himalaya Clauses.

The decision, however, leaves many questions unanswered and does not come close to solving the problems created by the absence of an international convention covering "door to door" multimodal shipments. Moving on further with the analysis in the *Kirby* case, the Court determined that there is nothing inherently local about this dispute to justify interference with the uniformity of federal maritime law. There is a type of "network," when the ICC bill of lading contained network liability provisions, applying US COGSA to the sea portion of transport and establishing ICC's maximum liability in accordance with

"applicable international convention or mandatory national law" with respect to any other "stage of the multimodal transport" and with the Hague/Visby limits as a default limit (Crowley 2005, p. 1487).

Furthermore, if a carton inside the container is damaged, when the vessel launches and crosses the boundaries of the Departure State where civil law was applied and enters another state where common law applies, it is hard to find the suitable legal framework. It is even more difficult to define where the damage occurred.

For instance, in *Berkshire Fashions, Inc. v. M.V. Hakusan II* 954 F. 2d 874 (3rd Circuit 1992) a container carrying umbrellas by sea from Taiwan to Los Angeles and then by rail to New Jersey, was stolen from the inland carrier's warehouse in New Jersey. The bill of lading identified Keelung, Taiwan as the load port and New York as the place of delivery, but did not specify that the shipment would move overland via Los Angeles. The shipper sued in federal court, asserting admiralty jurisdiction. The lower court, however, held that the claim did not give rise to admiralty jurisdiction, because the bill of lading involved "extensive cross-land transport" and thus granted the inland carrier's motion to dismiss.

On appeal, the United States Court of Appeals for the Third Circuit cited the general rule that a contract must be "purely" or "wholly" maritime in nature to fall within admiralty jurisdiction, with two exceptions to the rule. Firstly, if a contract is partially maritime and partially non-maritime, the court will entertain admiralty jurisdiction if the maritime and non-maritime portions of the contract can be severed without prejudice to either party. Secondly, a federal court may exercise maritime jurisdiction over the entire contract if the non-maritime aspects of the transportation are "merely incidental."

The Third Circuit held that neither exception applied. Nevertheless, due to the ambiguity in the bill of lading, the court reversed and remanded for further proceedings to determine whether the shipper had a reasonable belief, based on prior dealings or customary trade practice, as to whether the goods would travel entirely by sea. If the parties had contemplated a voyage entirely by sea, admiralty jurisdiction would attach. Where the bill of lading unambiguously provides for inland carriage, however, the courts have not hesitated to dismiss for a lack of jurisdiction.

Lastly, even where the parties have agreed to apply COGSA or some other law to the period of inland carriage, courts have treated COGSA only as a contract term; enforcing its provisions only to the extent they do not conflict with applicable state law, as previously indicated. As a result, the parties to a multimodal bill of lading have been subject to different rules respecting liability, burdens of proof, and limits of liability, time bar, and choice of law, depending on what law is applied. It is customary for parties to a multimodal bill of lading to include choice of law provisions covering liability during the different stages of transport. This is due in part to the present lack of any mandatory international multimodal convention governing these stages.

Commonly known as “network liability” clauses, these provisions often apply the law of any mandatory international convention or national law covering the stage where the loss or damage occurred and a default liability framework (such as COGSA, Hague Rules, Hague-Visby, etc.), if the location of the occurrence cannot be proven. Whether the parties agree to uniformly extend COGSA/Hague Rules inland, or use a network liability choice of law approach, US courts have not hesitated to apply state law, including a forum state’s choice of law rules, to determine the validity of the bill of lading’s provisions.

The CMI/UNCITRAL Draft Convention 2008 (the recent "*Rotterdam Rules*") also attempts to provide a network solution by Art. 26, but there is a more fundamental problem with the CMR in that a hypothetical road contract for, say, the pre-maritime leg of the carriage would, in many cases, fall outside the ambit of the Convention (Baughen 2009, p. 161). For the "network" system to apply, the damage must have occurred during pre-carriage or during carriage. In this respect, a choice can be made between the place where the damage is caused, where it occurs, and where it is detected. The time of detection may be before the voyage begins, e.g. in case of damage caused by the shipper having the cargo badly stowed in a container. The most serious objection against the place where the damage is caused is that the question of proper causation according to the applicable law has to be resolved before it can be determined whether the provisions of the UNCITRAL Instrument 2008 or of another convention are applicable.

The place where damage has occurred is a factual matter, is usually relatively easy to establish and may be expected to produce fair results. Therefore, the place of occurrence must be regarded as the proper choice within the scope of the network system and art. 26 of the UNCITRAL Draft 2008 so provides. As an example of the "network scope" may be taken a contract of carriage from Singapore to Antwerp, Belgium. Under this particular contract the goods are to be shipped through a Dutch port of discharge, Rotterdam, and carried thence by land. This contract is governed by Singapore law, whether by express choice of the parties or by operation of other principles of the conflict of laws. Before a court in a country adhering to the Instrument, Singapore law would be displaced to the extent that mandatory provisions of an international convention governing road haulage, also adopted by that country, are applicable to the inland leg of the journey.

The law governing the carriage of goods by sea has always been unique. Concepts such as seaworthiness, perils of the sea, general average (Richardson 1998, pp. 81-83) salvage (Richardson 1998, p. 83), and deviation are peculiar to sea carriage and will continue to make maritime law such an intriguing area of practice. Unlike other modes of transport, however, sea carriage is governed by an outdated liability framework that has failed to keep up with changes in the industry.

ii) Modified Network Liability System

The so-called **modified network liability system** gives authority to the agreement of the parties, thus eliminating the weaknesses of the pure network system. The basic idea of the modified system is preserved but it can be modified by statute or by the parties' agreement. The MTO is also subject to the mandatory regulations of the trajectory where the damage has occurred. It is possible, however, for an additional arrangement to be made with respect to the multimodal transport operator's liability in a case where no mandatory framework is applicable or in case of non-localised damage (Pampouki 2000, pp. 30-31).

If modification is established by contractual agreement, it is more than certain, that the carriers will attempt to include a rule favouring themselves. However, the modified network system cannot effectively fill the existing gap with respect to the damages occurring in the intervals that are not covered by transport law. Neither does it cover the gaps existing as regards to damages occurring gradually or due to delay.

It creates problems with respect to the nature of the law governing the various parts of the transport; namely, whether the law applicable to a trajectory should be considered as mandatory, and if so, whether it is mandatory in its entirety or could it also be considered as mandatory in a case where certain of its provisions are non-mandatory. The answer to this question is that, through interpretation, a liability regime may be considered as mandatory in its entirety, in spite of the fact that certain of its provisions are non-mandatory. This, of course, creates uncertainty of law at the expense of the shipper, who has no way of knowing in advance, which liability framework will govern the multimodal transport contract he has entered into. All of this further reinforces the case for an appropriate system of law with general applicability and is of major jurisprudential significance.

Many standard transport documents, such as Combiconbill and BIMCO Combidoc, as well as the initial version of the FIATA BL, have been drafted on the basis of this system (Pampouki 2000, pp. 31-32).

iii) Unified Liability System

If, in contrast, one contract is made for a transport engaging at least two different modes of transport, then it is necessary to resolve the issue of whether or not the liability of such a carrier (the so-called "multimodal transport operator," MTO) should not, in principle, depend upon the localisation of the loss or damage to the particular mode of transport where the loss or damage occurred (the so-called **"uniform/ unified" liability system**) (Faber 1997, p. 26).

The uniform/ unified liability system, as the term itself indicates, provides the same carrier's liability throughout the whole transport, namely, a single liability framework, founded on the same basis from the beginning to the end of the transportation. The framework of liability may be one of those governing one of the transport stages, a combination of them, or even a completely different framework. As regards the base of liability, in particular, it could be a fault-presumed liability, containing or not containing limits of liability; it could also be a strict liability, providing or not providing exemption grounds (Pampouki, pp. 32-33).

The uniform liability system, including certain elements of the modified network system is depicted in the UN Convention of 1980 on International Multimodal Transport of Goods. This system presents fewer gaps and creates fewer problems than those of the network system, in case of non-localised damage. Actually, since the same set of rules applies to all phases of transport from the beginning to the end, there is no reason to search for the particular stage at which damage has occurred. Thus, problems concerning the gradual occurrence of damage or of damage due to delay existing under the network system are eliminated.

The uniform liability system, however, leaves certain problems unresolved. One of the most important problems concerns the recourse action of the carrier against the sub-carriers who were delegated to perform particular parts of the transport. Naturally, the MTO does not always carry out the whole transport personally, but employs sub-carriers to perform one or more parts of it. The MTO is liable to cargo-interested persons in the same way for the entire transport, while the sub-carrier is subject to the law governing the part of transport where damage had occurred. Therefore, the MTO who has indemnified the cargo interested person for damage caused not by the MTO, but by one of the employed sub-carriers, has a recourse action against the latter to claim back the paid compensation. However, such a recourse action has very little chance of success.

In the case of identified damage, if the uniform liability of MTO results in a larger amount than the liability of the sub-carrier under the rules governing the particular part of the multimodal carriage, the recourse action will not (completely) cover the claim of MTO. In case of non-localised damage, on the other hand, the MTO should first localise the damage in order to find the actual carrier (sub-carrier) against whom to direct his recourse action. In such a case, however, the problems arising under the network system return (Pampouki 2000, p. 33).

It has also been maintained that the establishment of a uniform and mandatory liability framework of MTO would be in conflict with binding unimodal liability frameworks provided by international conventions or by domestic laws. Taking into consideration that mandatory liability provisions operate in favour of the shipper, the objection can be rejected if the uniform liability framework covers all the liabilities prescribed in unimodal conventions; even more so, if multimodal transport is looked upon as a specific mode of transport, constituting an integrated whole and not as a technical

adjustment of minor parts, each constituting a separate contract of carriage. Certainly, the practical question is how to establish such a worldwide uniform liability framework.

The best way for such a framework is for it to be established through an international convention, in as much as multimodal transport is mainly concerned with international carriage. The particular issues enumerated above illustrate how uncoordinated the international scene is. Therefore, it is vital to establish binding international conventions with a mechanism to achieve uniformity of interpretation and application. However, the UN Convention on the subject, though duly signed and concluded, failed to be ratified to come into effect and is very unlikely to come into effect in the near future (Pampouki 2000, p. 33). Existing unimodal conventions providing for certain combined forms of transport, cannot apply by extensive interpretation or by analogy to other cases than those provided therein.

A national statute could certainly establish a uniform liability system for the multimodal transport operator; such a statute, however, will not change the mandatory framework of unimodal transport international conventions. Additionally, such a statute could only have a limited local application.

Finally, contracting parties will -by adopting a set of rules (i.e. UNCTAD/ICC or some others) or a standard bill of lading- be unable to provide a solution oriented towards a uniform liability of the MTO. A uniform liability framework, covering all stages of carriage, could only be established by law, more specifically by an international convention. Multimodal transport is commonplace today and constitutes a major legal problem that is under discussion globally. Consequently, it merits any efforts made for drawing up a new international convention, which in the light of new views and thoughts could lead to more successful results (Pampouki 2000, p. 34).

In the absence of an applicable mandatory international convention, the parties to a combined transport contract are entitled to negotiate their own terms and can impose on the carrier a uniform liability throughout the period of transit. Even if an international convention is applicable to one leg, the parties may still agree on a uniform liability throughout the remainder of the transit.

In the majority of cases, however, the extent of the carrier's liability will be dependent on locating the place where the damage or loss occurred (Wilson 2008, p. 247). Although the network liability system changes the law according to the mode of transportation and the location of the damage, still the unified liability appears the fairest. This is also the position of the United States (Hooper 2004, p. 9[239]). Uniformity could be achieved if the network exception is narrowed as much as possible. In particular, the United States supports a door-to-door framework on a uniform liability basis as between the contracting parties, subject to a limited network exception.

[239] See also *HOOPER CD* (December 1989) "Admiralty Law Institute Symposium: Terminal Operations and Multimodalism, Legal Relationships: Terminal Owners, Operators, and Users," 64, Tulane Law Review, p. 595.

iv) Ambiguities about Mixed Contracts

The mixed contracts are a common feature in the liner trade. However, their legal character is not always well understood and, in practice, many create ambiguities. They may refer to "connecting carrier" arrangements. Such arrangements may apply where a carrier is able to carry out only part of the voyage with a vessel under its own control and has agreed with the shipper to take care that the other part(s) are carried out by other carrier(s) with whom it may have an arrangement to do so. Occasionally, the connecting carrier may be an inland carrier[240]. If a transport document or an electronic record is issued, the mixed character must be reflected in such document or record, so as to protect third parties relying on the contents of such documents or records.

"Multimodal transport" means the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery. It differs from the concept "mixed contracts" or "door-to-door" in that it requires the presence of a single contract for multimodal transportation, one document and one responsible party for the entire transit, while the latter does not necessarily do so as it may be organised with various carriers, or indeed as the parties may wish. On the other hand, "intermodal transport" has been defined as the movement of goods in one and the same loading unit or road vehicle, which uses successively two or more modes of transport without handling the goods themselves in changing modes.

Agreeing with Alcantara (2002, p. 401), we can only and properly refer to transport as "multimodal international transport" when it corresponds to the legal definition stated

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[240] "The Rotterdam Rules" does not expressly provide for mixed contracts; *supra,* n. 54; *cf.* Art. 4.3 CMI Draft 2001.

earlier. Usually, various expressions are used in an operational or commercial sense. This may cause confusion (Alcantara 2002, p. 401), because we are aware that most, if not all, of the multimodal arrangements are "door-to-door" but not the reverse. The expression "door-to-door" is thus opposed to "port-to-port."

"Port-to-port," as differentiated from "tackle-to-tackle" (Alcantara 2002, p. 401), refers to a sea carriage in which any minor transportation of the goods between the place of their storage within the port to the ship, and vice versa at the port of destination, effected by land carriage is regarded as supplementary to the sea carriage, usually undertaken by the sea carrier. As a result, confusion may arise if we mix up concepts in order to treat a "door-to-door" transportation by different modes, but in which one must be a sea carriage, while "door-to-door" also fits with land transportation only without involving a sea leg. This will all be the more so, as such a marine segment is to be the axis of the others and a single contract and documents are to be used (Alcantara 2002, p. 401).

Such a model of two or more carriages, though supplementary to the sea carriage, will certainly be "door-to-door" and, insofar as it is arranged with one carrier, in one contract and under one document it will also be "multimodal;" but other forms of multimodalism excluding the sea carriage could not be assimilated to that particular structure (Alcantara 2002, p. 401)[241].

In fact, the proposal for application of the rules contained in the Draft Instrument is a maritime transport effecting door-to-door application with the supply of other non-marine modes of carriage. To the extent that it will be intended to use ("partly by sea") more than one mode, the entire transportation should be deemed to be multimodal, though any other choice of combined transport excluding sea carriage would not fit within the scope of the

[241] *Cf. Jindal Iron & Steel Co v. Islamic Solidarity Co (The Jordan II)* [2004] UKHL 49.

new framework. The latter, therefore, will have to be understood only as a limited type of multimodalism (Alcantara 2002, p. 403).

Under Art. 5 of the UNCITRAL Draft 2008, the transits from the port of discharge to the final place of delivery will normally be performed by road or railway or indeed, by road and air or inland waterways, so rendering the whole service to be multimodal and door-to-door (Carr 2010, p. 306). It is important to note that the carrier's period of responsibility extends from receipt to delivery of the goods, thus serving the purposes of uniform liability for the entire transportation. This, of course, is in principle only, because the uniform rule has not been thoroughly pursued.

Under Art. 26 of the UNCITRAL Draft 2008, for example, in respect of transportation preceding or subsequent to sea carriage, gives way to the application of other mandatory international Conventions in relation to other modes of transport. The Draft 2008 will then be displaced where a Convention which constitutes mandatory law for inland (or other) carriage is applicable to the inland (or other) leg of a contract for carriage by sea, and it is clear that the loss in question occurred solely in the course of the inland (or other) carriage (Carr 2010, p. 406). According to this though, this Draft then, known as *"The Rotterdam Rules,"* has nothing more to add in the current situation, since the UNCITRAL/ICC Rules play a similar role.

From a multimodalist[242] perspective, it is doubtful that the future UNCITRAL Convention will achieve the desired uniformity in the field of multimodal transport liability. Therefore, it might be worth following the route of "the pyramid method."[243]

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[242] As Alcantara is also using the term "multimodalism," "multimodalist," at p. 399.
[243] As *per the Pyramid Method,* see Conclusion, B (b) (iii).

D.) THE SYSTEMS IN PRACTICE

The international solutions proposed for the liability issues of multimodal transport just outlined adopt different approaches and therefore can result in significantly different distributions of risk and responsibility for the same incident. In practice, the UNCTAD/ ICC Rules 1992 were accepted as the appropriate standard for the model combined transport bills of lading designed by such industry associations as BIMCO and FIATA (Kindred/ Brooks 1998, p. 7). They are not voluntary but mandatory and certainly, that may have its advantages and drawbacks, since it depends on whether the parties agree to apply these Rules or not. The advantage is that they are able to reflect a longer experience of multimodalism and to draw on the precedents provided by the previous separate models of ICC and UNCTAD.

The vital matter in commercial practice is whether the Multimodal Rules desired by the operator, the shipper or the consignee are incorporated into the transport documents used. Finally, the Rules applicable will depend on the type of document requested by the cargo owner, if any, and the carrier's or TPL's available documents (Kindred 1998, p. 24). In practice, few cargo interests examine the fine print of contracts arranged on their behalf (Kindred/Brooks 1998, p. 24) but accept the documents provided as standard for the service. There is commercial pressure on the operator to issue a transport contract matching the terms of the letter of credit; otherwise, shippers tend to accept the third party's or operator's transport document as issued without considering that they may negotiate the use of an alternate document or clause(s). This tendency works in favour of multimodal operators minimizing the risks they face (Kindred/Brooks 1998, pp. 24-25).

Furthermore, according to Faber (1997, p. 25) as far as the distinction between the freight forwarder as an agent and the freight forwarder as a carrier is concerned, the problems are basically the same. This is irrespective of whether the transport is performed by a single mode of transit (so-called "unimodal transport"), or by a combination of different modes in the same contract (so-called "combined" or "multimodal" transport). However, the rules applicable to the different modes of transport differ with respect to basis as well as limitation of liability, since every transport mode is run by its own legal regime and that may create controversy in legal disputes, as demonstrated in *Royal § Sun Alliance Insurance plc v. MK Digital FZE (Cyprus) Ltd.* [2006] EWCA Civ 629, [2006] 2 All ER (Comm) 145.

Thus, if separate contracts are made for each segment of transport from place of dispatch to the final destination (so-called "segmented" transport) different rules apply for each segment depending upon the mode of transport. This is totally unacceptable for all parties concerned, since it creates confusion, and more importantly, it allows for the possibility of avoiding liability. This is why we must attain the uniformity of laws. For example, in *The Gabrielle Wehr*, (decision of the Hoge Raad of June 29, 1990, Nederlandse Jurisprudentie (NJ) 1992, p. 106, translated in European Transport Law (ETL) 1990, p. 589) the Dutch Supreme Court applied the CMR to so-called "RoRo"-transport (Roll on-Roll off), where a truck was loaded onto a ferry from Goteborg (Sweden) to Rotterdam (the Netherlands). As the carriage by sea of the goods in the truck took place under a waybill and not under a bill of lading, neither the Hague Rules, nor the Hague-Visby Rules were of direct application, something which can create ambiguity in the world of maritime space.

If, in contrast, one contract is made for a transport engaging at least two different modes of transport, then it is necessary to resolve whether or not the liability of such a

carrier (the so-called "multimodal transport operator", MTO) should be segmented so that his liability would depend upon the identification of the particular mode of transport where the loss or damage occurred (the so-called "network" liability system) (Faber 1997, p. 26).

Suffice to say that the "network" liability system has been preferred in the current rules and conditions applicable to multimodal transport. Lord *Diplock*[244] remarked that in practice nearly all claims are settled without any recourse to the network system, particularly as recourse to it has no practical effect on the liability of the Multimodal Transport Operator (Alcantara 2002, p. 404). Furthermore, in some cases private settlement may take place and the case not reach the courts at all[245]. This will certainly at least sometimes prove to be beneficial to the parties, since the pure network principle poses certain difficulties for the parties to anticipate and by which to assess their respective risk exposures.

The most important matter for Containerisation is to decide what we actually need: should this be an international convention to solve multimodal matters; or something more practical, like the domestic law of the Destination State, where the damage was actually discovered or the transhipment port. Moreover, it is open to debate whether the desired international convention would have mandatory scope or would be the same as the one with the Rules. Since no international multimodal convention is in force for Containerisation yet, one way to judge relevant cases is the incorporation of the UNCTAD/ICC Rules 1992 in the contract, which then may govern combined transport.

Furthermore, it is worth examining whether or not an extension of the Hague/Visby Rules would be able to govern multimodal transport internationally and whether this may

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[244] In *The Genoa Seminar on Combined Transport 1974*, quoted by Alcantara 2002, p. 404.
[245] As interviewed by *NAZIRIS VK*, ship-agent, in Greece, on 10/10/2003.

be the answer to the problem of uniformity. Certainly, achieving uniformity is essential in this undertaking, since that would solve issues at a global level and would harmonise the applicable laws. The level of mandatory scope that may be rendered would enhance the powers of a fresh convention. A flexible way of satisfying modern trade needs to be sought.

Additionally, converting a unimodal carrier into an MTO may mean escaping from mandatory rules: hence, the existence of Rule 13 of the UNCTAD/ICC Rules. Moreover, such a "conversion" would bring certain consequences. We need MTOs in Containerisation and we should harmonise the UNCTAD/ICC Rules, so that they comply with the domestic legislation and with their applicability in different regions.

As there is also intermodal transport, which is integrated transportation of goods over both sea and land (Mahoney 1985, p. 7)[246], this kind of transport may require a separate convention or legal framework. Containerisation has brought many problems as it starts developing rapidly without limits yet set. It is the most efficient kind of trade that has existed so far and therefore its legal problems should be settled accordingly. Perhaps, in the future, a super multimodal harmonising legal framework will finally be devised and render this kind of trade the most powerful of all. Although disputes mainly arise in the sea leg, this does not mean that the road and train legs do not also play their part in this undertaking.

According to the Executive Summary, the UNCTAD/ICC Model Rules, which are based on the network principle, have filled a gap in intermodal transport liability left by the failure of the 1980 UN Convention on Multimodal Transportation of Goods to attract

[246] *Cf. Sea-Land Service, Inc. v. Richard J. Danzig, Secretary of Navy* 211 F. 3d 1373; also, *Alasca Barge* 373 F. 2d.

sufficient support and consequently failed to enter into force[247]. The result is remaining uncertainty in the terms of liability and the legal position generally. Harmonisation of conditions, such as uniform liability limit for all modes to facilitate intermodal transport, could yield massive savings in costs to intermodal transport of up to 50M Euro per annum[248], and this is only one of several benefits to be derived from a harmonising international convention.

The legal system of Thailand deserves consideration. Here, there is no specific legal framework focusing on multimodal transport. The general provisions of the Thai Civil and Commercial Law ("CCC") apply when goods are damaged during inland transportation, irrespective of the mode, road or rail. In contrast, when goods are damaged in the sea-leg, the COGSA applies. In the near future, Thailand will be enacting legislation for multimodal transport. Thailand and the rest of Asian countries have formulated the Asian Framework Agreement on Multimodal Transport as the model law for application among Asian countries. The forthcoming legislation will thus be on line with the Asian Framework Agreement[249].

According to the proposed legislation of Thailand, the consignee is required to give written notice of loss or damage to the goods to the multimodal transport operator when the

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[247] See European Commission, "The Economic Impact of Carrier Liability on Intermodal Freight Transport: Executive Summary 5," available at *http://europa.eu.int/comm/transport/intermodality/highlights/doc/executive_summary.pdf* (22nd January 2001).

[248] The text of Draft COGSA is available at *http://www.mcgill.ca/maritimelaw/maritime-admiralty/cogsa*.

[249] Refer for more information to *Pimvimol (June) Vipamaneerut* (January 2001) Multimodal Transport Bill, Tilleke & Gibbins International Ltd. as in *http://www.tillekeandgibbing.com/publications/pdf/multimodal_transport.pdf* (25/04/2005, at 21:30).

goods are delivered to him. Without such notice, the goods so delivered will be deemed to be the proper and exact goods as described in the multimodal transport document.

However, where the loss/damage is not apparent, the consignee has six (consecutive) days to give notice in writing, or else the same presumption of properly delivered goods will apply. These provisions are equally applicable to actions in contract and tort, and to claims made against the multimodal transport operator or his/her servant, agent or other person whose services were used by the multimodal transport operator to perform the contract. So, this could be adopted in whole in the future international instrument that should be drafted to govern international multimodal transportation.

Finally, it should be mentioned that,[250] containerised cargo now accounts for a very high percentage of cargo movements carried on a multi-modal basis by more than one mode of transport under a single contract. Current commercial as well as insurance practice and existing maritime conventions are generally structured to provide for this traditional type of transport. Certainly, we should move towards a "single contract" method, which would promote simplicity and clarity. Furthermore, this "single contract" method stands for multimodalism on a door-to-door basis (Wilson 2008, p. 246).

Accordingly, the Multimodal Transport Operator would remain solely responsible to the cargo owner for the safety of the goods during transit, having negotiated separate contracts for the different legs with individual unimodal carriers. The essence of such an arrangement is that the cargo owner would not be in contractual relations with individual "actual carriers" and his rights and liabilities would depend solely on the terms of the combined transport contract.

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[250] *Supra*, n. 3, at p. 388.

Therefore, many modern shipping documents are now drafted in a form in which they can be used interchangeably for either combined transport, through transport or on a port-to-port basis, and include terms appropriate for each contingency, like P&O Ned Lloyd bill, Conline bill, ACL bill[251].

Any attempt to solve the problem by agreement is similarly restricted, since contractual provisions are liable to be overruled where a unimodal convention is mandatory on a particular leg and that is why it is not possible to govern multimodalism with merely private contracts, as economists argue should be the case[252]. This problem can, however, be overstated since, in general, unimodal conventions are only applicable where the leg in question is "international," i.e. the points of departure and arrival are located in different states.

In practice this means that, outside Europe, conventions other than Hague or Hague/Visby Rules are rarely relevant. The network system, expressed in UNIDROIT drafts has tried to bring the carrier's liability close to the liability of the sub-carrier, so that the carrier's recourse action against the sub-carriers can be ensured. Thus, the established liability system retains the multiplicity of unimodal liability frameworks: moreover, it avoids unjust treatment of the carrier, in cases where his liability is larger in amount than the liability of the sub-carriers or his servant and agents.

However, one should expect an international convention of multimodal transport to be more than a simple reproduction and juxtaposition of the laws governing the modes of transport and the constitutive parts of the contract. Additionally, the complexity and lack of

[251] Appendix 7.
[252] *Supra*, n. 229.

predictability of their provisions have been considered as weaknesses of the UNIDROIT drafts (Pampouki 2000, pp. 36-37).

According to Pampouki (2000, p. 63), the main problem is that uniformity has not been achieved at an international level and therefore the important issue of a global and mandatory application of an international convention governing multimodal transport should be discussed. An important issue which arises at this point is whether the domestic rules can or should be extended in order to render solutions to the international commercial forum and whether the desirable uniformity may be achieved. One good idea would be to use the limits of liability provided by CMR, given that they are widely accepted (Pampouki 2003, p. 64).

The different ways of interpreting law in several States is, of course, also an obstacle to achieving the desirable uniformity. For example, the US Shipping Act of 1984 by the Federal Maritime Commission (now replaced by the Shipping Act of 1998) defines "through transportation" as "continuous transportation between origin and destination for which a through rate is assessed and which is offered or performed by one or more carriers, at least one of which is a common carrier, between a United States point or port and a foreign point or port." The regulation issued by the Federal Maritime Commission[253] in 1984 requires in part that the multimodal tariff must include: "a contract of affreightment clearly setting forth the responsibility for through transportation which is consistent with the holding out provided by the application of the rates and conditions of the tariff."

Some commentators have suggested that this regulation requires the carrier, issuing the bill of lading, to accept responsibility for the goods throughout the entire period of

[253] See 2nd Chapter; also *http://www.fmc.gov/about/StatutesAndRules.asp* (10th March 2009, at 07:00).

transportation, thus preventing the latter from confining its liability to the portion of the transportation that it performs under a network system[254].

Naturally, it would lead to uniformity[255] if this method were followed. It follows directly that all the harm and cost is caused by the absence of an integrated international convention. On defining uniformity, it should be added that any desirable multimodal legal framework should contain clear and simple rules that will create certainty in trade but above all, would comprise of legislation that is fair and equitable to all parties.

On seeking uniformity, Transport Canada[256] suggests that the "Hague/Visby Rules be retained and the government continue to make efforts, in consultation with industry and in co-operation with like-minded countries, towards the development of practical options for a new international framework of liability for the carriage of goods by sea that would provide a viable alternative to the Hague/Visby Rules."

Finally, if the entire multimodal system is to operate under one set of laws, the terminal's liability standard should not change with the particular role it is performing at any given moment; rather, it should be as close as possible to the standards of other participants in the contract of carriage. All parties to the multimodal system should be entitled to contract to carry cargo under one contract governed by one set of laws. The uniformity[257] and predictability that would flow from such a system would encourage quicker settlements and more efficient insurance placements.

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[254] *Supra,* n. 226, p. 284.
[255] See *BURRELL LL* (1992) "Current Problems in Maritime Uniformity," 5, USF Maritime Law Journal, p. 67.
[256] See *http://www.cmla.org/papers/2004/TransportReport_Oct.4,%202004.pdf* (29/06/2007, at 14:30).
[257] *Supra,* n. 226.

But, we should not forget Peru's position: "a consensus is almost a utopia," when it expressed concern that the CMI Draft Instrument's door-to-door provision might be too ambitious, thereby precluding its acceptance[258].

[258] *Supra,* n. 235, at p. 106.

E.) THE APPLICABILITY OF STRICT LIABILITY IN MULTIMODAL TRANSPORT

Furthermore, liability problems may emerge when successive carriers become involved and here the chaos begins, especially when attempting to attach responsibility for misfortunes. This should be analysed in the new multimodal liability framework, where the immunities and resources of the Multimodal Transport Operators against the Claimants, would be assessed, as well as whether there are any exceptions to the fault-based rule. A definition of strict and fault-based liability is relevant at this point and, more specifically, their applicability to any future multimodal transport law should be sought and adopted for the resolution of liability. Meanwhile, it is important to explore and compare the mandatory standard of care the MTOs should have in situations where their liability is fault-based, as well as to examine what different States rule on this issue.

On the question of establishing the basis of liability, an initial choice could be between holding the multimodal operator strictly liable[259] for all loss and damage to goods while in its possession (however caused), or liable only for preventable loss and damage resulting from lack of care and attention (fault-based liability)[260]. In principle, the liability of the carrier, according to both the Hamburg Rules (Art. 5.1) and the Multimodal Transport Convention (Art. 16) follows the principle of presumed fault. For example, the carrier must disprove negligence on his part. Actually, as expressed in these Conventions, he must prove "that he, his servants or agents took all measures that could reasonably be required to prevent the occurrence and its consequences" (MTC Art. 16).

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[259] See *DE WIT* (1995, pp. 29-30, 42).
[260] See *WILSON* (2008, pp. 269-271).

The former standard of absolute liability provides greater protection for cargo owners since the multimodal operator is made to bear all the risks. In practice, this is never the case as all rules of strict liability excuse the carrier or operator in a few uncontrollable causes of loss such as *force majeure* (Act of God), shipper's own faults, and inherent vice or defects of the goods themselves (Kindred/Brooks 1997, p. 2). Additionally, the matter as to who will bear the costs for such losses, if the MTOs escape them, should be discussed.

In contrast, the standard of fault liability allocates to the operator only those risks associated with its own actions, leaving losses that arise from others to fall on the cargo owner. Therefore, the operators will be responsible only for the consequences of any negligent acts and omissions that are committed by themselves or their employees and agents[261].

According to the FIATA *Model Rules for Freight Forwarding Services*, the freight forwarder can be liable as carrier. This followed the principles of French Law with a kind of *del credere - liability* for the freight forwarder's subcontractors (i.e. the acting carriers). This would thus determine the extent of the freight forwarder's liability vis-à-vis his client *(systeme cameleon)* and it represents the so-called "network liability."

This system enables the freight forwarders to enjoy a back-to-back position, since they can institute recourse actions against their sub-contractors on the same terms as those applied in their relation to their own customers. This occurs primarily when the loss or damage can be attributed to a particular segment of damage.

[261] See chapter 3(Da) "The Himalaya Clause."

Still, art. 6.1.1 of the FIATA *Model Rules* notes that the freight forwarders should admit liability more or less on the basis of a presumed fault or neglect, when the loss or damage can be attributed to the freight forwarders themselves.

These rules follow the *del credere- liability* system of French Law in that the freight forwarder as principal for carriage and other services is liable according to the same rules that would apply if the customers had entered into a separate contract for such service or carriage. Consequently, the mandatory or other rules and conditions relating to the service or carriage would apply (Art. 7.3 of the FIATA *Model Rules*).

However, it is pointed out that if the freight forwarders performed the service of carriage using their own facilities or means of transport, they would, of course, be free to subject the contract to their own specific conditions providing these did not depart from any compulsorily applicable framework. This could create problems since they would try to escape most of their liability. In contrast, if the freight forwarders are not engaged as carriers, their liabilities will be based on a duty to exercise due diligence and to take reasonable measures in performing the services.

F.) THE TRUE CONSTRUCTION OF THE CONTRACT

Constructing container law gets even more complicated when three or more separate parties are involved, and where the location and cause of damage must be determined which in turns leads to the problem of which is the true construction of the contract and how it could be interpreted to determine which participant in the carriage might enjoy the protection offered by which contract of carriage.

On calculating liability, the courts will meet the relevant problem of interpreting the true construction of the contract. The United States Court of Appeals used the common sense approach in *Stolt Tank Containers, Inc. v. Evergreen Marine Corporation, et al,* 962 F.2d 276, 1992 AMC 2015 (2nd Cir. 1992). In this case, *Stolt Tank Containers* leased ocean tank containers to Monsanto International. Monsanto entered a Bill of Lading contract with Evergreen to carry the containers filled with chemicals. Some containers were damaged while in Evergreen's custody. The Second Circuit upheld the *Evergreen* BL limitation against *Stolt Tank Containers* even though *Stolt Tank Containers* was not privy to the Evergreen BL. The Second Circuit upheld the district court's reasoning that *Stolt Tank Containers* had "at least constructive notice of the liability limitations, and was bound both by COGSA and the BL," since the five containers were to be shipped by sea from a United States port to Japan aboard Evergreen vessels.

Therefore, the true construction of the contract should be considered in the drafting of the new law that will govern containerisation and generally what is hidden beneath. For example, according to the case above "constructive notice of the liability limitations" bound *Stolt Tank Containers,* which was essential for the calculation of the liability.

G.) THE UN MULTIMODAL CONVENTION

Further work towards an international convention on multimodal transport took place within UNCTAD and resulted in the 1980 United Nations Convention on International Transport of Goods. This basically followed the principle of a "uniform" liability, but with the important exception that it was possible to depart from the monetary limitation of the Multimodal Transport Convention whenever the loss or damage could be localised to a particular mode of transport where, according to the applicable mandatory law, a higher limitation amount would apply (Art. 19)[262].

By the parties' agreement, the limits of liability may be increased (art. 18, par. 6) but not reduced, due to the mandatory character of the regulations operating in favour of the shipper (art. 3). When loss of or damage to the goods occurred in one particular part of the multimodal transport, in respect of which an international convention is applicable or a mandatory national law provides a higher limit of liability, the limit of liability would follow from the application of art. 18, par. 1-3. Under this latter provision, the limit of multimodal transport operator's liability for such loss or damage is to be determined by reference to the provisions of such convention or by mandatory national law (art. 19).

Here, a modified network system is implied in relation to the area of limitation of liability. As already noted above multimodal liability limits apply whenever damage can be localised to a particular mode of the transport. This regulation, however, does not cover the entire framework[263] and therefore, it may not be adequate to render fair solutions within this field.

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[262] See *DE WIT* (1995, pp. 221-222 & 514-515); Appendix 8.
[263] See *PAMPOUKI* (2000, pp. 36-42); refer also to UNCTAD (January 2003) "Multimodal Transport: The Feasibility of an International Legal Instrument," as in *http://www.unctad.org/en/docs/sdtetlb20031_en.pdf* (27 November 2004, at 22:55), pp. 4-7.

Furthermore, it should be noted that the facts which led to the negotiation of the Multimodal Convention are still applicable today; cargoes continue to move in containers on a point-to-point basis, passing through several liability frameworks while on their journey from shipper to consignee. While documentation accompanying multimodal shipments is not yet uniform, great strides have been made through commercial channels and practices, most notably the International Chamber of Commerce and its Uniform Rules for a Combined Transport Document. For Coffey, however[264], the problems that the Convention sought to address either were "largely resolved by 1980 or never existed at all". But they did exist indeed[265]. I would have to say that I disagree, especially taking account the advent of Containerisation. The problems became more significant as technology developed.

Many of the principles of the Multimodal Convention are applied in practice[266] despite the fact that it has not been ratified. Obviously, certain of its values have been indirectly accepted in practice.

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[264] *As per Coffey, supra*, n. 224, at p. 574-578.
[265] *Cf. UNCTAD* (13/01/2003) "Multimodal Transport: The Feasibility of an International Legal Instrument," as in *http://www.unctad.org/en/docs/sdtetlb20031_en.pdf*.
[266] See analysis *SCHOENBAUM TJ & others* (Current through the 2007 Update) "Chapter 10, Carriages of Goods by Sea, A. The Business of Shipping," 10(4), Admiralty & Maritime Law.

H.) THE MERCOSUR[267] PARTIAL AGREEMENT FOR THE FACILITATION OF MULTIMODAL TRANSPORT OF GOODS

This Agreement aims to facilitate multimodal transport between member States. The member States of Mercosur to which the Agreement is to apply are Brazil, Argentina, Paraguay and Uruguay. The Agreement applies to contracts for multimodal transport of goods and the provisions of this Agreement will only apply if specific reference to the Agreement is made in the multimodal contract. The liability of the Multimodal Transport Operator -in respect of loss following delay in delivery, consequential loss or damage other than loss or damage to the goods- is limited to an amount not exceeding the equivalent of the freight under the multimodal contract (Art. 16).

Accordingly, under Art. 18, the MTO will lose the right to limit liability (Art. 18) if it is proved that the loss, damage or delay resulted from his personal act or omission committed with malice (intent to cause such loss or damage or reckless conduct with knowledge that such loss, damage or delay would probably result) or gross fault (negligence that is marked by conduct that presents an unreasonably high degree of risk to others and by a failure to exercise even the slightest standard of care).

[267] The South American Common Market.

I.) CONCLUSION

We need multimodal law broad enough in scope to govern the rights and liabilities of all parties involved in multimodal carriage, including inland carriers and their contractors. To guarantee predictability and minimize litigation costs, simple provisions on liability and limitation (possibly following the form of strict liability framework adopted in the CMR Convention), together with jurisdiction, dispute resolution and combined transport provisions need to be adopted. Until then, the industry can continue to expect ad hoc decisions by the courts, such as the *Kirby* decision, to shape the rules for multimodal transport.

Particularly, in view of the defences available to the carrier according to the rules for carriage of goods by sea (error in the navigation and management of the vessel as well as fire) considerable difficulties are encountered when efforts are made to establish a "uniform" liability for the multimodal transport operator (Faber 1997, p. 27).

Finally, only time will tell what fate the most recent *"Rotterdam Rules"* will have.

CONCLUSION

The evolution of containerisation has affected the liability of the carriers and it is to question whether we need new law. On replying it, an issue of major gravity is to be debated further, such as whether drafting a new legal regime to govern multimodal transport is feasible or not. As shown, containerisation brought a revolution in international trade but there are still developments to take place in the future. The container may be defined as the "metal package" one day meanwhile debate may occur on what the "metal package" limitation would be.

Custom comes forth to complete the current legislation (Chapter III). Therefore, we need a legal regime that will govern on deck cargo issues. To pure logic, undeclared deck cargo should not constitute an issue anymore, since marine technology brought a change in the maritime legal world concerning undeclared deck cargo on board of containerships. It is to be debated further in which part of the modern containerships cargo is to be stowed. Accordingly, the container is an essential modern metal portable accessory of the ship but not a hold.

Additionally, the future legal regime will read as to how and under what type of containers the goods will be transported. If the cargo acquires special treatment, it needs to be stated so, early in advance. Particularly, the multimodal law that might be developed should classify goods, temperatures and type of containers in order to govern adequately without gaps containerisation and multimodal transportation.

Moreover, it is to be researched whether the "Himalaya" clause is to be extended to the stevedores meddling with containerisation and what the role of the modern stevedores in the future is meant to be. Similarly, the issue with INCOTERMS is debated as such. We need new law, indeed. But, do we need new INCOTERMS, as well?

Achieving legal uniformity is the result of the future new container law but certain factors might hinder it. The current method of dealing with container legal cases under the multimodal liability systems is solving partially the problems.

On the other hand, it is the most realistic way nowadays of dealing with them. Global advances will be taking place in multimodal transportation and the technological part of it, but legally we are pacing slowly. It is to be debated, whether the "pyramid method" as discussed below can be a way to achieving uniformity under the ideal future container legal regime that will be shaped to conquer all the current ones, will be under a mandatory scope and will put an end to the multimodal mayhem.

Additionally, the most recent *"Rotterdam Rules,"* an UNCITRAL convention, (Baughen 2009, p. 151) does not adequately cover the field of multimodal transport. A more appropriate solution would be an international instrument that involves all legs equally and at an unlimited level to satisfy multimodal needs.

A. CURRENT DEVELOPMENTS IN CONTAINER TRANSPORT

a. Containerisation has Limits

Although cheap shipping, fuelled by containerisation is remarking the world, and the shipping container made the world smaller and the world economy bigger[268], still, the Post-Panamax Containerships are "striving" to cross the Panama Canal, since these ships cannot fit anymore there. Therefore, Containerisation has limits in all the aspects of it. Initially, the Panama Canal problem and, secondly, the only document that may render legal temporary solutions in relevant cases, which currently exists is the Multimodal Transport Document (MTD) which entails the Multimodal Transport Rules. Therefore, our "Current Limited Legislation" status in this field indicates the limits of Containerisation and it is to be debated in the future how we will shape the multimodal law.

Lately, the Panama Canal is asking funds from Europe to expand its width and it is to wonder whether the fiscal life of Panama Canal will ever be the same again.

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[268] See also *Raine G.* (Sunday, 5th February 2006) "A Sea Change in Shipping; 50 years ago, Containerships altered the World," Section J-1, San Francisco Chronicle, pp. 12-16; *Rybczynski W.* (10th August 2006) "Shipping News," 53 (13), New York Review of Books, pp. 1-10; *Koning H.* (5th October 2006), "All Aboard," 53 (15), New York Review of Books, p 11; *Levinson M.* (2006) The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger, Princeton University Press; *Cudahy B.J.* (2006) Box Boats: How Container Ships Changed the World, Fordham University Press; *McPhee J.* (2006) Uncommon Carriers, Farrar, Straus and Giroux; *Donovan A./ Bonney J.* (2006) The Box that Changed the World; Fifty Years of Container Shipping, Commonwealth Business Media.

b. The Social Implications of Containerisation: Labour Problems.

Developing countries confront problems on containerisation like lack of money and unsuitable infrastructure. Many workers will be laid off their jobs, resulting in many serious implications. It remains an important factor the effect of the invalidation of Container Rules on future negotiations involving automation and intermodalism, not only between maritime labor and management, but in other industries as well[269].

Computerisation in modern maritime trade has developed globally and rapidly. The more applicable it is, the more likely it is for marine workers to lose their jobs. The problem is more intense particular in the developed countries in contradiction with the Developing States.

Therefore, containerisation and employment law cannot be symbiotic.

[269] See *Northeast Marine Terminal Company, Inc. et al. v. Ralph Caputo et al. International Terminal Operating Company, Inc. v. Carmelo Blundo et al.* 97 S.Ct. 2348, 432 U.S. 249. It is not in the scope of the current theses to extend in the equally important matter of the labour implications brought up with the advent of containerisation.

c. The Affect of Globalisation in Modern Shipping

Experience elsewhere suggests that it might be possible to make improvements, but there is no suitable model of terminal performance that can be reliably applied to individual sites. It was put to us that even with productivity improvements the need for new capacity is delayed rather than dismissed altogether. Given the lead times between any decisions to approve and proceed with a project, completion of it, and even with productivity improvements and lower trans-shipment, such decisions are likely to have to be made by ports and others on future capacity, in the very near future.

Furthermore, the AP Moller-Maersk Group's share of the total global cellular fleet still remains at just over 13%, reflecting little change since 2000 -a truly remarkable achievement by any standards. Its executives will argue that when you get to the top, you are an easier target to be shot at, and far more cargo is required to remain there in real terms[270]. The global alliances whose membership includes seven of the top ten carriers collectively control an estimated 39% of the world's static capacity and 66% of the static capacity controlled by the top twenty carriers. If the comparatively higher service frequency offered by the global alliances on the world's arterial routes is factored in, it is likely that the global alliances control a significantly greater proportion of total capacity for both the world and the top twenty.

Ocean carriers seek to control marine container terminal operations for strategic, economic and operational reasons[271].

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[270] Containerization International (November 2003).
[271] See *BRENNAN JR* (2002) "Brave New World?" 35 Containerization International, pp. 39-41.

The size of international trade market is constantly increasing at a time when both modern technology and transport systems are making it ever easier to move goods around the world. Banks have recognised this fact and are prepared to invest money into emerging markets, particularly, where sellers of goods are more likely to require financial assistance with start up costs, growing, purchasing and processing or mining expenses[272].

It should be possible for a universally accepted document of title to be developed (which in time could become computerised) that would provide the banks with sufficient security whilst the goods are store and thereby allow trade in emerging markets to develop. However, such a system would seem to be some way away and is likely to require a great amount of international co-operation to achieve. Only time will tell whether this idea becomes a reality. In the meantime, documenting transactions requires care and attention.

Furthermore, liberalisation and technological progress have steadily altered the way in which international production is being undertaken. At first, multinational companies adopted *simple* integration strategies where they set up foreign affiliates producing, typically with technology obtained from the parent company, the same standardised commodities that previously had been subject to cross-border trade (Hoogvelt A 1997, p. 122).

[272] *WEBSTER P /WYNNE G* (1998) "Warehouse Receipts Past, Present & Future: Part 2," 17(3) International Banking & Financial Law, pp. 27-29.

B. REMARKS

a. Filling the "Bandwidths"

Checking former or existing law and attempting to correct mistakes or fill gaps is probably one of the best actions one could take to solve definitely not all, but some of these huge problems. Certainly a question might be raised here of how we are supposed to re-examine; definitely by empirical research. By revising legislation, it seems that we are almost getting there but we never reach our goal; the legal regime which promotes uniformity. After thorough empirical research, we should solve as better as possible the problems maritime lawyers and their customers meet in practice and law or better in the practice of law for containerisation, particularly when damage cannot be located. It must be defined, finally, which of all these laws is the most appropriate for a specific international container case and what our answer would be to our clients. An adequately shaped multimodal legal regime should govern whether my advice will have "nationality." Moreover, what "nationality" that advice would be in a common insoluble multimodal case.

Furthermore, it would be necessary to distinguish between, for instance, vessel-operating MTOs (VO-MTOs) and non-vessel MTOs (NVO-MTOs). Freight forwarders would fall into the latter category, but this would not make any difference with respect to their liability (Faber 1997, p. 28). According to Japanese law ((Kozuka Souichiro, quoted by Pampouki (2000, p. 13) freight forwarders are considered as a type of multimodal transport operator and it may be wise, liability is also attributed to them. This constitutes an additional reason for synchronizing the liability of the MTO with the liability which applies to the maritime carrier as such, since otherwise the NVO-MTO would have to assume a more extended liability than would apply to a maritime carrier (Faber 1997, p. 29).

If, for instance, the defence of error in navigation and management of the ship was available to the maritime carrier in case of collisions and stranding, and the NVO-MTO lacked the possibility of invoking that defence against his customer, then the liability would ultimately have to be against his customer, then the liability would ultimately have to be born by the MTO without any possibility of recourse against the party who actually caused the loss or damage (Faber 1997, p. 28).

Therefore, the mere conversion of a maritime carrier into an MTO seems insufficient to deprive the carrier of the defences which he would have had if he had concluded a contract for an ordinary port-to-port shipment. For this reason, any switch from the traditional "network" liability system to the "uniform" liability system depends upon whether or not the Hamburg Rules successfully replace the traditional maritime liability system under the Hague and Hague-Visby Rules.

It should be born in mind that the transport industry has been considerably re-organised in latter years. Attention is not focused to the same extent on the ownership of the means of conveyance. Quite often ships are not owned by the operators at all. They can be used by shipping lines under various chartering and leasing arrangements or else by a joint organisation which charters the ships from its partners in the joint venture. From a legal view-point, when deciding carrier status and carrier liability, one should therefore focus on the question whether or not the enterprise actually operates the respective means of conveyance. But, it should be discussed, what is meant by "operation" for the purpose of distinguishing between a performing and a contracting carrier if the controlling circumstance is no longer ownership (Faber 1997, p. 29).

But, gaps are not the only ones above defined, as the biggest one is the lack of adequate multimodal legal system.

b. What We actually Need;

The Future of Multimodal/ Intermodal/ Combined Transport Liability Rule

No international multimodal convention is shaped for Containerisation. Therefore, we should be specific on what we actually need, either an international convention to solve multimodality matters or something more practical. That may be defined as either the domestic law of destination delivery where the damage was actually discovered or the transhipment port. It should also be considered whether that international convention would have a mandatory scope or it would be the same as the situation with the UNCTAD/ICC Multimodal Transport Rules 1992, taking also consideration the fact that certain countries have not legislation at all and some states not even developed containerisation in their maritime trade but they are trying to develop their imports (for example, the Less Developed Countries -LDCs).

It is important to define what we need, when replying the question whether we need new law. Perhaps, we would not need this if private contracts resolved this ambiguity, but this may not be currently valid. Besides, inside a contract, a breach can always take place and if we rely upon the private contracts only, without the co-existence of an appropriate legal regime, certainly we would not get an adequate result upon our matters.

Taking into account, all this tangled web of laws and exploring for innovations, in my view, international multimodal law should be shaped and ratified unanimously, not having to be incorporated in the contract as the situation with the UNCTAD/ICC Rules 1992. It seems we have nothing at the end, since the latter, even though incorporated to the contract, cannot work when there is a mandatory law applied; thence, the need of preparing

a multimodal legal instrument under an international mandatory scope which would reach uniformity[273].

In this project, the importance and emergency of the settlement of law in this undertaking is highlighted, particularly with the development of technology meanwhile the economic impact of it and the labour problems it can create. A solution might be to extend the domestic rules in order to render solutions to the international commercial forum. It may be possible to achieve uniformity and surely that is our main desire.

An extension of the Hague/Visby Rules to govern multimodal transport internationally might be the answer to this problem, but that means we unanimously adopt them, since we are talking about multimodalism, which entails a multitask to be performed universally. At this point exactly is where the need of uniformity "sparkles", because it is not only one country we are talking about where the maritime trade is flowing by implementing containerisation. Actually, it is more than one country involved and that acquires a mandatory uniform multimodal legal regime to govern and render fair solutions to any arising problems within this undertaking wherever in the universe. Moreover, the ideal multimodal legal regime would adequately rule upon the defences and resources of the Multimodal Transport Operators (MTOs) against the Claimants, which are significant. But, unfortunately, uniformity is only partial.

It should be taken into account what the parties agreed to and as evidenced in the bill of lading. For example, a COGSA package should be the result of some amount of preparation to facilitate transport and handling but a container can also be considered as a metal package, either there is a clear agreement to that effect or not.

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[273] Meagan Leary (Winter 2003) "Say What You Mean and Mean What You Say: Edging Towards a Workable Container Solution," 28, Tulane Maritime Law Journal, p. 191.

Unless otherwise agreed, when goods are placed in containers without being described as separately packed, they would be regarded as goods not shipped in packages. Finally, when a bill of lading is ambiguous, then, in view of the widely accepted understanding that the original purpose of the limitation was to protect shippers against carriers, the ambiguity would be resolved against the carrier.

Therefore, we need multimodal law that will govern the package problem adequately. The question whether massive metal shipping containers can be considered packages for purposes of the $500 limitation of liability under section 1304(5) has been the subject of judicial and scholarly debate for the past thirty years. A "metal package" approach may solve problems as such.

Moreover, we need new law that will govern the deck cargo on containerships. While looking on the facts in maritime practice in containerisation, one day all containers will be placed on deck by custom which will conquer and may, might become law or even by just an oral consent of the parties themselves or by something that will not even be spoken as a term, since this is the way that the modern ships are being constructed, "single-platformed." This will take place and become reality, unless we hinder technology from manufacturing these modern ships.

Finally, we need new law that will govern fairly and entail both these issues; the package problem and the deck cargo on containerships. Perhaps, having one "singular" regime to include all these major and minor issues under itself might be a unique idea.

i) BIFA & FIATA

BIFA has made a major contribution to standardising the terms of multimodal carriage by drafting the Standard Trading Conditions for use by its members. These set out the responsibilities and liabilities of the Company (defined as "a BIFA member trading under these Conditions") and the Customer (defined as "any person at whose request or on whose behalf the Company undertakes any business or provides advice, information or services") who warrants that he is either the "Owner or the authorized Agent of the Owner." BIFA has also endorsed the FIATA Bill which incorporates the UNCTAD/ICC Rules. So, we are again in a similar situation, since the Conditions need to be incorporated into the contract, and they are not mandatory. Express incorporation is the ideal method, but they may be incorporated impliedly, or otherwise.

Not having a mandatory scope does not necessarily provide for solutions to the problems arising[274].

A legal issue likely to arise is whether a negotiable multimodal bill of lading is recognised as such -i.e. as a document of title- in English law. Common law recognises only a shipped bill of lading as a document of title. However, a document of title may be created by mercantile custom at common law. It would therefore be possible for a multimodal bill of lading to be recognised as a document of title through a customary use in the trade.

The FIATA Bill and the UNCTAD/ICC Rules work within the parameters of a network framework in that there are different provisions in respect of extent of liability: i.e. whether or not the carriage involves a sea or inland waterways segment. This issue of kind

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[274] See also *CARR I* (1998) "International Multimodal Transport," 4(3), International Trade Law & Regulation, pp. 99-110.

of mode also affects the maximum amount of carrier liability. And all this is subject to the proviso that mandatory laws, be they domestic or international convention, do not enter into the picture.

Standard trade conditions are also accepted by professional associations in Belgium, France, Germany, the Netherlands and the UK[275].

However, both FIATA Bill and BIFA have brought some temporary harmonisation and certainty in the area of multimodal transport, but a mandatory scope is what we need. Unluckily, the Multimodal Convention 1980 is unlikely to be ratified by the United Kingdom, unless it decides to ratify the Hamburg Rules. If the Multimodal Convention came in force, it would create a regime of minimum liability which cannot be derogated from unless of benefit of cargo interests.

But, currently there are no plans to ratify the Hamburg Rules but the United Kingdom might be persuaded to do so if countries with shipping interests or E.U. Member States were to ratify it. The Multimodal Convention is designed to introduce a uniform liability scheme. The liability of the multimodal transport operator is therefore not dependent on establishing on which mode of transport the loss or damage occurred.

It adopts a simple scheme: the MTO is responsible for loss, damage or delay in delivery while the goods are in his control- that is, from the time he takes them in his charge to the time of delivery, and, it assumes fault based liability. And, exactly this is what we mean by "unification." The above simplicity in respect of liability does not mean that the Multimodal Convention is the perfect solution to a complex situation. It has its fair share of problems, some of which are highlighted here.

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[275] See further *GLASS D/ TODD P/ CLARKE M* (2000) Standard Form Contracts for the Carriage of Goods, London, LLP.

It adopts a complex network scheme for compensation by drawing a distinction between multimodal transport involving a sea trajectory and multimodal transport not involving a sea trajectory. So, where there is sea carriage liability the amount is limited to 920 SDRs per package or other shipping unit or 2.75 SDRs per kilogram. In the absence of a sea leg, liability is set at the maximum of 8.33 SDRs per kilogram of gross weight of goods lost or damaged.

However, where loss or damage occurs on a mode of transport where application of a mandatory national law, or international convention would provide a higher limits of liability than that set in Art. 18 of the Multimodal Convention, the MTOs liability amount will be calculated by reference in the international convention or mandatory national law.

The "limited network system" of compensation means that the issue of where the damage or loss occurred is still pertinent, if not for the basis of liability, for calculation of liability amounts. The Multimodal Convention 1980 also innocently assumes that transport documents clearly state whether the freight forwarder acts in the capacity of principal to bring him within the definition of multimodal transport operator provided in Art. 1(2). This is likely to produce expensive and time-consuming litigation to ascertain the forwarder's capacity.

But, what is more surprising for the Multimodal Convention itself is that it lacks a precise definition of international multimodal transport. Art. 1(1) defines that: "…the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country. The operations of pick up and delivery of goods carried out in the

performance of a unimodal transport contract, as defined in such contract, shall not be considered as international multimodal transport."

No attempt has been made to define mode of transport. "Is mode of transport restricted to the vehicle (e.g. train, ship), the medium (e.g. sea, road) or does it include both? The definition also excludes operations of pick-up and delivery of goods in the performance of a unimodal transport; it does not specify the acceptable extent of these operations. For instance, should a road leg/ sea leg/ road leg operation be regarded as multimodal carriage, or are the road legs simply operations of pick-up and delivery? Will the issue be decided by looking at how the road legs are described in the documents, or will factors such as the time taken to complete the different legs and calculation of charges be used to ascertain whether the particular carriage contract is a unimodal transport contract or not[276]?"

Still, regardless of these ambiguities, the Multimodal Convention if adopted will herald a new era of predictability inside this uncertainty. To some extent this has been achieved by the standard terms devised by the freight associations for use by their members. This may arguably be true of the United Kingdom and other Member States of the European Community, such as Germany and the Netherlands, but the same is not true of the developing countries that are playing an increasingly important role in the global marketplace.

Against this drawback, the Multimodal Convention introduces a regime which will protect the cargo interests by giving a minimum level of legal protection.

It is high time the United Kingdom re-examines both the Hamburg Rules 1978 and the Multimodal Convention 1980. Apathy or hostility on its part may prove, in the long run,

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[276] *Ibid.*

detrimental in economic terms. It must be remembered that any international convention is the product of compromise between different national interests and legal systems. Ambiguities in international conventions resolve themselves over time through jurisprudence and amendments. The Hague Rules and the Warsaw Convention are fine illustrations.

However, it is also high time for the USA to re-examine the Hague/Visby Rules and the SDR Protocol.

ii) The CMI Draft Instrument in Transport Law

The liability Committee (IUMI) supports the work of CMI. The CMI may be the right forum to discuss and possibly achieve harmonization in the law that governs the carriage of goods by sea. But, the CMI project will only be promising if the views of the interested commercial parties will be observed by the ISC. In discussions, at governmental level these commercial aspects are frequently neglected and legal arguments prevail. This for example has happened during the discussions on the Hamburg Rules. When economic aspects are neglected there is no guarantee that the new legal instrument will find the necessary support. In such a case, the new legal instrument will only lead to further proliferation of law.

The CMI Draft Instrument on Transport Law and its successor "The Rotterdam Rules" should apply to all contracts of carriage, including those concluded electronically. To reach this goal, the Instrument must be medium neutral as well as technology neutral. Fortunately or unfortunately, the Draft Instrument does not lay down rules for uniform and general acceptance over the burden of proof, which would then be subject to the national law in force in the place of jurisdiction, so leading to diverse and probably frustrating results.

The dividing line of application between the Draft Instrument and the mandatory Conventions cannot be left to such a complex and relative matter as is the burden of proving the location of the loss or damage to the goods, because then the exposure of risks will continue to be far from predictable (Alcantara 2002, p. 405). Therefore, the solution suggested in the CMI may be interesting, but not efficient to eliminate legal uncertainty. As it is significant to regulate a carriage by sea from door-to-door the exercise is reasonable and probably unbeatable.

However, through its variations, opting outs and limitations on both the uniform and network liability principles, the Draft Instrument does not embrace multimodal transport through any combined modes but by sea-carriage and others only, so such scope is not suitable to a project of uniformity in the international legislation on multimodal transportation (Alcantara 2002, p. 405). The area of maritime carriage may well need to be updated so as to contemplate and take up the needs of trade for door-to-door arrangements.

To that effect and extent the CMI Draft Instrument is valid and meritorious. Whether it will help to procure international uniformity for multimodal transport law, given the existing lack of a uniform liability regime in force internationally is another matter, which should be discussed[277].

It should be added that the recent draft Convention, known as the "Rotterdam Rules" is quite ambitious in that it is not confined to the familiar territory of the sea carrier's liability for cargo. But, it raises difficult issues when hypothetical road contracts for the pre-maritime leg of the carriage would, in many cases, fall outside the ambit of the Convention (Baughen 2009, p. 161). Therefore, it is difficult to achieve uniformity at this point.

Whether the new convention (*"The Rotterdam Rules"*) will avoid the fate of the Hamburg Rules remains to be seen (Baughen 2009, p. 151) and it is to be seen whether Art. 2 of "*the Rotterdam Rules*" will have its merit in the future, since uniformity is very difficult to be accomplished.

[277] *Supra*, n. 3, at p. 390.

iii) The Pyramid Method

Whilst the Hague and Hague-Visby Rules contain no provisions on jurisdiction and arbitration, provisions are contained in articles 21 and 22 of the Hamburg Rules. The CMR contains provisions on jurisdiction and arbitration in art. 31 and 33, but the Budapest Convention on the Contract for Carriage of Goods in Inland Navigation 2000 contains no such provisions[278].

Under a fault-based regime, such as found in the Hague/Hague-Visby and Hamburg Rules, the carrier whether or not fault is presumed, is generally liable if negligent, although certain regimes provide limited defences even in the event of negligence. Such regimes are intended to reflect the particular risks associated with the particular mode of transport e.g. exclusion of navigational fault under the Hague/ Hague-Visby Rules. Were a strict liability regime to be adopted, the carrier's defences in theory would be limited to establishing that the loss or damage was caused by an act wholly beyond the control of the carrier, such as an act of God or that of a third party etc. Under a strict liability regime, the level of property insurance cover required by the shipper would inevitably be less than that required under a fault based system and should therefore cost less.

The Hamburg Rules, which provide an express rule of limitation in the case of delay (Article 6(1)(b)), are not accepted internationally while in some countries the Hague Rules are adopted and others opt for the Hague-Visby Rules. Still this does not cover the current needs of trade. That is why Containerisation and the evolution of the new technology in container-ships has affected the frameworks directly or indirectly for the limitation of the liability of the carriers and since the current frameworks are not adequate

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[278] CMI Yearbook 2001, Issues of Transport Law; the CMI Draft Instrument on Transport Law pp. 532-600, at p. 535; *cf. supra,* n. 54.

to cover problems as such, the thought of creating a new legal framework might be urgent at this point. We need new law that will be accepted internationally, it will not bisect the judgements in courts, and it will be unified.

However, as the carrier would be exposed to greater liability than under a fault based system, indemnity cover would be likely to cost more and this would be more passed on to the goods owner by way of an increase in freight rate. Furthermore, payments and associated administrative and legal costs arising from incidents occurring during the adventure e.g. GA and salvage would continue to be funded at first instance by cargo interests (unless provision is made in the contract of carriage) albeit that ultimately such costs may be recovered from the carrier.

Although, fewer claims are likely to be disputed by the carrier under a strict rather than a fault based regime, with an associated reduction in administrative and legal costs, disputes would still arise. However, with either system both the prudent goods owner and the prudent carrier will need to affect appropriate property and indemnity cover. It is therefore unlikely that by adopting the one liability system rather than the other, there would be an overall saving on the total costs of the adventure. It is more likely that the shift in allocation of risk between the parties and their respective insurers would merely be accompanied by a re-stribution between them, of the costs of the adventure.

Currently, most MTOs provide a combined transport service, while shipowners, NVOCCs or freight forwarders operate under contracts providing for network liability. However, in response to commercial pressure, from powerful volume shippers who wish to utilise systems which they consider straightforward and advantageous from a liability perspective, a number of MTOs have agreed contracts which provide for uniform liability

and this is what we acquire. These MTOs require special cover to cater for liabilities, which exceed those, permitted by standard P&I cover.

In the case of approved multimodal contracts the Clubs are in effect, extending cover to meet what are strictly non-marine risks e.g. loss or damage during road carriage. The Clubs will generally provide cover to meet the commercial needs of their members.

It is likely therefore that if the shipping community wished to accept higher levels of liability, the Club system could be amended in order to accommodate them. However, as pointed out above, a shift in the allocation of risk between the parties to a contract of carriage is unlikely of itself to reduce the overall costs of the adventure. Amending the regimes that presently govern the carriage of goods is worthwhile if the goal of greater international uniformity can be achieved, with a consequent benefit to all involved in the carriage of goods by sea and land.

Consequently, amending the regimes that presently govern the carriage of goods is worthwhile if the goal of greater international uniformity can be achieved, with a consequent benefit to all involved in the carriage of goods by sea and land. But, we need to put forward the "Pyramid Method." The current tried and tested practices should not be lightly abandoned. In a paper approved by the Maritime Transport Committee of the Organization for Economic Co-operation and Development, the comment was made "the greatest opportunity for improvement does not necessarily lie in the creation of a radical, new regime, but rather to identify those elements (probably the vast majority) on which there is agreement and use these elements as the basis for future work." Therefore, taking as a basis the Hague or Hague/Visby Rules upon it, we can build the ideal multimodal legal regime and not deprive containerisation of its law.

It is true that under the multimodal muddle, three options may arise:

a) Either we leave the problem as it is,

b) We go for the middle ground solution and we change something into an extent and like that we end up with the Multimodal legal regime,

c) We erase all the existing conventions from the map and start from the very beginning to create a new legal regime.

In my opinion, we should definitely do something about this modern problem nowadays. The preferable solution is (b), which is more realistic, since solution (c) might be a "utopia." It is vital that the future Multimodal Law will not give way to other mandatory international Conventions, but that will be mandatory and "independent." Since these various legal frameworks are causing confusion, it is better that we look ahead and shape a Multimodal Law that can stand on its own and which will govern multimodalism.

For example, Hague/Visby Rules do not read either about deck cargo or delay. The recent "Rotterdam Rules" do. At this point, perhaps, we should select one of these plenty legal regimes as a base and modify them in a manner, which will be compatible with the needs of modern international multimodal transport. Superficially, it looks as if the CMI Draft is a combination of the Hamburg Rules and the Hague/Visby Rules. Still, though, it lacks the ultimate sense of modern international multimodal transport, since, for instance, the USA have not adopted neither the Hague/Visby Rules, nor the SDR Protocol. It would be advantageous if the USA adopted them. This may well be a forward step towards uniformity. When and if this will take place is unknown, since it is a matter of balancing the interests of the opposite parties.

Having a variety of laws might be beneficial in maritime trade, since there is a variety of cases and contracts as well, which may be provided via the network system. But,

the uniform approach which stands more rational may render more clarity. And, actually clarity is what we need for such a multi-task. An appropriate legal instrument would be the one that embraces multimodal transport through any combined modes, apart from just sea-carriage. Such scope is suitable to a project of uniformity in the international legislation on multimodal transportation.

Exactly, we need to synchronise the liabilities in order to achieve uniformity but it is to wonder how much feasible this is. We need a mandatory universal multimodal legal framework that will cover fairly all legs and all contracts and might rule as such; "This Convention applies exclusively to all multimodal contracts of carriage and only when goods are carried by containers." Certainly, my successor who will comment further on this should reply to my pending query how many SDRs the "metal" package limitation would be, was my "metal" package theory adopted.

Besides, perfection is achieved, not when there is nothing more to add, but when there is nothing left to take away[279].

[279] As *per Antoine de Saint Exupery*.

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APPENDICES

*

APPENDIX 1

NOMINATING FRIENDS & RELATIVES

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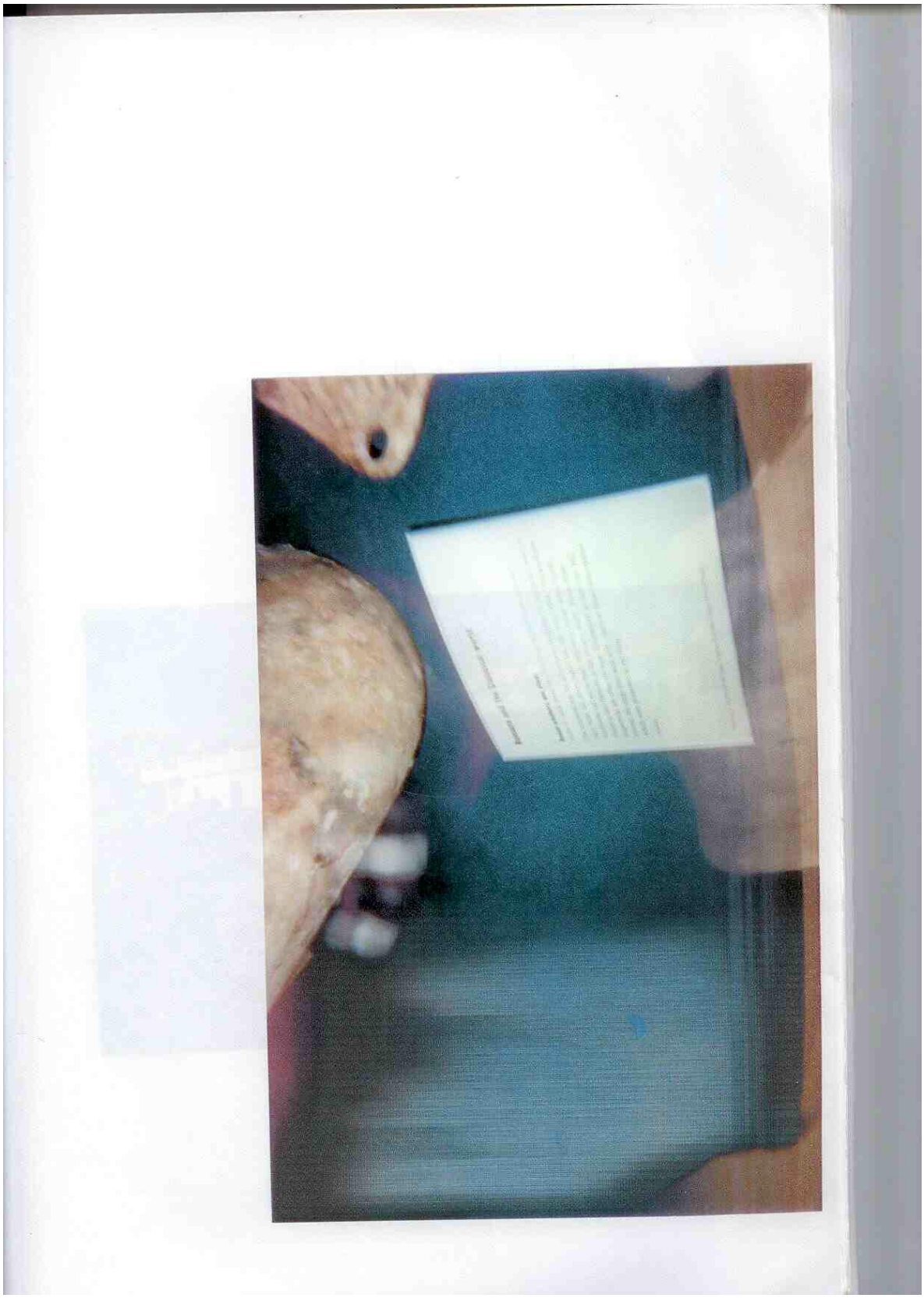
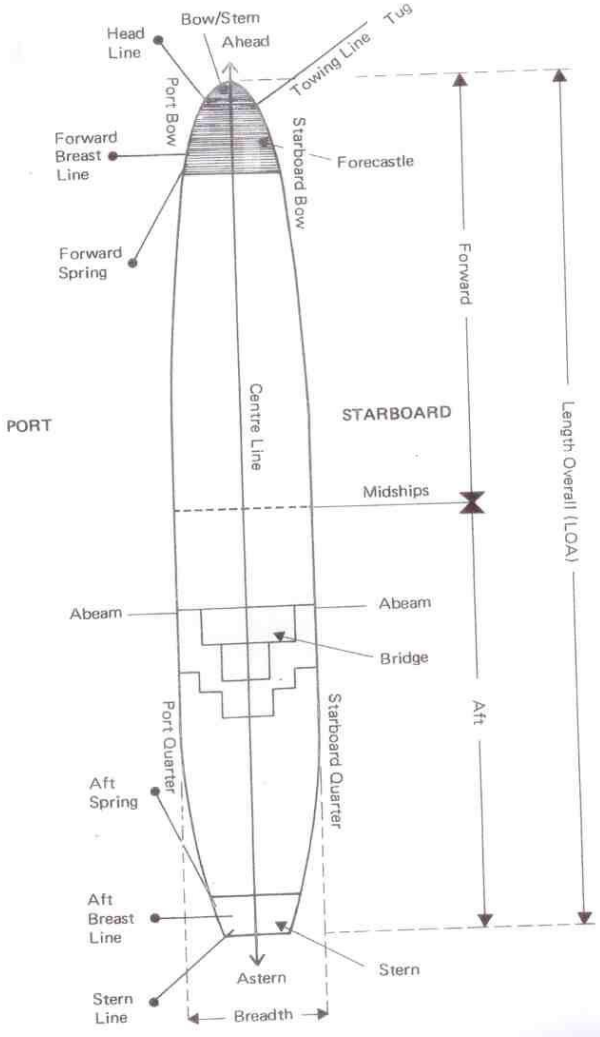
APPENDIX 2



The Future

APPENDIX 3


Head Line
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Forward Breast Line
Forecastle
Forward Spring
Forward
Length Overall (LOA)
PORT
STARBOARD
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Midships
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Abeam
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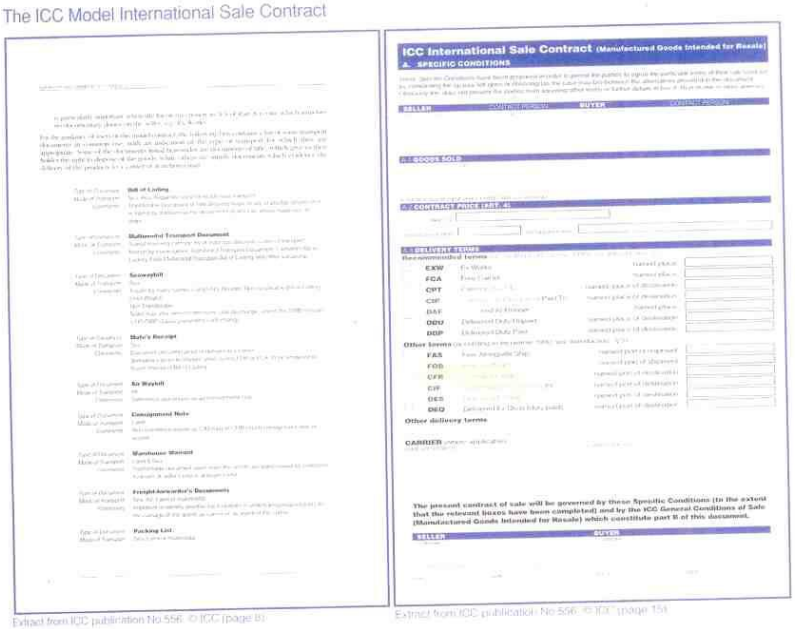
Aft Spring
Aft Breast Line
Astern
Stern
Stern Line
Breadth

Vessel 1

APPENDIX 4

The ICC Model International Sale Contract



ICC International Sale Contract (Manufactured Goods Intended for Resale)

A. SPECIFIC CONDITIONS

Extract from ICC publication No 556. © ICC (page 8)

Extract from ICC publication No 556. © ICC (page 15)

Terms and business strategies

Sellers and buyers seldom reflect on the choice of an Incoterm for every transaction. Normally, the choice is determined by their business strategy. As noted, the choice of the maritime terms in most cases depends on the type of the cargo and the buyer's intention to sell the goods in transit. Here, the choice between any of the F-terms rather than the C-terms depends on the ability of sellers and buyers to obtain the most favourable contract of carriage.

In countries where the seller has good possibilities of procuring maritime transport, or where he is induced to use a national shipping line, he may prefer to use CFR or CIF. Where the buyer for the same reasons has good possibilities to procure the transport, he is likely to insist on the choice of FAS or FOB. In the same manner, the choice between CFR and CIF depends on the seller's and the buyer's insurance arrangements and their possibilities to arrange insurance at the most competitive rate.

In principle, the same considerations apply with respect to the sale of manufactured goods. In this case, however, sellers, in order to remain competitive, frequently have to sell on extended terms using either DDU or DDP. But when a small exporter sells goods to a sizeable wholesaler or department store, these buyers may find it more advantageous to arrange for transport in order to ensure just-in-time deliveries at the most competitive price. In such cases, the buyer may prefer to use EXW or FCA.

CPT or CIP may be appropriate when the buyer prefers that the seller procure carriage (CPT), or carriage as well as insurance (CIP), but if the buyer would nevertheless accept bearing the risk of loss of or damage to the goods when in transit. It should be added

APPENDIX 5

APPENDIX 5

MULTIDOC 95[1]

MT Doc. No

Code Name: "MULTIDOC 95"

Consignor

Reference No.

Negotiable

MULTIMODAL TRANSPORT BILL OF LADING

Issued by The Baltic and International Maritime Council (BIMCO), subject to the UNCTAD/ICC Rules for Multimodal Transport Documents (ICC Publication No. 481).

Issued 1995

Consigned to order of

Notify party/address

Place of receipt

Ocean Vessel | Port of loading

Port of discharge | Place of delivery

Marks and Nos. | Quantity and description of goods | Gross weight, kg. | Measurement, m³

Particulars above declared by Consignor

Freight and charges

RECEIVED the goods in apparent good order and condition, as far as ascertained by reasonable means of checking, as specified above unless otherwise stated.

The MTO, in accordance with and to the extent of the provisions contained in this MT Bill of Lading, and with liberty to sub-contract, undertakes to perform and/or in his own name to procure performance of the multimodal transport and the delivery of the goods, including all services related thereto, from the place and time of taking the goods in charge, to the place and time of delivery ...

for the goods or delivery order.

IN WITNESS whereof MT Bill(s) of Lading ... stated below, one of which being accomplished the other(s) to be void.

Consignor's declared value of ...

subject to payment of above extra charge

Note:

The Merchant's attention is drawn to the fact that according to Clauses 10 to 12 of this MT Bill of Lading, the liability of the MTO is, in most cases, limited in respect of loss of or damage to the goods.

Freight payable at | Place and date of issue

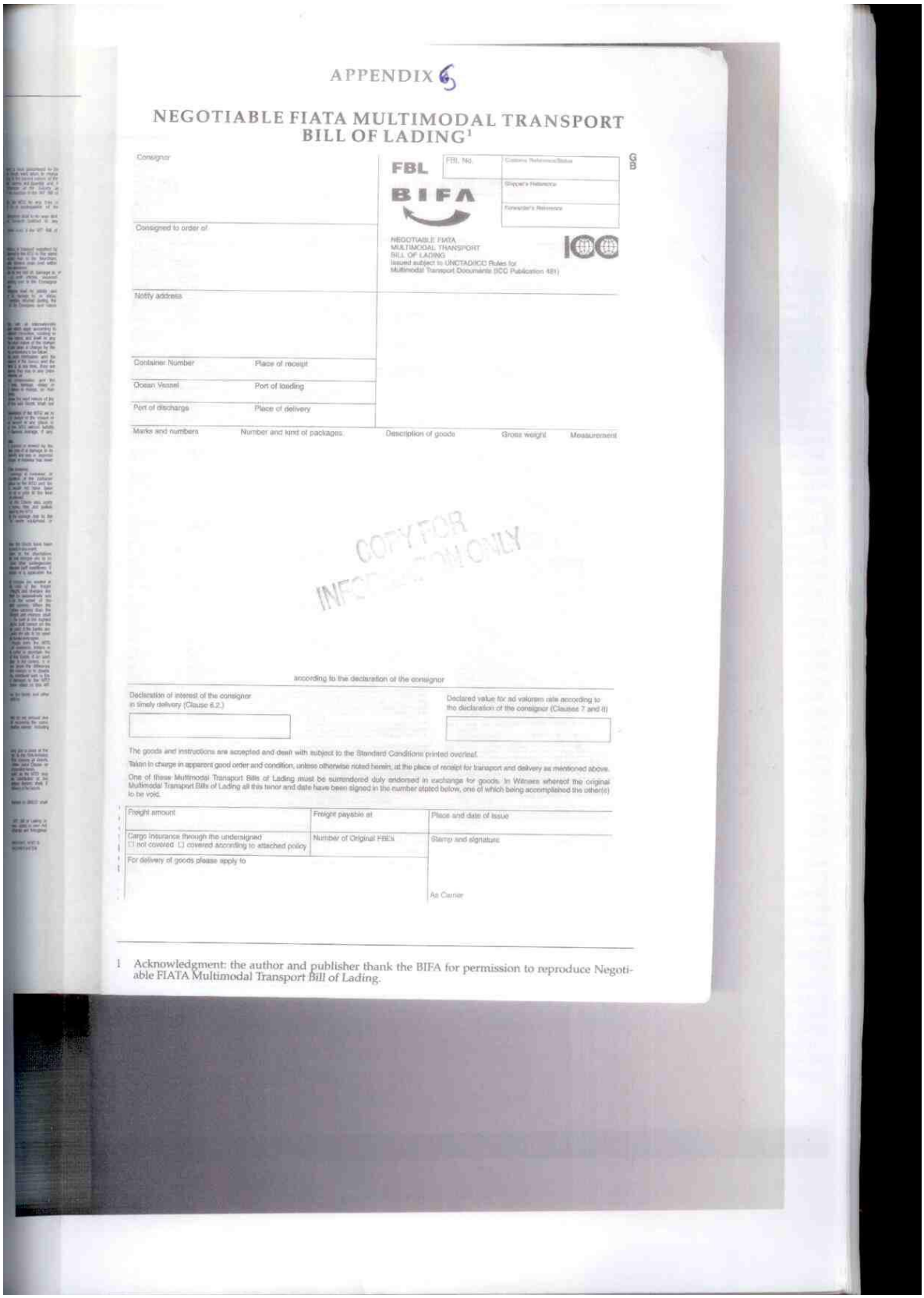
Number of original MT Bills of Lading

... signature ... MTO

p.t.o.

1 Acknowledgment: the author and publisher thank the Baltic and International Maritime Council (BIMCO) for permission to reproduce MULTIDOC 95.

MULTIMODAL TRANSPORT BILL OF LADING



APPENDIX 6

NEGOTIABLE FIATA MULTIMODAL TRANSPORT BILL OF LADING[1]

Consignor

FBL

BIFA

FBL No. | Customs Reference/Status

Shipper's Reference

Forwarder's Reference

GB

NEGOTIABLE FIATA
MULTIMODAL TRANSPORT
BILL OF LADING
Issued subject to UNCTAD/ICC Rules for
Multimodal Transport Documents (ICC Publication 481)

Consigned to order of

Notify address

Container Number	Place of receipt
Ocean Vessel	Port of loading
Port of discharge	Place of delivery

Marks and numbers	Number and kind of packages	Description of goods	Gross weight	Measurement

COPY FOR INFORMATION ONLY

according to the declaration of the consignor

Declaration of interest of the consignor in timely delivery (Clause 6.2.)

Declared value for ad valorem rate according to the declaration of the consignor (Clauses 7 and 8)

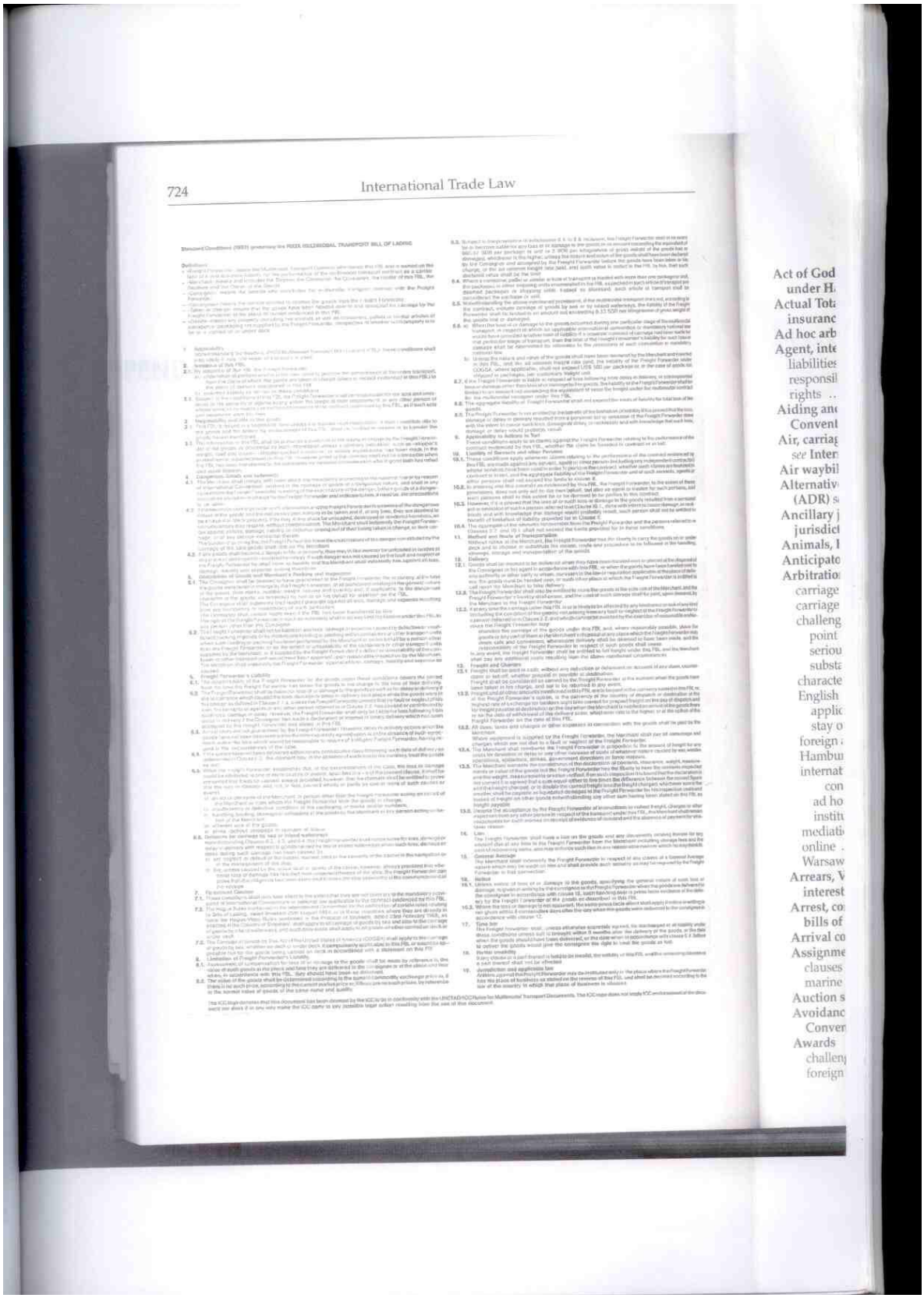
The goods and instructions are accepted and dealt with subject to the Standard Conditions printed overleaf.

Taken in charge in apparent good order and condition, unless otherwise noted herein, at the place of receipt for transport and delivery as mentioned above.

One of these Multimodal Transport Bills of Lading must be surrendered duly endorsed in exchange for goods. In Witness whereof the original Multimodal Transport Bills of Lading all this tenor and date have been signed in the number stated below, one of which being accomplished the other(s) to be void.

Freight amount	Freight payable at	Place and date of issue
Cargo Insurance through the undersigned ☐ not covered ☐ covered according to attached policy	Number of Original FBLs	Stamp and signature
For delivery of goods please apply to		As Carrier

1 Acknowledgment: the author and publisher thank the BIFA for permission to reproduce Negotiable FIATA Multimodal Transport Bill of Lading.



724 International Trade Law

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APPENDIX 6

Uniform Rules for a Combined Transport Document

1973-11-01 From: ICC

The Uniform Rules for a Combined Transport Document were first issued as ICC Publication degree 273 in November 1973.

This revised version incorporates modifications designed to overcome practical difficultes of application concerning the combined transport operator's liability for delay. It was adopted by the ICC Executive Committee in June 1975.

The single mode tradition

The traditional carriage of goods by a single mode of transport developed an appropriate transport document for each mode. This document applies only to carriage by that mode. It is issued at the point of departure by that mode by the actual provider of the trans- port, and it establishes his liability for loss or damage to the goods whilst in his charge by reference to an international Convention, or to a national law, applying only to that mode of transport.

Each of these << single mode >> transport documents has served to pass the information necessary for the movement of the goods, and also met commercial and financial needs by acting as a receipt for identified goods, as a contract of carriage, and also, when issued in negotiable form, as a document of title to the goods.

Combined transport operators

The transport developments of the past decade have led to a greatly increased through movement of goods, often in << unit load >> form, from a point of departure to a point of final destination by the successive use of more than one mode of transport.

Such << combined transport >> (also referred to in the USA as << inter-modal transport >> and in other parts of the world as << multi-modal transport >>) means either the issue of a series of separate single mode transport documents - which is inefficient from the international trade viewpoint - or their replacement by a new, through, << start-to-finish >> transport document. Such new transport document, a << CT document >> (combined transport document), would of necessity be issued by someone who might be the actual provider of the transport - or at least of part of it - or who might merely be an arranger for the provision of all, or part of, the transport by others.

But whether as provider or as arranger of the transport, such person issuing the CT document (the CTO - Combined Transport Operator) would be acting as principal vis-a-vis the shipper and would be responsible, as a principal, for the transport being properly carried out, and liable, as a principal, for loss or damage wherever it occurred during the course of the whole combined transport.

Uniform Rules for CT Documents

In the absence of a new international Convention specially applicable to multi-modal transport in the way that existing conventions apply to the different single modes of transport, and as an essential measure to avoid the commercially retrograde step of the development of a multiplicity of differing documents for combined transport operations, the ICC has drafted a set of minimum uniform rules to govern an acceptable - and easily recognisable - CT document. The Rules may be given legal effect by their incorporation into a private contract, the combined transport contract evidenced by the CT document.

Application

The ICC Rules are applied by the issue of the CT document, and by the issue of this document the CTO accepts full responsibility for the performance of the combined transport, as well as liability.

throughout the entire combined transport.

Because, however, the Rules are applied by private contract,

a. The liability for loss or damage has to be governed

i by the appropriate single mode rules when the loss or damage can be attributed to a particular stage of transport (cf. Rule 13), or

ii by the ICC Rules when the loss or damage is << concealed >>, i. e. cannot be attributed to a particular stage of transport (cf. Rules 11 and 12).

b. The liability for delay has to be governed in all cases by the single mode rules degarding delay, where such single mode rules exist, applying to the stage of transport where the delay occurred (cf. Rule 14).

Nevertheless, the Rules do not preclude the voluntary acceptance by the CTO of a greater responsibility or obligation than that outlined above.

Forward looking

The Rules are also forward looking, in that they take note of the increasing tendency to replace negotiable documents of title, which must be surrendered at destination before the goods may be delivered, by non-negotiable documents, whereby delivery is made to a consignee named in the document without the need to surrender any document, and provide for the issue of the CT document in either negotiable form, or in non-negotiable form.

They do not, however - and, indeed, they cannot - legislate for the commercial and financial standing of the CTO. This will be resolved by commercial willingness - or by commercial unwillingness - to regard a CT document issued by any particular CTO as a worthwile document.

In this revised form the Rules represent a major contribution towards the simplification of international trade procedures as a means of facilitating international trade and its finance.

[Rule 1]

a. These Rules apply to every contract concluded for the performance and/or procurement of performance of combined transport of goods which is evidenced by a combined transport document as defined herein.

These Rules shall nevertheless apply even if the goods are carried by a single mode of transport contrary to the orginal intentions of the contracting parties that there should be a combined transport of the goods as defined hereafter.

b. The issuance of such combined transport document confers and imposes on all parties having or thereafter acquiring an interest in it the rights, obligations and defences set out in these Rules.

c. Except to the extent that it increases the responsibility or obligation of the combined transport operator, any stipulation or any part of any stipulation contained in a contract of combined transport or in a combined transport document evidencing such contract, which would directly or indirectly derogate from these Rules shall be null and void to the extent of the conflict between such stipulation, or part thereof, and these Rules. The nullity of such stipulation or part thereof shall not affect the validity of the other provisions of the contract of combined transport or combined transport document of which it forms a part.

[Rule 2] For the purpose of these Rules:

a. Combined transport means the carriage of goods by at least two different modes of transport, from a place at which the goods are taken in charge situated in one country to a place designated for delivery situated in a different country.

b. Combined transport operator (CTO) means a person (including any corporation, company or legal

entity) issuing a combined transport document.

Where a national law requires a person to be authorised or licenced before being entitled to issue a combined transport document, then combined transport operator can only refer to a person so authorised or licenced.

c. Combined transport document (CT Document) means a document evidencing a contract for the performance and/or procurement of performance of combined transport of goods and bearing on its face either the heading << Negotiable combined transport document issued subject to Uniform Rules for a Combined Transport Document (ICC Publication degree 298) >> or the heading << Non-negotiable combined transport document issued subject to Uniform Rules for a Combined Transport Document (ICC Publication degree 298)>>.

d. Different modes of transport means the transport of goods by two or more modes of transport, such as transport by sea, inland waterway, air, rail or road.

e. Delivery means delivering the goods to or placing the goods at the disposal of the party entitled to receive them.

f. Franc means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900.

[Rule 3] Where a CT document is issued in negotiable form:

a. it shall be made out to order or to bearer;

b. if made out to order it shall be transferable by endorsement;

c. if made out to bearer it shall be transferable without endorsement;

d. if issued in a set of more than one original it shall indicate the number of originals in the set;

e. if any copies are issued each copy shall be marked <non-negotiable copy>;

f. delivery of the goods may be demanded only from the CTO or his representative, and against surrender of the CT document duly endorsed where necessary;

g. the CTO shall be discharged of his obligation to deliver the goods if, where a CT document has been issued in a set of more than one original, he, or his representative, has in good faith delivered the goods against surrender of one of such originals.

[Rule 4] Where a CT document is issued in non-negotiable form:

a. it shall indicate a named consignee;

b. the CTO shall be discharged of his obligation to deliver the goods if he makes delivery thereof to the consignee named in such non-negotiable document, or to the party advised to the CTO by such consignee as authorised by him to accept delivery.

[Rule 5] By the issuance of a CT document the CTO:

a. undertakes to perform and/or in his own name to procure performance of the combined transport - including all services which are necessary to such transport - from the time of taking the goods in charge to the time of delivery, and accepts responsibility for such transport and such services to the extent set out in these Rules;

b. accepts responsibility for the acts and omissions of his agents or servants, when such agents or servants are acting within the scope of their employment, as if such acts and omissions were his own;

c. accepts responsibility for the acts and omissions of any other person whose services he uses for the performance of the contract evidenced by the CT document.

d. undertakes to perform or to procure performance of all acts necessary to ensure delivery;

e. assumes liability to the extent set out in these Rules for loss of or damage to the goods occurring between the time of taking them into his charge and the time of delivery, and undertakes to pay compensation as set out in these Rules in respect of such loss or damage;

f. assumes liability to the extent set out in Rule 14 for delay in delivery of the goods and undertakes to pay compensation as set out in that Rule.

[Rule 6] In addition to the information specifically required by these Rules, the parties shall insert in a CT document such particulars as they may agree to be commercially desirable.

[Rule 7] The consignor shall be deemed to have guaranteed to the CTO the accuracy, at the time the goods were taken in charge by the Cto, of the description, marks, number, quantity, weight and/or volume of the goods as furnished him, and the consignor shall indemni- fy the CTO against all loss, damage and expense arising or resulting from inaccuracies in or inadequacy of such particulars.

The right of the CTO to such indemnity shall in no way limit his responsibility and liability under the CT Document to any person other than the consignor.

[Rule 8] The consignor shall comply with rules which are mandator accordint to the national law or by reason of international Conven- tion, releating to the carriage of goods of a dangerous nature, and shall in any case inform the CTO in wnting of the exact nature of the danger before goods of a dangerous nature are taken in charge by the CTO and indicate to him, if need be, the precautions to be taken.

If the consignor fails to provide such information and the CTO is unaware of the dangerous nature of the goods and the necessary precautions to be taken and if, at any time, they are deemed to be a hazard to life or property, they may at any place be unloaded, destroyed or rendered harmless, as circumstances may require, without compensation, and the consignor shall be liable for all loss, damage, delay or expenses arising out of their being taken in charge, or their carriage, or of any service incidental thereto.

The burden of proving the CTO knew the exact nature of the danger constituted by the carriage of the said goods shall rest upon the person entitled to the goods.

[Rule 9] The CTO shall clearly indicate in the CT document, at least by quantity and/or weight and/or volume and/or marks, the goods he has taken in charge and for which he accepts responsibility.

Subject to paragraph 1 of this Rule, if the CTO has reasonable grounds for suspecting that the CT document contains particulars concerning the descripton, marks, number, quantity, weight and/or volume of the goods which do not represent accurately the goods actually taken in charge, or if he has no reasonable means of checking such particulars, the CTO shall be entitled to enter his reservations in the CT document, provided he indicates the particular information to which such reservations apply.

The CT document shall be prima facie evidence of the taking in charge by the CTO of the goods as therein described. Proof to the contrary shall not be admissible when the CT document is issued in negotiable form and has been transferred to a third party acting in good faith.

[Rule 10] Except in respect of goods treated as lost in accordance with Rule 15 with hereof, the CTO shall be deemed prima facie to have delivered the goods as described in the CT document unless notice of loss of, or damage to, the goods, indicating the general nature of such loss or damage, shall have been given 1 writing to the CTO or to his representative at the place of delivery before or at the time of removal of the goods into the custody of the person entitled to delivery thereof under the CT document, or, if the loss or damage is not apparent, within seven consecutive days thereafter.

A. Rules applicable when the stage of transport where the loss or damage occurred is not known

[Rule 11] When in accordance with Rule 5 (e) hereof the CTO is liable to pay compensation in respect of loss of, or damage to, the goods and the stage of transport where the loss or damage occurred is not known:

a. such compensation shall be calculated by reference to the value of such goods at the place and time they are delivered to the consignee or at the place and time when, in accordance with the contract of combined transport, they should have been so delivered;

b. the value of the goods shall be determined according to the current commodity exchange price or, if there is no such price, according to the current market price, or, if there is 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 exceed 30 francs per kilo of gross weight of the goods lost or damaged, unless, with the consent of the CTO, the consignor has declared a higher value for the goods and such higher value has been stated in the CT document, in which case such higher value shall be the limit.

However, the CTO shall not, in any case, be liable for an amount greater than the actual loss to the person entitled to make the claim.

[Rule 12] When the stage of transport where the loss or damage occurred is not known the CTO shall not be liable to pay compensa- tion in accordance with Rule 5 (e) hereof if the loss or damage was caused by:

a. an act or omission of the consignor or consignee, or person other than the CTO acting on behalf of the consignor or consignee, or from whom the CTO took the goods in charge;

b. insufficiency or defective condition of the packing or marks;

c. handling, loading, stowage or unloading of the goods by the consignor or the consignee or any parson acting on behalf of the consignor or the consignee;

d. inherent vice of the goods;

e. strike, lockout, stoppage or restraint of labour, the consequences of which the CTO could not avoid by the exercise of reasonable diligence;

f. any cause or event which the CTO could not avoid and the consequences of which he could not prevent by the exercise of reasonable diligence;

g. a nuclear incident if the operator of a nuclear installation or a person acting for him is liable for this damage under an applicable international Convention or national law governing liability in respect of nuclear energy.

The burden of proving that the loss or damage was due to one or more of the above causes or events shall rest upon the CTO.

When the CTO establishes that, in the circumstances of the case, the loss or damage could be attributed to one or more of the causes or events specified in (b) to (d) above, it shall be presumed that it was so caused. The claimant shall, however, be entitled to prove that the loss or damage was not, in fact, caused wholly or partly by one or more of these causes or events.

B. Rules applicable when the stage of transport where the loss or damage occurred is known

[Rule 13] When in accordance with Rule 5 (e) hereof the CTO is liable to pay compensation in respect of loss or damage to the goods and the stage of transport where the loss or damage occurred is known, the liability of the CTO in respect of such loss or damage shall be determined:

a. by the provisions contained in any inter national Convention or national law, which provisions:

i cannot be departed from by private contract, to the detriment of the claimant, and

ii would have applied if the claimant had made a separate and direct contract with the CTO in respect of the particular stage of transport where the loss or damage occurred and received as evidence thereof any particular document which must be issued in order to make such international Convention or national law applicable; or

b. by the provisions contained in any international Convention relating to the carriage of goods by the mode of transport used to carry the goods at the time when the loss or damage occurred, provided that:

i no other international Convention or national law would apply by virtue of the provisions contained in sub-paragraph (a) of this Rule; and that

ii it is expressly stated in the CT Document that all the provisions contained in such Convention shall govern the carriage of goods by such mode of transport; where such mode of transport is by sea, suc provisions shall apply to all goods whether carried on deck or under deck; or

c. by the provisions contained in any contract of carriage by inland waterways entered into between the CTO and any sub-contractor, provided that:

i no international Convention or national law is applicable under sub-paragraph (a) of this Rule, or is applicable, or could have been made applicable, by express provision in accordance with sub-paragraph (b) of this Rule and that

ii it is expressly stated in the CT Document that such contract provisions shall apply; or

d. by the provisions of Rules 11 and 12 in cases where the provisions of sub-paragraphs (a), (b) and (c) above do not apply.

Without prejudice to the provisions of Rule 5 (b) and (c), when, under the provisions of the preceding paragraph, the liability of the CTO shall be determined by the provisions of any international Convention or national law, this liability shall be determined as though the CTO were the carrier referred to in any such Convention or national law. However, the CTO shall not be exonerated from liability where the loss or damage is caused or contributed to by the acts or omissions of the CTO in his capacity as such, or his servants or agents when acting in such capacity and not in the performance of the carriage.

[Rule 14] The CTO is liable to pay compensation for delay only when the stage of transport where a delay occurred is known, and to the extent that there is liability under any international Convention or national law, the provisions of which:

i cannot be departed from by private contract to the detriment of the claimant;

ii would have applied if the claimant had made a separate and direct contract with the CTO as operator of that stage of transport and received as evidence thereof any particular document which must be issued in order to make such international Convention or national law applicable.

However, the amount of such compensation shall not exceed the amount of the freight for that stage of transport, provided that this limitation is not contrary to any applicable international Convention or national law.

[Rule 15] Failure to effect delivery within 90 days after the expiry of a time limit agreed and expressed in a CT Document or, where no time limit is agreed and so expressed, failure to effect delivery withe 90 days after the time it would be reasonable to allow for diligent completion of the combined transport operation shall, in the absence of evidence to the contrary, give to the party entitled to receive delivery the right to treat the goods as lost.

[Rule 16] The defences and limits of liability provided for in these Rules shall apply in any action against the CTO for loss of damage, or delay to the goods whether the action be founded in contract or in tort.

[Rule 17] The CTO shall not be entitled to the benefit of the limitation of liability provided for in Rule 11 hereof 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.

[Rule 18] Nothing in these Rules shall prevent the CTO from includ- ing in the CTO document provisions for protection of his agents or servants or any other person whose services he uses for the perfor- mance of the contract evidenced by the CT document, provided such protection does not

extend beyond that granted to the CTO himself.

[Rule 19] The CTO shall be discharged of all liability under these Rules unless suit is brought within nine months after,

i the delivery of the goods, or,

ii the date when the goods should have been delivered, or

iii the date, when in accordance with Rule 15, failure to deliver the goods would, in the absence of evidence to the contrary, give to the party entitled to receive delivery the right to treat the goods as lost.

APPENDIX 7

ACL ATLANTIC CONTAINER LINE AB

ORIGINAL **BILL OF LADING**

SHIPPER/EXPORTER (COMPLETE NAME AND ADDRESS) REF #:

BILL OF LADING NO.: ACLU

BOOKING NO.:

FORWARDER REF #:

CONSIGNEE (COMPLETE NAME AND ADDRESS) REF #:

FORWARDER FMC No.:

NOTIFY(COMPLETE NAME AND ADDRESS)

ALSO NOTIFY -

ROUTING & INSTRUCTIONS -

PRE-CARRIAGE BY *	PLACE OF RECEIPT *
CARRIER (VESSEL / VOYAGE	PORT OF LOADING
PORT OF DISCHARGE	PLACE OF DELIVERY *

LOADING PIER / TE

TYPE

Marks & Nos. Container/Seal No.	Particulars Declared by Shipper Quantity and Description of Goods	Gross Weight in Kilos	Measurement in Cubic Meters
TOTALS			

THESE COMMODITIES, TECHNOLOGY OR SOFTWARE WERE EXPORTED FROM THE UNITED STATES IN ACCORDANCE WITH THE EXPORT ADMINISTRATION REGULATIONS. DIVERSION CONTRARY TO U.S. LAW PROHIBITED.

Shipper Declared Value $ _____ Subject to Extra Freight as Per Tariff and Clause 6 of this B/L	Freight Payable At/By		No.of Original Bill of Lading :

Freight Charges	Basis	Prepaid	Collect	CurrCode

CARRIER RECEIPT - Received for shipment in apparent external good order and condition, except otherwise noted above, the number of Containers or other packages listed under "NO. OF PKGS.". If the goods are shipped in sealed Containers, the carrier has no knowledge of and makes no representations as to the marks and numbers on the goods, the quantity and description of the goods furnished by the shipper, the gross weight or measurement. If the goods are shipped breakbulk, the carrier has verified the marks and numbers shown and the quantity shown, but not the description of the goods or the gross weight or measurement furnished by the shipper, this receipt covers only the Containers or other packages visible to the Carrier.The shipment to be transported by the ocean vessel, loader vessel or other means of transportation (rail, truck or air), subject to the terms and conditions noted on this page and overleaf and also, when applicable, subject to the Carrier's published tariffs on file with the Federal Maritime Commission, Washington, D.C. USA and with the Canadian Transport Commission, Ottawa,Ont.Canada, such tariffs also being available from any port agent listed on the reverse side hereof. In accepting this bill of lading the merchant agrees to be bound by it terms and conditionsin witness of the contract herein,[ ] original bill[s] of lading have been signed and accepted, one of whichbeing accomplished the other(s) to be void.

Signed on behalf of the Carrier
ATLANTIC CONTAINER LINE AB

BY : _____

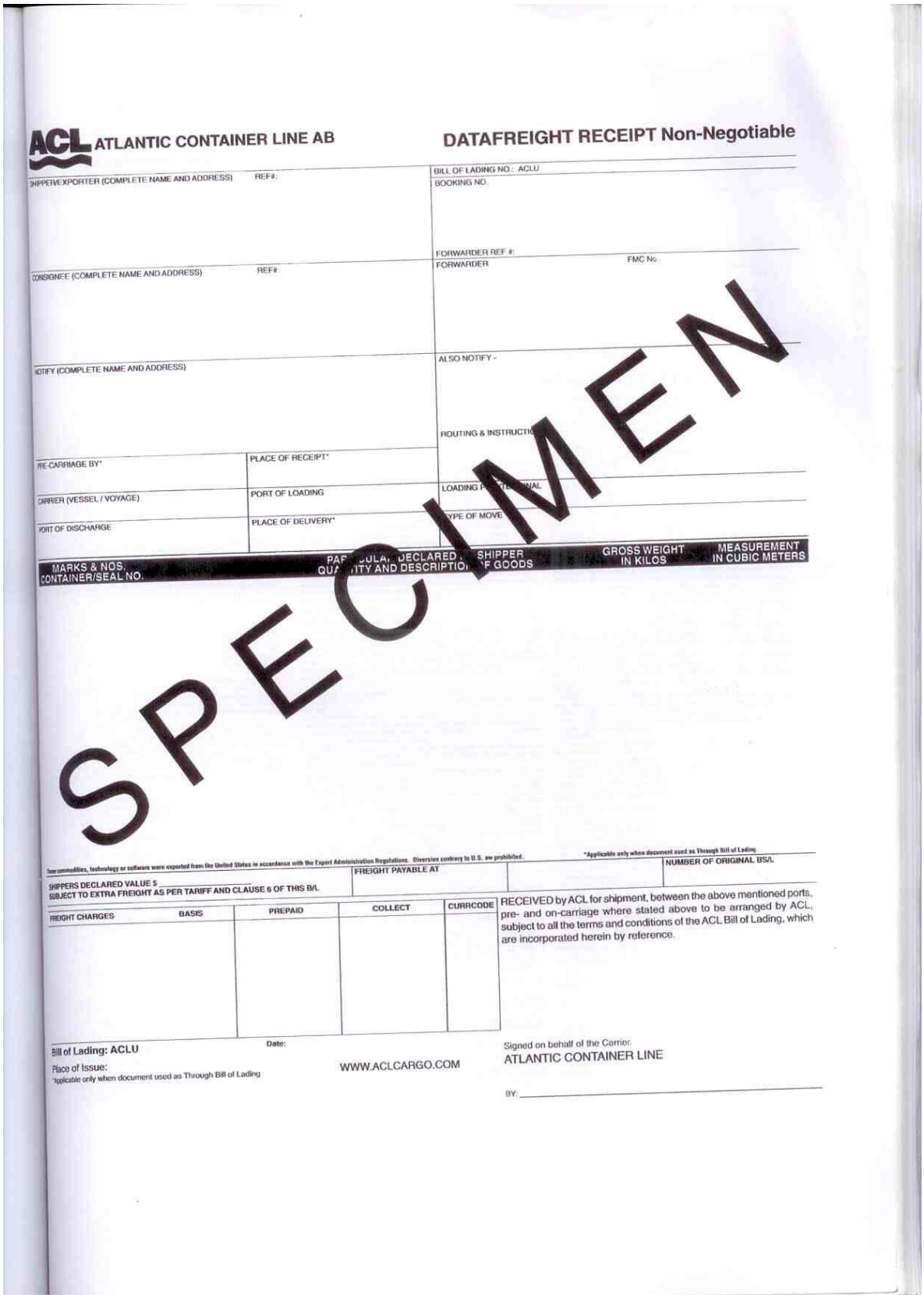
Bill of Lading : ACLU

Date :

Place of Issue :

WWW.ACLCARGO.COM

* Applicable only when document used as Through Bill of Lading



ACL ATLANTIC CONTAINER LINE AB

DATAFREIGHT RECEIPT Non-Negotiable

SHIPPER/EXPORTER (COMPLETE NAME AND ADDRESS) REF#:

BILL OF LADING NO.: ACLU

BOOKING NO.

FORWARDER REF #:

CONSIGNEE (COMPLETE NAME AND ADDRESS) REF#:

FORWARDER FMC No.

NOTIFY (COMPLETE NAME AND ADDRESS)

ALSO NOTIFY -

ROUTING & INSTRUCTIONS

PRE-CARRIAGE BY* | PLACE OF RECEIPT*

CARRIER (VESSEL / VOYAGE) | PORT OF LOADING | LOADING PIER/TERMINAL

PORT OF DISCHARGE | PLACE OF DELIVERY* | TYPE OF MOVE

MARKS & NOS. CONTAINER/SEAL NO.	PARTICULARS DECLARED BY SHIPPER QUANTITY AND DESCRIPTION OF GOODS	GROSS WEIGHT IN KILOS	MEASUREMENT IN CUBIC METERS

SPECIMEN

These commodities, technology or software were exported from the United States in accordance with the Export Administration Regulations. Diversion contrary to U.S. law prohibited. *Applicable only when document used as Through Bill of Lading.

SHIPPERS DECLARED VALUE $
SUBJECT TO EXTRA FREIGHT AS PER TARIFF AND CLAUSE 6 OF THIS B/L

FREIGHT PAYABLE AT

NUMBER OF ORIGINAL BS/L

FREIGHT CHARGES	BASIS	PREPAID	COLLECT	CURRCODE

RECEIVED by ACL for shipment, between the above mentioned ports, pre- and on-carriage where stated above to be arranged by ACL, subject to all the terms and conditions of the ACL Bill of Lading, which are incorporated herein by reference.

Bill of Lading: ACLU

Date:

Place of Issue:
*Applicable only when document used as Through Bill of Lading

WWW.ACLCARGO.COM

Signed on behalf of the Carrier:
ATLANTIC CONTAINER LINE

BY: _____

ATLANTIC CONTAINER LINE AB
REGISTERED OFFICE: S-403 36, GOTHENBURG, SWEDEN
CORP. ID NR.: 556000-7006

TRAFFIC OFFICES IN THE UNITED STATES, CANADA & EUROPE

For General Cargo
To All Destinations

ATLANTIC CONTAINER LINE
194 Wood Avenue South, Ste. 500
Iselin, NJ 08830-4120
USA

ENDORSEMENTS:

PORT OFFICES & AGENTS US & CANADA

Virginia Beach
Atlantic Container Line
272 Bendix Rd., Ste. 300
Virginia Beach, VA 23452

Halifax
ACL
1969 Upper Water St., Ste. 1600
Purdy's Wharf Tower 2
Halifax, N.S. B3J 3R7
Canada

PORT OFFICES & AGENTS IN EUROPE

Atlantic Container Line Benelux N.V.
Cassiersstraat 19
B-2060 Antwerpen 6

Natural AG
St. Jakobsstrasse 220
CH- 4002 Basel / Switzerland

Atlantic Container Line UK Limited
8 Princes Parade
St. Nicholas Place
Pier Head
Liverpool L3 1DL

Atlantic Container Line
Deutschland GmbH
Grosser Grasbrook 10
20457 Hamburg
Germany

Atlantic Container Agencies Ltd.,
7 Crampton Quay
Bedford Row
Temple Bar
Dublin 2

ACL Denmark
Transocean Shipping
Agency A/S
53, Hoje Taastrup Blvd
DK-2630 Taastrup
Copenhagen. Denmark

ACL Sweden AB
Sydatlantен, 10
S-403 36 Gothenburg

Rev. 12/07

Atlantic Container Line
C/O Global Transport Services AS
P.O. Box 155, Bogstadveien
N-0323 Oslo
Norway

ACL France
Europe Building
Quai de L'Europe
76600 Le Havre

ACL Finland
Transocean Oy AB
Hameentie 33, 12th Floor
Fin - 00500
Helsinki

Atlantic Container
Agencies
Unit 2 Seaview House
7 West Bank Road
Belfast BT2 9 JL
Northern Ireland

ATLANTIC CONTAINER LINE AB BILL OF LADING TERMS AND CONDITIONS

1. DEFINITIONS
In this Bill of Lading the word "Carrier" includes Atlantic Container Line AB (publ), the vessel, owner, master and any charterer, pre-carrier, on-carrier and any other person participating in the carriage of the goods. The word "Merchant" includes the shipper, the consignee, the receiver of the goods, the holder of this Bill of Lading, any person owning or entitled to the possession of the goods or this Bill of Lading, any person having a present or future interest in the goods or any person acting on behalf of any of the above mentioned persons. The word "Container" includes any container, trailer, transportable tank, lift van, flat, pallet or any similar article of transport used to consolidate goods. The words "Hague Rules" means the provisions of the International Convention for Unification of certain Rules relating to Bills of Lading signed at Brussels on 25th August 1924. "Hague-Visby Rules" means the Hague Rules as amended by the Protocol signed at Brussels on 23rd February 1968, and where applicable, the Protocol signed at Brussels on 21st December 1979. "COGSA" means the Carriage of Goods by Sea Act of the United States of America approved on 16th April 1936. "COGWA" means the Carriage of Goods by Water Act of Canada amended 1993. The words "on board", or similar, mean on board any mode of transportation used or procured by the Carrier, including ship, rail, road and air transports.
2. CARRIER'S TARIFF
The provisions of the Carrier's applicable Tariff, if any, are incorporated herein. Copies of such provisions are obtainable from the Carrier or his agents upon request or, where applicable, from a government body with whom the Tariff has been filed. In the case of inconsistency between this Bill of Lading and the applicable Tariff, this Bill of Lading shall prevail.
3. CARRIER'S RESPONSIBILITY – PARAMOUNT CLAUSE
(1) For U. S. Trade Route: This bill of lading shall take effect subject to the provisions of the U.S. Carriage of Goods by Sea Act, 1936 (COGSA) insofar as it is compulsorily applicable. Further, it is agreed that COGSA, including all its limitations and defenses, and the U.S. Forwarder Act, 1916, shall apply by contract to all shipments to or from the United States before loading and after discharge from the time the goods are received by the Carrier at the Place of Receipt or Port of Loading until delivered by the Carrier at the Port of Discharge or Place of Delivery, as applicable.
(2) Trade Routes other than U.S.A.
This bill of lading shall take effect subject to the provisions of the 1924 Hague Rules, or the 1968 Hague Visby Rules (including the 1979 Protocol) or the Canadian Carriage of Goods by Water Act, (COGWA) but only insofar as such Rules or Act are compulsorily applicable to this bill of lading.
(3) The Carrier's tariffs and regulations, as applicable to this shipment, are also incorporated herein as if set forth at length. Copies are obtainable upon written request from any of the carrier's offices listed above.
(4) The carrier shall also be entitled to the full benefits of the laws or regulations of any country and the provisions of the contracts of any sub-contracting agent, servant or carrier that may be applicable to the goods before loading or after discharge of the vessel, including all defenses and exclusions set forth therein and any limitations that are lower than those provided in Clause 6 of this bill of lading. Copies of sub-contracts shall be made available to the Merchant upon written request to any of the carrier's offices listed above.
(5) The Carrier shall have the right to carry vehicles, machinery, boats, or other large break bulk cargo on deck and to carry any containerized cargo, whether packed by the Shipper or the Carrier, on deck. Any such goods carried on deck shall be considered carried under deck and subject to COGSA, COGWA or the above mentioned Rules, or any legislation based upon such Rules.
(6) The Carrier, by this contract shall be entitled to the limitations and exemptions from liability provided by Sections 4281 to 4289, inclusive of the Revised Statutes of the U.S.A., despite the fact that the Carrier may be the time charterer, voyage charterer, or slot charterer of the carrying vessel.
(7) Where loss or damage to cargo is due to concurrent causes, the burden shall be on the Merchant to prove the portion of the loss or damage attributable to the carrier's negligence.
(8) The Carrier shall have the right to forward any goods shut out from a vessel, or from any other means of transport used by the carrier, on a subsequent vessel or by any subsequent available means of transport, at the option of the carrier and without notice.
4. DELAY, CONSEQUENTIAL LOSS
Save as otherwise provided herein, the Carrier shall in no circumstances be liable for direct, indirect or consequential loss or damage caused by delay or any other cause whatsoever and howsoever caused. Without prejudice to the foregoing, if the Carrier is found liable for delay, liability shall be limited to the freight applicable to the relevant stage of the transport.
5. CERTAIN RIGHTS AND IMMUNITIES FOR THE CARRIER AND OTHER PERSONS
(1) The carrier shall be entitled to sub-contract on any terms the whole or any part of the carriage.
(2) The Merchant undertakes that no claim or allegation shall be made against any person or vessel whatsoever, other than the Carrier, including, but not limited to the Carrier's servants or agents, any independent contractor and his servants or agents, and all others by whom the whole or any part of the carriage, whether directly or indirectly, is procured, performed or undertaken, which imposes or attempts to impose upon any such person or vessel any liability whatsoever in connection with the goods or the carriage, and if any claim or allegation should nevertheless be made to defend, indemnify and hold harmless the Carrier against all consequences thereof. Without prejudice to the foregoing every such person and vessel shall have the benefit of all provisions herein benefiting the Carrier as if such provisions were expressly for his benefit and in entering into this contract the Carrier, to the extent of these provisions, does so not only on his own behalf, but also as agent or trustee for such persons and vessels and such persons and vessels shall to this extent be or be deemed to be parties to this contract.
(3) The Merchant shall defend, indemnify and hold harmless the Carrier against any claim or liability (and any expense arising therefrom) arising from the carriage of goods insofar as such claim or liability exceeds the Carrier's liability under this Bill of Lading.
(4) The defenses and limits of liability provided for in this Bill of Lading shall apply in any action against the Carrier whether the action be found in contract or in Tort
6. PACKAGE/UNIT LIMITATION AND DECLARED VALUE
(1) Limitation for U.S. Trade Route
If shipment is to or from the United States ports, or to or from inland points in the United States, the carrier's maximum liability shall not in any event exceed US 500 per package, or in the case of goods not shipped in packages US 500 per customary freight unit, unless a declared value has been fixed in accordance with section (4) below.
(2) Limitation for Visby Trade Routes
Where the Hague Rules or Hague-Visby Rules (including 1968 and 1979 Protocols), or any legislation making such rules compulsorily applicable to this bill of lading, such as COGWA, the carrier shall not be liable for any higher package or unit limitation, unless the value has been declared and fixed at a higher limit in accordance with section (4) below. Such limitation amount according to the 1924 Hague Rules is 100 pounds sterling current value, and according to Hague-Visby, 1968 and 1979 Protocols, as well as COGWA, the limitation is 2SDR'S per kilo or 667.67 SDR's per package, whichever is higher.
(3) Limitation for Other Trades
In trades where the Hague, Hague-Visby or COGWA or COGSA are not compulsorily applicable, the Carrier's liability shall not exceed US $2.00 per kilo of the gross weight of the goods lost or damaged, or their c.i.f. value, whichever is less.
(4) Ad Valorem. Declared Value of Goods
The Carrier's liability may be fixed at a higher value (1) if the nature and value of the goods are declared by the Carrier by the Shipper in writing before shipment, and (2) such declared higher value is inserted on the front of this Bill of Lading in the space provided, and (3) the applicable extra freight as per tariff is paid. Any partial loss or damage shall be adjusted pro rata on the basis of such declared value.
(5) Definition of Package or Unit
Where a Container is stuffed by the Carrier, the number of packages or units stated on the face of this Bill of Lading under the column entitled "MARKS+NOS. CONTAINER SEAL NO." shall be deemed the number of packages or units for the purpose of any limit of liability provided in the above Rules or any legislation based upon those Rules, including COGWA. Except as aforesaid, the Container shall be considered the package or unit if shipped under seal and not stuffed by the Carrier.. The word "package" shall also include pallets, skids, tanks, flats or any other means of consolidating goods for shipping purposes. In other than U.S.A. trade, the word "unit" shall mean physical unit or piece of cargo not shipped in a package, including any boats, vehicles or machinery, and irrespective of the weight or measurement unit employed in calculating freight charges. As to goods shipped in bulk, the limitation applicable thereto shall be the limitation provided in such Rules or legislation as may be applicable, and if none is provided, then according to the weight or measurement unit used to calculate freight charges.
7. TIME-BAR
Unless notice of loss or damage and the general nature of such loss or damage is given in writing to the Carrier at the place of delivery before or at the time of removal of the goods into the custody of the person entitled to delivery thereof under this Bill of Lading, such removal shall be prima facie evidence of the delivery by the Carrier of the goods as described in this Bill of Lading. If the loss or damage is not apparent, the notice must be given within three days of delivery. All liability whatsoever of the Carrier shall cease unless suit is brought within 12 months after delivery of the goods or the date when the goods should have been delivered.
8. MERCHANT'S RESPONSIBILITY
(1) The description and particulars of the goods set out on the face hereof are furnished by the Merchant and the Merchant warrants to the Carrier that the description and particulars including, but not limited to of weight, content, measure, quality, condition, marks, numbers and value are correct.
(2) The Merchant shall comply with all applicable laws, regulations and requirements of customs, port and other authorities and shall bear and pay all duties, taxes, fines, imposts, expenses and losses incurred or suffered by reason thereof or by reason of any illegal, incorrect or insufficient marking, numbering or addressing of the goods.
(3) The Merchant undertakes that the goods are packed in a manner adequate to withstand the ordinary risks of carriage having regard to their nature and in compliance with all laws, regulations and requirements which may be applicable.
(4) No goods which are or may become dangerous, inflammable or damaging or which are or may become liable to damage any property or person whatsoever shall be tendered to the Carrier for carriage without the Carrier's express consent in writing and without the Container or other covering in which the goods are to be transported and the goods being distinctly marked on the outside so as to indicate the nature and character of any such articles and so as to comply with all applicable laws, regulations and requirements. If any such articles are delivered to the Carrier without such written consent and marking or if in the opinion of the Carrier the articles are or are liable to become of a dangerous, inflammable or damaging nature, the same may at any time be destroyed, disposed of, abandoned, or rendered harmless without compensation to the Merchant and without prejudice to the Carrier's right to charges.
(5) The Merchant shall be liable for the loss, damage, contamination, soiling, detention or demurrage before, during and after the carriage of property (including, but not limited to, Containers) of the Carrier or any person or vessel (other than the Merchant) referred to in 5(2) above caused by the Merchant or any person acting on his behalf or for which the Merchant is otherwise responsible.
(6) The Merchant shall defend, indemnify and hold harmless the Carrier against any loss, damage, claim, liability or expense whatsoever arising from any breach of the provisions of this clause 8 or from any cause in connection with the goods for which the Carrier is not responsible.
9. CONTAINERS
(1) Goods may be stuffed by the Carrier in or on Containers and goods may be stuffed with other goods.
(2) The Merchant shall carefully inspect any Container supplied by the Carrier to ensure that it is suitable and satisfactory in all respects for the goods being shipped. The Merchant shall defend, indemnify and hold harmless the Carrier against any loss, damage, claim, liability or expense whatsoever caused by packing, checking, stowage and securing of the goods stuffed in a Container, or by failure to inspect the container properly, by or on behalf of the Merchant.
10. TEMPERATURE CONTROLLED CARGO
(1) The Merchant undertakes not to tender for transportation any goods which require temperature control without previously giving written notice (and filling in the box on the front of this Bill of Lading if this Bill of Lading has been prepared by the Merchant or a person acting on his behalf) of their nature and particular temperature range to be maintained and in the case of a temperature controlled Container stuffed by or on behalf of the Merchant further undertakes that the Container has been properly pre-cooled, that the goods have been properly stuffed in the Container and that its thermostatic controls have been properly set by the Merchant before receipt of the goods by the Carrier.
If the above requirements are not complied with, the Carrier shall not be liable for any loss of or damage to the goods caused by such non-compliance.
(2) The Carrier shall not be liable for any loss of or damage to the goods arising from defects, derangement, breakdown, stoppage of the temperature controlling machinery, plant, insulation or any apparatus of the Container, provided that the Carrier shall before or at the beginning of the carriage exercise due diligence to maintain the refrigerated Container in an efficient state.
11. MATTERS AFFECTING PERFORMANCE
(1) If at any time the carriage is or is likely to be affected by any hindrance, risk, delay, difficulty or disadvantage of any kind (including the condition of the goods), whensoever and howsoever arising (whether or not the carriage has commenced) the Carrier may:
(A) without notice to the Merchant abandon the carriage of the goods and where reasonably possible place the goods or any part of them at the Merchant's disposal at any place which the Carrier may deem safe and convenient, whereupon the responsibility of the Carrier in respect of such goods shall cease.
(B) without prejudice to the Carrier's right subsequently to abandon the carriage under (A) above, continue the carriage.
In any event the Carrier shall be entitled to full charges on goods received for carriage and the Merchant shall pay any additional costs resulting from the above mentioned circumstances.
(2) The liability of the Carrier in respect of the goods shall cease on the delivery or other disposition of the goods in accordance with the orders or recommendations given by any government or authority or any person acting or purporting to act as or on behalf of such government or authority.
12. METHODS AND ROUTE OF TRANSPORTATION
(1) The Carrier may at any time and without notice to the Merchant:
Use any means of transport or storage whatsoever; load or carry the goods on any vessel whether named on the front hereof or not; transfer the goods from one conveyance to another including transshipping or carrying the same on another vessel than that named on the front hereof or by any other means of transport whatsoever; at any place unpack and remove goods which have been stuffed in or on a Container and forward the same in any manner whatsoever, proceed at any speed and by any route in his discretion (whether or not the nearest or most direct or customary or advertised route) and proceed to or stay at any place whatsoever once or more often and in any order; load or unload the goods from any conveyance at any place (whether or not the place is a port named on the front hereof as the intended Port of Loading or intended Port of Discharge) comply with any orders or recommendations given by any government or authority or any person or body acting or purporting to act as or on behalf of such government or authority or having under the terms of the insurance on the conveyance employed by the Carrier the right to give orders or directions, permit the vessel to proceed with or without pilots, to tow or be towed or to be dry-docked, permit the vessel to carry livestock, goods of all kinds, dangerous, or otherwise, contraband, prohibited substances, explosives, munitions or warlike stores and sail armed or unarmed.
(2) The liberties set out in (1) above may be invoked by the Carrier for any purposes whatsoever whether or not connected with the carriage of the goods. Anything done in accordance with (1) above or any delay arising therefrom shall be deemed to be within the contractual carriage and shall not be a deviation of whatsoever nature or degree.
13. DELIVERY OF GOODS
If delivery of the goods is not taken by the Merchant at the time and place when and where the goods are ready for delivery, the Carrier shall be entitled without notice to remove from a Container the goods if stuffed in or on a Container and to store the goods at the sole risk and expense of the Merchant. Such storage shall constitute due delivery hereunder, and thereupon the liability of the Carrier in respect of the goods shall cease.
14. CHARGES
(1) Charges shall be deemed fully earned on receipt of the goods by the Carrier and shall be paid and non-refundable in any event.
(2) The charges have been calculated on the basis of particulars furnished by or on behalf of the Merchant. The Carrier shall be entitled to production of the commercial invoice for the goods or true copy thereof and to inspect, reweigh, remeasure and revalue the goods and if the particulars are found by the Carrier to be incorrect the Merchant shall pay the Carrier the correct charges (credit being given for the charges charged) and the costs incurred by the Carrier in establishing the correct particulars.
(3) All charges shall be paid without any set-off, counter-claim, deduction or stay of execution.
(4) Freight and all other amounts pertaining to this B/L are, at the option of ACL, to be paid in the currency named in this B/L or of the country of the port of loading or port of discharge, at the highest selling rate of exchange for banker's sight draft current on the date of the freight agreement or on the date of this B/L, or for prepayable freight on the date of loading, or for freight payable at destination on the day when the vessel is entered at the Customs House or on the date of withdrawal of the delivery order. If ACL has consented to payment of freight and charges in other currencies than U.S. or Canadian dollars and such other currencies are devalued before payment, then the conversion of U.S. or Canadian currencies shall be effected at the highest bank selling rate on the date of payment.
15. LIEN
The Carrier shall have a lien on the goods and any documents relating thereto for all sums whatsoever due at any time to the Carrier from the Merchant and for General Average contributions to whomsoever due and for the costs of recovering the same and the Carrier shall have the right to sell the goods and documents by public auction or private treaty, without notice to the Merchant, and at the Merchant's expense and without any liability towards the Merchant.
16. GENERAL AVERAGE
General Average to be adjusted at any port or place at the Carrier's option, and to be settled according to the York Antwerp Rules, 1974, this covering all goods, whether carried on or under deck. The amended Jason Clause is to be considered as incorporated herein. Such security including a cash deposit as the Carrier may deem sufficient to cover the estimated contribution by the goods and any salvage and special charges thereon, shall, if required, be submitted to the carrier prior to delivery of the goods.
17. JURISDICTION AND LAW
Except as otherwise stated herein, the contract evidenced by or contained in this Bill of Lading is governed by the laws of Sweden and any claim or dispute arising hereunder or in connection herewith shall be determined by the courts in Sweden and no other court. Without prejudice to the foregoing, for traffic to or from the United States, such claim or dispute shall be determined by the U.S. District Court for the Southern District of New York and in accordance with the laws of the United States.
18. SEPARABILITY
The terms of this Bill of Lading shall be separable, and if any provision hereof, or any part of any provision be held to be invalid or unenforceable, such holding shall not affect the validity or enforceability of any other provision or part thereof in this Bill of Lading.

Shipper

LINER BILL OF LADING

Page 2

Bill No.

Reference No.

Consignee

Notify address

Pre-carriage by

Place of receipt by pre-carrier

Vessel

Port of loading

Port of discharge

Place of delivery by on-carrier

Marks and Nos.

Number and kind of packages; description of goods

Gross weight

Measurement

Appendix 4

Particulars furnished by the Merchant

Freight details, charges etc.

SHIPPED on board in apparent good order and condition, weight, measure, marks, numbers, quality, contents and value unknown, for carriage to the Port of Discharge or so near thereunto as the Vessel may safely get and lie always afloat, to be delivered in the like good order and condition at the aforesaid Port unto Consignees or their Assigns, they paying freight as indicated to the left plus advances and charges incurred in accordance with the provisions contained in this Bill of Lading. In accepting this Bill of Lading the Merchant expressly accepts and agrees to all its stipulations on both pages, whether written, printed or signed by the Merchant.
If they were all of Lading must be surrendered duly endorsed in exchange for the goods or delivery order.
IN WITNESS whereof the Master of the said Vessel has signed the number of original Bills of Lading stated below, all of this tenor and date, one of which being accomplished, the others to stand void.

Daily demurrage rate (additional) Clause 24

Freight payable at

Place and date of issue

Number of original Bs/L

Signature

* Applicable only when documents used as a Through Bill of Lading

Printed and published 1978
by F. G. Kjeldgaard, Ltd., 58, Toldbodgade, Copenhagen
by authority of The Baltic and International Maritime Conference
(BIMCO), Copenhagen

LINER BILL OF LADING

(Liner terms approvd by The Baltic and International Maritime Conference)

Code Name: "CONLINEBILL"

Amended January 1st, 1950, August 1st, 1952, January 1st, 1973, July 1st, 1974, August 1st, 1976, January 1st, 1978.

1. Definition.
Wherever the term "Merchant" is used in this Bill of Lading, it shall be deemed to include the Shipper, the Receiver, the Consignee, the Holder of the Bill of Lading and the Owner of the cargo.

2. General Paramount Clause.
The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply.
Trades where Hague-Visby Rules apply.
In trades where the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on February 23rd 1968 – The Hague-Visby Rules – apply compulsorily, the provisions of the respective legislation shall be considered incorporated in this Bill of Lading. The Carrier takes all reservations possible under such applicable legislation, relating to the period before loading and after discharging and while the goods are in the charge of another Carrier, and to deck cargo and live animals.

3. Jurisdiction.
Any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein.

4. Period of Responsibility.
The Carrier or his Agent shall not be liable for loss of or damage to the goods during the period before loading and after discharge from the vessel, howsoever such loss or damage arises.

5. The Scope of Voyage.
As the vessel is engaged in liner service the intended voyage shall not be limited to the direct route but shall be deemed to include any proceeding or returning to or stopping or slowing down at or off any ports or places for any reasonable purpose connected with the service including maintenance of vessel and crew.

6. Substitution of Vessel, Transhipment and Forwarding.
Whether expressly arranged beforehand or otherwise, the Carrier shall be at liberty to carry the goods to their port of destination by the said or other vessel or vessels either belonging to the Carrier or others, or

hours before the vessel's arrival there. In the absence of such declaration the Carrier may elect to discharge at the first or any other optional port and the contract of carriage shall then be considered as having been fulfilled. Any option can be exercised for the total quantity under this Bill of Lading only.

11. Freight and Charges.
(a) Prepayable freight, whether actually paid or not, shall be considered as fully earned upon loading and non-returnable in any event. The Carrier's claim for any charges under this contract shall be considered definitely payable in like manner as soon as the charges have been incurred.
Interest at 5 per cent., shall run from the date when freight and charges are due.
(b) The Merchant shall be liable for expenses of fumigation and of gathering and sorting loose cargo and of weighing onboard and expenses incurred in repairing damage to and replacing of packing due to excepted causes and for all expenses caused by extra handling of the cargo for any of the aforementioned reasons.
(c) Any dues, duties, taxes and charges which under any denomination may be levied on any basis such as amount of freight, weight of cargo or tonnage of the vessel shall be paid by the Merchant.
(d) The Merchant shall be liable for all fines and/or losses which the Carrier, vessel or cargo may incur through non-observance of Custom House and/or import or export regulations.
(e) The Carrier is entitled in case of incorrect declaration of contents, weights, measurements or value of the goods to claim double the amount of freight which would have been due if such declaration had been correctly given. For the purpose of ascertaining the actual facts, the Carrier reserves the right to obtain from the Merchant the original invoice and to have the contents inspected and the weight, measurement or value verified.

12. Lien.
The Carrier shall have a lien for any amount due under this contract and costs of recovering same and shall be entitled to sell the goods privately or by auction to cover any claims.

13. Delay.
The Carrier shall not be responsible for any loss sustained by the Merchant through delay of the goods unless caused by the Carrier's personal gross negligence.

14. General Average and Salvage.
General Average to be adjusted at any port or place at Carrier's

discharge the cargo at port of loading or any other safe and convenient port.
(d) The discharge under the provisions of this clause of any cargo for which a Bill of Lading has been issued shall be deemed due fulfilment of the contract. If in connection with the exercise of any liberty under this clause any extra expenses are incurred, they shall be paid by the Merchant in addition to the freight, together with return freight if any and a reasonable compensation for any extra services rendered to the goods.
(e) If any situation referred to in this clause may be anticipated, or if for any such reason the vessel cannot safely and without delay reach or enter the loading port or must undergo repairs, the Carrier may cancel the contract before the Bill of Lading is issued.
(f) The Merchant shall be informed if possible.

17. Identity of Carrier.
The Contract evidenced by this Bill of Lading is between the Merchant and the Owner of the vessel named herein (or substitute) and it is therefore agreed that said Shipowner only shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel's seaworthiness. If, despite the foregoing, it is adjudged that any other is the Carrier and/or bailee of the goods shipped hereunder, all limitations of, and exonerations from, liability provided for by law or by this Bill of Lading shall be available to such other.
It is further understood and agreed that as the Line, Company or Agents who has executed this Bill of Lading for and on behalf of the Master is not a principal in the transaction, said Line, Company or Agents shall not be under any liability arising out of the contract of carriage, nor as Carrier nor bailee of the goods.

18. 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 Merchant for any loss, damage or delay 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

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by other means of transport, proceeding either directly or indirectly to such port and to carry the goods or part of them beyond their port of destination, and to tranship, land and store the goods either on shore or afloat and reship and forward the same at Carrier's expense but at Merchant's risk. When the ultimate destination at which the Carrier may have engaged to deliver the goods is other than the vessel's port of discharge, the Carrier acts as Forwarding Agent only.
The responsibility of the Carrier shall be limited to the part of the transport performed by him on vessels under his management and no claim will be acknowledged by the Carrier for damage or loss arising during any other part of the transport even though the freight for the whole transport has been collected by him.

7. Lighterage.
Any lightering in or off ports of loading or ports of discharge to be for the account of the Merchant.

8. Loading, Discharging and Delivery
of the cargo shall be arranged by the Carrier's Agent unless otherwise agreed.
Landing, storing and delivery shall be for the Merchant's account.
Loading and discharging may commence without previous notice.
The Merchant or his Assign shall tender the goods when the vessel is ready to load and as fast as the vessel can receive and – but only if required by the Carrier – also outside ordinary working hours notwithstanding any custom of the port. Otherwise the Carrier shall be relieved of any obligation to load such cargo and the vessel may leave the port without further notice and deadfreight is to be paid.
The Merchant or his Assign shall take delivery of the goods and continue to receive the goods as fast as the vessel can deliver and – but only if required by the Carrier – also outside ordinary working hours notwithstanding any custom of the port. Otherwise the Carrier shall be at liberty to discharge the goods and any discharge to be deemed a true fulfilment of the contract, or alternatively to act under Clause 16.
The Merchant shall bear all overtime charges in connection with tendering and taking delivery of the goods as above.
If the goods are not applied for within a reasonable time, the Carrier may sell the same privately or by auction.
The Merchant shall accept his reasonable proportion of unidentified loose cargo.

9. Live Animals and Deck Cargo
shall be carried subject to the Hague Rules as referred to in Clause 2 hereof with the exception that notwithstanding anything contained in Clause 19 the Carrier shall not be liable for any loss or damage resulting from any act, neglect or default of his servants in the management of such animals and deck cargo.

10. Options.
The port of discharge for optional cargo must be declared to the vessel's Agents at the first of the optional ports not later than 48

option and to be settled according to the York-Antwerp Rules 1974. In the event of accident, danger, damage or disaster before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which or for the consequence of which the Carrier is not responsible by statute, contract or otherwise, the Merchant shall contribute with the Carrier in General Average to the payment of any sacrifice, losses or expenses of a General Average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods. If a salving vessel is owned or operated by the Carrier, salvage shall be paid for as fully as if the salving vessel or vessels belonged to strangers.

15. Both-to-Blame Collision Clause. (This clause to remain in effect even if unenforcible in the Courts of the United States of America.)
If the vessel comes into collision with another vessel as a result of the negligence of the other vessel and any act, negligence or default of the Master, Mariner Pilot or the servants of the Carrier in the navigation or in the management of the vessel, the Merchant will indemnify the Carrier against all loss or liability to the other or non-carrying vessel or her Owner in so far as such loss or liability represents loss of or damage to or any claim whatsoever of the owner of the said goods paid or payable by the other or non-carrying vessel or her Owner to the owner of said cargo and set-off, or recouped or recovered by the other or non-carrying vessel or her Owner as part of his claim against the carrying vessel or Carrier. The foregoing provisions shall also apply where the Owner, operator or those in charge of any vessel or vessels or objects other than, or in addition to, the colliding vessels or objects are at fault in respect of a collision or contact.

16. Government directions, War, Epidemics, Ice, Strikes, etc.
(a) The Master and the Carrier shall have liberty to comply with any order or directions or recommendations in connection with the transport under this contract given by any Government or Authority, or anybody acting or purporting to act on behalf of such Government or Authority, or having under the terms of the insurance on the vessel the right to give such orders or directions or recommendations.
(b) Should it appear that the performance of the transport would expose the vessel or any goods onboard to risk of seizure or damage or delay, resulting from war, warlike operations, blockade, riots, civil commotions or piracy, or any person onboard to the risk of loss of life or freedom, or that any such risk has increased, the Master may discharge the cargo at port of loading or any other safe and convenient port.
(c) Should it appear that epidemics, quarantine, ice – labour troubles, labour obstructions, strikes, lock-outs, any of which onboard or on shore – difficulties in loading or discharging would prevent the vessel from leaving the port of loading or reaching or entering the port of discharge or there discharging in the usual manner and leaving again, all of which safely and without delay, the Master may

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 evidenced by this Bill of Lading.
The Carrier shall be entitled to be paid by the Merchant on demand any sum recovered or recoverable by the Merchant or any other from such servant or agent of the Carrier for any such loss, damage or delay or otherwise.

19. Optional Stowage. Unitization.
(a) Goods may be stowed by the Carrier as received, or, at Carrier's option, by means of containers, or similar articles of transport used to consolidate goods.
(b) Containers, trailers and transportable tanks, whether stowed by the Carrier or received by him in a stowed condition from the Merchant, may be carried on or under deck without notice to the Merchant.
(c) The Carrier's liability for cargo stowed as aforesaid shall be governed by the Hague Rules as defined above notwithstanding the fact that the goods are being carried on deck and the goods shall contribute to general average and shall receive compensation in general average.

ADDITIONAL CLAUSES
(To be added if required in the contemplated trade).

A. Demurrage.
The Carrier shall be paid demurrage at the daily rate per ton of the vessel's gross register tonnage as indicated on Page 2 if the vessel is not loaded or discharged with the dispatch set out in Clause 8, any delay in waiting for berth at or off port to count. Provided that if the delay is due to causes beyond the control of the Merchant, 24 hours shall be deducted from the time on demurrage.
Each Merchant shall be liable towards the Carrier for a proportionate part of the total demurrage due, based upon the total freight on the goods to be loaded or discharged at the port in question.
No Merchant shall be liable in demurrage for any delay arisen only in connection with goods belonging to other Merchants.
The demurrage in respect of each parcel shall not exceed its freight.
(This Clause shall only apply if the Demurrage Box on Page 2 is filled in).

B. U.S. Trade. Period of Responsibility.
In case the Contract evidenced by this Bill of Lading is subject to the U.S. Carriage of Goods by Sea Act, then the provisions stated in said Act shall govern before loading and after discharge and throughout the entire time the goods are in the Carrier's custody.

Bill of Lading for Combined Transport shipment or Port to Port shipment

Shipper

B/L No.:
Booking Ref.:
Shipper's Ref.

Consignee or Order

P&O Nedlloyd

Notify Party/Address

Place of Receipt

Vessel and Voy. No.

Place of Delivery

Port of Loading

Port of Discharge

Marks:

Number and kind of Packages; description of Goods

Measurement (cbm)

Above particulars as declared by Shipper, but not acknowledged by the Carrier (see clause 11

ages received by the Carrier

Total No. of

Movement

Freight and Cl

whether prepaid or collect):

Origin In land Rou

Origin Terminal H

Ocean Freight

Destination Terminal

Destination In land

ge Charge

ndling/LCL Service Charge

al Handling/LCL Service Charge

Haulage Charge

Received by the Carrier from the Ship
total number or quantity of Containe
No. of Containers/Packages received
(INCLUDING THE TERMS A
CONDITIONS OF THE CARRI
Merchant
Goods or the storage, where any can
by special arrangement or pursuant
the Carrier as required, before the ar
be surrendered by the Merchant to t
Carrier. In accepting
whether printed, st
Lading
Clause

apparent good order

noted herein) the

Freight Payable at

Place and Date of Issue

Number of Original Bills of Lading

IN WITNESS of the contract herein contained the number of originals stated opposite has been issued, one of which being accomplished the other(s) to be void

ORIGINAL

S/PONL B/L5 8/00

*OPERATING IN PARTNERSHIP WITH P&O NEDLLOYD BV

4/2049

TERMS AND CONDITIONS

(Enlarged print available from the Carrier or his agents.)

1. DEFINITIONS

In this Bill of Lading the word:-

"Carrier" means the party named in the Signature box on the face hereof.

"Merchant" includes any Person who at any time has been or becomes the Shipper, Holder, Consignee, Receiver of the Goods, any Person who owns or is entitled to the possession of the Goods or of this Bill of Lading and any Person acting on behalf of any such Person.

"Holder" means any Person for the time being in possession of (or entitled to the possession of) this Bill of Lading.

"Person" includes an individual, group, company or other entity.

"Sub-Contractor" includes (but is not limited to) owners and operators of vessels (other than the Carrier), stevedores, terminal and groupage operators, road, rail and air transport operators and any independent contractor employed by the Carrier in performance of the Carriage and any sub-sub-contractors thereof.

"indemnify" includes defend, indemnify and hold harmless whether or not the obligation to indemnify arises out of negligent or non-negligent acts or omissions of the Carrier, his servants, agents or Sub-Contractors.

"Goods" means the whole or any part of the cargo received from the Shipper and includes the packing and any equipment or Container not supplied by or on behalf of the Carrier.

"Container" includes any container, trailer, transportable tank, flat or pallet, or any similar article used to consolidate goods and any ancillary equipment.

"Carriage" means the whole or any part of the operations and services undertaken by the Carrier in respect of the Goods covered by this Bill of Lading.

"Port of Loading" means any port at which the Goods are loaded on board any vessel (which may not necessarily be the vessel named overleaf) for Carriage under this Bill of Lading.

"Port of Discharge" means any port at which the Goods are discharged from any vessel (which may not necessarily be the vessel named overleaf) after Carriage under this Bill of Lading.

"Vessel" means any waterborne craft used in the Carriage under this Bill of Lading which may be a feeder vessel or an ocean vessel.

"Combined Transport" arises if the Place of Receipt and/or the Place of Delivery are indicated on the face hereof in the relevant spaces.

"Port to Port" arises if the Carriage is not Combined Transport.

"Shipped on Board" relates only to the Container into which the Goods are manifested.

"Freight" includes all charges payable to the Carrier in accordance with the applicable Tariff and this Bill of Lading.

"Hague Rules" means the provisions of the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25th August, 1924 and includes the amendments by the Protocol signed at Brussels on 23rd February, 1968, but only if such amendments are compulsorily applicable to this Bill of Lading. (It is expressly provided that nothing in this Bill of Lading shall be construed as contractually applying said Rules as amended by said Protocol).

2. CARRIER'S TARIFF

The terms and conditions of the Carrier's applicable Tariff are incorporated herein. Particular attention is drawn to the terms and conditions therein relating to container and vehicle demurrage. Copies of the relevant provisions of the applicable Tariff are obtainable from the Carrier or his agents upon request. In the case of inconsistency between this Bill of Lading and the applicable Tariff, this Bill of Lading shall prevail.

3. WARRANTY

The Merchant warrants that in agreeing to the terms and conditions hereof he is, or has the authority of the Person owning or entitled to the possession of the Goods and this Bill of Lading.

4. SUB-CONTRACTING AND INDEMNITY

(1) The Carrier shall be entitled to sub-contract the Carriage on any terms whatsoever.

(2) The Merchant undertakes that no claim or allegation shall be made against any Person whomsoever by whom the Carriage is performed or undertaken (including all Sub-Contractors of the Carrier), other than the Carrier, which imposes or attempts to impose upon any such Person, or any vessel owned by any such Person, any liability whatsoever in connection with the Goods or the Carriage of the Goods, whether or not arising out of negligence on the part of such Person and, if any such claim or allegation should nevertheless be made, the Merchant will indemnify the Carrier against all consequences thereof. Without prejudice to the foregoing every such Person or vessel shall have the benefit of every right, defence, limitation and liberty of whatsoever nature herein contained or otherwise available to the Carrier (including, but not limited to Clause 24 hereof) as if such provisions were expressly for his benefit, and in entering into this contract, the Carrier, to the extent of these provisions, does so not only on his own behalf but also as agent and trustee for such Persons or vessel.

(3) The provisions of Clause 4 (2), including but not limited to the undertakings of the Merchant contained therein, shall extend to claims or allegations of whatsoever nature against other Persons chartering space on the carrying vessel.

(4) The Merchant further undertakes that no claim or allegation in respect of the Goods shall be made against the Carrier by any Person other than in accordance with the terms and conditions of this Bill of Lading which imposes or attempts to impose upon the Carrier any liability whatsoever in connection with the Goods or the Carriage of the Goods, whether or not arising out of negligence on the part of the Carrier and, if any such claim or allegation should nevertheless be made, to indemnify the Carrier against all consequences thereof.

5. CARRIER'S RESPONSIBILITY PORT-TO-PORT SHIPMENT

If Carriage is Port-to-Port, the liability (if any) of the Carrier for loss, damage or delay to the Goods occurring from and during loading onto any vessel up to and during discharge from that vessel or from another vessel into which the Goods have been transhipped shall be determined in accordance with any national law making the Hague Rules compulsorily applicable to this Bill of Lading, or in any other case in accordance with the Hague Rules, Articles 1–8 inclusive only.

Unless Clause 25 applies, the Carrier shall be under no liability whatsoever for loss, damage or delay to the Goods, howsoever occurring, if such loss or damage arises prior to loading onto or subsequent to discharge from a vessel. Notwithstanding the above, in case and to the extent that any applicable law provides for any additional period of responsibility, the Carrier shall have the benefit of every right, defence, limitation and liberty in the Hague Rules as applied by this clause during that period, notwithstanding that the loss, damage or delay did not occur at sea.

In the event of the Goods being discharged at a port other than the Port of Discharge nominated in this Bill of Lading and forwarded to the nominated Port of Discharge by whatever means, the Hague Rules as referred to in paragraph 1 of this clause shall continue to apply until delivery at the nominated Port of Discharge, notwithstanding that Carriage may not be by sea.

6. CARRIER'S RESPONSIBILITY/ COMBINED TRANSPORT

If Carriage is Combined Transport, the Carrier undertakes to perform and/or in his own name to procure performance of the Carriage from the Place of Receipt or the Port of Loading whichever is applicable, to the Port of Discharge or the Place of Delivery, whichever is applicable, and, save as is otherwise provided for in this Bill of Lading, the Carrier shall be liable for loss, damage or delay occurring during the Carriage only to the extent set out below.

(1) *If the stage of the Carriage during which loss or damage occurred is not known*

(a) *Exclusions*

If the stage of the Carriage during which the loss, damage or delay occurred is not known, the Carrier shall be relieved of liability for any loss, damage or delay if such loss, damage or delay was caused by:

(i) an act or omission of the Merchant,

(ii) insufficiency of or defective condition of packing or marking,

(iii) handling, loading, stowage or unloading of the Goods by or on behalf of the Merchant (see Clause 8),

(iv) inherent vice of the Goods,

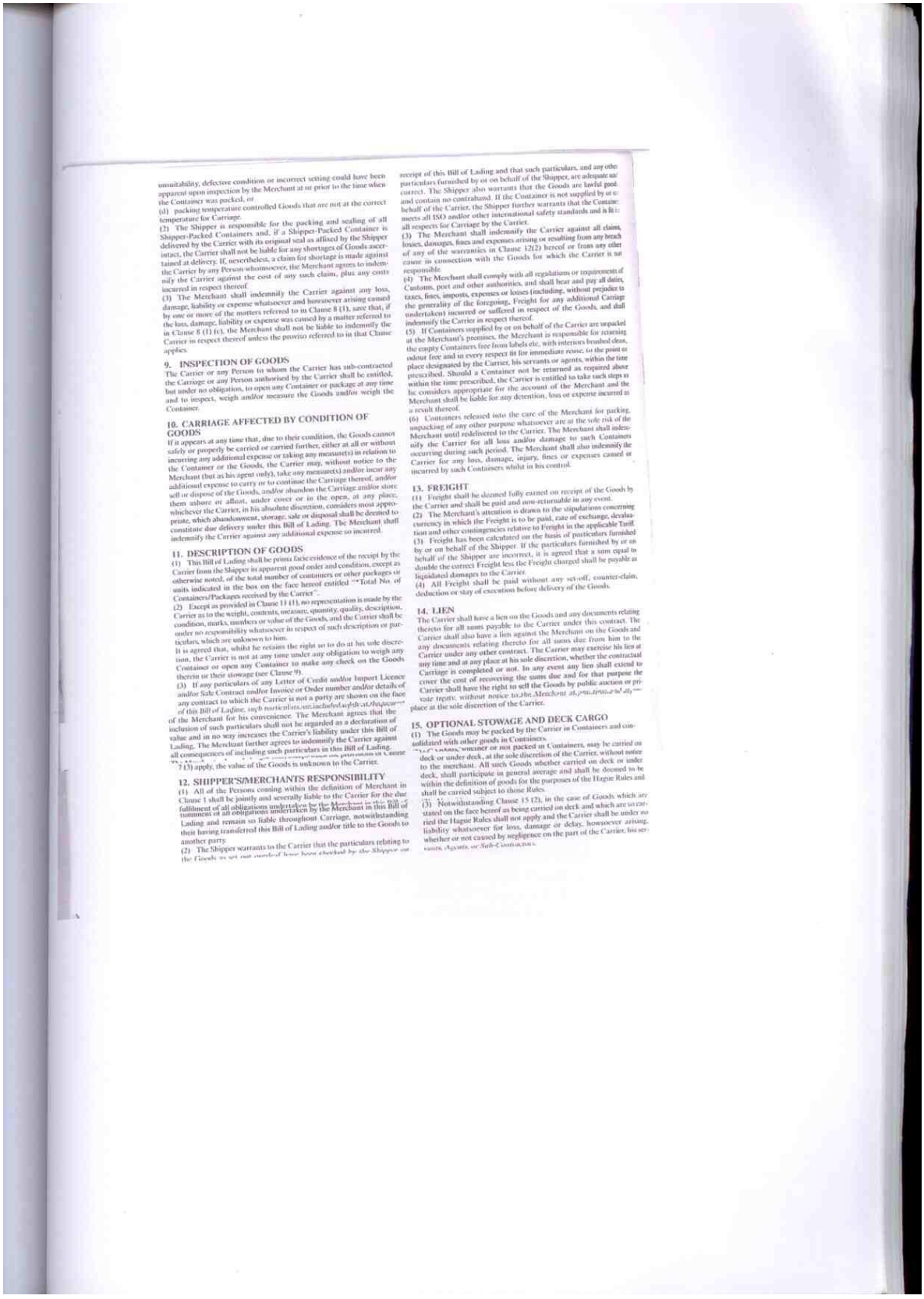
(v) strike, lock-out, stoppage or restraint of labour, from whatever cause, whether partial or general,
(vi) a nuclear incident,
(vii) any cause or event which the Carrier could not avoid and the consequences whereof he could not prevent by the exercise of reasonable diligence,
(viii) any act or omission of the Carrier the consequences of which he could not reasonably have foreseen,
(ix) compliance with instructions of any Person entitled to give them.
(b) *Burden of Proof*
The burden of proof that the loss, damage or delay was due to one or more of the causes or events specified in this Clause 6 (1) shall rest upon the Carrier. Save that if the Carrier establishes that, in the circumstances of the case, the loss or damage could be attributed to one or more of the causes or events specified in Clause 6 (1) (a) (ii), (iii) or (iv), it shall be presumed that it was so caused. The Merchant shall, however, be entitled to prove that the loss or damage was not, in fact, caused either wholly or partly by one or more of these causes or events.
(c) *Limitation of Liability*
Except as provided in Clauses 7 (2), 7 (3), and 27, if Clause 6 (1) operates total compensation shall in no circumstances whatsoever and howsoever arising exceed 2 SDRs per kilo of the gross weight of the Goods lost or damaged. (SDR means Special Drawing Right as defined by the International Monetary Fund). Limitation of liability for delay shall be as provided in the applicable international convention or national law, in the absence of which the Carrier accepts no liability whatsoever for delay, howsoever caused (see Clause 7 (4)).
(2) *If the state of the Carriage during which the loss or damage occurred is known*
Notwithstanding anything provided for in Clause 6 (1) and subject to Clauses 15 and 16, if it is known during which stage of the Carriage the loss, damage or delay occurred, the liability of the Carrier in respect of such loss, damage or delay shall be determined:
(a) by the provisions contained in any international convention or national law which provisions:-
(i) cannot be departed from by private contract to the detriment of the Merchant, and
(ii) would have applied if the Merchant had made a separate and direct contract with the Carrier in respect of the particular stage of the carriage during which the loss, damage or delay occurred and received as evidence thereof any particular document which must be issued in order to make such international convention or national law applicable, or
(b) if no international convention or national law would apply by virtue of Clause 6 (2) (a), by the Hague Rules, Articles 1–8 inclusive only if the loss, damage or delay is known to have occurred during waterborne Carriage, or
(c) by the provisions of Clause 6 (1) if the provisions of Clause 6 (2) (a) and (b) above do not apply.
For the purposes of Clause 6 (2), references in the Hague Rules to carriage by sea shall be deemed to include references to all waterborne Carriage and the Hague Rules shall be construed accordingly.
(3) *If the Place of Receipt or Place of Delivery is not named on the face hereof*
Subject to Clauses 5 and 25,
(a) if the Place of Receipt is not named on the face hereof, the Carrier shall be under no liability whatsoever for loss, damage or delay to the Goods, howsoever occurring, if such loss, damage or delay arises prior to loading onto the vessel.
(b) if the Place of Delivery is not named on the face hereof, the Carrier shall be under no liability whatsoever for loss, damage or delay to the Goods, howsoever occurring, if such loss or damage arises subsequent to discharge from the vessel.
(4) *Notice of Claim*
Unless Clause 25 applies, the Carrier shall be deemed prima facie to have effected timely delivery of the Goods as described in this Bill of Lading unless notice of loss, damage or delay to the Goods, indicating the general nature of such loss, damage or delay, shall have been given in writing to the Carrier or to his representative at the Place of Delivery (or the Port of Discharge if no Place of Delivery is named on the face hereof) before or at the time of removal of the Goods into the custody of the Person entitled to delivery thereof under this Bill of Lading, or, if the loss or damage is not apparent, within three working days thereafter.
(5) *Time-bar*
Unless Clause 25 applies, the Carrier shall be discharged of all liability whatsoever in respect of the Goods, unless suit is brought and notice thereof given to the Carrier within nine months after delivery of the Goods or, if the Goods are not delivered, ten months after the date of issue of this Bill of lading.

7. SUNDRY LIABILITY PROVISIONS

(1) *Basis of Compensation*
Unless Clause 25 applies, compensation shall be calculated by reference to the value of the Goods at the place and time they are delivered to the Merchant, or at the place and time they should have been delivered. For the purpose of determining the extent of the Carrier's liability for loss, damage or delay to the Goods, the sound value of the Goods is agreed to be the FOB/FCA invoice value plus freight and insurance if paid.
(2) *Hague Rules Limitation*
If the Hague Rules are applicable by national law, the liability of the Carrier shall in no event exceed the limit provided in the applicable national law. If the Hague Rules are applicable otherwise than by national law, in determining the liability of the Carrier the liability shall in no event exceed £100 sterling per package or unit.
(3) *Ad Valorem*
The Merchant agrees and acknowledges that the Carrier has no knowledge of the value of the Goods, and that higher compensation than that provided for in this Bill of Lading may not be claimed unless, with the consent of the Carrier, the value of the Goods declared by the Shipper prior to the commencement of the Carriage is stated in this Bill of Lading and extra Freight paid, if required. In that case, the amount of the declared value shall be substituted for the limits laid down in this Bill of Lading. Any partial loss or damage shall be adjusted pro rata on the basis of such declared value.
(4) *Delay*
(a) Unless Clause 25 applies, the Carrier does not undertake that the Goods shall arrive at the Port of Discharge or Place of Delivery at any particular time or to meet any particular market or use, and the Carrier shall in no circumstances whatsoever and howsoever arising be liable for direct, indirect or consequential loss or damage caused by delay.
(b) However, if Clause 25 applies, unless a latest date of delivery is shown on the face hereof and any required premium paid, timely delivery shall be considered to have been made if the Goods are made available to the Merchant at the Port of Discharge or Place of Delivery, as the case may be, within 60 days after the date published in the P&O Nedlloyd Inbound Schedule against the Port of Discharge nominated therein for the relevant ocean Vessel. The Carrier shall be entitled to all the defences, exceptions and limitations provided in the applicable international convention or national law and this Bill of Lading.
(5) *Scope of Application*
(a) The terms and conditions of this Bill of Lading shall at all times govern all responsibilities of the Carrier in connection with or arising out of the supply of a Container to the Merchant, not only during the Carriage, but also during the periods prior to and/or subsequent to the Carriage.
(b) The rights, defences, limitations and liberties of whatsoever nature provided for in this Bill of Lading shall apply in any action against the Carrier for loss, damage or delay, howsoever occurring and whether the action be founded in contract or in tort and even if the loss, damage or delay arose as a result of unseaworthiness, negligence or breach of a fundamental term of this contract.
(c) Save as is otherwise provided for in this Bill of Lading, the Carrier shall in no circumstances whatsoever and howsoever arising be liable for direct or indirect or consequential loss or damage or loss of profits.
(6) *Inspection by Authorities*
If by order of the authorities at any place, a Container has to be opened for the Goods to be inspected, the Carrier will not be liable for any loss, damage or delay incurred as a result of any opening, unpacking inspection or repacking. The Carrier shall be entitled to recover the cost of such opening, unpacking, inspection and repacking from the Merchant.

8. SHIPPER-PACKED CONTAINERS

If a Container has not been packed by or on behalf of the Carrier:
(1) The Carrier shall not be liable for loss, damage or delay to the Goods caused by matters beyond his control, including, inter alia, without prejudice to the generality of this exclusion:
(a) the manner in which the Container has been packed, or
(b) the unsuitability of the Goods for carriage in the Container supplied, or
(c) the unsuitability or defective condition of the Container or the incorrect setting of any temperature controls thereof, provided that, if the Container has been supplied by or on behalf of the Carrier, this



unsuitability, defective condition or incorrect setting could have been apparent upon inspection by the Merchant at or prior to the time when the Container was packed, or

(d) packing temperature controlled Goods that are not at the correct temperature for Carriage.

(2) The Shipper is responsible for the packing and sealing of all Shipper-Packed Containers and, if a Shipper-Packed Container is delivered by the Carrier with its original seal as affixed by the Shipper intact, the Carrier shall not be liable for any shortages of Goods ascertained at delivery. If, nevertheless, a claim for shortage is made against the Carrier by any Person whomsoever, the Merchant agrees to indemnify the Carrier against the cost of any such claim, plus any costs incurred in respect thereof.

(3) The Merchant shall indemnify the Carrier against any loss, damage, liability or expense whatsoever and howsoever arising caused by one or more of the matters referred to in Clause 8 (1), save that, if the loss, damage, liability or expense was caused by a matter referred to in Clause 8 (1) (c), the Merchant shall not be liable to indemnify the Carrier in respect thereof unless the proviso referred to in that Clause applies.

9. INSPECTION OF GOODS

The Carrier or any Person to whom the Carrier has sub-contracted the Carriage or any Person authorised by the Carrier shall be entitled, but under no obligation, to open any Container or package at any time and to inspect, weigh and/or measure the Goods and/or weigh the Container.

10. CARRIAGE AFFECTED BY CONDITION OF GOODS

If it appears at any time that, due to their condition, the Goods cannot safely or properly be carried or carried further, either at all or without incurring any additional expense or taking any measure(s) in relation to the Container or the Goods, the Carrier may, without notice to the Merchant (but as his agent only), take any measure(s) and/or incur any additional expense to carry or to continue the Carriage thereof, and/or sell or dispose of the Goods, and/or abandon the Carriage and/or store them ashore or afloat, under cover or in the open, at any place, whichever the Carrier, in his absolute discretion, considers most appropriate, which abandonment, storage, sale or disposal shall be deemed to constitute due delivery under this Bill of Lading. The Merchant shall indemnify the Carrier against any additional expense so incurred.

11. DESCRIPTION OF GOODS

(1) This Bill of Lading shall be prima facie evidence of the receipt by the Carrier from the Shipper in apparent good order and condition, except as otherwise noted, of the total number of containers or other packages or units indicated in the box on the face hereof entitled "*Total No. of Containers/Packages received by the Carrier".

(2) Except as provided in Clause 11 (1), no representation is made by the Carrier as to the weight, contents, measure, quantity, quality, description, condition, marks, numbers or value of the Goods, and the Carrier shall be under no responsibility whatsoever in respect of such description or particulars, which are unknown to him.

It is agreed that, whilst he retains the right so to do at his sole discretion, the Carrier is not at any time under any obligation to weigh any Container or open any Container to make any check on the Goods therein or their stowage (see Clause 9).

(3) If any particulars of any Letter of Credit and/or Import Licence and/or Sale Contract and/or Invoice or Order number and/or details of any contract to which the Carrier is not a party are shown on the face of this Bill of Lading, such particulars are included solely for the convenience of the Merchant for his convenience. The Merchant agrees that the inclusion of such particulars shall not be regarded as a declaration of value and in no way increases the Carrier's liability under this Bill of Lading. The Merchant further agrees to indemnify the Carrier against all consequences of including such particulars in this Bill of Lading.

(4) [illegible] apply, the value of the Goods is unknown to the Carrier.

12. SHIPPER'S/MERCHANTS RESPONSIBILITY

(1) All of the Persons coming within the definition of Merchant in Clause 1 shall be jointly and severally liable to the Carrier for the due fulfilment of all obligations undertaken by the Merchant in this Bill of Lading and remain so liable throughout Carriage, notwithstanding their having transferred this Bill of Lading and/or title to the Goods to another party.

(2) The Shipper warrants to the Carrier that the particulars relating to the Goods as set out overleaf have been checked by the Shipper on receipt of this Bill of Lading and that such particulars, and any other particulars furnished by or on behalf of the Shipper, are adequate and correct. The Shipper also warrants that the Goods are lawful goods and contain no contraband. If the Container is not supplied by or on behalf of the Carrier, the Shipper further warrants that the Container meets all ISO and/or other international safety standards and is fit in all respects for Carriage by the Carrier.

(3) The Merchant shall indemnify the Carrier against all claims, losses, damages, fines and expenses arising or resulting from any breach of any of the warranties in Clause 12(2) hereof or from any other cause in connection with the Goods for which the Carrier is not responsible.

(4) The Merchant shall comply with all regulations or requirements of Customs, port and other authorities, and shall bear and pay all duties, taxes, fines, imposts, expenses or losses (including, without prejudice to the generality of the foregoing, Freight for any additional Carriage undertaken) incurred or suffered in respect of the Goods, and shall indemnify the Carrier in respect thereof.

(5) If Containers supplied by or on behalf of the Carrier are unpacked at the Merchant's premises, the Merchant is responsible for returning the empty Containers free from labels etc. with interiors brushed clean, odour free and in every respect fit for immediate reuse, to the point or place designated by the Carrier, his servants or agents, within the time prescribed. Should a Container not be returned as required above within the time prescribed, the Carrier is entitled to take such steps as he considers appropriate for the account of the Merchant and the Merchant shall be liable for any detention, loss or expense incurred as a result thereof.

(6) Containers released into the care of the Merchant for packing, unpacking of any other purpose whatsoever are at the sole risk of the Merchant until redelivered to the Carrier. The Merchant shall indemnify the Carrier for all loss and/or damage to such Containers occurring during such period. The Merchant shall also indemnify the Carrier for any loss, damage, injury, fines or expenses caused or incurred by such Containers whilst in his control.

13. FREIGHT

(1) Freight shall be deemed fully earned on receipt of the Goods by the Carrier and shall be paid and non-returnable in any event.

(2) The Merchant's attention is drawn to the stipulations concerning currency in which the Freight is to be paid, rate of exchange, devaluation and other contingencies relative to Freight in the applicable Tariff.

(3) Freight has been calculated on the basis of particulars furnished by or on behalf of the Shipper. If the particulars furnished by or on behalf of the Shipper are incorrect, it is agreed that a sum equal to double the correct Freight less the Freight charged shall be payable as liquidated damages to the Carrier.

(4) All Freight shall be paid without any set-off, counter-claim, deduction or stay of execution before delivery of the Goods.

14. LIEN

The Carrier shall have a lien on the Goods and any documents relating thereto for all sums payable to the Carrier under this contract. The Carrier shall also have a lien against the Merchant on the Goods and any documents relating thereto for all sums due from him to the Carrier under any other contract. The Carrier may exercise his lien at any time and at any place at his sole discretion, whether the contractual Carriage is completed or not. In any event any lien shall extend to cover the cost of recovering the sums due and for that purpose the Carrier shall have the right to sell the Goods by public auction or private treaty, without notice to the Merchant at such time and [illegible] place at the sole discretion of the Carrier.

15. OPTIONAL STOWAGE AND DECK CARGO

(1) The Goods may be packed by the Carrier in Containers and consolidated with other goods in Containers.

"[illegible] unless, whether or not packed in Containers, may be carried on deck or under deck, at the sole discretion of the Carrier, without notice to the merchant. All such Goods whether carried on deck or under deck, shall participate in general average and shall be deemed to be within the definition of goods for the purposes of the Hague Rules and shall be carried subject to those Rules.

(3) Notwithstanding Clause 15 (2), in the case of Goods which are stated on the face hereof as being carried on deck and which are so carried the Hague Rules shall not apply and the Carrier shall be under no liability whatsoever for loss, damage or delay, howsoever arising, whether or not caused by negligence on the part of the Carrier, his servants, Agents or Sub-Contractors.

16. LIVE ANIMALS

The Hague Rules shall not apply to the Carriage of live animals which are carried at the sole risk of the Merchant. The Carrier shall be under no liability whatsoever for any injury, illness, death, delay or destruction to such live animals howsoever arising. Should the Master in his sole discretion consider that any live animal is likely to be injurious to any other live animal or any person or property on board, or to cause the vessel to be delayed or imperiled in the prosecution of its voyage, such live animal may be destroyed and thrown overboard without any liability attaching to the Carrier. The Merchant shall indemnify the Carrier against all or any extra costs incurred but any reason whatsoever in connection with the Carriage of any live animal.

17. METHODS AND ROUTES OF CARRIAGE

(1) The Carrier may at any time and without notice to the Merchant:

(a) use any means of carriage whatsoever;

(b) transfer the Goods from one conveyance to another, including but not limited to transhipping or carrying them on another vessel than that named on the face hereof;

(c) unpack and remove the Goods which have been packed into a Container and forward them in a Container or otherwise;

(d) proceed by any route in his discretion (whether or not the nearest or most direct or customary or advertised route), at any speed, and proceed to or stop at any place or port whatsoever, once or more often and in any order;

(e) load or unload the Goods at any place or port (whether or not such port is named expressly as the Port of Loading or Port of Discharge) and store the Goods at any such place or port;

(f) comply with any orders or recommendations given by any government or authority, or any Person acting or purporting to act as or on behalf of such government or authority, or having under the terms of any insurance on any conveyance employed by the Carrier the right to give orders or directions;

(g) permit the vessel to proceed with or without pilots, to tow or be towed, or to be dry-docked with or without Goods and/or Containers on board.

(2) The liberties set out in Clause 17(1) may be invoked by the Carrier for any purpose whatsoever, whether or not connected with the Carriage of the Goods, including but not limited to loading or unloading other goods, bunkering, undergoing repairs, obtaining instructions, picking up or landing any persons, including but not limited to persons involved with the operation or maintenance of the vessel and avoiding vessels in all situations. Anything done in accordance with Clause 17 (1) or any delay arising therefrom shall be deemed to be within the contractual Carriage and shall not be a deviation.

(3) By tendering Goods for Carriage without any written request for Carriage in a specialised Container, or for Carriage otherwise than in a Container, the Merchant accepts that Carriage may properly be undertaken in a general purpose container, carried on or under deck at the Carrier's sole discretion.

18. MATTERS AFFECTING PERFORMANCE

If at any time the Carriage, the vessel or other goods on board the vessel are or are likely to be affected by any hindrance, risk, delay, difficulty or disadvantage of any kind other than the inability of the Goods, due to their condition, safely or properly to be carried or carried further) and howsoever arising (even though the circumstances giving rise to such hindrance, risk, delay, difficulty or disadvantage existed at the time this contract was entered into or the Goods were received for Carriage), the Carrier (whether or not the Carriage is commenced) may, without prior notice to the Merchant and at the sole discretion of the Carrier, either:

(a) Carry the Goods to the contracted Port of Discharge or Place of Delivery, whichever is applicable, by an alternative route to that indicated in this Bill of Lading or that which is usual for Goods consigned to that Port of Discharge or Place of Delivery. If the Carrier elects to invoke the term of this Clause 18 (a) then, notwithstanding the provisions of Clause 17 hereof, he shall be entitled to charge such additional Freight as the Carrier may determine;

or

(b) Suspend the Carriage of the Goods and store them ashore or afloat upon the terms of this Bill of Lading and endeavour to forward them as soon as possible, but the Carrier makes no representations as to the maximum period of such suspension of Carriage. If the Carrier elects to invoke the terms of this Clause 18 (b) then notwithstanding the provisions of Clause 17 hereof, he shall be entitled to charge such additional Freight as the Carrier may determine;

or

(c) Abandon the Carriage of the Goods and place them at the Merchant's disposal at any place or port which the Carrier may deem safe and convenient, whereupon the responsibility of the Carrier in respect of such Goods shall cease. The Carrier shall nevertheless be entitled to full Freight on the Goods received for Carriage, and the Merchant shall pay any additional costs of the Carriage, and delivery and storage at, such place or port. If the Carrier elects to use an alternative route under Clause 18 (a) or to suspend the Carriage under Clause 18 (b) he shall not prejudice his right subsequently to abandon the Carriage.

19. DANGEROUS GOODS

(1) No Goods which are or may become dangerous, inflammable, damaging or injurious (including radioactive materials), or which are or may become liable to damage any property whatsoever or injure any person whomsoever, shall be tendered to the Carrier for Carriage without his express consent in writing, and without the Container as well as the Goods themselves being distinctly marked on the outside so as to indicate the nature and character of any such Goods and so as to comply with any applicable laws, regulations or requirements. Even such Goods are delivered to the Carrier without such written consent and/or marking, or if in the opinion of the Carrier the Goods are or are liable to become of a dangerous, inflammable, damaging or injurious nature, they may at any time be destroyed, disposed of, abandoned, or rendered harmless without compensation to the Merchant and without prejudice to the Carrier's right to Freight.

(2) The Merchant undertakes that such Goods are packed in a manner adequate to withstand the risks of Carriage having regard to their nature, and in compliance with all laws, regulations which may be applicable during the Carriage. In particular but without prejudice to the generality of this Clause 19(2), if the Goods are not packed into the Container by or on behalf of the Carrier, the Merchant undertakes that incompatible Goods are not packed in the same Container.

(3) Whether or not the Merchant was aware of the nature of the Goods, the Merchant shall indemnify the Carrier against all claims, losses, damages or expenses arising in consequence of the Carriage of such Goods.

(4) Nothing contained in this Clause shall deprive the Carrier of any of his rights provided for elsewhere.

20. NOTIFICATION AND DELIVERY

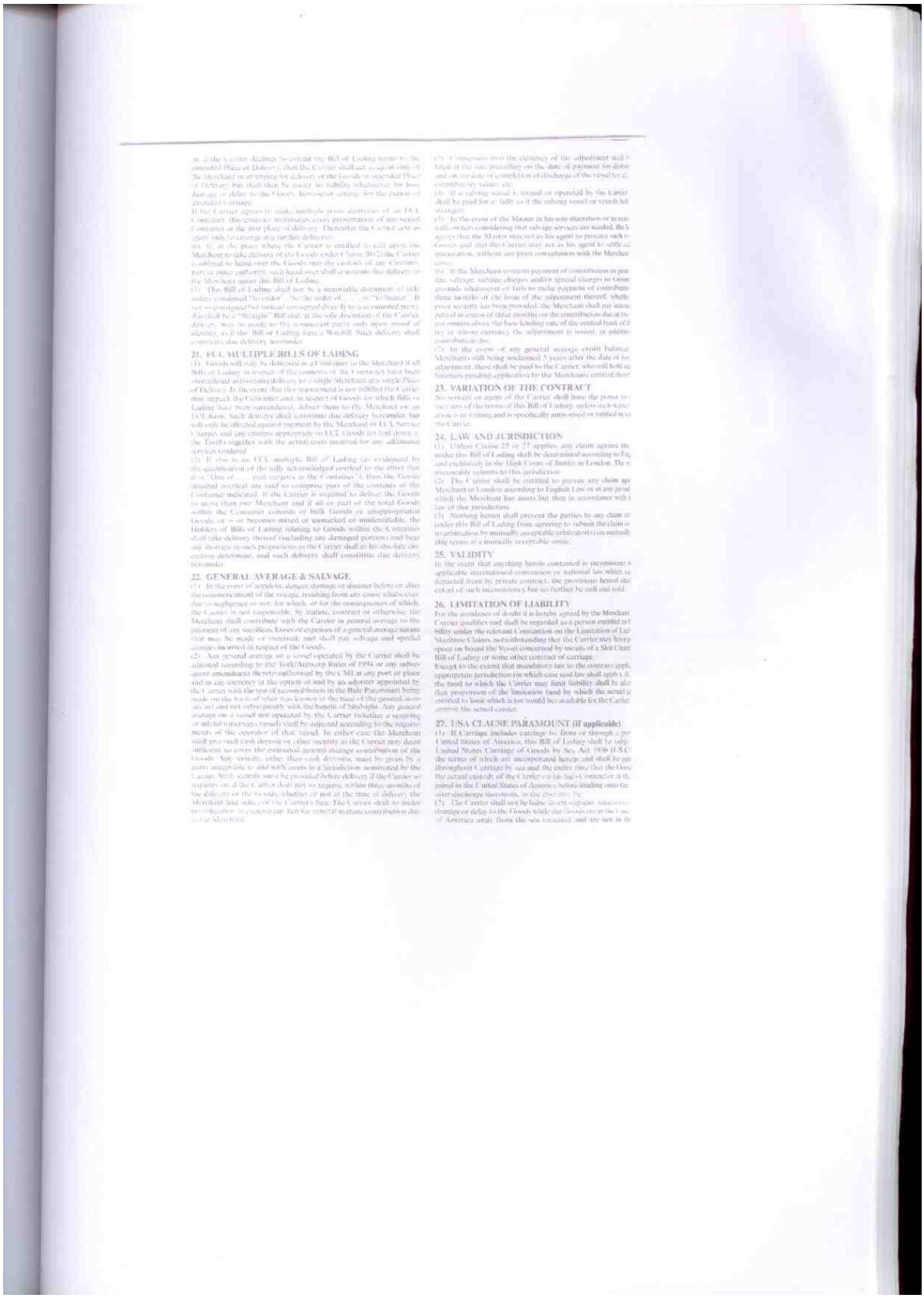
(1) Any mention herein of parties to be notified of the arrival of the Goods is solely for information of the Carrier, and failure to give such notification shall not involve the Carrier in any liability nor relieve the Merchant of any obligation hereunder.

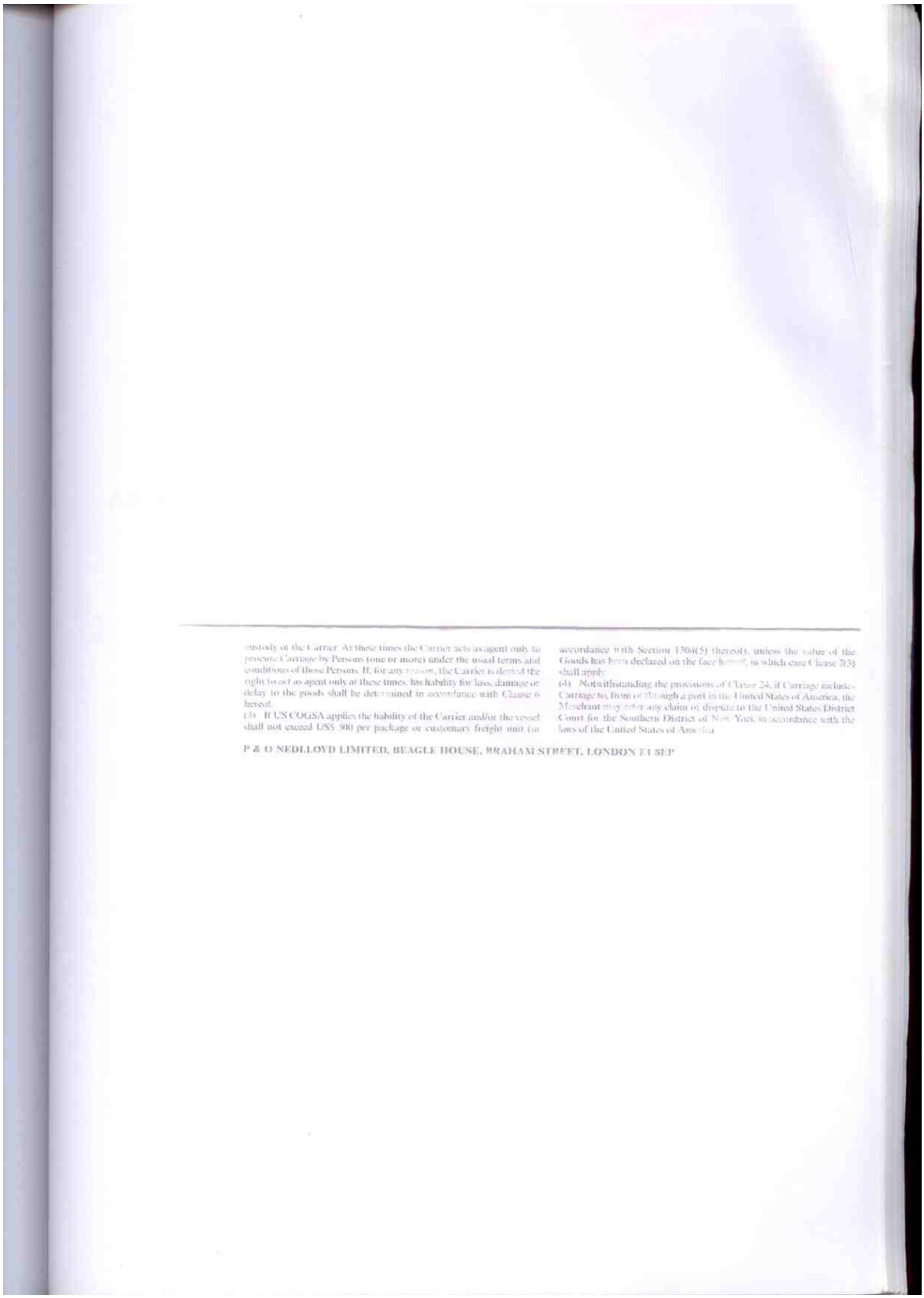
(2) The Merchant shall take delivery of the Goods within the time provided in the Carrier's applicable Tariff (see Clause 2). If the Merchant fails to do so the Carrier shall be entitled, without notice, to unpack the Goods if packed in Containers and/or to store the Goods ashore, afloat, in the open or under cover, at the sole risk of the Merchant. Such storage shall constitute due delivery hereunder, and thereupon the liability of the Carrier in respect of the Goods stored as aforesaid shall wholly cease, and the costs of such storage, if paid or payable by the Carrier or any agent or Sub-Contractor of the Carriers shall forthwith upon demand be paid by the Merchant to the Carrier.

(3) If the Merchant fails to take delivery of the Goods within thirty days of delivery becoming due under Clause 20 (2), or if in the opinion of the Carrier they are likely to deteriorate, decay, become worthless or incur charges whether for storage or otherwise in excess of their value, the Carrier may, without prejudice to any other rights which he may have against the Merchant, without notice and without any responsibility whatsoever attaching to him, sell, destroy or dispose of the Goods and apply any proceeds of sale in reduction of the sums due to the Carrier from the Merchant.

(4) Refusal by the Merchant to take delivery of the Goods in accordance with the terms of this Clause and/or to mitigate any loss or damage thereto shall constitute a waiver by the Merchant to the Carrier of any claim whatsoever relating to the Goods or the Carriage thereof.

(5) In the event of the Carrier agreeing to a request of the Merchant to amend the Place of Delivery stated herein without stipulating any particular terms and conditions to apply during said amended Carriage, to the extent provided by the applicable Tariff the terms and conditions of this Bill of Lading shall continue to apply, but only until the Goods are delivered by the Carrier to the Merchant at the amended Place of Delivery. Once the applicable Tariff ceases to provide for the continued application of the terms and conditions of the Bill of Lading





custody of the Carrier. At these times the Carrier acts as agent only to procure Carriage by Persons (one or more) under the usual terms and conditions of those Persons. If, for any reason, the Carrier is denied the right to act as agent only at these times, his liability for loss, damage or delay to the goods shall be determined in accordance with Clause 6 hereof.

13 If US COGSA applies the liability of the Carrier and/or the vessel shall not exceed US$ 500 per package or customary freight unit (in accordance with Section 1304(5) thereof), unless the value of the Goods has been declared on the face hereof, in which case Clause 7(3) shall apply.

14 Notwithstanding the provisions of Clause 24, if Carriage includes Carriage to, from or through a port in the United States of America, the Merchant may refer any claim or dispute to the United States District Court for the Southern District of New York in accordance with the laws of the United States of America.

P & O NEDLLOYD LIMITED, BEAGLE HOUSE, BRAHAM STREET, LONDON E1 8EP

APPENDIX 8

United Nations Convention on International Multimodal Transport of Goods

(Geneva, 24 May 1980)

THE STATES PARTIES TO THIS CONVENTION

RECOGNIZING

(a) that international multimodal transport is one means of facilitating the orderly expansion of world trade;

(b) the need to stimulate the development of smooth, economic and efficient multimodal transport services adequate to the requirements of the trade concerned;

(c) the desirability of ensuring the orderly development of international multimodal transport in the interest of all countries and the need to consider the special problems of transit countries;

(d) the desirability of determining certain rules relating to the carriage of goods by international multimodal transport contracts, including equitable provisions concerning the liability of multimodal transport operators;

(e) the need that this Convention should not affect the application of any international convention or national law relating to the regulation and control of transport operations;

(f) the right of each State to regulate and control at the national level multimodal transport operators and operations;

(g) the need to have regard to the special interest and problems of developing countries, for example, as regards introduction of new technologies, participation in multimodal services of their national carriers and operators, cost efficiency thereof and maximum use of local labour and insurance;

(h) the need to ensure a balance of interests between suppliers and users of multimodal transport services;

(i) the need to facilitate customs procedures with due consideration to the problems of transit countries;

AGREEING to the following basic principles;

(a) that a fair balance of interests between developed and developing countries should be established and an equitable distribution of activities

between these groups of countries should be attained in international multimodal transport;

(b) that consultation should take place on terms and conditions of service, both before and after the introduction of any new technology in the multimodal transport of goods, between the multimodal transport operator, shippers, shippers' organizations and appropriate national authorities;

(c) the freedom for shippers to choose between multimodal and segmented transport services;

(d) that the liability of the multimodal transport operator under this Convention should be based on the principle of presumed fault or neglect,

HAVE DECIDED to conclude a Convention for this purpose and have thereto agreed as follows:

PART I. GENERAL PROVISIONS

Article 1

Definitions

For the purposes of this Convention:

1. "International multimodal transport" means the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country. The operations of pick-up and delivery of goods carried out in the performance of a unimodal transport contract, as defined in such contract, shall not be considered as international multimodal transport.

2. "Multimodal transport operator" means any person who on his own behalf or through another person acting on his behalf concludes a multimodal transport contract and who acts as a principal, not as an agent or on behalf of the consignor or of the carriers participating in the multimodal transport operations, and who assumes responsibility for the performance of the contract.

3. "Multimodal transport contract" means a contract whereby a multimodal transport operator undertakes, against payment of freight, to perform or to procure the performance of international multimodal transport.

4. "Multimodal transport document" means a document which evidences a multimodal transport contract, the taking in charge of the goods by the multimodal transport operator, and an undertaking by him to deliver the goods in accordance with the terms of that contract.

5. "Consignor" means any person by whom or in whose name or on whose behalf a multimodal transport contract has been concluded with the multimodal transport operator, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the multimodal transport operator in relation to the multimodal transport contract.

6. "Consignee" means the person entitled to take delivery of the goods.

7. "Goods" includes any container, pallet or similar article of transport or packaging, if supplied by the consignor.

8. "International convention" means an international agreement concluded among States in written form and governed by international law.

9. "Mandatory national law" means any statutory law concerning carriage of goods the provisions of which cannot be departed from by contractual stipulation to the detriment of the consignor.

10. "Writing" means, *inter alia* , telegram or telex.

Article 2

Scope of application

The provisions of this Convention shall apply to all contracts of multimodal transport between places in two States, if:

(a) the place for the taking in charge of the goods by the multimodal transport operator as provided for in the multimodal transport contract is located in a Contracting State, or

(b) the place for delivery of the goods by the multimodal transport operator as provided for in the multimodal transport contract is located in a Contracting State.

Article 3

Mandatory application

1. When a multimodal transport contract has been concluded which according to article 2 shall be governed by this Convention, the provisions of this Convention shall be mandatorily applicable to such contract.

2. Nothing in this Convention shall affect the right of the consignor to choose between multimodal transport and segmented transport.

Article 4

Regulation and control of multimodal transport

1. This Convention shall not affect, or be incompatible with, the application of any international convention or national law relating to the regulation and control of transport operations.

2. This Convention shall not affect the right of each State to regulate and control at the national level multimodal transport operations and multimodal transport operators, including the right to take measures relating to consultations, especially before the introduction of new technologies and services, between multimodal transport operators, shippers, shippers' organizations and appropriate national authorities on terms and conditions of service; licensing of multimodal transport operators; participation in transport; and all other steps in the national economic and commercial interest.

3. The multimodal transport operator shall comply with the applicable law of the country in which he operates and with the provisions of this Convention.

PART II. DOCUMENTATION

Article 5

Issue of multimodal transport document

1. When the goods are taken in charge by the multimodal transport operator, he shall issue a multimodal transport document which, at the option of the consignor, shall be in either negotiable or non-negotiable form.

2. The multimodal transport document shall be signed by the multimodal transport operator or by a person having authority from him.

3. The signature on the multimodal transport document may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the multimodal transport document is issued.

4. If the consignor so agrees, a non-negotiable multimodal transport document may be issued by making use of any mechanical or other means preserving a record of the particulars stated in article 8 to be contained in the multimodal transport document. In such a case the multimodal transport operator, after having taken the goods in charge, shall deliver to the consignor a readable document containing all the particulars so recorded, and such document shall for the purposes of the provisions of this Convention be deemed to be a multimodal transport document.

Article 6

Negotiable multimodal transport document

1. Where a multimodal transport document is issued in negotiable form:

(a) it shall be made out to order or to bearer;

(b) if made out to order it shall be transferable by endorsement;

(c) if made out to bearer it shall be transferable without endorsement;

(d) if issued in a set of more than one original it shall indicate the number of originals in the set;

(e) if any copies are issued each copy shall be marked "non-negotiable copy".

2. Delivery of the goods may be demanded from the multimodal transport operator or a person acting on his behalf only against surrender of the negotiable multimodal transport document duly endorsed where necessary.

3. The multimodal transport operator shall be discharged from his obligation to deliver the goods if, where a negotiable multimodal transport document has been issued in a set of more than one original, he or a person acting on his behalf has in good faith delivered the goods against surrender of one of such originals.

Article 7

Non-negotiable multimodal transport document

1. Where a multimodal transport document is issued in non-negotiable form it shall indicate a named consignee.

2. The multimodal transport operator shall be discharged from his obligation to deliver the goods if he makes delivery thereof to the consignee named in such non-negotiable multimodal transport document or to such other person as he may be duly instructed, as a rule, in writing.

Article 8

Contents of the multimodal transport document

1. The multimodal transport document shall contain the following particulars:

(a) the general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the gross weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the consignor;

(b) the apparent condition of the goods;

(c) the name and principal place of business of the multimodal transport operator;

(d) the name of the consignor;

(e) the consignee, if named by the consignor;

(f) the place and date of taking in charge of the goods by the multimodal transport operator;

(g) the place of delivery of the goods;

(h) the date or the period of delivery of the goods at the place of delivery, if expressly agreed upon between the parties;

(i) a statement indicating whether the multimodal transport document is negotiable or non-negotiable;

(j) the place and date of issue of the multimodal transport document;

(k) the signature of the multimodal transport operator or of a person having authority from him;

(l) the freight for each mode of transport, if expressly agreed between the parties, or the freight, including its currency, to the extent payable by the consignee or other indication that freight is payable by him.

(m) the intended journey route, modes of transport and places of transhipment, if known at the time of issuance of the multimodal transport document;

(n) the statement referred to in paragraph 3 of article 28;

(o) any other particulars which the parties may agree to insert in the multimodal transport document, if not inconsistent with the law of the country where the multimodal transport document is issued.

2. The absence from the multimodal document of one or more of the particulars referred to in paragraph 1 of this article shall not affect the legal character of the document as a multimodal transport document provided that it nevertheless meets the requirements set out in paragraph 4 of article 1.

Article 9

Reservations in the multimodal transport document

1. If the multimodal transport document contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the multimodal transport operator or a person

acting on his behalf knows, or has reasonable grounds to suspect, do not accurately represent the goods actually taken in charge, or if he has no reasonable means of checking such particulars, the multimodal transport operator or a person acting on his behalf shall insert in the multimodal transport document a reservation specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking.

2. If the multimodal transport operator or a person acting on his behalf fails to note on the multimodal transport document the apparent condition of the goods, he is deemed to have noted on the multimodal transport document that the goods were in apparent good condition.

Article 10

Evidentiary effect of the multimodal transport document

Except for particulars in respect of which and to the extent to which a reservation permitted under article 9 has been entered:

(a) the multimodal transport document shall be *prima facie* evidence of the taking in charge by the multimodal transport operator of the goods as described therein; and

(b) proof to the contrary by the multimodal transport operator shall not be admissible if the multimodal transport document is issued in negotiable form and has been transferred to a third party, including a consignee, who has acted in good faith in reliance on the description of the goods therein.

Article 11

Liability for intentional misstatements or omissions

When the multimodal transport operator, with intent to defraud, gives in the multimodal transport document false information concerning the goods or omits any information required to be included under paragraph 1(a) or (b) of article 8 or under article 9, he shall be liable, without the benefit of the limitation of liability provided for in this Convention, for any loss, damage or expenses incurred by a third party, including a consignee, who acted in reliance on the description of the goods in the multimodal transport document issued.

Article 12

Guarantee by the consignor

1. The consignor shall be deemed to have guaranteed to the multimodal transport operator the accuracy, at the time the goods were taken in charge by the multimodal transport operator, or particulars relating to the general nature of the goods, their marks, number, weight and quantity and, if

applicable, to the dangerous character of the goods, as furnished by him for insertion in the multimodal transport document.

2. The consignor shall indemnify the multimodal transport operator against loss resulting from inaccuracies in or inadequacies of the particulars referred to in paragraph 1 of this article. The consignor shall remain liable even if the multimodal transport document has been transferred by him. The right of the multimodal transport operator to such indemnity shall in no way limit his liability under the multimodal transport contract to any person other than the consignor.

Article 13

Other documents

The issue of the multimodal transport document does not preclude the issue, if necessary, of other documents relating to transport or other services involved in international multimodal transport, in accordance with applicable international conventions or national law. However, the issue of such other documents shall not affect the legal character of the multimodal transport document.

PART III. LIABILITY OF THE MULTIMODAL TRANSPORT OPERATOR

Article 14

Period of responsibility

1. The responsibility of the multimodal transport operator for the goods under this Convention covers the period from the time he takes the goods in his charge to the time of their delivery.

2. For the purpose of this article, the multimodal transport operator is deemed to be in charge of the goods:

(a) from the time he has taken over the goods from:

(i) the consignor or a person acting on his behalf; or

(ii) an authority or other third party to whom, pursuant to law or regulations applicable at the place of taking in charge, the goods must be handed over for transport;

(b) until the time he has delivered the goods:

(i) by handing over the goods to the consignee; or

(ii) in cases where the consignee does not receive the goods from the multimodal transport operator, by placing them at the disposal of the consignee in accordance with the multimodal transport contract or with the

law or with the usage of the particular trade applicable at the place of delivery; or

(iii) by handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the place of delivery, the goods must be handed over.

3. In paragraphs 1 and 2 of this article, reference to the multimodal transport operator shall include his servants or agents or any other person of whose services he makes use for the performance of the multimodal transport contract, and reference to the consignor or consignee shall include their servants or agents.

Article 15

The liability of the multimodal transport operator for his servants, agents and other persons

Subject to article 21, the multimodal transport operator shall be liable for the acts and omissions of his servants or agents, when any such servant or agent is acting within the scope of his employment, or of any other person of whose services he makes use for the performance of the multimodal transport contract, when such person is acting in the performance of the contract, as if such acts and omissions were his own.

Article 16

Basis of liability

1. The multimodal transport operator shall be liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge as defined in article 14, unless the multimodal transport operator proves that he, his servants or agents or any other person referred to in article 15 took all measures that could reasonably be required to avoid the occurrence and its consequences.

2. Delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent multimodal transport operator, having regard to the circumstances of the case.

3. If the goods have not been delivered within 90 consecutive days following the date of delivery determined according to paragraph 2 of this article, the claimant may treat the goods as lost.

Article 17

Concurrent causes

Where fault or neglect on the part of the multimodal transport operator, his servants or agents or any person referred to in article 15 combines with another cause to produce loss, damage or delay in delivery, the multimodal transport operator shall be liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the multimodal transport operator proves the part of the loss, damage or delay in delivery not attributable thereto.

Article 18

Limitation of liability

1. When the multimodal transport operator is liable for loss resulting from loss of or damage to the goods according to article 16, his liability shall be limited to an amount not exceeding 920 units of account per package or other shipping unit or 2.75 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.

2. For the purpose of calculating which amount is the higher in accordance with paragraph 1 of this article, the following rules apply:

(a) where a container, pallet or similar article of transport is used to consolidate goods, the packages or other shipping units enumerated in the multimodal transport document as packed in such article of transport are deemed packages or shipping units. Except as aforesaid the goods in such article of transport are deemed one shipping unit.

(b) in cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the multimodal transport operator, is considered one separate shipping unit.

3. Notwithstanding the provisions of paragraphs 1 and 2 of this article, if the international multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the multimodal transport operator shall be limited to an amount not exceeding 8.33 units of account per kilogramme of gross weight of the goods lost or damaged.

4. The liability of the multimodal transport operator for loss resulting from delay in delivery according to the provisions of article 16 shall be limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the multimodal transport contract.

5. The aggregate liability of the multimodal transport operator, under paragraphs 1 and 4 or paragraphs 3 and 4 of this article, shall not exceed the limit of liability for total loss of the goods as determined by paragraph 1 or 3 of this article.

6. By agreement between the multimodal transport operator and the consignor, limits of liability exceeding those provided for in paragraphs 1, 3 and 4 of this article may be fixed in the multimodal transport document.

7. "Unit of account" means the unit of account mentioned in article 31.

Article 19

Localized damage

When the loss of or damage to the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law provides a higher limit of liability than the limit that would follow from application of paragraphs 1 to 3 of article 18, then the limit of the multimodal transport operator's liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law.

Article 20

Non-contractual liability

1. The defences and limits of liability provided for in this Convention shall apply in any action against the multimodal transport operator in respect of loss resulting from loss of or damage to the goods, as well as from delay in delivery, whether the action be founded in contract, in tort or otherwise.

2. If an action in respect of loss resulting from loss of or damage to the goods or from delay in delivery is brought against the servant or agent of the multimodal transport operator, if such servant or agent proves that he acted within the scope of his employment, or against any other person of whose services he makes use for the performance of the multimodal transport contract, if such other person proves that he acted within the performance of the contract, the servant or agent or such other person shall be entitled to avail himself of the defences and limits of liability which the multimodal transport operator is entitled to invoke under this Convention.

3. Except as provided in article 21, the aggregate of the amounts recoverable from the multimodal transport operator and from a servant or agent or any other person of whose services he makes use for the performance of the multimodal transport contract shall not exceed the limits of liability provided for in this Convention.

Article 21

Loss of the right to limit liability

1. The multimodal transport operator is not entitled to the benefit of the limitation of liability provided for in this Convention if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the

multimodal transport operator done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.

2. Notwithstanding paragraph 2 of article 20, a servant or agent of the multimodal transport operator or other person of whose services he makes use for the performance of the multimodal transport contract is not entitled to the benefit of the limitation of liability provided for in this Convention if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant, agent or other person, done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.

PART IV. LIABILITY OF THE CONSIGNOR

Article 22

General rule

The consignor shall be liable for loss sustained by the multimodal transport operator if such loss is caused by the fault or neglect of the consignor, or his servants or agents when such servants or agents are acting within the scope of their employment. Any servant or agent of the consignor shall be liable for such loss if the loss is caused by fault or neglect on his part.

Article 23

Special rules on dangerous goods

1. The consignor shall mark or label in a suitable manner dangerous goods as dangerous.

2. When the consignor hands over dangerous goods to the multimodal transport operator or any person acting on his behalf, the consignor shall inform him of the dangerous character of the goods and, if necessary, the precautions to be taken. If the consignor fails to do so and the multimodal transport operator does not otherwise have knowledge of their dangerous character:

(a) the consignor shall be liable to the multimodal transport operator for all loss resulting from the shipment of such goods; and

(b) the goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.

3. The provisions of paragraph 2 of this article may not be invoked by any person if during the multimodal transport he has taken the goods in his charge with knowledge of their dangerous character.

4. If, in cases where the provisions of paragraph 2(b) of this article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where there is an obligation to contribute in general average or where the multimodal transport operator is liable in accordance with the provisions of article 16.

PART V. CLAIMS AND ACTIONS

Article 24

Notice of loss, damage or delay

1. Unless notice of loss or damage, specifying the general nature of such loss or damage, is given in writing by the consignee to the multimodal transport operator not later than the working day after the day when the goods were handed over to the consignee, such handing over is *prima facie* evidence of the delivery by the multimodal transport operator of the goods as described in the multimodal transport document.

2. Where the loss or damage is not apparent, the provisions of paragraph 1 of this article apply correspondingly if notice in writing is not given within six consecutive days after the day when the goods were handed over to the consignee.

3. If the state of the goods at the time they were handed over to the consignee has been the subject of a joint survey or inspection by the parties or their authorized representatives at the place of delivery, notice in writing need not be given of loss or damage ascertained during such survey or inspection.

4. In the case of any actual or apprehended loss or damage the multimodal transport operator and the consignee shall give all reasonable facilities to each other for inspecting and tallying the goods.

5. No compensation shall be payable for loss resulting from delay in delivery unless notice has been given in writing to the multimodal transport operator within 60 consecutive days after the day when the goods were delivered by handing over to the consignee or when the consignee has been notified that the goods have been delivered in accordance with paragraph 2(b)(ii) or (iii) of article 14.

6. Unless notice of loss or damage, specifying the general nature of the loss or damage, is given in writing by the multimodal transport operator to the consignor not later than 90 consecutive days after the occurrence of such loss or damage or after the delivery of the goods in accordance with paragraph 2(b) of article 14, whichever is later, the failure to give such notice is *prima facie* evidence that the multimodal transport operator has

sustained no loss or damage due to the fault or neglect of the consignor, his servants or agents.

7. If any of the notice periods provided for in paragraphs 2, 5 and 6 of this article terminates on a day which is not a working day at the place of delivery, such period shall be extended until the next working day.

8. For the purpose of this article, notice given to a person acting on the multimodal transport operator's behalf, including any person of whose services he makes use at the place of delivery, or to a person acting on the consignor's behalf, shall be deemed to have been given to the multimodal transport operator, or to the consignor, respectively.

Article 25

Limitation of actions

1. Any action relating to international multimodal transport under this Convention shall be time-barred if judicial or arbitral proceedings have not been instituted within a period of two years. However, if notification in writing, stating the nature and main particulars of the claim, has not been given within six months after the day when the goods were delivered or, where the goods have not been delivered, after the day on which they should have been delivered, the action shall be time-barred at the expiry of this period.

2. The limitation period commences on the day after the day on which the multimodal transport operator has delivered the goods or part thereof or, where the goods have not been delivered, on the day after the last day on which the goods should have been delivered.

3. The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations.

4. Provided that the provisions of another applicable international convention are not to the contrary, a recourse action for indemnity by a person held liable under this Convention may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if instituted within the time allowed by the law of the State where proceedings are instituted; however, the time allowed shall not be less than 90 days commencing from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against himself.

Article 26

Jurisdiction

1. In judicial proceedings relating to international multimodal transport under this Convention, the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

(a) the principal place of business or, in the absence thereof, the habitual residence of the defendant; or

(b) the place where the multimodal transport contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(c) the place of taking the goods in charge for international multimodal transport or the place of delivery; or

(d) any other place designated for that purpose in the multimodal transport contract and evidenced in the multimodal transport document.

2. No judicial proceedings relating to international multimodal transport under this Convention may be instituted in a place not specified in paragraph 1 of this article. The provisions of this article do not constitute an obstacle to the jurisdiction of the Contracting States for provisional or protective measures.

3. Notwithstanding the preceding provisions of this article, an agreement made by the parties after a claim has arisen, which designates the place where the plaintiff may institute an action, shall be effective.

4. (a) Where an action has been instituted in accordance with the provisions of this article or where judgement in such an action has been delivered, no new action shall be instituted between the same parties on the same grounds unless the judgement in the first action is not enforceable in the country in which the new proceedings are instituted.

(b) For the purposes of this article neither the institution of measures to obtain enforcement of a judgement nor the removal of an action to a different court within the same country shall be considered as the starting of a new action.

Article 27

Arbitration

1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to international multimodal transport under this Convention shall be referred to arbitration.

2. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places;

(a) a place in a State within whose territory is situated:

(i) the principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or

(ii) the place where the multimodal transport contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(iii) the place of taking the goods in charge for international multimodal transport or the place of delivery; or

(b) any other place designated for the purpose in the arbitration clause or agreement.

3. The arbitrator or arbitration tribunal shall apply the provisions of this Convention.

4. The provisions of paragraphs 2 and 3 of this article shall be deemed to be part of every arbitration clause or agreement and any term of such clause or agreement which is inconsistent therewith shall be null and void.

5. Nothing in this article shall affect the validity of an agreement on arbitration made by the parties after the claim relating to the international multimodal transport has arisen.

PART VI. SUPPLEMENTARY PROVISIONS

Article 28

Contractual stipulations

1. Any stipulation in a multimodal transport contract or multimodal transport document shall be null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation shall not affect the validity of other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of the goods in favour of the multimodal transport operator or any similar clause shall be null and void.

2. Notwithstanding the provisions of paragraph 1 of this article, the multimodal transport operator may, with the agreement of the consignor, increase his responsibilities and obligations under this Convention.

3. The multimodal transport document shall contain a statement that the international multimodal transport is subject to the provisions of this

Convention which nullify any stipulation derogating therefrom to the detriment of the consignor or the consignee.

4. Where the claimant in respect of the goods has incurred loss as a result of a stipulation which is null and void by virtue of the present article, or as a result of the omission of the statement referred to in paragraph 3 of this article, the multimodal transport operator must pay compensation to the extent required in order to give the claimant compensation in accordance with the provisions of this Convention for any loss of or damage to the goods as well as for delay in delivery. The multimodal transport operator must, in addition, pay compensation for costs incurred by the claimant for the purpose of exercising his right, provided that costs incurred in the action where the foregoing provision is invoked are to be determined in accordance with the law of the State where proceedings are instituted.

Article 29

General average

1. Nothing in this Convention shall prevent the application of provisions in the multimodal transport contract or national law regarding the adjustment of general average, if and to the extent applicable.

2. With the exception of article 25, the provisions of this Convention relating to the liability of the multimodal transport operator for loss of or damage to the goods shall also determine whether the consignee may refuse contribution in general average and the liability of the multimodal transport operator to indemnify the consignee in respect of any such contribution made or any salvage paid.

Article 30

Other conventions

1. This Convention does not modify the rights or duties provided for in the Brussels International Convention for the unification of certain rules relating to the limitation of owners of sea-going vessels of 25 August 1924; in the Brussels International Convention relating to the limitation of the liability of owners of sea-going ships of 10 October 1957; in the London Convention on limitation of liability for maritime claims of 19 November 1976; and in the Geneva Convention relating to the limitation of the liability of owners of inland navigation vessels (CLN) of 1 March 1973, including amendments to these Conventions, or national law relating to the limitation of liability of owners of sea-going ships and inland navigation vessels.

2. The provisions of articles 26 and 27 of this Convention do not prevent the application of the mandatory provisions of any other international convention relating to matters dealt with in the said articles, provided that the dispute arises exclusively between parties having their principal place of business in States parties to such other convention. However, this paragraph

does not affect the application of paragraph 3 of article 27 of this Convention.

3. No liability shall arise under the provisions of this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of 28 January 1964 or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or amendments thereto; or

(b) by virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions.

4. Carriage of goods such as carriage of goods in accordance with the Geneva Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road in article 2, or the Berne Convention of 7 February 1970 concerning the Carriage of Goods by Rail, article 2, shall not for the States Parties to Conventions governing such carriage be considered as international multimodal transport within the meaning of article 1, paragraph 1, of this Convention, in so far as such States are bound to apply the provisions of such Conventions to such carriage of goods.

Article 31

Unit of account or monetary unit and conversion

1. The unit of account referred to in article 18 of this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amounts referred to in article 18 shall be converted into the national currency of a State according to the value of such currency on the date of the judgement or award or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State which is a member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect on the date in question, for its operations and transactions. The value of a national currency in terms of the Special Drawing Right of a Contracting State which is not a member of the International Monetary Fund, shall be calculated in a manner determined by that State.

2. Nevertheless, a State which is not a member of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this article may, at the time of signature, ratification, acceptance, approval or accession or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in its territory shall be fixed as follows: with regard to the limits provided for in paragraph 1 of article 18 to 13,750 monetary units per

package or other shipping unit or 41.25 monetary units per kilogramme of gross weight of the goods, and with regard to the limit provided for in paragraph 3 of article 18 to 124 monetary units.

3. The monetary unit referred to in paragraph 2 of this article corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. The conversion of the amount referred to in paragraph 2 of this article into national currency shall be made according to the law of the State concerned.

4. The calculation mentioned in the last sentence of paragraph 1 of this article and the conversion referred to in paragraph 3 of this article shall be made in such a manner as to express in the national currency of the Contracting State as far as possible the same real value for the amounts in article 18 as is expressed there in units of account.

5. Contracting States shall communicate to the depositary the manner of calculation pursuant to the last sentence of paragraph 1 of this article, or the result of the conversion pursuant to paragraph 3 of this article, as the case may be, at the time of signature or when depositing their instruments of ratification, acceptance, approval or accession, or when availing themselves of the option provided for in paragraph 2 of this article and whenever there is a change in the manner of such calculation or in the result of such conversion.

PART VII. CUSTOMS MATTERS

Article 32

Customs transit

1. Contracting States shall authorize the use of the procedure of customs transit for international multimodal transport.

2. Subject to provisions of national law or regulations and intergovernmental agreements, the customs transit of goods in international multimodal transport shall be in accordance with the rules and principles contained in articles I to VI of the Annex to this Convention.

3. When introducing laws or regulations in respect of customs transit procedures relating to multimodal transport of goods, Contracting States should take into consideration articles I to VI of the Annex to this Convention.

PART VIII. FINAL CLAUSES

Article 33

Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 34

Signature, ratification, acceptance, approval and accession

1. All States are entitled to become Parties to this Convention by:

(a) signature not subject to ratification, acceptance or approval; or

(b) signature subject to and followed by ratification, acceptance or approval; or

(c) accession.

2. This Convention shall be open for signature as from 1 September 1980 until and including 31 August 1981 at the Headquarters of the United Nations in New York.

3. After 31 August 1981, this Convention shall be open for accession by all States which are not signatory States.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the depositary.

5. Organizations for regional economic integration, constituted by sovereign States members of UNCTAD, and which have competence to negotiate, conclude and apply international agreements in specific fields covered by this Convention shall be similarly entitled to become Parties to this Convention in accordance with the provisions of paragraphs 1 to 4 of this article, thereby assuming in relation to other Parties to this Convention the rights and duties under this Convention in the specific fields referred to above.

Article 35

Reservations

No reservation may be made to this Convention.

Article 36

Entry into force

1. This Convention shall enter into force 12 months after the Governments of 30 States have either signed it not subject to ratification, acceptance or approval or have deposited instruments of ratification, acceptance, approval or accession with the depositary.

2. For each State which ratifies, accepts, approves or accedes to this Convention after the requirements for entry into force given in paragraph 1 of this article have been met, the Convention shall enter into force 12 months after the deposit by such State of the appropriate instrument.

Article 37

Date of application

Each Contracting State shall apply the provisions of this Convention to multimodal transport contracts concluded on or after the date of entry into force of this Convention in respect of that State.

Article 38

Rights and obligations under existing conventions

If, according to articles 26 or 27, judicial or arbitral proceedings are brought in a Contracting State in a case relating to international multimodal transport subject to this Convention which takes place between two States of which only one is a Contracting State, and if both these States are at the time of entry into force of this Convention equally bound by another international convention, the court or arbitral tribunal may, in accordance with the obligations under such convention, give effect to the provisions thereof.

Article 39

Revision and amendments

1. At the request of not less than one third of the Contracting States, the Secretary-General of the United Nations shall, after the entry into force of this Convention, convene a conference of the Contracting States for revising or amending it. The Secretary-General of the United Nations shall circulate to all Contracting States the texts of any proposals for amendments at least three months before the opening date of the conference.

2. Any decision by the revision conference, including amendments, shall be taken by a two thirds majority of the States present and voting. Amendments adopted by the conference shall be communicated by the depositary to all the Contracting States for acceptance and to all the States signatories of the Convention for information.

3. Subject to paragraph 4 below, any amendment adopted by the conference shall enter into force only for those Contracting States which have accepted it, on the first day of the month following one year after its acceptance by two thirds of the Contracting States. For any State accepting an amendment after it has been accepted by two thirds of the Contracting States, the amendment shall enter into force on the first day of the month following one year after its acceptance by that State.

4. Any amendment adopted by the conference altering the amounts specified in article 18 and paragraph 2 of article 31 or substituting either or both the units defined in paragraphs 1 and 3 of article 31 by other units shall enter into force on the first day of the month following one year after its acceptance by two thirds of the Contracting States. Contracting States which have accepted the altered amounts or the substituted units shall apply them in their relationship with all Contracting States.

5. Acceptance of amendments shall be effected by the deposit of a formal instrument to that effect with the depositary.

6. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of any amendment adopted by the conference shall be deemed to apply to the Convention as amended.

Article 40

Denunciation

1. Each Contracting State may denounce this Convention at any time after the expiration of a period of two years from the date on which this Convention has entered into force by means of a notification in writing addressed to the depositary.

2. Such denunciation shall take effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the notification is received by the depositary.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have affixed their signatures hereunder on the dates indicated.

DONE at Geneva on 24 May 1980 in one original in the Arabic, Chinese, English, French, Russian and Spanish languages, all texts being equally authentic.

ANNEX

PROVISIONS ON CUSTOMS MATTERS RELATED TO INTERNATIONAL MULTIMODAL TRANSPORT OF GOODS

Article I

For the purposes of this Convention:

"Customs transit procedure" means the customs procedure under which goods are transported under customs control from one custom office to another.

"Customs office of destination" means any customs office at which a customs transit operation is terminated.

"Import/export duties and taxes" means customs duties and all other duties, taxes, fees or other charges which are collected on or in connexion with the import/export of goods but not including fees and charges which are limited in amount to the approximate cost of services rendered.

"Customs transit document" means a form containing the record of data entries and information required for the customs transit operation.

Article II

1. Subject to the provisions of the law, regulations and international conventions in force in their territories, Contracting States shall grant freedom of transit to goods in international multimodal transport.

2. Provided that the conditions laid down in the customs transit procedure used for the transit operation are fulfilled to the satisfaction of the customs authorities, goods in international multimodal transport:

(a) shall not, as a general rule, be subject to customs examination during the journey except to the extent deemed necessary to ensure compliance with rules and regulations which the Customs are responsible for enforcing. Flowing from this, the customs authorities shall normally restrict themselves to the control of customs seals and other security measures at points of entry and exit;

(b) without prejudice to the application of law and regulations concerning public or national security, public morality or public health, shall not be subject to any customs formalities or requirements additional to those of the customs transit regime used by the transit operation.

Article III

In order to facilitate the transit of the goods, each Contracting State shall:

(a) if it is the country of shipment, as far as practicable, take all measures to ensure the completeness and accuracy of the information required for the subsequent transit operations;

(b) if it is the country of destination:

(i) take all necessary measures to ensure that goods in customs transit shall be cleared, as a rule, at the customs office of destination of the goods;

(ii) endeavour to carry out the clearance of goods at a place as near as is possible to the place of final destination of the goods, provided that national law and regulations do not require otherwise.

Article IV

1. Provided that the conditions laid down in the customs transit procedure are fulfilled to the satisfaction of the customs authorities, the goods in international multimodal transport shall not be subject to the payment of import/export duties and taxes or deposit in lieu thereof in transit countries.

2. The provisions of the preceding paragraph shall not preclude:

(a) the levy of fees and charges, by virtue of national regulations on grounds of public security or public health;

(b) the levy of fees and charges, which are limited in amount to the approximate cost of services rendered, provided they are imposed under conditions of equality.

Article V

1. Where a financial guarantee for the customs transit operation is required, it shall be furnished to the satisfaction of the customs authorities of the transit country concerned in conformity with its national law and regulations and international conventions.

2. With a view to facilitating customs transit, the system of customs guarantee shall be simple, efficient, moderately priced and shall cover import/export duties and taxes chargeable and, in countries where they are covered by guarantees, any penalties due.

Article VI

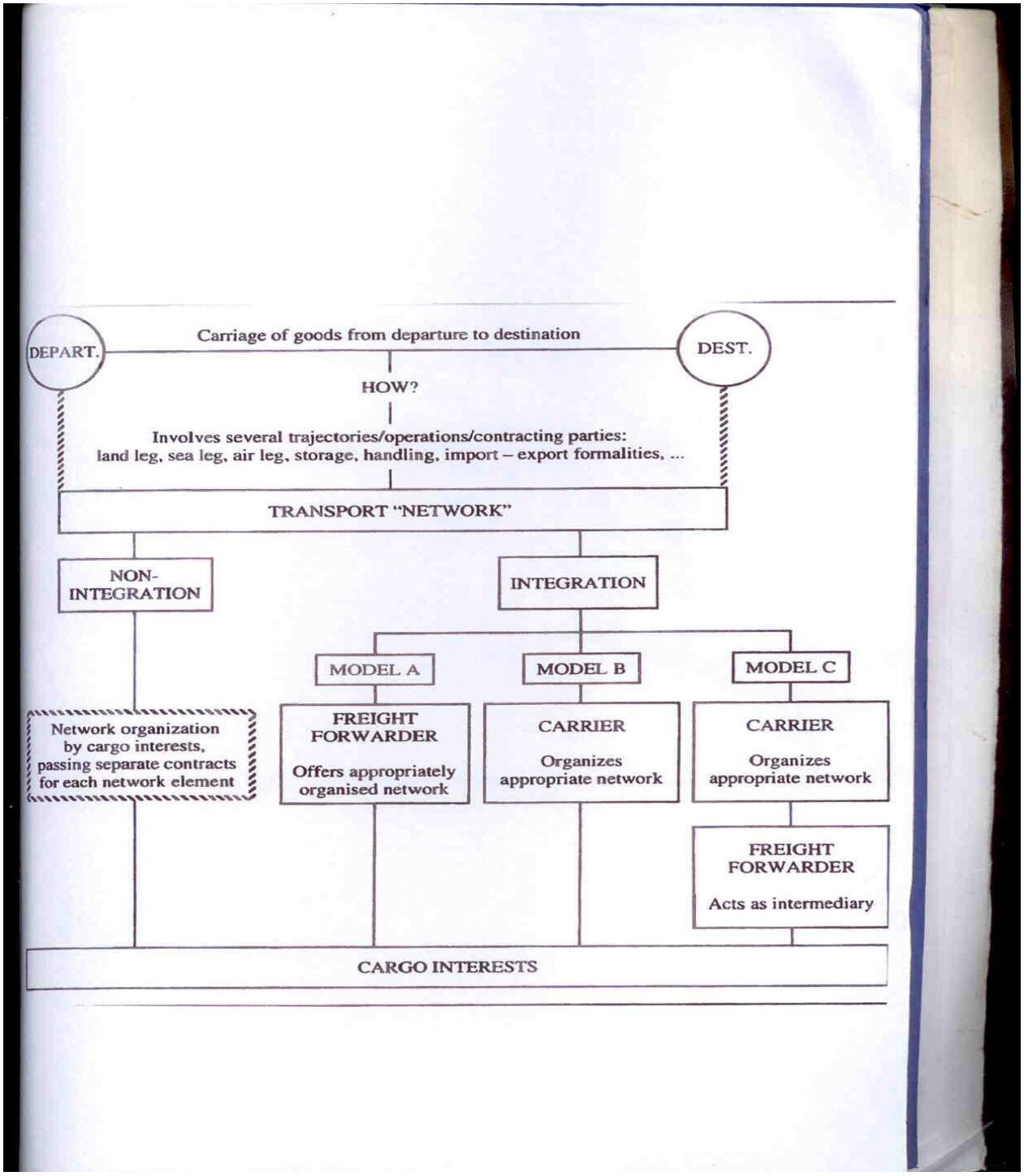
1. Without prejudice to any other documents which may be required by virtue of an international convention or national law and regulations, customs authorities of transit countries shall accept the multimodal transport document as a descriptive part of the customs transit document.

2. With a view to facilitating customs transit, customs transit documents shall be aligned, as far as possible, with the layout reproduced below.

GOODS DECLARATION (CUSTOMS TRANSIT)

	Consignor (name and address)	Office of departure	Date No.	
	Consignee (name	Declarant (name and		

	and postal address)	address)		
	Delivery address	Country whence consigned	Country of destination	
	Place of loading Pier, warehouse, etc.	Documents attached	Official use	
	Via	Mode and means of transport		
	Office of destination			Seals, etc. affixed by Customs Declarant
B/L No	Transport-unit (type, identification No.); Marks & numbers of packages or items	Number & kind of packages; Description of goods	Commodity No.	Gross weight, kg.
		Total number of packages	Total gross weight, kg.	
		(Guarantee details)		
	(National administrative requirements)	I, the undersigned, declare that the particulars given in this Declaration are true and correct and accept responsibility for fulfilment of the obligations incurred under this Customs transit operation in accordance with the conditions prescribed by the competent authorities. Place, date and signature of declarant.		


DEPART.
Carriage of goods from departure to destination
DEST.
HOW?
Involves several trajectories/operations/contracting parties:
land leg, sea leg, air leg, storage, handling, import – export formalities, ...
TRANSPORT "NETWORK"
NON-INTEGRATION
INTEGRATION
MODEL A
MODEL B
MODEL C
Network organization by cargo interests, passing separate contracts for each network element
FREIGHT FORWARDER
Offers appropriately organised network
CARRIER
Organizes appropriate network
CARRIER
Organizes appropriate network
FREIGHT FORWARDER
Acts as intermediary
CARGO INTERESTS