

CONTAINERS IN THE LAW OF CARRIAGE OF GOODS

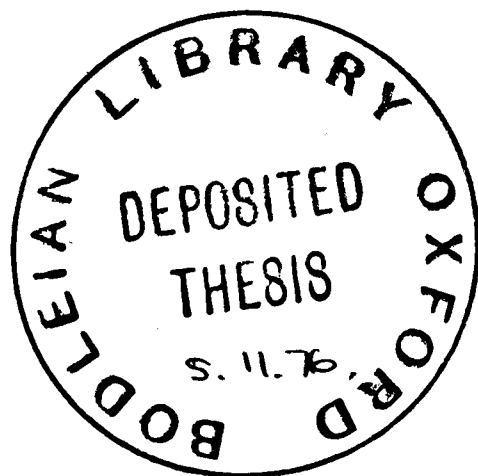
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Abstract

Container transport is not a new mode of transport. It is only a more efficient method of using the three main conventional modes, namely sea, rail and road transport. As the international community has as yet failed to achieve agreement about a uniform set of rules to deal with the legal problems arising in connection with the new method, it has become necessary to attempt to solve these problems on the basis of existing legal rules governing the conventional modes of transport. The present work analyses attempts made in that direction in English, American, Canadian and French law, and generally studies the feasibility of applying the old rules of transport law, both the local ones prevailing in the above-mentioned legal systems, and the rules of existing international transport conventions, to the new realities of containerisation.

Such an application would have been a mere mechanical operation if containers could be defined in such a way as would have enabled them to be uniformly classified within the conventional concepts of either 'goods', 'package' or 'vessel/vehicle'. But the container is a hybrid. Indeed, its ability to change functions in rapid succession, and even perform several functions at the same time, as a mobile part of the ship, a storage compartment of a vehicle, a warehouse and a package, is the very reason why it has been brought into use.

The categorisation of all aspects of container transport within traditional terms and concepts of transport law can therefore be done only piecemeal, deciding in each legal context which facet of the container is relevant to the issue at hand. This has led to classifying the container in different parts of the thesis as 'part of the ship', as 'goods' and as 'package' within the meaning of the same statute. The aim of the present

thesis is to show that, inconvenient as this manner of solving the legal problems of container transport may seem to be, it is the correct one. Simple solutions to these problems are theoretically easy to conceive, but only legislation can give them the force of law. Attempts to achieve similar solutions through judicial interpretation by uniform, but arbitrary, classification, would achieve relative simplicity in some aspects, but only at the cost of distorting the structure of existing rules and producing unacceptable solutions in other aspects.

The first chapter, after a short account of the history of modern containerisation, enlarges further on this theme and sets out the methodological principles behind the solutions suggested later in the thesis.

The second chapter deals with the pre-shipment stages of container operations. It is shown that, as the success of container operations becomes increasingly dependent on the proper performance of these early stages, the latter become the focal point of the law of container transport. It is explained that the degree of involvement of the carrier in the pre-shipment operations has far-reaching effects on all important aspects of the subject. Containerisation can achieve its aim of economical optimisation of cargo protection only by transferring a large part of the task of preparing the goods and the container for shipment to the shipper. When the latter 'stuffs' the container out of the sight of the carrier, both the structure of the carrier's substantive liability, the documentary regime, and the probative arrangements for establishing the carrier's liability in court, undergo drastic changes. The greater the involvement of the carrier, however, the smaller the difference between container transport and conventional forms of transport from the legal point of view.

The second part of the chapter studies the various effects of containerisation on the carrier's responsibility for loss or damage during transit arising out of negligence committed in the pre-shipment stages. It is submitted that responsibility for the cargoworthiness of the container itself falls mandatorily on the carrier when the container is supplied by him, with the exception of the most obvious defects which can be discovered by the shipper during 'stuffing'. It is also submitted that the parties are free to decide who will 'stuff' the container, but a large section of the chapter is devoted to proving that when 'stuffing' is performed by the shipper there remains with the carrier the residual duty to inspect the container. The moment of delivery to the carrier is analysed in relation to containerised goods, and it is shown that the nature of the inspection required from the carrier depends on whether or not 'delivery' precedes the closure of the container doors.

The third chapter deals with the specific problem of applying the 'package or unit' limitation in the Hague Rules to containers. A recent American solution based on a 'functional economics test' is criticised as impractical, and a suggestion is made on similar lines to proposals in the Brussels Protocol 1968 and the newly accomplished UNCITRAL draft Convention on International Carriage by Sea. The suggestion that the question of whether the container or each inner package should constitute the relevant 'package' should be answered according to the carrier's knowledge about the number of inner packages as reflected in the bill of lading, is defended on the grounds of both equitability and uniformity. It is argued that the suggestion is equitable because it is based on the only real disadvantage to carriers which may justify a drastic change in their standard

of liability, namely their inability to discover by their own means the quantity of containerised goods when they are delivered to them already 'stuffed'. The suggestion would also promote certainty and uniformity because it refers all interested parties to the easily verifiable contents of the bill of lading.

The fourth chapter discusses the question of stowage of containers on deck. An effort is made to discover whether the traditional hostility of the law against deck-stowage, justified as it was in the realities of conventional transport, has rendered the rules on such method of stowage so inflexible as to irrefutably assume the unsafety of every deck-stowage, thus requiring the shipper's consent, or the existence of a custom to stow on deck, even when such stowage is in fact relatively safe, as is often the case with deck containers. It is argued that considerable flexibility can be achieved by proper attention to the causal relation between the method of stowage and the actual loss or damage, but it is also maintained that the definition of 'deck' is perhaps flexible enough to exclude cases of safe deck-stowage from the scope of the prohibition altogether. However, the state of the law is analysed also on the basis of a contrary assumption, and it is suggested in this connection that clauses permitting the deck-carriage of containers run the risk of being invalidated as repugnant to the Hague Rules, insofar as they attempt to exempt the carrier from responsibility for the consequences of carriage on deck, and that carriers can escape this risk only by stating the fact that the container is carried on deck in the bill of lading. It is contended, on the other hand, that the shipper's consent should be allowed to remain valid even under the Hague Rules, in the narrow sense of preventing the catastrophic consequences which would otherwise result from characterising the deck-carriage

as fundamental breach and deviation. As to the current belief that it is only a matter of time before custom to carry containers on deck is established, some doubt is expressed, based on the fact that all contemporary container bills of lading include a contractual authorisation of such carriage, thus leaving very little room for the formation of a meaningful custom, binding in its own right. The last part of the chapter analyses the relevant amendments in the UNCITRAL draft Convention. While it is doubted whether special rules on deck-carriage are necessary at all, it is contended that the suggested amendments would promote the normalisation of the deck-carriage of containers.

The last two chapters deal with the special aspects of container bills of lading. The fifth chapter, on container bills of lading as documents of title, describes the development of the special container transport documents, and again ~~gives rise to doubt~~ as to whether the over-legalism of modern commerce would allow a practice of treating container bills of lading as documents of title, if such practice exists, to develop in a natural way into a binding legal custom. In a different connection it is asked whether container bills of lading are sufficiently similar to the model bill of lading already confirmed in principle as a document of title at common law, and it is argued that the answer should depend on the scope of the carriage operation actually performed. Contemporary container bills of lading cover both port-to-port and door-to-door operations, and the main principle suggested is that they should be considered as ordinary bills of lading in the former, but not the latter type of operation.

The final chapter analyses the function of container bills of lading as receipts. It is shown that when 'stuffing' precedes

delivery to the carrier the latter has no obligation to include in the bill of lading details of the containerised cargo which cannot be verified by an external inspection of the container. As neither the number of inner packages, nor the condition of the packages can usually be thus verified, it can be concluded that containerisation has brought about a significant decline in the function of the bill of lading as a meaningful receipt. It is suggested that this should be made clearer to the participants in container transport transactions by omitting unverifiable shipper-supplied details about the cargo altogether, as opposed to the current practice of mentioning such details under a 'said to contain' reservation, which brings about the same legal effects as complete omissions but is bound to mislead the unwary. It is also submitted that reservations about the bill of lading particulars are currently used more widely than warranted by the law, qualifying details which are easily verifiable when delivery to the carrier is completed at any time before the closure of the container doors. Another part of the chapter discusses the significance of recording the external appearance of the container and its seal in the bill of lading. It is shown that, though revealing little about the contents in a direct way, the description of these features in the bill of lading can sometimes be useful to the cargo-owner in establishing a prima facie case against one or all the carriers in an indirect way, namely by pointing to changes in the outward appearance of the container or the seal as indicative of the place of occurrence of loss or damage to the inner goods.

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- Scrutton - Scrutton on Charterparties and Bills of Lading, 18th ed. (London, 1974), by A.A.Mocatta, M.J.Mustill and S.C.Boyd.
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Chapter I: CONTAINER TRANSPORT AND THE ROLE OF THE LAW

1. The Development of Container Transport

Containerisation is so simple a concept that it seems surprising that the Container Revolution materialised only ten years ago. This is even more surprising if one considers that, being such an obvious idea for improving the use of transport facilities, containerisation seems always to have existed in some corner of the transport world for as far back as one may care to check. A hundred and thirty years ago the Liverpool and Manchester Railway Company toyed with the idea of large, re-usable container boxes built for alternative carriage by specially designed flat rail wagons and road carts; and this operation, itself a failure, already embodied most of the basic principles of modern containerisation systems.

The process which finally brought about the most far-reaching revolution in the transport world since the invention of self-propelled means of transport, had been simmering slowly since the 1920s. That decade first saw the privately-owned container boxes carrying products such as Lyon's tea and Jacob's biscuits on rail and road, and on short sea routes. The British railway companies inaugurated in 1928 a container service utilising railway-owned containers, mainly in domestic routes but also across the sea to Ireland and the Continent. The American army started using containers in a systematic way towards the end of the Second World War, and in 1949 one John Woodham started experiments which culminated in the formation in 1954 of Anglo-Continental Container Services, the first full container service using container ships. Again, each of these services demonstrated the essential wisdom of containerisation, but the impact they left on the transport world was negligible.

The next twelve years are perhaps the most interesting, from an historical point of view. In these years three American carriers, namely Sea-Land Services, Matson Navigation Company and Grace Line operated a fairly successful container service, virtually identical to container systems in operation today. Centered around a large shipping company, operating a fleet of specially equipped vessels, together with their own fleet of containers, and controlling various land enterprises such as container depots and land carriage systems, these carriers offered a wide variety of container services, including a full-scale door-to-door service. Still, containerisation remained until 1966 limited in scope to one-company enterprises, a technological curiosity rather than an integral part of the transport world.

The main feature of containerisation has always been its capacity for horizontal integration of different modes of transport. What made the post-1966 Container Revolution different from anything hitherto known in cargo transport is the vertical integration it brought about, the willingness of the major carriers in the world, chiefly shipping companies, to harness all their resources, energies and reformative zeal and direct them onto standardised paths. In the four years between 1966 and 1970 containerisation has become a universal concept based on a uniform box, shared by all who were willing, and could afford to join the revolution.

The popular explanation of the growth of containerisation is that it was introduced in order to reduce the constantly increasing costs of handling goods between the different stages of transport. The oldest rule in transport economy is that cargo which does not move does not earn, and with labour becoming increasingly expensive without growing proportionately in productivity, this rule had become a painful truth to most of the carriers in the western world. The obvious solution was the replacement of labour-intensive methods

of handling and carriage with one more capital-intensive, a streamlined, automated and standardised system in which the goods are almost constantly on the move.

But showing the advantage of a good concept rarely amounts to a causal explanation of why it has materialised. In the micro-cosmos of trade and commerce, as in all human experience, men do not excel unless compelled to, and the fact that the excellent idea of standardised containerisation was ignored for at least forty years, is the best proof of this. As long as ocean carriage was the exclusive regime of shipping companies, conveniently organised in shipping conferences, shipowners did not have to excel : they could simply pass the rising costs of handling to their customers as they had always done. It was in response to the threat of external competition that the shipping world finally found the energy and resolution to improve itself. In the late 1960s air-transport seemed to pose a serious threat to the dominance of shipping in cross-ocean cargo transport, and the shipping industry searched for ideas at least as attractive as the new giant air ships. With the concept of container systems close at hand, it took most of the large sea carriers only a short time after the signal was given to become totally engulfed in the Container Revolution.

The signal was the inauguration on 23 April 1966 of Sea-Land's weekly container-ship service from Boston and New York to Rotterdam. This was not the first international container-service, nor was it the longest one operated until that time, but all previous operations had been carried out between points in the same coastal or economic zone (such as between Britain and Ireland, the U.S. mainland and Hawaii or Puerto Rico, or between the U.S. coasts through the Panama Canal). Sea-Land's service had broken this barrier and crossed the ocean to connect the two main industrial areas of the world.

2. The Role of the Law

Where did the Law stand in this pattern of events? J. Bird, in an otherwise excellent account of the history of containerisation, writes:¹

"The 1966 international developments were made when Sea-Land realised that there was nothing in the Hague Rules to prevent a shipowner accepting a wider areal responsibility for goods if he so wishes..."

Now, if there is any suggestion in this passage of a causal relation between the advent of international container transport and any 'discovery' of the state of the Law, nothing could be further from the truth. Each step in the development of modern containerisation has been dictated by economic interests and technological expertise, and transport law has been faced with the consequences as accomplished facts.

Container ships, designed for deck-carriage of as much as a third of their cargo, plied the seas long before any of the legal consequences of such deck-carriage on finance, insurance and carrier's liability had been made clear. Container operators transferred to shippers the task of 'stuffing' the containers, and consequently most of the task of preparing the cargo for transit, with little or no attention to the legal side of the transfer. And if it was almost self-evident that 'there was nothing in the Hague Rules to prevent a shipowner accepting a wider areal responsibility for goods', very little thought indeed was given in the pioneering days of containerisation to the legal regimes lying beyond the province of the Hague Rules.

However, once container ships, shipper-'stuffing' and cross-

1. Seaports and Seaport Terminals(London,1971),107.

ocean multi-modal container operations had become a reality, the Law could choose only one of two alternatives, namely to classify and accommodate container-transport problems within the existing framework of legal rules or to devise new rules altogether.

At the time of writing there appears to be little hope for the emergence of new rules. The international community, anxious about the consequences of containerisation in general, has chosen to refrain from legislative action in the immediate future. Trade practices are evolving in some aspects of container-transport, but it remains to be seen whether they will develop into legally binding customs, and whether they will be able to play any significant role in adapting traditional law to the realities of the new system of transport.

Ten years of experience with the remaining alternative, namely judicial application of existing rules to container realities, have not proved encouraging either. Only a very small proportion of the potential legal problems of containerisation has been dealt with by authoritative courts thus far, but if the patterns established in the last decade persist, a long period of doubt and uncertainty awaits the legal aspect of container-transport.

3. Classification and Definition

Rules of law are flexible. Without such flexibility the common law would have become a dead letter hundreds of years ago, and the legislatures in other systems would have had to sit constantly and make specific rules for all situations requiring legal decisions as they arise. Instead, modern legal systems consist of a collection of general rules applied by courts to specific sets of facts in processes of classification and interpretation which allow for considerable flexibility, often dispensing with strict adherence to both pure logic and language. Yet, there is a limit to this flexibility, beyond which the rule of

law may become a mockery, and unless a new general rule is made to suit the new reality, the credibility of the system as a whole may be in jeopardy.

The traditional rules of shipping law which needed little substantial change for many generations are brought very near that breaking-point when attempts are made to stretch them far enough to cover the legal problems of containerisation.² Old rules may survive evolutionary stresses; they can hardly survive revolutions. When the only way for a court to express its approval of the manner of stowage of a container is by characterizing the stowage as a 'reasonable deviation',³ when after almost 20 major decisions by American, Canadian and French courts there is still no sign of an end to the question of whether a container is a 'package',⁴ - a question which may justifiably seem somewhat odd to the man on the Clapham omnibus, when 'apparent good condition' is said by a court to include what is undeniably not apparent, namely the contents of a sealed container⁵, when the consignee's failure to return unloaded trailers to their owner in the agreed time is considered to give rise to liability for 'demurrage' under Admiralty jurisdiction⁶, and when there were very good reasons why the courts in all these cases could do very little else, the signs are clear that traditional legal rules of carriage have outlived their usefulness where containers are concerned.

2. The reality of the danger can be appreciated to some extent by observing the history of containerisation in Industrial Law in Britain, where the 20 years old Dock Labour Scheme, which had shown remarkable resistance and flexibility while in existence, finally collapsed under the new realities of containerisation. See D.F. Wilson, Dockers (1972), 137 et seq.: Heatons Transport v. TGWU, [1973] A.C.15.

3. Du Pont de Nemours Int'l, S.A. v. SS. Mormacvega, 493 F.2d.97 (2nd. Circ.1974). See Chapter V, esp. pp. 191, 233-4, *infra*.

4. See Chapter III, *infra*.

5. Paquet & Co. v. Dart Containerline Co., N.Y.S.2d. 446(1973). See pp. 329-30, *infra*.

6. Gulf Puerto Rico Lines v. Associated Food Co., 366 F.Supp.631 (D. Puerto Rico, 1973).

These rules have their roots, both in rationale and terminology, in the realities of conventional modes of transport. In some cases the application of an existing rule to container problems would appear technically simple, but a closer look would indicate that the rule would be robbed of its original rationale in the process. In other cases an old rule would upset the delicate balance of liability between shipper and carrier⁷ when applied to container-transport, without there being an effective machinery for restoring the equilibrium. In many other cases, however, the difficulty in applying existing rules to problems of container-transport would be more immediately obvious, taking the form of a terminological impossibility of determining which of several existing provisions should apply.

For instance, let us take the legal problems connected with the preparation of the container and the cargo for transit.^{7a} To solve these problems within the existing framework of traditional concepts such as 'insufficient packing', 'defective loading', 'bad stowage' or 'uncargoworthy vessel/vehicle', would first require a decision as to whether the process of putting the goods inside the container should be termed 'packing', 'loading' or 'stowage',^{7b} and whether the container should be considered part of the 'goods' or the 'vessel/vehicle'.^{7c}

These are not problems of terminology per se, of course. Had it been only that almost every writer refers to the

7. See T.Bissel, 'The Operational Realities of Containerization, etc.' (1971), 45 Tulane L.Rev.903, cited in Gulf Puerto Rico Lines v. Associated Food Co., *ibid.* at 637.

7a. See Chapter II, *infra*.

7b. See chapter D, sec. 3, and pp. 149-151, *infra*.

7c. See Chapter II, sections 4.1.3 (esp. pp. 55-6, 68-76), 4.2 (esp. pp. 75-6) and 4.3.2, *infra*.

operation of filling the container in different terms,⁸ the matter would have had little legal significance. Legislation, had it been forthcoming, could even have adopted the useful, if somewhat inelegant, term in current use in the shipping industry, namely 'stuffing'.⁹ But courts cannot take such shortcuts. In the same way as they have been hopelessly entangled in the question of whether a container is a 'package',^{9a} they will most probably be called upon to decide upon such questions as whether faulty 'stuffing' is or is not 'insufficiency of packing' in the meaning of art.4(2)(n) of the Hague Rules; whether it is 'defective stowage' according to a common law rule which requires some degree of inspection from the carrier, as against a rule of 'insufficient package' in common law which according to one interpretation does not require any inspection; or whether the container is 'part of the ship in which the goods are carried'.¹⁰ Once such a question is put before a court, it has to decide one way or the other, however ill-equipped it may be to do so.

Quite obviously the whole of the terminological problem and the ensuing legal ones could be solved if a consensus can be reached as

8. The operation of placing the goods inside the container is referred to sometimes as 'loading' [see L.J.Rinaldi, Containerisation (New York, 1972), 7; C.M. Schmitthoff, The Export Trade 6th ed. (London, 1975), 340; Farrell Lines Inc. v. F.M.C. 475 F.2d.1332, 1333. (Circ.Col.1973), sometimes as 'stowing' (see K.Grönfors, 'Container Transport and the Hague Rules', [1967] J.B.L.298, 299; Containerisation International Yearbook 1974 (London, 1974), 237], sometimes as 'packing' [P.M. Alderton, Sea Transport (London, 1973), 25].

9. See Heaton Transport v. T.G.W.U., [1973] A.C.15, 39 ("This operation has its own terminology. When you load a container you 'stuff' it; when you unload it you 'strip' it"). The term is still used in most legal and technical works with some reservation, indicated by the use of inverted commas or by attaching the term to another, more conventional, one. See, e.g. Norfolk Terminal v. U.S. Lines, 215 Va.80, 205 S.E.2d.400, 401 (1974). See the use of the French legally-neutral term 'mise en conteneurs' in the Marseille Tribunal of Commerce, 11.6.74., 27 D.M.F.169, 170, and 'loger dans conteneurs' in the Havre Tribunal of Commerce, 5.11.74, 27 D.M.F. 352, 353.

9a. See chapter III, infra.

10. Hague Rules, art.3(1)(c).

to what is the container. If it is a box, a receptacle, a package, then filling it is 'packing', lifting it on to a vessel is 'loading', attaching it to the vessel's hold or deck is 'stowage'. It is then also part of the 'goods' mentioned in art.3(2) of the Hague Rules and it is not any 'part of the ship' within art.3(1)(c). The answers to these questions would be different, of course, if the container is taken as an article of transport, as part of the vessel or vehicle or both. But can such a consensus be hoped for?

'The container' write the editors of the latest edition of Scrutton¹¹ 'is essentially no more than a sophisticated form of package'. Simon,¹² however, declares with no less confidence that a container "is not a 'package' but a handling, loading, stowing and unloading device" and Van den Burg¹³ suggests yet another generalisation, that is, 'Containerisation is a transport system, not a packing system'.

Now, it is submitted that this apparent controversy is not accidental. The truth, unfortunate as it is from a lawyer's point of view, is that neither function of the container can claim any exclusivity over the other. The container is an article of transport but it is also a packaging as well as a handling, loading, stowing and unloading device, and if language cannot accommodate all these functions within a simple expression which would also be universally acceptable, this is not really language's fault. Both conventional language and the law have this thing in common that, when faced with a new phenomenon, they require either an

11. Art.180,p.379.

12. 'Latest Developments in the Law of Shipping Containers'(1973),
4 J.M.L.441,447.

13. Containerisation, a Modern Transport System,(London,1969),57.

authoritative reformer, or a period of adjustment in which to deal with it. Nowhere is this more evident than in the definition of a container which has dominated the scene in the marginal (from the commercial lawyer's point of view) legal aspects of containerisation, the best example of which can be found in ISO Recommendation R668:¹⁴

- 'A freight container is an article of transport equipment
- (a) of a permanent character and accordingly strong enough to be suitable for repeated use,
 - (b) specially designed to facilitate the carriage of goods by one or more modes of transport without intermediate reloading,
 - (c) fitted with devices permitting its ready handling, particularly its transfer from one mode of transport to another,
 - (d) so designed as to be easy to fill and empty,
 - (e) having an internal volume of 1m³ or more'.

Doubts as to the legitimacy of a seventy-seven word long narrative being entitled 'definition' could have more easily been cast aside as academic snobbery had these words succeeded in conveying to the unknowing reader what a container is. If, however, after seventy-seven words the reader is expected by the authors to have such a vague idea of what a container is that they felt compelled to add that '[t]he term freight container includes neither vehicles nor conventional packing', one cannot help feeling that for all the effort put into it, this definition cannot be considered satisfactory.

Yet the definition has achieved remarkably wide recognition.¹⁵

14. On Dimensions and Ratings of Freight Containers, adopted Feb.1968. A revised recommendation was adopted in 1970.

15. See G.J.Murphy's comment that all criticism of the definition is of academic value only, as it has been generally accepted as a practicable formula; Transport and Distribution, (London, 1972) 28.

It has survived almost intact for twenty years.¹⁶ Hundreds of experts in dozens of committees and working groups have apparently never succeeded in devising a better one, as it was repeatedly adopted and incorporated with minor changes into most of the legal instruments mentioning containers specifically,¹⁷ and the only major 'improvement' to it was the addition to it of another 58 words.¹⁸

Now, if it has proved difficult to define the container in the context of specific statutory or quasi-statutory instruments, where the question is 'what objects are meant to be included when a container is mentioned in the present context', it would be unrealistic to hope for an accurate, universally-accepted answer to the more general question mentioned earlier, namely 'what is a container'?

A container is 'that which contains'.¹⁹ The container which is of interest to the present work, however, is one which has been designed as a device for making better use of the existing modes of

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16. Its original version, as far as could be judged, was prepared by the Economic Commission for Europe and included in the first Customs Convention on Containers, Geneva, 18.5.56, 338 U.N.T.S.103
 17. In chronological order: The Customs Convention on the International Transport of Goods under Cover of TIR Carnets, Geneva, 15.1.59, 548 U.N.T.S.13; International Regulations Concerning the Carriage of Containers(RICO), annex to the 1970 version of the CIM Convention, T.S.40(1975), Cmd.5897. (Earlier versions of RICO contained a different definition, see note 20, infra); U.S. Coast Guard Regulations, 35 F.R.12776, 31.7.70, 49 C.F.R.420; International Convention for Safe Containers (CSC), Geneva 2.12.72, E/Con.59/45 (This version is different in part from the prototype, but the differences are not significant, except, perhaps, for the fact that it is intended here to include wheeled containers).
 18. In the revised Customs Convention on Containers done in Geneva, 2.12.72., during the joint UN/IMCO Conference on International Container Transport.
 19. See the OED for 'container'.

transport through a more efficient method of packing, handling, loading and stowage, all embodied in the container itself. This means that the only way to define our container, i.e. to distinguish it from other things which contain, is to describe its functions.²⁰ And if our container is a hybrid, as far as the classification of functions under the legal provisions designed to deal with conventional systems of transport is concerned, then the only way to deal with it, having only old laws at hand, is to decide in each specific legal problem which property of the container is dominant in that specific case, or which of the container's facets is relevant to the legal issue at hand.²¹

In the discussion of the 'package or unit' limitation problem it would be submitted that the container is 'a package'.²² It would be with no lesser conviction that one would state that the container is, in many cases, part of the ship which must be made cargoworthy by the carrier, yet at the same time part of the 'goods' the carrier is obliged to 'stow, handle, etc.' with care.

To do this, the direction of the search for the meaning of words must be reversed. Instead of asking 'what is the container?

20. It is worth noting that RICO's first two versions relied on a definition whose dominant 'functional' features are more apparent than in the later version (note 17, *supra*): 'For the purpose of these regulations, any receptacle ... so constructed as to facilitate door-to-door carriage of goods by rail only or by rail in combination with other means of transport shall be deemed to be a container' [Annex VII to the 1961 and 1952 versions of the CIM Convention, T.S.67(1965), Cmd.2810, and T.S.46(1958), Cmd.564, respectively].

21. A very good example of language-law relations and chameleon-like objects is Serreno v. U.S. Lines, 238 F.Supp.383 (S.D.N.Y.1965), where a trailer's tyre burst during stowage and injured a stevedore. When deciding upon an argument of unseaworthiness the court stated "... the trailer is not goods being shipped, but an instrumentality of the shipping process, a mobile package. It is, thus, container and not cargo..." (p.387). Yet, when dealing with a different argument the court stated: "while, for the purpose of the distinction between cargo and container in the law of seaworthiness the defective tyre is a container defect, the meaning of 'package' in the statement of this warranty [of suitability of packages] is something different. The statement deals with the suitability to contain its own components..." (pp 388-9).

Is the container a package?', one starts by asking, e.g., "What is the 'package' mentioned in art.4(5) of the Hague Rules? Can it be interpreted to include containers?", and in a different problem, "what is the 'package' mentioned in the 'insufficient packing' rule of the common-law?"

This, no doubt, makes the discussion of the legal problems of containerisation much more tedious, as it necessitates, in many cases, long and tiresome pursuits of rationales and of *raison d'être*, working one's way into the origins of transport and commercial law rules which have become institutionalized, sometimes even fossilized, during generations of unquestioned existence.

Moreover, taking up this methodology, there was no escaping a considerable amount of patchiness and apparent diversity. Characterizing the container as one thing within the scope of one article, and as another thing within the scope of another article in the same statute may seem odd, but what this approach loses in uniformity, elegance and convenience it gains in integrity and verity.

Angus²² cries out:

'... how can a new system of transportation become established without encountering complex problems in the process if the main element of such new system defies concise definition?'

Apparently, the system has become established and a concise definition of its main element cannot be achieved unless one is satisfied with arbitrary generalisations, and true enough, it is quite obvious that, had it not been for the container operators' exceptional general readiness to compromise on claims and keep containerisation away from courts, transport law would have been by now riddled with many complex problems affecting all aspects of

22. W.D. Angus 'Legal Implications of "The container Revolution", etc.' (1968), 14 McGill L.J.395,399.

container-transport. And yet, with or without concise definition, the legal issues of containerisation will have to be dealt with by the courts sooner or later, and if the legislator does not intervene by imposing a uniform doctrine, the better chances are that the body of rules on container-transport will build up and form itself naturally in the manner suggested here, namely fragmented and heterogeneous.

Chapter II: THE EFFECT OF PRE-SHIPMENT OPERATIONS ON CARRIERS' LIABILITY

1. THE PROTECTION OF CONTAINERISED GOODS

1.1. General

The Container Revolution has been accompanied by the apparently inevitable wave of uncritical, enthusiastic, literature,¹ typical of the early days of all successful revolutions. The enormous amount of initial credit and energy poured into the launching of the revolution has given containerisation enough momentum to set it, from its very beginning, onto a course of no-return. But it is arguable whether greater caution on the part of objective observers would not have played some part in making that course smoother than it proved to be for the first generation of modern containers.

This is not to say that the early optimists were basically wrong. It is no less correct today than 10 years ago, to say that containerisation may prove to be the most profitable and advantageous innovation in transport of goods since the invention of self-propelled vehicles and vessels. What was probably overlooked or underestimated earlier is the fact that the advantages of containerisation are conditional, and that the role the fulfilment of prior conditions plays in the success of a container operation is much greater than earlier writers cared to mention. Leaving most of these conditions to economists and marine engineers,² this chapter is

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1. A very good example of the early literature on containerisation is The Journal of Commerce's Library of Containerisation, which is a reprint of three volumes published in 1966-67 containing hundreds of small articles about almost all aspects of the subject. The titles, speaking almost exclusively of 'advancement', 'expansion', 'revolution' or 'boom' and all at a 'dizzying pace' (Vol.2, p.40), give a good indication of the content. A.Picone's well-balanced 'Insurance Rate Reduction Seen for Containers' (Vol.2. p.31), is an exception.
 2. For the major works in these fields, see K.M.Johnson and H.C.Garrett, The Economics of Containerisation (London, 1971); H.Tabak, Cargo Containers (Cambridge, Mass.1970); J.R.Whittaker, Containerisation (London, 1972).

concerned with the most important aspect of container operations from the legal point of view, viz. the efficient and careful pre-shipment preparations as a necessary condition to the realization of the three main advantages of containerisation, namely the overall savings in labour, time and damage.

The use of a container for carriage of goods may reduce the number of workers needed for handling the goods, but this is true only if a greater number of expert workers is used at the pre-shipment stages. Time may be saved, but only if a greater than usual amount of time is spent on planning and executing the preparation for shipment. Most importantly, containerisation offers a better protection for goods, but only if very great care is taken in striking the right balance between, on the one hand the two elements mentioned earlier, namely expert labour and time in pre-shipment stages, and, on the other hand, elements such as the nature of the goods and the contemplated hazards of the journey.³

The smooth movement of containers across continents and oceans will only be made possible by concentrating in the pre-shipment stages of the operations a large part of the skills formerly spread along the route. As far as the protection of containerised goods in transit is concerned, more versatile tasks will be performed and more decisions will be taken before the beginning of the journey than in its duration. Thus, if the function of the law is to allocate tasks (or regulate the ways in which this can be done by the parties) and assign responsibility for wrong decisions, it is

3. In E. Rath's curt and uncompromising wording: 'The use of freight containers has been acclaimed as the panacea for improper delivery, but success depends upon efficient stuffing and proper security of contents'; Container Systems (London, 1973), 153.

only logical to expect that the law of container-transport will focus more attention on the preparatory stages than previously has been necessary in conventional transport.

1.2. The Protection of Goods in Transit -
its Basic Legal Concepts

Goods in transit are usually exposed to a great variety of elements and forces which, if not guarded against, may damage or destroy them. The combination of environmental conditions, alien chemical and biological elements, stresses generated by the motion of the conveyance or by adjoining cargoes, and vices inherent in the goods themselves, not to mention the dangers of intentional meddling by human hand, still make the task of protecting goods in transit a formidable one. In the realities of today this is so, not because of any outstanding technological problems, but because of the acute difficulties of countering the combination of risks in any given case with the most economically efficient combination of protective measures.

Protecting goods in transit is a matter of economic alternatives⁴ rather than of absolute truths. There is almost no potential source of danger which cannot be either eliminated (e.g., by air-conditioning), or effectively guarded against (e.g., by protective matter). The only relevant consideration is that of cost and of economic viability. The primary criterion in this context is naturally the value of the goods themselves. The second is the probability, as far as it can be predicted, of the occurrence of the risk. The third, the relative cost of either controlling or guarding against it, and the relative costs of the various means of

4. As an example of the interplay among alternative manners of cargo protection, costs and risks in conventional transit, see the facts of Leonard v. Pennsylvania Ry. Co., 15 F.Supp.55 (S.D.N.Y.1936). For the same in container-transport see Cameco v. s.s.American Legion, 514 F.2d.1291 (2nd Circ.1974); see p.357, *infra*.

achieving each of the latter. What should be sought is an optimal balance between these criteria, a combination of means of protection which would achieve in the most efficient and economical way the degree of protection the goods 'deserve'. It is along these lines of commercial common sense and efficiency that the true meaning of the legal concepts dominating pre-shipment stages should be traced.

The standards of 'sufficient packing', 'proper stowage' and 'cargoworthy vessel/vehicle' can only be defined in their relation to each other, and as variants in a formula of overall efficiency. Thus, in Bache v. Silver Line⁵ the experience accumulated in the continuous carriage of a specific type of cargo was called upon to supply the standard for a correct balance between the various means of protecting the cargo in transit. The bales of rubber involved there were stowed one above the other and the lower ones were twisted under the weight, the consignment thus losing some of its commercial value. Stowing the bales otherwise would have resulted in a considerable waste of space in the vessel's holds. Packing the bales in a manner enabling them to sustain the weight of bales stacked above them would have been costly to the shipper. The court thus observes:

'To stow the goods as the libellants [the shippers] insist was required, would impose a loss upon the ship, to case them, a loss upon the shipper. The greater part of the law is made up of the compromise of such conflicts of interests; and this is no exception. In the carriage of goods the trade must always come to some accommodation between ideal perfection of stowage and entire disregard of the safety of the goods; when it has done so, that becomes the standard for that kind of goods'.⁶

5. 110 F.2d.60 (2nd.Circ.1940).

6. Ibid., at p. 62. See p. 117, infra.

But Bache v. Silver Line is quite unique in Anglo-American case-law in its consciousness of the concept of relative efficiency, and in the clear expression given in it to the concept. The greater part of case-law appears to deal with the standards of the various measures of protection in absolute terms, and as if each could be based on independent objective criteria. Yet what courts say does not always reflect what they actually mean. To choose an example at random⁷ let us look closely at the decision of the United States Court of Appeals for the Second Circuit in Continental Can Company Inc. v. Eazor Express, Inc.⁸ There, a heavy machine, mounted on skids and chained to a truck fell off the vehicle when ascending a steep hill. The decision deals with the three arguments which could be expected in such a case, namely that the machine was not properly prepared for shipment by the **shipper**, that it was not properly stowed by the carrier and that the vehicle was driven negligently. Each argument is dealt with separately, as if unconnected to the others and as if there were independent criteria for deciding upon each of them.

What the court says, in finding for the shipper, is that 'it was not feasible' to skid the machine differently, that the 'truck was travelling at an excessive speed' and that the chain used for securing the machine was 'defective'. It is suggested, however, that what the court actually meant is different. It is difficult to believe that, whatever the shape of the machine involved, it was technically impossible in America in the 1960s to achieve greater security in packaging the machine. What is much more sensible is that other packaging alternatives were much more expensive than the

7. The form of analysis suggested here could be applied to any of the decisions mentioned later in this chapter, dealing with aspects of defective packing, loading, stowage etc.

8. 354 F.2d.222 (2nd Cir. 1965).

cost of different modes of protecting the machine, namely reducing the speed of the vehicle to 10 m.p.h. when taking sharp turns and steep hills all the way between Chicago and Washington, and using a new chain to secure the machine. Whether the court admitted it or not, the decision was based on efficiency considerations as to the interrelations between package, stowage and the speed of performing the transport operation. It makes no sense otherwise.

1.3. The Overall-Efficiency Formula and Conventional Transport

The extent to which courts may apply considerations of optimisation in retrospect must depend on the practicability of achieving such optimisation in real life. In the realities of conventional transport the formula of overall efficiency can never be taken as more than a framework of rough guidelines in which ample room must be left for the interplay between different standards and opposing interests. Sauerbier,⁹ writing about the alternative methods of stowing vessels states simply: 'To know what is the best thing to do under a given set of circumstances is not always possible; in some cases the true answer to a question may not be known by anyone'. But if this can be taken as a general remark on the human inability always to excel, there can be discerned three more specific reasons why full optimisation of cargo-protection is rarely practicable in conventional transport.

1) Different parties are responsible for different stages in preparing the goods for transport and protecting them, and it is unrealistic to expect the parties to work selflessly towards achieving overall efficiency.

To say this is not to say that the standards of each protective measure can have an independent existence. Careful

9. Capt.C.L.Sauerbier, Marine Cargo Operations (London, 1956), 106.

driving may be assumed in calculating the standard of packing,¹⁰ normal behaviour of the cargo may be assumed when choosing the type and quality of the conveyance,¹¹ adequate packing may be assumed when deciding the method of stowage and, generally, what is 'careful', 'normal', 'adequate', 'sufficient', or 'proper' in each aspect of cargo protection can only be conceived within a comprehensive formula; but it is illusory to expect this formula to reach optimisation. To do this a much greater degree of co-operation between opposite parties must be achieved than can be expected between the suppliers and users of conventional transport.

2) Even had there been a will between carrier and shipper to strike a sensible balance of expenditure between themselves, this would be extremely difficult in most of the international transport operations, where more than one mode of transport is used and the protective environment around the goods changes constantly. The more diversified the conditions in the various places of storage along the route, in warehouses, on quays and in the storage compartments of vessels and vehicles, the greater

10. See a Dordrecht court decision of 18.5.66, [1968] E.T.L.416 (cited by R.Rodiére, 'The Convention of Road Transport', [1970] E.T.L.620 [1971] E.T.L.2,306, at 309) where it was decided that packaging should guard against normal risks involved in the journey, but not against consequences of an accident caused by the driver falling asleep. But a sudden application of the brakes is a normal risk in modern times and should be anticipated and guarded against; Rodiére, *ibid.* at 311, citing a decision of the Court of Appeal of Paris, 27.1.70. The same applies to a manoeuvre executed in order to avoid another vehicle; Tribunal of Commerce of Namur, 22.6.65. [1969] E.T.L.1039,1042.

11. See, e.g., Blower v. Great Western Ry.Co. (1872), L.R. 7 C.P.655, where it was decided that the carrier was not expected to supply a car which would prevent the escape of the shipper's bullock under any condition.

the variety of risks the original package has to encounter, and the lesser the possibility of achieving economies in cargo-protection, even had it been possible to predict all the risks.

3) The constantly changing environment around the goods gives rise to the problem of unpredictability and the need for over-protection. There is always a marginal region of unpredictable risks against which it is usually uneconomical to attempt any protection at all. What concerns us here, however, is risks which are much more common and yet unpredictable where a long, multi-modal transport operation is concerned. The goods change hands so many times and are exposed to so many different environments that it is unrealistic to try to predict the conditions which would prevail during the different stages of the journey. A wise operator would take the unpredictable for granted and add generously to the protection measures which efficiency calculations based on the predictable would suggest.

The fact should not be ignored that time, competitiveness and the accumulation of experience produce better standards of overall efficiency in the shape of trade customs.¹² But the value of customs as legal criteria should not be overestimated. Firstly, they develop in connection with, and are limited to, certain commodities carried on specific routes. Secondly, the search for the existing custom often becomes no less tiresome and full of conflicting opinion than the direct discussion of the very question which initiates that search, e.g., what is 'proper' stowage or packing.

12. Bache v. Silver Line, supra. One interpretation of the decision of the Tribunal of Commerce of Paris, 13.2.74, 27 D.M.F.90, may suggest that there the stowage of tins of paint inside containers was declared insufficient, despite being 'habituel'. It is submitted, however, that a better interpretation is that the court did not accept the expert's opinion that the stowage was customary.

1.4. The Overall-Efficiency Formula and Container Transport

The revolutionary aspect of containerisation in relation to cargo-protection is that it is now possible to pre-determine before the beginning of the journey many of the relevant features of the environment surrounding the goods, simply by making the environment travel with the goods. The three problems preventing efficient and economical protection for the goods are either reduced or solved altogether when the goods are containerised: 1) There is no problem of competing interests between different parties when, as is often the case, shippers undertake the task of 'stuffing' the container. The whole of the job of protecting the goods is then actually undertaken by one party, the various carriers confining themselves almost exclusively to carrying the containers themselves. 2) The problem of multiplicity of elements which prevents simple calculations of efficiency is reduced because most of the conditions during carriage are 'created' or controlled by pre-shipment preparation outside and inside the container. 3) Thus, predictability is much more feasible.

S.Simon, whose zealous advocacy of containerisation is unmatched among lawyers, brings out these three advantages in the following words:¹³ 'In view of the fact that under containerization the shipper stows his own packages he can now determine in advance the exact physical environment of his shipment during the voyage... it is no longer necessary in the containerization era for a careful shipper to try and anticipate by means of elaborate and costly packaging all the possible vicissitudes to which a carrier may subject his packages ... under containerization and mechanization the shipper knows and controls the physical stresses and risks to which his goods may be subjected. Consequently he may use packaging materials of the precise type and strength commensurate

13. 'The Law of Shipping Containers' (1974), 5 J.M.L.^{&Comm.} 507, 512-3.

with the known stresses involved rather than unknown misfortunes.'

But progress is rarely achieved without cost, and if containerisation has yet failed to produce the spectacular results in damage-prevention expected of it, this is perhaps because too much has been said about the potential gains, too little about the cost.

Simon's description, as the three-tiered formula of optimisation mentioned before it, is certainly more elegant, and generally more valid, than many accounts which strive to promote the concept of container transport on the basis of the totally misleading image of the container as a 'strong, safe, secure unit'.¹⁴ The present description makes it quite clear that it is the system of containerisation, not the walls of the container, which may bring about a reduction in the total amount of loss and damage. But though it points out the correct direction to optimisation, this description still fails to stress either the dangers lying on the way to achieving that goal, or the substantial re-allocation of duties and responsibilities between users and suppliers of transport which becomes necessary if the system is to achieve full success within the overall-efficiency formula. Let us explain.

1.4.1. Predictability and Safety Margins

Better predictability of the hazards of transit eliminates the need for over-protection. But the other side of the same token is that little room is allowed for mistakes; and mistakes in container-transport are usually more costly than in conventional transport.

The 'functional economic test',¹⁵ which gradually is gaining

14. F. Miller, 'Containerisation: A Dynamic Method for Economic Growth and Development' p.4, 1st International Conference on Containerisation, Geneva, Oct.1967.

15. Royal Typewriter Co. v. R.V.Kulmerland, 483 F.2d.645,648 (2nd Circ.1973); see pp. 155-6, 237-8, *infra*.

momentum as a court-made criterion for the problem of containers and the 'package or unit limitation',¹⁶ has been instrumental in demonstrating the fact that containerisation has given many shippers the opportunity to economize in packing materials and methods. In The Brooklyn Maru,¹⁷ in Lufty v. Canadian Pacific,¹⁸ in the Havre Tribunal of Commerce of 19.10.73.¹⁹ and in The Kulmerland²⁰ itself, there were clear indications that the goods would have been packed better, had they not been shipped in containers.

Indeed, even loosely packed goods stand a very good chance of arriving at their destination in a perfect condition if stowed before shipment inside a perfectly-maintained container by experts whose knowledge extends to all modes of transport used along the route, if the container is hauled to the seaport by a vehicle equipped with special container corner-locks, if handled in the port by container-cranes and other adequate equipment, if properly stowed aboard a container-ship, and if the same standards are maintained in the operations carried out in reverse order at the end of the journey. One flaw in the pattern, however, and the cargo would be ruined. The unusually vulnerable packages would not be able to prevent it. A hole in the roof of the container,²¹ bottles

16. See Chapter III, sec. 2, *infra*.

17. Insurance Co. of North America v. s.s. Brooklyn Maru, [1975] 2 Lloyd's Rep. 512, [1974] A.L.C. 2443 (S.D.N.Y. 1974); see n. 22, *infra*.

18. Lufty v. Canadian Pacific Ry. Co., [1973] F.C. 1115, 1139 (Can. Fed. Ct. Tr. Div. 1973); see n. 21, *infra*.

19. 26 D.M.F. 304.

20. *Supra*, n. 15.

21. Lufty v. Canadian Pacific, *supra*. Holes in the container's roof there resulted in \$10,386 worth of water damage.

of corrosive chemicals breaking inside it,²² a distortion of the container's doors,²³ some metal items breaking loose inside the container during the sea voyage,²⁴ and extensive damage will ensue.²⁵

In short, an ideal container operation is bound to produce ideal results, despite significant economies in packing,²⁶ but even a slightly less-than-ideal one may well result in disaster, the probability of occurrence and magnitude of which are higher than in conventional transport.²⁷

1.4.2. The Art of 'Stuffing' Containers

It ensues from the previous paragraph that, if pre-determination of the environment is the condition for optimisation of cargo protection, then it must be performed perfectly.

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22. The Brooklyn Maru,^{n.17} supra. The chemicals there contaminated the rest of the contents of the container to such a degree that the whole container load was rejected by the consignee.
23. Tribunal of Commerce of Havre, 9.5.75, 27 D.M.F.497. A container whose doors did not close hermetically allowed water to penetrate and severely damage the contents.
24. Through Transit Club, a brochure published by Through Transit Marine Mutual Assurance Association (Bermuda) Ltd., (London 1976), gives an account of 46 containers being lost overboard as a result of tin ingots breaking loose in one container.
25. See J. Agnew & J. Huntley Container Stowage, A Practical Approach (Dover, 1972), 127.
26. For some well balanced accounts of the relations between the container and packaging methods and materials see J.S. Carter and I.J. Steele 'Packaging and Containers', the International Container Symposium, London, 1968, sponsored by the London Chamber of Commerce and others, p.57: J. van Leeuw. 'Packaging vis-a-vis Containers and Unit Loads', [1967] E.T.L.567, and J.S. Carter 'Container Packing', Containerisation Data Book, 1969 (Kingston upon Thames, 1969), 49. But Cf. J.R. Woods who speaks solely in terms of 'elimination of the export packing cost' in his 'The Container Revolution' (1972), 6 J. of World Trade Law, 661, 664.
27. For an excellent account of the operational risks connected with containerisation see the report on Containerisation and Marine Insurance prepared by the Advanced Study Group No.196 of the Insurance Institute of London (Bennister's above quoted article is a summary of this report). See also 'Use of Containers, liability of Carriers and the effect on Cargo Insurance' by a Maine Underwriter, Containerisation Data Book, 1969. 69, 71; Carter, op.cit. 49-50; 'Legal and Regulatory Aspects of the Container Revolution' (1969), 57 Georgetown L.J. 533, 546.

Pre-shipment operations are still a constant source of small but fatal errors in container-transport,²⁸ and it is not illogical to expect that this will become a permanent feature of the system. But a realisation of the magnitude of the task of preparing a container for shipment will help to reduce the acuteness of the problem.

The container is not merely a box. It is a compartment which in rapid succession performs the functions of trailer, railway wagon, ship's hold and warehouse, and the art of stowing goods in it must include not only the vast know-how required for the fulfilment of each of these functions separately, but also the ability to prepare the goods and the container for all these functions together, and in advance.

The description of containerisation as aiming 'to turn a labour-intensive industry into a capital-intensive one'²⁹ is generally correct. But the fierce fight put up by dockers around the world against the new system³⁰ is not wholly about loss of jobs. A great part of it is only about what was called by Schmeltzer and Peavy³¹ 'dislocation of labour'. The need for skilled labour for seaworthy stowage has not disappeared; a large part of it has only moved inland together with the ship's hold, viz., the container.³²

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28. Report on Containerisation by the Containerisation Study Group of the National Joint Council of Material Handling, 2nd.ed. (London, 1967), p.52; C.W.Wood, 'Damage in International Container Shipments' The International Container Symposium, London, 1968, sponsored by the London Chamber of Commerce and others, p.76; C.F.McDowell, 'Changing Underwriting Problems' Container News, Jan.1975, 28.
29. B.S.Wheble, 'Containerisation and Its Impact on Banking' J.of Inst.of Bankers, Feb.70, 17, 18.
30. See D.F.Wilson, Dockers (1972), 137 et seq.; E.Schmeltzer and R.A.Peavy, 'Prospects and Problems of the Container Revolution' (1970), J.M.L.203, 235-8.
31. Ibid. 235. ~~Accm~~
32. See, e.g. A.A.Evans, Technical and Social Changes in the World's Ports, (Geneva, 1969), I.L.O. Studies and Reports, n.S.No.74, p.37; F.Suykens and H.Coppieters 'The New Cargo Handling Techniques and the Seaports', [1968] E.T.L.596, 651.

Rath writes: 'Containers must be stowed carefully and scientifically, otherwise the shipper will lose the opportunity of insuring arrival of goods factory fresh. This opportunity has never previously existed and it should not be wasted'.³³

In order to comply with this advice shippers will have to have at their disposal a most formidable combination of resources, skill and know-how in the field of cargo protection, ready in the right time and the right place to perform flawless 'stuffing'.

1.4.3. The Shipper's Role

No exact data exists as to the percentage of containers 'stuffed' by carriers. 27³⁴ out of the 35 decisions involving container-transport (or similar unitisation systems) reported in England, U.S.A. Canada and France give a clear indication about the identity of the party who performed the 'stuffing'. In all 27 cases the 'stuffing' was performed by the shipper. In one case³⁵ the carrier's agent shared a part of the task, in another case³⁶ the container was opened for tallying by the carrier's representatives, and in three cases³⁷ the carrier's driver was present at the 'stuffing' operation; in the other 22 cases the carrier had nothing to do either actively or passively with the contents of the container. But these figures cannot be taken to

33. Rath, op.cit.155. And see a similar warning in Thomas's Stowage, 6th ed.(Glasgow,1968), by Capt.O.O.Thomas, 76-7, and in J.E.Bannister 'Containerisation and Marine Insurance'(1974), 5 J.M.L.463,476.

34. It did not seem practical to specify here by name and reference the whole list of cases. These appear frequently through the whole thesis and it seemed preferable to refer only to the exceptional cases mentioned in the following notes.

35. Norfolk Terminal v. U.S.Lines,215,Va.80,205 S.E.2d.400 (1974); see pp.333-5,infra.

36. Court of Cassation, 12.10.64, 17 D.M.F.18.

37. Inter-American Foods v. Coordinated Caribbean Transport Inc., 313 F.Supp.1334(S.D.Fa.1970); Leather's Best v. ss Normaclinx 313 F.Supp.1373(E.D.N.Y.1970), aff'd 451 F.2d 800(2nd Circ.1971); Cameco v. American Legion, supra, n.4, p.17

see pp.154,330-1,infra

reflect reality. The model is statistically insignificant, and personal observation, incomplete as it is, indicates a much larger percentage of containers 'stuffed' in depots controlled by or affiliated to, a carrier.

Whatever the exact figures, however, the fact remains that the true advantage of containerisation over conventional transport, as far as efficiency of cargo protection is concerned, can only be achieved when containers are 'stuffed' by the shipper. The argument of the present chapter is that this entails a re-allocation of duties and responsibilities which affects most of the significant aspects of legal relations between carriers and shippers.

The task of protecting the goods in transit was always shared between carrier and shipper. The exact border-line between the shipper's and the carrier's share of the task differed from one case to the other³⁸ and was always a popular subject of litigation, but to draw a rough line it could be said that the shipper was expected to contribute the first layer of protective matter, the layer which was in direct contact with the goods, whereas the carrier was expected to do the rest of the protection, the part which was directly connected with the conveyance used. This distribution of duties suited the knowledge and expertise which each party normally possessed. Shippers are generally more acquainted with the special characteristics of the goods and the package which suits them best³⁹ whereas carriers have professional knowledge of the qualities of the vessel or vehicle used, and the best way of stowing the goods in it.⁴⁰

38. As an example of the subtleness and possible varieties of this division, see Court of Cassation, 8.6.71, J.C.P.1971.2.16399, where the border line between shippers' and carriers' duty was constituted by the moment the goods were loaded on the vehicle by the shipper according to the carrier's instructions, the stowage being the carrier's duty.

39. See, e.g., Northwestern Marble and Tile Co. v. Williams, 128 Minn.514, 151 N.W.419(1915).

40. See, e.g., Sauerbier, op.cit.105.

Every traditional mode of goods transport was made of two main parts - the traction unit and the storage compartment, and carriers were put in charge of both. Containerisation has given the carrier the opportunity to detach the storage compartment and lay it at the shipper's door, inviting the shipper to take full charge of that compartment, and in effect stow the vessel's hold, the railway wagon and the lorry's trailer. Perhaps for the first time since merchants ceased to travel with their goods as a habit, carriers are again given the opportunity to confine themselves to carriage. Even if shippers do not travel with the containers they 'stuff', the interior of the containers remains an exclusive cargo-owner's territory for the duration of the journey, with all the ensuing legal consequences in the relations between the cargo-owners and the carriers.

No theoretical example could demonstrate this point better than the case of Guadano v. Hamburg Chicago Line G.m.b.h.⁴¹ There the shipper packed two containers with antiques and articles of furniture for a trans-Atlantic journey. The goods arrived in a damaged condition, and the Canadian court inevitably ruled in favour of the carrier-defendant on the ground that the packing was inadequate and that there was no negligence in stowing the containers where they were designed to be stowed, namely on deck. The implications of one passage in this decision go so deeply into the roots of the shipper-carrier division of duties and responsibilities in connection with containerised goods that it cannot but be quoted in full:

'While the defendants knew that the containers enclosed fragile goods they had no obligation to examine the packing to ensure that it was properly done, even if they physically were able to do so, and in my opinion were entitled to expect that the

41. [1973] F.C.726 (Can.Fed.Ct.Tr.Div.1973).

shipper would ensure that valuable, fragile goods would be packed to withstand the rigours of north Atlantic travel regardless of where the containers were stowed.⁴²

There existed in this case a combination of circumstances very unfavourable to the goods. Because of their own fragile nature, the relatively hazardous route and the ship being equipped with container fittings only on deck, considerable skill and ingenuity would clearly have been needed if an environment which would resist the stresses, cushion the shocks and offset all other risks were to have been created. If in such circumstances the task of protection and the ensuing responsibility is so emphatically and completely left to the shipper, this means that, recalling an earlier observation about the standards of 'adequate packing', 'good stowage' etc. being set by a balance of each party's expectations from the other,^{42a} shippers are entitled to expect very little from carriers beyond the mere physical strength of the containers themselves (and even that only when the containers are supplied by the carrier). Once deck carriage of containers is universally recognised as standard 'good stowage',^{42b} shippers who 'stuff' containers are virtually left with the whole of the business of protecting the cargo during transit. They may, of course, make as many economies in packaging the goods and in stowing them in containers as they wish, and, as said earlier,^{42c} such economies would be wise and justifiable in many cases, but the greater the economies, the greater the risks, and shippers would have only themselves to blame if they miscalculated.

1.5. The 'New Order' - its Impact on Case Law

The new balance in the allocation of risks in container-transport has left, until the time of writing, a remarkably small impact on case-law in terms of number of reported cases.

42. Ibid.736.

42a. See pp. 18-20, supra.

42b. See chapter II, infra.

42c. At p. 25, supra.

The lack of decisions on the subject in England should not be surprising, as parties to container operations here seem to have developed a spirit of co-operation and restraint which has kept almost all container problems away from the courts. But when one considers the tremendous legalistic zeal and effort poured in America into the peripheral problem of whether a container is a 'package or unit',^{42d} one could have expected at least some of that effort to have been channelled into the more important problems of liability for damage. And yet not one decision⁴³ dealing with such problems has been reported there in almost twenty years of containerisation.

Theoretically, it is not impossible that the revolutionary shift in allocation of risk has materialized without the intervention of the courts, and that claims involving faulty 'stuffing' on the part of the shipper are successfully curbed in their preliminary stages.

It is also generally true that many significant revolutions in legal concepts have been achieved by an example set by one clear decision by an authoritative court, and if Guadano v. Hamburg Chicago Line⁴⁴ has no doubt left a strong impression in the Canadian system, the French Court of Cassation has delivered no less firm a message in its decision of 4.6.71.⁴⁵

There, a manufacturer undertook to deliver industrial washing machines to a buyer. Traditionally he would have confined himself to making a contractual arrangement with adequate carriers or a

^{42d} See chapter III, sec. 2.1., infra.

43. United Purveyors v. The New Yorker, 250 F.Supp.102(S.D.N.Y.1965), touches on the fringes of one aspect of substantive liability, but the decision is so short and ambiguous that it could be practically ignored.

44. Supra, n.41

45. [1973] E.T.L.448. For the lower court's decision see 24 D.I.F. 332.

forwarding agent. In the event, the seller himself performed a decisive part of the transport operation, namely stowing the machines inside ocean containers. The system of securing the machines was not adequate to withstand the rigours of the North Atlantic in January, and the seller-shipper ended up paying the carrier for damage to the latter's container, the buyer for the damage to the machines, and, needless to say, losing his action against the carrier for the damage to the machines. The latter action was governed by the Hague Rules and the Court, once it found that the damage was causally related to a fault in lashing the machines to the container's walls, saw no difficulty in bringing into operation either art.4(2)(i) or 4(2)(n) of the Rules.

Three years later, the Tribunal of Commerce of Paris⁴⁶ was able to state:

"Il est de jurisprudence confirmée que le transporteur est exonéré de toute responsabilité lorsque les avaries sont dues à l'insuffisance du callage de la marchandise à l'intérieur du conteneur."

1.6. The re-allocation of Duties and the Basis of Carriers' Liability

The emphasis put in the previous sections on the decline in the carrier's share of the risk in shipper-'stuffed' containers does not entail an adverse opinion about the justifiability of the new balance. From the financial point of view, a new equilibrium may be arrived at in the still relatively competitive container-transport market, in which reductions in freight rates in consideration for the shippers' pains in packing the containers would offset the ensuing increases in cargo insurance premiums.⁴⁷ As to broader

46. Decision of 13.2.74, 27 D.H.F.90, 92.

47. See Containerisation: The Key to low cost transport, an economic research prepared by McKinsey and Co. for the British Transport Docks Board in 1967.

principles of justice, the shift in responsibility is based on a very sound principle, namely that responsibility for an operation should fall on the party who performs it.⁴⁸

The subject of the present analysis should not be theoretically confused with another problem which has received wide attention recently,⁴⁹ namely the basis of carriers' liability in general. Even where the idea of exempting carriers from all liability, regardless of fault, has been dismissed without discussion,⁵⁰ it was not suggested that carriers should be made responsible for shippers' faults.⁵¹ What could be said, however, is that in cases of shipper-'stuffing' containerisation may cause a shift in the construction built upon the existing basis of responsibility without any change in the basis itself. The principle of liability for fault is the main basis of carriers' liability in international transport today, and so it will remain for the foreseeable future, but with a major part of the task of cargo protection transferred to the shipper, carriers would be left with much smaller opportunities to commit faults. This has been demonstrated in an excellent way in Guadano v. Hamburg Chicago Line.⁵²

Carriage by rail has been operated in Britain since 1854 on the basis of two alternative schemes of liability without any apparent signs of problem.⁵³ When wagons are stowed and prepared for shipment by the sender they are usually consigned 'at [cargo] owner's risk'

48. See P. Manca, 'A Legal Outline of Carriage by Containers', [1968] E.T.L. 491, 517.

49. See UNCITRAL's report on Responsibility of Ocean Carriers for Cargo: Bills of Lading (1972), U.N. Doc. A/CN.9/65/Add.1, paras. 79-90, pp. 178-214; UNCTAD's report on Bills of Lading (1970), U.N. Doc. TD/B/C.4/ISL/6, passim; J. Rarberg, 'The Law of Carriage of Goods, Attempts at Harmonization', [1974] E.T.L. 2.

50. UNCITRAL's report, *ibid.*, para. 184, p. 80, n. 164.

51. *Ibid.*, para. 189, p. 82.

52. *Supra*, n. 41, p. 20.

53. O. Kahn-Freund, The Law of Carriage by Inland Transport, 4th ed. (London, 1965) 255 et seq.

(i.e. the carrier being liable only for wilful misconduct and for non-delivery), in exchange for a lower freight rate. Here the difference in the basis of liability has been given full recognition, thus preventing ambiguity and uncertainty. Without legislation no similar arrangement can be adopted for container-transport. It remains for us, therefore, to make the effect of the exact allocation of duties between the parties on their responsibilities under the existing basis of liability as clear as possible.

As will become evident when more aspects of container-transport law are discussed in the course of the present work, the responsibility of the container operator who receives a 'stuffed' and sealed container from the shipper is practically no broader than to deliver the container to its destination in the same external condition as on receipt. But the relative positions of the parties change in direct relation to the carrier's involvement in the pre-shipment stages. Supplying the container itself involves the carrier with responsibility for its cargoworthiness.⁵⁴ Presence of the carrier's agents or employees in the 'stuffing' operation, and subsequent knowledge of the quantity and order of the contents, has far-reaching effects both on the content⁵⁵ and status⁵⁶ of the bill of lading, on the 'package or unit' problem,⁵⁷ and on aspects of liability for the condition of the cargo connected to its external appearance.⁵⁸ Actual involvement in the 'stuffing' involves, of course, direct responsibility for faults committed in the process, the extent of which depending on whether or not the carrier assumed command over the operation.⁵⁹

The degree of involvement of the carrier in pre-shipment operations is the key to most aspects of the special law of container-transport, because it is mainly the lack of direct contact with the goods which makes container-transport legally different from conventional transport.

Before the application of this hypothesis to the legal aspects of cargo-protection can be demonstrated in greater detail, two matters must be dealt with, namely the question of the applicable law and the problem of terminology.

54. See pp. 71-73, 75-6, 88-9, *infra*.

55. See pp. 355-6, *infra*.

56. For the connection between the status and content of bills of lading, see pp. 313-4, *infra*.

57. See p. 167, *infra*.

58. See p. 232, *infra*.

59. See p. 110, *infra*.

2. THE LAW APPLICABLE TO CONSEQUENCES
OF FAULTY 'STUFFING'

An old chain is used for securing a machine to an ocean container. The chain gradually weakens under the stresses of ordinary successive road, rail and sea carriage operations, and finally breaks under no unusual circumstances, during road-carriage in the country of destination. The fact that the breakage occurred during road-transport was purely accidental. It occurred because of the passage of time and the accumulation of stresses; it would have occurred in any other means of transport, and had nothing whatsoever to do with the characteristics of road-transport, its economic realities or its peculiar hazards. And yet, the legal proceedings very probably will be governed by a set of legal rules which were specially designed to suit these very characteristics, economic realities and peculiar hazards.

This is so because of one of the major, but largely neglected, characteristics of the existing fragmented sets of transport law rules, namely that each set applies to a specific set of facts according to the place in which the damage occurred, not according to the place where it originated. Whatever the minute variations among different views, the Hague Rules apply to loss or damage which occurred between some point in the port of origin and some point in the port of arrival. The CMR applies where damage occurred between the time the carrier takes possession of the goods and the time of delivery,¹ and the same is true for the CIM,² and the French local Statute on carriage of goods by sea of 18.6.1966.³ In the words of J.Ramberg in his excellent comparative study of the various regimes

1. Art.17(1)

2. Art.21(1)

3. Arts.27,29.

of transport law:⁴

'In order not to extend the particular regimes of maritime and air law, the period of liability has been more or less fixed to the vehicle of transportation itself.'

Historically, the reasons why this was so are only too obvious. The transport law treaties were initiated and prepared by specialized organisations for the needs and interests which arose in their own specific regimes. The CIM, for instance, was conceived, drafted and has been managed to this day, by an organisation of European railways for the harmonization of general principles of carriage by rail. It was only natural that the drafters of that convention confined themselves to damage to goods occurring while in the custody of a railway. Even if they had any interest in other modes of transport it is unlikely they had any desire to infringe on the regime of any other specialized organisation.⁵

And yet, the problem is there. It would seem very strange to an outsider that the very same fault, the same negligent behaviour, may well be treated differently if the ensuing damage happened to occur in one place or another, there being no causal connection between the fault and the time or place of the accident.

Admittedly this position is not entirely new. It existed previously without arousing any special attention in relation to faults in the traditional packaging of goods. But packaging proper used to be only a small part of the whole task of protecting the goods in transit. The rest of that task was performed

4. 'The Law of Carriage of Goods, etc.', [1974]E.T.L.2,18.

5. In the CIM there are some provisions on combined rail-sea transport, but they are limited in scope and strive to make the legal relations prevalent during the sea-leg similar to those prescribed by the Hague Rules; see CIM arts.2 and 64.

separately for each of the means of transport used during transit, and it was only right that the stowage of goods in a railway wagon would be dealt with under the domain of railway legal rules if this particular stowage resulted in damage during the railway transport. Similarly, if the goods were transferred from the train to a ship, stowed there by stevedores and damaged at sea because of a fault in that stowage, it was only right that the applicable law would be that developed by maritime lawyers for the needs and realities of maritime transport.

where containerisation is involved, however, almost the whole of the task of making the goods safe for transport, whether by rail, road or by sea, is performed in one continuous process, in many cases completed for better or for worse, before the doors of the container are sealed. As said earlier, a large part of the fate of the transport operation is determined before it has even begun, by the quality of the precautionary preliminary operations; and yet these operations have no legal independent status at all. Legally they emerge as part of the transport operation only through the legal regime which applies when the ensuing damage happens to occur.

this is not to say that there are drastic differences of principle between the different legal regimes with regard to the task of protecting the goods. It can quite safely be stated that, whatever the legal regime, the fundamental principle remains that a man is responsible for his own acts and omissions.

'That the bailee was not liable if it was through the action of the bailor that the goods were damaged or could not be returned' was already judicially recognized in England in 1410.⁶

The extent of this rule's influence on common carriers' liability as bailees was greatly obscured by earlier textwriters' reluctance to abandon the apparently simple formula of the common carriers' absolute

6. (1410)Y.B. 11 Hy.N.Mich. pl.46.p.24, cited from E.G.M.Fletcher, The Carrier's Liability (London, 1932), 221.

liability, qualified only by Acts of God and the King's enemies.⁷ But during the nineteenth century the shipper's fault gradually⁸ assumed its present role as a well-established major exception to the carrier's liability.⁹

Once firmly established, this exception was not confined to any one mode of transport. Road,¹⁰ sea,¹¹ rail,¹² and later air transport law¹³ recognized it, and embodied it in the respective international conventions.¹⁴

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7. See, e.g., G.F.Jones on Common Carriers (London, 1827), 9, and the first edition of Story's Law of Bailments, (London, 1839) p.318. Cf. Stuart v. Crawley (1818), 2 Stark.323,324; William v. Grant 1 Conn.487,491(1816).
 8. See J.K.Angell, The Law of Carriers (Boston, 1849), paras.212-3, pp.216-8; Niagara v. Cordes, 21 How.7(1858).
 9. This principle prevails also in French law. The Commercial Code of 1808 excepted "force majeure" and "vice propre de la chose". As far back as this could be traced, the latter exception has always been deemed to include some kind of shipper's fault. See J.M.Pardessus, Cours du Droit Commercial, 5th ed.(Paris, 1841), para.542, vol.2, p.449-50; Dalloz's Répertoire de Législation, etc. (Paris, 1848), 'Commissionnaire', para.341, p.97; Court of Cassation, 16.6.1890, S.1893.1.50; Modière, Gén.Trans. para.907, vol.2, p.486; C.Chaiban, Clauses Légales d'Exonération du Transporteur Maritime, etc.(Paris, 1968), paras.740-2, pp.307-8.
 10. Kahn-Freund, op.cit. at 199.
 11. Carver, para.17, pp.15-16.
 12. A.Leslie, The Law of Transport by Railway, 2nd ed.(London, 1928), 37-41.
 13. Shawcross & Beaumont on Air Law, 2nd ed.(London, 1951) by C.H.Shawcross, K.M.Beaumont, F.R.E.Browne, art.346, pp.324-5.
 14. The Hague Rules, art.4(2), paras.(i), (n), and (o); CFR, art.17(2), paras.(4)(b)(c) and (e); CIL, art.27(2) paras.(3)(b), (c), (d) and (f); The Warsaw Convention liability system does not refer to specific exceptions.

Thus, confining our scope of interest to the consequences of faults in the preparation of the container and the goods for shipment, it could be fairly expected that, whatever the stage of transit the damage occurred in, and whatever the classification of the faulty operation, the general principle should be the same, namely that the loss should fall on the party which carried out the faulty operation.

But legal controversies are rarely settled on broad principles only. More often than not it is the minute detail, the subtle distinction, the rule of procedure or of burden of proof which determines the case; and these vary considerably from one legal regime to the other and from one class of rules to the other.

Let us take the example of the onus of proving the cause of the damage. Not only does it often entail acute technological problems, but, as is often the case with questions of cause and effect, what seems to be a question of fact turns into a controversy over norms, and a favourable provision about the onus of proving the cause of damage is in many cases all a party may need to win the case. Having this in mind, one should consider CMR art.18(2), quoted in the next paragraph, an example of a very powerful weapon indeed in the hands of carriers, compared with their position under the Hague Rules.

Thus, when a container is opened after combined sea and road transport, revealing some damage by breakage to the contents, the basic principle should be the same whether the place of occurrence of the damage could be traced to the train or sea leg of the journey, namely that if the shipper delivered to the operator an already 'stuffed' container, and if the damage occurred as a result of a fault in the 'stuffing', the operator should be exonerated. But proving this causal connection may be difficult, and whereas under the CMR it is sufficient for the carrier to prove that 'in the circumstances of the case, the loss or damage could be attributed'

to the 'stuffing' operation, under the Hague Rules the carrier has to assume the full burden of proving that point. Needless to say, even a combined transport operator (i.e. a party which assumes liability for both legs of the transport operation) would have a very strong interest indeed in bringing the case under the domain of the CMR.

A carrier may have the opposite inclination in a case involving damage caused by a faulty container. If the container is treated as part of the vessel when carried by sea, and as part of the vehicle when carried by road, then the carrier would surely prefer the Hague Rules formula, which calls only for due diligence where seaworthiness is concerned, to the CMR system which makes the carrier absolutely liable for the 'defective condition of the vehicle used by him ...' [art.17(3)]. At least when it is the shipper who furnishes the container and 'stuffs' it without any intervention by the carrier, one should think that by any criteria of due diligence according to the Hague Rules, the carrier cannot be expected to remedy any but the strikingly obvious defects, whereas the CMR's absolute liability would make the carrier responsible regardless of any considerations.

More examples will emerge in the course of later discussions, but it is hoped that the point has been clearly made that the fate of an action for damages may often be determined by a peculiarity in the set of rules which are made applicable only by the fact that the actual damage happened to occur in one stage of a multi-modal journey rather than the other, a fact which is often more than usually accidental in container-transport.

In this respect, therefore, and paradoxical as this may seem, justice in its broader sense may be better served when, in connection with a combined transport operation governed by, e.g., a document incorporating the model ICC Uniform Rules for a Combined

Transport Document,¹⁵ the stage of transport in which the damage occurred cannot be established, and a dispute as to damages allegedly resulting from the preliminary stages of the container transport is resolved according to the uniform set of rules (such as in ICC Rules 11 and 12), being effective for the whole of the journey.¹⁶

The 'network system', such as the one prevailing in the ICC Rules¹⁷ dominates at present the combined transport liability scene and, unless a major revolution in international transport law, backed by the greater majority of the international community is achieved, it will, of necessity, continue to do so.¹⁸

Whether the 'network system' is desirable or not is another matter. If it has any justification at all it is that this system permits matters arising during carriage by a specific mode of transport to be treated with a legal instrument made specially to fit the peculiarities of that mode. Yet, whatever merits this argument may have, it certainly cannot stand where our present problem is concerned. The protective environment created inside the container is the same at sea, on rail or on the road, hardly

15. ICC Brochure 298.

16. This excludes, of course, all cases where the shipper contracts separately with each of the operating carriers. There, an impossibility of establishing the place of occurrence of the damage may result in one of two evils, namely, that all carriers escape liability, or that the last carrier is arbitrarily made *prima facie* responsible for the damage.

17. Rules 11-13.

18. An effective international settlement of the combined transport liability problem in any way other than within the 'network system' frame, would entail not only an agreement on the content of uniform rules governing the whole of the journey, but also a consensus as to ways of limiting the scope of the existing specialized conventions and local statutes in such a way as to avoid duplication where the stage of damage can be proved.

affected by the peculiarities traditionally connected with each mode of transport. If one can think of some justification as to why the task of proving causal connection between shipper's bad stowage and damage during transit should be made easier for a road carrier by comparison with a sea carrier, in a situation where the goods are stowed separately in each mode of transport, one cannot possibly think of any such justification where both the road and sea carrier receive for carriage a pre-stowed, closed and sealed container.

In a world where loaded lorries are carried by hovercraft, trains by ferries, barges by ships, vans by aircraft and containers by each of these, with ever-growing standardization and similarity, there should develop a uniform, universal set of legal rules to dominate all modes of international transport. If, however, it is naïve to hope that this could be achieved in the foreseeable future, one cannot help feeling some satisfaction at the achievement of justifiable uniformity, if not through international consensus and common sense, then at least through necessity, i.e. through the mere fact that the frequently occurring impossibility of proving the place of damage to containerised goods bars the use of the fragmented sets of rules and, where a 'door-to-door' operation is involved, brings about the use of a uniform set.¹⁹

19. See note 16, *supra*.

3. 'PACKING', 'LOADING' OR 'STORAGE' (OR BOTH?)

In London and North Western Ry.Co. v. Richard Hudson & Sons,¹ an open railway wagon was loaded by the consignor on his own premises and was covered with defective sheets which allowed rain to penetrate during transit. Was the carrier responsible for the ensuing damage?

Lord Dunedin brought the problem down to the following statement:

'If the improper sheeting could be represented as bad packing then the railway company might be excused, but I think it is out of the question to so consider it. It is really a part of the vehicle not of the goods.'²

What was 'out of the question' to Lord Dunedin, seems to have been quite correct, however, to Lord Atkinson's mind and a large part of the latter's decision³ is explicable only on the basis of an analogy between the improper sheeting and bad packing.⁴

It is not the mere difference of opinion which is worth noting, but the fact that each of the noble Lords seems to have relied purely on intuition in deciding for or against the analogy. Their decisions, at any rate, do not include any argumentation on this matter. And yet, whether or not the sheeting could be considered as 'package' was the decisive element, certainly in Lord Dunedin's decision, and perhaps also in those of the other Lords.

But are there any objective criteria, as opposed to subjective intuitions, on the basis of which one could clearly classify any of

1. [1920] A.C.324

2. Ibid.334.

3. Ibid.336 et seq.

4. After a rather surprising turn, however, the decision eventually goes against the carrier, joining the view of the majority of the Lords.

the various processes connected with preparing goods for transport under 'package', 'stowage' or 'loading'?

Again, language itself is of little help. The borderlines between dictionary definitions of the three terms are far from clearly defined. If common usage is adhered to, it is possible to establish a loose line of distinction between the terms. Whereas 'pack' and its derivatives relate physically much more closely to the goods themselves, 'stow' and 'load' have more to do with relating the goods to a place, a vehicle or a vessel. Symbolically, one would speak more in terms of 'putting together' and 'putting in' a box or receptacle when referring to 'packing', and more in terms of 'placing in' a warehouse or ship's hold when referring to 'stowage' or 'loading'.⁵ But this distinction hardly qualifies as a clear objective criterion. It does not advance us much further than Lord Dunedin and Lord Atkinson's intuitive observations.

On the face of it, the classification of the different pre-shipment processes should not usually pose difficult problems in connection with conventional modes of transport, because of the relatively clear distinction between the conveyance and the goods.

The American ALR, for instance, introduces a subject entitled "Carrier's Liability as affected by Improper Packing or Preparation of Goods for Shipment"⁶ in the following manner:

'This annotation is concerned with cases of improper packing as distinguished from negligent or faulty loading; that is to say; the method of placing, fastening, or otherwise securing goods in the vehicle of carriage is of no concern, but only the

5. See, for instance, the language used in the OED in defining these terms.

6. 81ALR,811.

manner of wrapping, crating, boxing, canning, or otherwise preparing goods for loading and shipping.'⁷

The same tone of confidence in the correct classification emanates from the French Court of Cassation decision of 8.6.71.⁸ There, the applicable tariff made it the shipper's duty to load ('charger') the goods on the vehicle according to the carrier's instructions, and the carrier's duty to stow ('arrimer') the goods. In a very short decision it was stated that, as the damage resulted from a fault in securing the goods in the trailer, and as this was part of the stowage operation, the responsibility was the carrier's. Rodière, in a comment on the decision,⁹ fully agrees with the classification, and even seems to suggest that, had the matter involved carriage by sea rather than by land, even greater accuracy could have been achieved by relying on the richness of mariners' language which has separate terms for each of the stages of the operation generally termed 'stowage'.¹⁰

Yet, as follows from other French cases, mentioned by Rodière himself in his major treatise,¹¹ even the basic distinction between 'chargement' and 'arrimage' is not altogether beyond dispute. While all agree that, strictu sensu, 'chargement' is confined to hoisting the goods onto the vehicle/vessel, as opposed to all

7. Similar distinctions are made when other subjects related to stowage, loading, adequacy of the vehicle, etc., are dealt with in the ALR. See, e.g., 44 ALR 2d.993.

8. J.C.P.1971.2.16899.

9. Ibid.

10. He mentions 'arrimage' in the narrow sense of arranging the goods in the hold, 'seisage' (securing the goods to each other) and 'calage' (securing the goods to the hold).

11. Gén.Trans. paras.632-3, vol.2, pp.254-6.

subsequent operations aimed at securing the goods during transit,¹² 'practical needs'¹³ brought about the ruling that 'chargement' includes operations which would have otherwise been considered as 'arrimage' and 'bachage'.¹⁴

Similarly, in English law, it was decided that 'the operation of loading involves all that is required to put the cargo in a condition in which it can be carried'¹⁵ including stowage.¹⁶ And yet, the drafters of the Hague Rules had apparently so little confidence in the exact scope of these terms that they found it necessary to mention in art.3(2) both loading and stowage, together with a list of other terms, the exact meaning of which is even less clear, seemingly hoping that among these terms, every possible operation connected with the ship would be covered.¹⁷

As to 'stowage' itself, in Artieselkab Helios v. Ekman & Co.,¹⁸ the term is mentioned in its very narrow sense of 'Arrang[ing]... in a proper manner',¹⁹ similar to the narrower scope of 'arrimage' mentioned earlier.²⁰

12. See a list of decisions to that effect in F.F.Durand, 'Transports Par Chemin de Fer; Obligations du Voiturier' (1968), Juris-classeur commercial, C.Com., arts.100-2, no.139, p.17.

13. 'Nécessités de la pratique', Rodière, *ibid.* 255, i.e., presumably the need not to spread the various pre-shipment operations between the parties.

14. Thus, 'bachage' (sheeting) was considered part of the shipper's duty to load ('charger'), in Court of Cassation, 26.5.32, Gaz.Pal. 1932.2.368,369.

15. C.Wilh.Svensson Travarkuaktiebolag v. Cliffe Steamship Co., [1932] 1 L.B.490,495.

16. Scrutton, art.87, p.166.

17. Cf. UNCITRAL's suggested draft convention which relates the carrier's liability to a legal concept (i.e. the goods being in the carrier's charge), not to a list of technical operations. UN.Doc. A/CN.9/105, Annex, p.3, art.5(1).

18. [1897] 2 Q.B.83.

19. *Ibid.* 92.

20. Note 10, *supra*.

Scrutton²¹ and Carver,²² both speaking in one connection of 'stowing and lashing', seem to have the same narrow interpretation in mind. But when Mr. Justice Roche referred in Cooper Stewart Engineering Co., v. Canadian Pacific Ry. Co.²³ to the method of stowage applied to barrels of acid in a ship's hold, he certainly referred to the whole task of securing the barrels in position, not only to their proper arrangement.

As to the laxity of language in American case-law, a recent decision of the U.S. Court of Appeals for the Fifth Circuit, in the case of Nat.G.Harrison Overseas Corporation v. American Tug Titan etc.²⁴ is as good an example as any. There a barge capsized because, inter alia, the cargo was arranged in a way which permitted voids in the holds, with a subsequent shift of the cargo. This same particular operation of arranging the cargo in the holds is referred to differently in almost every other sentence there. Sometimes it is referred to as 'loading and stowing', sometimes as 'stowing' and sometimes even as 'loading'.

No more examples are necessary at this stage. Technical terms such as 'loading' and 'stowage' are not confined to rigidly fixed territories in conventional language. They sometimes exclude each other, sometimes overlap and sometimes they are synonymous, and it is illusory to expect a different situation in the legal rules which make use of them.

The problem with containers in this connection, however, is much more acute. It would not have been solved even had there been a broader consensus as to the meaning of traditional terms. Let us

21. Art.87, p.166.

22. Para.623, p.535.

23. (1933), 45 Ll.L. Rep.246,250.

24. 516 F.2d.89(5th.Cir.1975).

assume a universal acceptance of the formula suggested earlier, namely, that 'package' and 'packaging' relate more to the goods themselves, to preparing them for shipment by binding, wrapping or putting them in receptacles, that 'loading' and 'stowage' have more to do with the vessel/vehicle, that 'loading' consists of hoisting the goods onto the article of transport; and that 'stowage' consists of arranging and securing the goods in their storage compartment. Still, there remains two possibilities where containers are concerned. 'Stuffing' the container may be considered a 'package' operation, 'loading' being confined to lifting the container onto the vehicle/vessel, and 'stowage' to attaching the container to the means of transport; or it could be argued that lifting the goods into the container is 'loading', arranging and securing them inside is 'stowage' and 'package' is confined to pre-'stuffing' processes. Both alternatives can be accommodated perfectly in ~~the~~ the above-mentioned formula, the only way of making a logical choice between them bringing us back full circle to the question 'what is the container? is it an article of transport, or is it a receptacle?' And one cannot suggest here an answer different from that suggested earlier, viz. that unless one is willing to rely on one's own subjective inclinations and preferences, there is no clear-cut answer to this question at all.

The new editors of Scrutton begin their short account of the most far-reaching development in the maritime industry in the ten years since the earlier edition, with this bold statement:

"The container is essentially no more than a sophisticated form of package, and it is thought that where the goods have been stowed in the container by the shipper, the carrier would be entitled to rely on a defence of 'inherent vice' or 'insufficiency of packing' if the goods were damaged because of some defect in the container or in the manner of stowage".²⁵

25. Art.180, p.379.

this statement is not wrong; but it is not right either. It is based on a purely subjective choice between alternatives; and though stating preferences is a legitimate task of a legal text book, this should be confined to cases where some objective legal criteria exist, and where the reader is allowed some insight into the arguments. True enough, where a virgin field of law is explored for the first time, some speculations are unavoidable, and even desirable as authoritative guide lines for further discussion.²⁶ What is done here, however, is different. The premise upon which the argument is constructed, namely that the container is a package, is stated as an indisputable truth, of which what 'is thought' by the writers, is the only logical inference. Yet this premise, as was repeated earlier, is far from unshakeable.

K.Grönfors, in his introductory passages to his 'Container Transport and the Hague Rules'²⁷ mentions the various consequences which naturally follow from one of the generalisations, namely that the container should be considered an external part of the ship's hold. Yet '[t]his conceptual method of solving different legal problems is obviously open to criticism. One has to put questions and give answers in a more diversified way and take into account all facts relevant to the interpretation.'²⁸

What, then, are the questions and facts relevant to the problem of applying existing legal provisions to the pre-shipment stages of

26. Compare, for instance, the method of analysis adopted by G.H.Treitel in Benjamin's Sale of Goods (London, 1974), gen.ed. A.G.Guest, paras.1834-1851, pp.948-957. Not only is the reader fairly warned (p.949) that the analysis is "more than usually speculative" because of lack of authorities, but the writer then proceeds to set up in detail the arguments for the basic suppositions he makes on the subject.

27. [1967] J.B.L.298.

28. Ibid.

container operations?

The question which may contain the key to our problem is that of the differences between the various existing legal rules dominating the various stages of preparing goods for safe transit. Surely, if there is no material difference between 'insufficient packing' and 'faulty stowage' as defences against the imposition of liability on a carrier, then it would not matter in the least, except for purely academic interest, whether the 'stuffing' of a container by a shipper is 'package' or 'stowage'. In both cases the carrier would be exonerated from liability for loss or damage causally connected with a fault either in the packaging proper of the goods themselves, or in the 'stuffing'. If, however, there are differences, they should be stated, and a further effort be made to classify the preliminary stages of a container operation within the different traditional rules, but with the aid of the lessons learnt during the search for differences as to the nature, reasons and characteristics of the various rules.

4. THE DUTY TO PREPARE FOR SHIPMENT

On whom does the duty to carry out the preliminary stages of a container operation lie? Who has to supply the container? Who has the duty to clean and inspect it for possible damage? Which party has to do the loading and 'stuffing' and with whose accessories and equipment?

Had legal relations involving carriage of goods been based on complete freedom of contract, the simple answer to these questions would have been that the duties mentioned in them fall upon him who, according to the intention of the parties, undertook to carry them out. But international carriage of goods is dominated by restrictive conventions and statutes and these should first be searched for any mandatory rules on these questions.

4.1. The Hague Rules

4.1.1. Loading

According to the English interpretation¹ of the Hague Rules art.3(2), the tasks mentioned in the article can be allocated among the parties according to their own free will. Even the actual operation of hoisting the cargo onto the vessel may, according to this view, be undertaken by the shipper if the parties so choose. The same view evidently prevails in Canada,² and possibly also in the U.S.³ The position in France is not perfectly clear, but one

1. Pyrene Co. v. Scindia Navigation Co., [1954] 2 Q.B.402, per Devlin J., at 418, approved in G.H.Renton & Co. v. Palmyra Trading Corporation of Panama, [1957] A.C.149, 120, 173-4.

2. Falconbridge Nickel Mines v. Chimo Shipping, [1969] 2 Lloyd's Rep.277, 295 (Can.Exch.Ct.Quebec, Admiralty Dist.).

3. There is no explicit ruling on this matter by an authoritative American court. See, however, The Wildwood, 133 F.2d.765 (9th circ. 1943), cert.den., 319 U.S.771, where loading was operated by the shipper, who was found responsible for the ensuing damage, although COGSA 1936 applied to the case as a whole.

would have thought that it goes against the English view.⁴ Yet the exact interpretation of art.3(2) is not crucial to the present discussion. The 'earliest' operation mentioned there is 'loading' and there can be no doubt whatsoever that, in this particular context, 'loading' does not refer to anything resembling the 'stuffing' of a container. If the differences between the extreme views on the interpretation of 'loading' range between such closely situated points as the ship's rail and the ship's tackle (more precisely, the hook of the tackle when attached to the goods on the quay), then any attempt to equate anything done to containerised goods before the container's doors are sealed with 'loading' in art.3(2) is bound to fail.⁵

The Hague Rules mention two other tasks which may have relevance to the preparatory stages of a container operation, namely the task of 'packing' and the task related to the seaworthiness of 'all other parts of the ship' mentioned in art.3(1)(c). None of these tasks is limited to time and place in

4. One French case, namely Court of Appeal of Paris, 26.6.67, 20 D.M.F.38,41, adopts the view that all operations from tackle to tackle must be carried out by, or on behalf of, the carrier, but this view is a clear obiter dictum. Rodière's account of the matter in his Traité Général de Droit Maritime, Para.743, vol.2,p.274, is somewhat puzzling. Not only the text itself is ambiguous, but the footnote (ibid. note 4) cites, without any comment, both the above-mentioned Parisian case and Devlin J.'s decision in Pyrene v. Scindia,^(n.1, supra) which represent opposite views on this particular issue. Yet, when in his shorter work, namely, Précis de Droit Maritime, Rodière refers (para.350, p.274) to art.38 of the Decree of 31.12.66 [the similarly worded equivalent of Hague Rules art.3(2), applicable in French local maritime law], he states without hesitation that "[L]e [c]hargement ... incombe juridiquement au transporteur". (See also his Traité Général, para.514, vol.2, p.149).
5. It is worth noticing that even the far reaching reform of the Hague Rules suggested by UNCITRAL's Working Group does not go beyond the sea-port's boundaries. (A/CN.9/105, Annex, p.2. art.4). Note, however, that the reform abolishes the list of carrier's duties altogether.

performance, an inland depot or a shipper's yard at any time before actual shipment being theoretically as good a time and place as any. But is there a mandatory, non-delegable duty connected with any of these two tasks?

4.1.2. Packing

'Packing' is mentioned in the Rules only in connection with the 'insufficiency of packing' exception, art.4(2)(n). It is submitted that the mere fact that 'packing' was mentioned as a possible exception to the carrier's liability, unlike the art.3(2) operations which are mentioned as at least prima facie duties, indicates that 'packing' is a task performed by or on behalf of the shipper, not the carrier. One would go so far as to suggest that the wording of art.4(2)(n) indicates that, in that particular context, 'packing' is by definition something done by the shipper, not the carrier. Now, almost all of art.4(2) exceptions relate the exculpatory circumstances mentioned in them to some principal source, be it human-beings in person or as authorities (such as the master of the ship, public enemies, rioters, quarantine officers, etc.), nature (perils of the sea), the goods themselves (latent defects) or the Almighty (Act of God). In two other cases, namely fire and strikes, it is made explicitly clear that the carrier's own act deprives him of the benefit of the exception. 'Insufficiency of packing' and 'insufficiency or inadequacy of marks' stand out from the other exceptions in that it is neither immediately clear to which principal they are related, nor is it expressly mentioned that, when performed by the carrier, no negligence in 'packing' or 'marking' may exculpate the carrier. It is suggested, then, that the natural explanation of this 'anomaly' is simply that the drafters never envisaged 'packing' and 'marking' as operations undertaken by carriers. 'Packing' was undoubtedly meant there to have its most natural, traditional meaning, namely that part of the preparation

for marketing and shipment, performed by the manufacturer or other shipper, which was closely related to the goods themselves. Both the historical development of the 'insufficiency of packing' defence in carriage law,⁶ and the placing of that defence in art.4(2), among the last four specific exceptions (m-p), all of which evidently refer to defects which lie in the goods before delivery to the carrier, support this contention.

This is not to say, however, that there lies with the shipper a mandatory duty to pack the goods, which he cannot transfer by contract to the carrier. The whole series of articles dealing with the mandatory character of the Hague Rules namely articles 2, 3(8), 5 and 7, make it quite clear that the carrier is free to undertake any duty or obligation beyond those falling on him compulsorily, and there is therefore no reason whatsoever to prevent the carrier from undertaking the 'packing' of the goods.

4.1.3. Cargoworthiness

The only possible mandatory duty which the Hague Rules impose on the parties to a container operation as far as the preliminary stages are concerned, could therefore stem from the duty in art.3(1)(c) to '[m]ake the holds ... and all other parts of the ship in which the goods are carried fit and safe for their reception, carriage and preservation'. That is, of course, if the containers can be considered a part of the carrying ship, within this article.

Two commentators, namely H.Schadee⁷ and J.Wong Kong Kee,⁸ have touched on this question. The latter left it open almost without

6. See, e.g., its close relation with the 'inherent vice' defence in French law, note 9, p.40, supra.

7. 'Le Contenu Juridique du Container'(1967),19 D.M.F.602,603.

8. 'Containerisation - its Legal Implications'(1970),12 Malaya L.Rev.364,368.

comment. Schadee's treatment of the matter is more lengthy but somewhat controversial. He starts by giving an opinion that containers are not 'part of the ship', and then proceeds to convince the reader of the inequitability of this position, resulting from the fact that the goods put in the ship's cold chambers are protected by the unseaworthiness clause, whereas the same goods stored in containers are not.

The present writer disagrees with this form of analysis. Speculations as to the legislator's intentions, analogies and criteria of equitable solutions may be wholly irrelevant to the interpretation of a statutory rule when its meaning is clear and unambiguous in conventional language. This is not the case in the present problem. Whether or not a container is part of the ship carrying it is by no means immediately clear, and considerations as to the legislator's intention and as to equitable results should be taken into account before and not after deciding on that question. Let us, then, inquire into the origins of art.3(1)(c) and its background.

1) The development of the concept of cargoworthiness

Comparing the statutes which formed the basis for the Hague Rules, it is immediately clear that the notion of 'cargoworthiness', as distinct both from pure 'seaworthiness' of the ship, and from the general obligation of care for the cargo during transit, crystallised and acquired its present shape around the end of the last century. The notion of seaworthiness expressed in the American Harter Act of 1893 was still very much limited, at least as the words themselves indicate, to the bare bones of that ancient legal concept, namely to ensuring the completion of the voyage.⁹

9. Later decisions such as The Silvia, 171 U.S.462(1898), and Martin et al v. The Southwark, 191 U.S.1(1903), interpreted the obligation in the article as including 'cargoworthiness', but one is not certain that these decisions did not enlarge the scope of the obligation beyond the boundaries intended by the legislator.

Eleven years later the Australian Sea-Carriage of Goods Act 1904, came up with a much more sophisticated and diversified formula. There, in art.5(b), reference is made to three quite distinct obligations, namely 1) '[T]o man, equip, and supply the ship 2) '[T]o make and keep the ship seaworthy' and 3) '[t]o make and keep the ship's hold refrigerating and cool chambers and all other parts of the ship in which the goods are carried fit and safe for their reception, carriage and preservation'.

The Canadian Water-Carriage of Goods Act 1910 art.4(b) is a literal repetition of this formula,¹⁰ and so is, finally, Hague Rules art.3(1).

The timing of these developments and the wording of the Australian formula were by no means accidental. They reflected a very real and substantive phenomenon, namely the growing momentum acquired by the concept of seaworthiness in maritime law circles. This concept, dormant during the first half of the nineteenth century, was revived towards the end of the century in order to restore some notion of a fair balance in the allocation of risks between shipper and carrier.

An American Circuit Judge wrote in 1946 that 'the warranty of seaworthiness is a favorite of the admiralty'.¹¹ Indeed, seaworthiness has acquired such prominence in the present law of

10. See P.Davidson, 'The Water-Carriage of Goods Act'(1910),46 Can.L.Jour.553,561.

11. Judge Hand in Metropolitan Coal Co. v. Howard, 155 F.2d. 780(2nd.Circ.1946).

snipping,¹² that it may come as a surprise to a lawyer of the present generation that the pre-1850 English Common law on seaworthiness in carriage by sea comes to not much more than two decisions by Lord Ellenborough in the first decade of the nineteenth century.¹³ A trickle of cases appears in the third quarter of the 19th century,¹⁴ insignificant to the extent that Field J. in Kopitoff v. Wilson,¹⁵ had to go all the way back to Lord Ellenborough¹⁶ and to the 1802 first edition of Abbott on Shipping, in search of a sufficiently authoritative support for the proposition that a warranty of seaworthiness is to be implied in every contract for carriage by sea.¹⁶

This pattern of development is easily explainable when the concept of seaworthiness is placed within the framework of carriers' liability as a whole. Seaworthiness is not a defence in its own right in carrier-shipper relations;¹⁷ nor does unseaworthiness in

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12. This is not special to carriage of goods law. Marine insurance is another obvious example. But a more astounding phenomenon is the growth of the seaworthiness concept in the American law of shipowners' liability for personal injuries. 'Unseaworthiness' has been used there to signify the consequences of almost every possible negligent act or omission connected with the ship. See, e.g., a fifty page long list of 'seaworthiness' cases in 46 U.S.C.A. 688, notes 261-355, and consider a court statement that "the vessel was unseaworthy because of the presence of [a] bundle" of doors which were negligently packed; Simpson Timber Co., et al. v. Parks, 390 F.2d.353 (9th Circ.1968; cert.den.395 U.S.858.
13. Lyon v. Wells (1804), 5 East 428; Havelock v. Geddes (1809), 10 East 555.
14. See Worms v. Storey (1855), 11 Ex.427; Readhead v. Midland Ry.Co. (1867), L.R.2 Q.B.412 (in an obiter dictum, at p.434); Stanton v. Richardson, etc. (1872), L.R. 7 C.P. 421 aff'd (1874), L.R. 9 C.P. 390 (Exch.Ch.), and (1875), 3 Asp. M.L.C.23 (H.L.).
15. (1876), 1 Q.B.D.377.
16. *Ibid.* at 380-1.
17. But unseaworthiness is a defence in marine insurance claims, and has played a significant role as such at least since the middle of the 18th century. See Park on Marine Insurance, 8th ed. (London, 1842), by F.Hildyard, 458.

itself, constitute a cause of action. The most important role of seaworthiness is as a precondition to other defences, namely the excepted perils. Hence its almost complete dormancy in an age when exceptions were used sparingly and wisely, and its eruption to life when the exceptions threatened to become the rule.

In Kopitoff v. Wilson the bill of lading was described as promising 'to deliver, with the exception of certain perils'.¹⁸ But a few years later, and with growing momentum towards the end of the century, bills of lading would compete with each other for longer and longer lists of exemptions from liability. 'Shipowners', writes Crutcher,¹⁹ 'had discovered the usefulness of fine print and the common law idea of freedom of contract'.²⁰

For some years seaworthiness did battle almost singlehanded²¹ against the exemption clauses, and it then gained considerable muscle and weight. Starting with the American Harter Act, and finally settling down on the scene with the international acceptance of the Hague Rules, there later grew another, much more decisive and all-embracing force, namely the statutory restriction of exemption clauses. Yet, since none of the statutes, national or

18. (1876) 1 Q.B.D. 377, 378.

19. A.B.Crutcher, 'The Ocean Bill of Lading - a Study in Fossilization' (1971), 45 Tulane L.Rev. 697, 708.

20. It is interesting to note the close correlation between this 'discovery' and the decline in real freedom of contract brought about by the advent of the shipping conference system. See B.M.Deakin, Shipping Conferences (Cambridge, 1973), 3.

21. 'Almost' because, (1) The American federal courts already restricted freedom of contract on public policy considerations for some years before the enactment of the Harter Act [see Gilmore & Black, p.142, n.11] and, (2) without imposing any such restriction, English courts frequently displayed an apparently hostile attitude towards extensive exception clauses by doing their best to interpret them narrowly, see e.g., Lloyd v. The General Iron Screw Collier Co. (1864), 3 H.&C.294.

international, dared to restore the old order of almost strict liability, and since excepted perils were left very much on the scene, it was only natural that seaworthiness was not abandoned. But how was it incorporated within the new realities of statutory control? What was the scope of the concept of seaworthiness when statutory law inherited it from the common law? How did the concept of cargoworthiness develop? In the answer to these questions is the key to our present problem, namely whether containers should be included at all in the province of seaworthiness and cargoworthiness.

'Seaworthiness', according to the Oxford English Dictionary refers to a ship being '[i]n a fit condition to undergo a voyage'. Telling a master of a ship that, fit, staunch, skilfully manned and admirably equipped as his ship may be, she is 'unseaworthy' because one rivet is missing in the hull, the only possible consequence of which being that some of the cargo may become wet during the transit,²² is likely to produce a very icy reaction indeed. But whether such a description would be legally correct depends on the extent to which 'seaworthiness' was extended to include fitness for cargo per se. In The Indrapura in 1910 it was said that:²³

"The warranty of seaworthiness extends, not alone to the vessel, but also to its reasonable and suitable adaptability and fitness to carry each particular article well known to commerce ... The term "seaworthy" in its earlier use, it must be admitted, was not of as broad or extended signification as under the present advanced state of commerce

22. This set of circumstances is based on that which existed in Ore Steamship Corp. v. D/S A/S Hassel, 137 F.2d.326 (2nd.Circ. 1943), but some facts were exaggerated for the clarity of the argument. The statement that the "mere loss of the rivet" rendered the ship unseaworthy calls for attention (id.p.328)

23. 178 F.591,594(D.Or.1910).

and transportation facilities; but it now has relation to the article carried, and the different compartments of the ship and their particular use as well as to the navigability of the ship".

But when had the transformation occurred? What changed the earlier use of the term? Surely, it is this stage of transition that all attention must be turned to in order to ascertain whether seaworthiness has really emerged from it changed and transformed as described here.

2) The transition from voyage-worthiness to cargoworthiness

The chain of precedents leading ^{back} through the Indrapura and The British King²⁴ to The Carib Prince²⁵ and The Edwin I. Morrison²⁶ of the 1890s, and further ^{back} into the 19th century American case-law, is based on the classic statements of the seaworthiness rule, such as the one formulated by the U.S. Supreme Court in Work v. Leathers,²⁷ to the effect that the shipowner 'is bound to see that [the ship] is seaworthy and suitable for the service in which she is to be employed'.

This statement was made about the ability of the ship to undertake and complete the voyage. Work v. Leathers, as all other seaworthiness cases of that age dealt with the navigability or voyage-worthiness of the ship itself, and there can be no doubt that the seaworthiness rule was conceived then in this narrow context.

24. 89 F.872(S.D.N.Y.1898).

25. 68 F.254(2nd.Circ.1895), aff'd 170 U.S.655.

26. 153 U.S.199(1893).

27. 97 U.S.379(1878). See similar language in as early a case as Putnam v. Wood(1818), 5 Mass.481.

Yet, as one works one's way up in the chain of precedents, one finds this principle gradually eroded by applying the old words to new situations which involve less and less elements of pure navigability.

Typical of the almost unnoticeable turning point in a chain of precedents which starts with broken shafts,²⁸ totally incapacitating the ship, and culminates in defects in the ship's refrigerating apparatus,²⁹ is the transition from The Edwin I. Morrison³⁰ to The Carib Prince.³¹ Both involved cases of leakage, but whereas in the former the leakage was external and endangered the safety of the ship, the latter involved only an internal leakage which had only an indirect effect on navigability. Yet, the latter decision cites the former as precedent without attempting any distinction,³² and The British King,³³ where the internal leakage had no connection at all to navigability, already mentions seaworthiness 'as respects cargo',³⁴ as a well established rule of common law.

The English rule of cargoworthiness developed at first in very much the same way. During the first three quarters of the 19th century the concept of seaworthiness was exclusively restricted to the natural import of that term, namely to ability to complete the

28. Work v. Leathers, supra: The Glenfruin(1885), 10 P.D.103; The Caledonia, 157 U.S.124(1894).

29. The Southwark, 191 U.S.1(1903).

30. Supra, n. 26

31. Supra, n. 25

32. See a similar indiscernible transition from pure voyage-worthiness to cargoworthiness between The Hadji, 16 F.861 (S.D.N.Y.1883) and The Svend, 1 F.861(Circ.Mass.1879).

33. Supra, n. 24.

34. 89 F.874.

voyage.³⁵ This is hardly surprising since the greater part of the law's interest in seaworthiness lay in the insurance policies on the vessels,³⁶ and it was only natural that seaworthiness was dealt with almost exclusively in connection with sunken ships. But it is also true that even in the small number of cases in that period involving shipowner-charterer or shipowner-shipper relations, the theme of seaworthiness was always connected with ships which had actually sunk or were in an imminent danger of sinking.

It was not until 1875, in Stanton v. Richardson,³⁷ and two years later in Steel v. State Line Steamship Co.,³⁸ that any consideration connected with the cargo was involved in a seaworthiness case. As in the stage of transition in American law, both the latter cases dealt with the effect of the cargo, or the manner of its stowage, on the safety of the ship as a whole,³⁹ not with cargoworthiness per se.

When the concept of pure cargoworthiness eventually appeared on the English maritime law scene, it did so in two significantly different streams.

The first was represented by Tattersall v. The Nat. Steamship Co.⁴⁰ which, like its American counterparts, purported to feature cargo-worthiness as an integral part of the concept of seaworthiness, simply by applying the classic seaworthiness cases to circumstances which, for the first time in English case-law, involved no element

35. One finds oneself in apparent opposition on that point to viscount Cave in Elder Dempster & Co. v. Paterson Zochonis & Co., [1924] A.C.522, 530-1.

36. See note 17,^{p. 58} supra.

37. 3 Asp.M.L.C.23. See n.14, p. 58, supra.

38. (1877), 3 App.Cas.72.

39. Stanton v. Richardson deals with cargo of sugar which, if allowed to be shipped, would have emitted a larger amount of fluid than could be drained by the ship's pumps. Steel v. State Line involves an insufficiently closed porthole, the access to which was obstructed by stowed cargo.

40. (1884), 12 Q.B.D.297.

of voyage-worthiness at all.⁴¹ here, again, older statements were applied as if they imported a warranty of cargoworthiness, ignoring the context in which they were ^{originally} made.⁴²

The second stream is represented by Lord Esher, M.R.'s decision in The Maori King,⁴³ which abandoned any attempt to refer to previous authorities, and built on firm grounds of general principles of contract and common sense.

3) Cargoworthiness as an independent warranty

The Master of the Rolls' decision in The Maori King is of an outstanding importance because of its success in breaking away, at least temporarily, from the maritime lawyers' traditional obsession with classifications. It does not ask 'does the implied warranty of seaworthiness include a warranty as to the condition of the refrigerating machinery before the beginning of the voyage?', but simply 'was there, upon general principles of contract, an implied warranty in this specific case as to the condition of the refrigerating machinery?' In deciding that there was such a warranty Lord Esher contented himself with the plain observation that both parties, knowing that the cargo of meat would decompose if not refrigerated, and being in their right senses, must have intended the carrier to have the ship supplied with refrigerating machinery in proper working order at least at the beginning of the journey.

The extent to which this reasoning is detached from the traditional seaworthiness concept is accentuated by the only passage which mentions the concept. There, Lord Esher expresses

41. the case involved failure to clean and disinfect the ship before accepting the shipper's cattle.

42. see Smith, L.J. in (1884), 12 Q.B.D.301. See also the same pattern adopted by Smith, L.J. in The Maori King, [1895] 2 Q.B.550, 561, and in Queensland Nat.Bank v. P.& C., [1898] 1 Q.B.567, 571.

43. *ibid.* 553-6.

his agreement with Mathew J., the trial judge, on the existence of the above mentioned warranty, and goes on to say:

"He made use of the term 'seaworthiness' but he did not mean the seaworthiness of the ship. He was dealing with the 'seaworthiness' of the machinery as distinct from that of the ship. In his judgment the machinery was warranted to be what might be called in nautical phraseology 'seaworthy', though it is not strictly an accurate term."⁴⁴

This theme was picked up by other judges of that time. Kay L.J. prudently observes that the question there was 'not, properly speaking, one of the seaworthiness of the ship'⁴⁵ and Collins L.J. made a similar observation in Queensland Nat.Bank v. P.& O.⁴⁶

Had the common law on this matter been allowed to develop naturally, there can be no doubt that a warranty of fitness of at least a carrier-owned container would have taken its proper role on a similar, but independent, level to that of the traditional warranty of seaworthiness. Pre-shipment warranties, as Lord Esher reminded us by the sheer simplicity of his decision, are not the creation of common-law; they exist or fail to exist according to the intention of the parties; and this is not less so even if some speculation is allowed in the case of implied warranties. To create a pre-shipment warranty, there should have been no need whatever to connect it in any way to the already 'existing' warranties, (i.e., those warranties which the law has become accustomed to imply in all contracts not expressly excluding them).

44. Ibid.555-6.

45. Ibid.558

46. [1898] 1 Q.B. 567, 571.

It is contended that it is this spirit of Lord Esher's broad-mindedness that went into the chain of legislative acts starting with the Australian ~~Sea~~ Carriage of Goods^{Act}, and that it is in this spirit that art.3(1)(c) of the Hague Rules should be interpreted, not in the spirit of the series of English cases which followed in the thirty years after The Maori King.

Cargoworthiness was hopelessly imprisoned in that series of cases, in the reins of seaworthiness. Sometimes it was flatly equated with seaworthiness;⁴⁷ sometimes presented as a special clause of seaworthiness⁴⁸ and sometimes there were even different rules drawn for seaworthiness qua ship and seaworthiness qua cargo,⁴⁹ but cargoworthiness was never allowed an independent status; it was always treated in these cases as an extension of seaworthiness. Not that in many of these cases the courts had a completely free hand to decide differently.

The luxury of the three-tier art.3(1)(c) was confined before 1924 to Australia and Canada. The Harter Act, as mentioned above, mentioned only seaworthiness as a pre-shipment warranty, and so did the bills of lading of that time; if courts, faced with that Act⁵⁰ or such bills,⁵¹ wished to give any legal status at all to cargo-worthiness, they had to bring it under the regime of seaworthiness,

47. See Ciampa v. British India Steam Navigation Co., [1915] 2 K.B. 774, 778.

48. Rowson v. Atlantic Transport Co., [1903] 1 K.B. 114, 115-6; Rathbone Bros. & Co. v. McIver, Sons & Co., [1903] 2 K.B. 378, 386, 389.

49. McFadden v. Blue Star Line, [1905] 1 K.B. 697, 702-3; Elder Dempster & Co. v. Paterson, Zochonis & Co., [1924] A.C. 522, 530, 536, 539-70; Reed & Co. v. Page, Son & East, [1927] 1 K.B. 743, 754.

50. See, Rowson v. Atlantic Transport, supra.

51. See, Rathbone v. McIver, supra.

inelegant though they themselves felt this solution to be.⁵²

There is no reason why this unfortunate state of affairs should affect the interpretation of art.3(1)(c). The original Australian Act's attitude to the pre-shipment warranties draws directly on The Maori King. It leaves seaworthiness to its traditional role and creates an entirely new province for the warranty of cargo-worthiness. One believes that this province is wide enough to include the cargoworthiness of containers, at least in some cases.

Now, it may be agreed that this solution is fairly obvious from the construction of art.3(1) itself, and that the lengthy exploration of the origins of that article and the seaworthiness problem in general has little bearing on the solution. The present writer believes differently.

As long as cargoworthiness is attached to the traditional concept of seaworthiness, even if through sheer terminological ties, it is difficult to argue with honesty that the condition of containers, which usually spend a good part of their lives on land, in preparation for shipment, in inland transport, in waiting on quays or in maintenance, can form an integral part of the ship's seaworthiness. It is only when the purely marine character of the warranty is abandoned and its more general aspect comes to the surface, that containers can be brought into the picture; and this, it is believed, is the true import of Lord Esher's decision in The Maori King. It is about warranties proper, about the intentions of the parties to the contract of carriage which is, in that respect, not different from any other contract of bailment.

52. See, e.g., Viscount Finlay's complaint in Elder, Dempster v. Paterson, Zochonis, [1914] A.C. 522, 539-40, that the description of cargoworthiness as seaworthiness is 'apt to lead to confusion', and that it is 'at once awkward and misleading'.

4) Cargoworthiness and containers

The warranty of cargoworthiness appeared on the legal scene at a time of technical innovations, when ships started to become something more than a floating hull, and when shipowners started offering better services than simply space aboard a vessel. What The Maori King implied was not more than the straightforward notion that a shipowner offering such an 'extra' service should supply it, and that a service thus offered becomes an integral part of the contract of carriage. Clearly, the Australian Act incorporated one such innovative service, namely refrigerating equipment, by express reference, simply because this was the most topical innovation of that time, and because it is that innovation which brought cargoworthiness to the forefront of maritime law. As it was drafted, however, the Australian formula and the ensuing art.3(1)(c) leave ample room for further innovations and for different services offered by the carrier in connection with the protection of the goods.

Now, what is the service offered by shipowners in relation to containers? In some cases it is to carry the shipper's container; in most cases it is to carry the shipper's goods in containers. The first service relates more to a type of container transport which is becoming rarer and more marginal as the container revolution reaches maturity, namely to the type of operation in which the operator of a conventional ship receives for shipment a sealed container of which he has had no previous control. What is then offered is no more than space in the ship for the carriage of a container. This is not so in most cases when a container ship is involved. The container ship itself is nothing but a hollow frame, a device to attach containers to. It is only when equipped with its containers that the container ship is fit to carry goods at

all,⁵³ and container-ship operators offer not the services of a mere ship, but the services of the ship and its containers. Recalling the 'functional economics test' on the 'package or unit limitation' problem,⁵⁴ the containers of a container-ship serve for all practical purposes as the holds of ships, as the 'part of the ship in which the goods are carried', and the safe arrival of the goods depends mainly on the container itself, (as opposed to the ship's frame) being 'fit and safe' for the 'reception, carriage and preservation' of the shipper's goods. In short, a container-ship's seaworthiness depends on its frame; its cargoworthiness depends on its containers.

Can the same thing, i.e., that the unfitness of the container is considered as uncargoworthiness of the ship, be said of the cases, small in number though they are, of a container-ship carrying shippers' containers?⁵⁵ Surely not. Exactly as in the case of conventional ships, when a container-ship owner receives the shippers' containers for carriage, locked and sealed, he supplies only one thing, namely space aboard the ship. The carrier's obligation then relates to the fitness of that space to receive the loaded containers, not the fitness of the containers to receive the cargo. If the basic dichotomy for the purposes of the present issue divides all inanimate things aboard a cargo vessel into either 'ship' or 'goods', then the shipper's containers in this situation are 'goods' not 'ship'. As 'goods' the carrier still has the usual

53. For convenience, these observations refer to the realities of fully cellular container ships, (i.e., ships equipped only with container stowage facilities), but they are perfectly valid also for 'mixed' vessels (e.g., vessels which have normal holds for the carriage of ordinary cargo, and a specially constructed and equipped deck for the carriage of containers), in which case the observations refer only to the container-space, not the whole of the vessel.

54. See pp.155-8, *infra*.

55. Such circumstances can be found mainly on the short sea routes. For instance, there are a number of small cellular vessels operating on the cross-channel routes, which carry mainly shippers' containers.

art.3(2) duties to treat them with care while in his custody, but it is the shipper who has the initial duty to make the containers 'fit and safe' for the 'reception, carriage and preservation' of the inner goods. Whether the outcome of a failure on the part of the shipper to do so should be considered 'inherent defect of the goods', 'insufficiency of packing', or simply 'act or omission of the shipper', is a matter for a different dichotomy which is of little interest at this stage because all three categories alike exempt the carrier from responsibility, at least for defects which are not apparent on delivery to the carrier.

Now, this solution not only conforms to the general pattern of the foregoing analysis, but it also serves as a good test of its practicality. It is unthinkable that a carrier would be responsible to the cargo-owner for the condition of a container when he never had the opportunity to check it. To check the cargoworthiness of containers is usually not an easy task even when the container is empty. To check the same when the container is loaded, locked and sealed is well-nigh impossible. Such a check is not likely to reveal any but the most obvious external defects, and these could be properly dealt with under the usual rules about the effect of apparent defects on the art.4(2) exemptions.⁵⁶

56. See, e.g., pp.111-121, *infra*, and especially pp.120-1 on apparent defects and 'insufficiency of packing'. As will be shown there, and in later parts of the chapter, there is no uniform, universally agreed, rule on the general question whether the apparentness of a defect prevents the carrier from raising that defect as a defence. The present writer's personal view is that such apparentness should deprive the carrier of the defence, 'apparentness' standing in direct relation to the opportunity to check and the state of the container on delivery to the carrier. According to this view, when the container is already sealed on delivery, the carrier should do no more than take a cursory look at the exterior, but when delivery occurs at any time before the closure of the doors, the carrier may become responsible for such internal defects which the open doors may reveal to the receiving agent or employee, standing outside. Where cargoworthiness of shippers' containers is concerned, however, even the latter situation is of little practical and legal significance because defects in the condition of containers which are not of the most spectacular dimensions usually reveal themselves only on a thorough inspection, and no such inspection of shippers' containers is required of the carrier, whatever the time of delivery.

Basic commercial commonsense requires that the task of maintaining the containers in a cargoworthy condition should fall on the party who has actual control over them. When a carrier runs a full container-service, offering his customers his containers as well as his ships, he, the carrier, must either construct a system of checking and repairing the containers as frequently as objectively required to maintain their cargoworthiness, or take the risk of ensuing loss and damage to cargo. When it is the shipper (as in the case of large manufacturers who own containers or hire them on long-term basis), or his agent (such as short-term leasing companies), who controls the containers, the carrier's role being confined to carriage only, the basic responsibility for ensuring fitness for carriage should fall on the shipper.

This amounts to the suggested rule that the party who supplies the container is the party responsible for its fitness to carry the contemplated cargo. This rule apparently gives much leeway to the will of the parties by being dependent on the nature of the specific contract of carriage, as freely decided by them. It is submitted, however, that the room allowed for freedom of contract here does not contravene the mandatory nature of the Hague Rules and in particular of art.3(2). An analogy to the rule of Pyrene v. Scindia⁵⁷ seems

57. [1954]2 Q.B.402

perfectly valid.⁵⁸ Recalling the words of that decision, the object of the Rules 'is to define not the scope of the contract service but the terms on which that service is to be performed',⁵⁹ and here, as there, the rule must be that when the carrier agrees to supply the ship and the containers, he has to exercise due diligence in making the ship and the containers seaworthy and cargoworthy; that in such a case any clause in the bill of lading which purports to relieve the carrier from such duty is invalid; but that when the carrier supplies only the ship, and not the containers, he has no responsibility as to the cargoworthiness of the containers, except perhaps for externally apparent defects.

This interpretation of the scope of the Rules is even more valid in relation to the special cargoworthiness problem than in relation to the task of loading discussed in Pyrene v. Scindia. Whether or not the responsibility for loading can pass to the shipper is arguable, and indeed, as mentioned earlier, it is not at all clear whether the English view is shared by the American and French systems. But that the supply of special services is a

58. Nothing in the pre-COGSA 1924 common law stands in the way of such analogy. Even the seaworthiness of the ship itself could be exempted by the carrier, as long as the exemption was clearly stated with as much legitimacy as any other common law duty of care. That for some still unexplained reason carriers voluntarily stopped at seaworthiness in their rush for exemptions in the late 19th century, and usually dared not exempt themselves from reasonable diligence in respect of seaworthiness, is another matter. [See Romer L.J. in Rathbone v. McIver, [1903] 2 K.B. 378, 381. Carver stated in 1900 in the third edition of his treatise, para.102a, that express bill of lading exemptions relieving the carrier from liability for unseaworthiness 'are frequently inserted'. Though the statement was retained verbatim by later editors, to the present 12th edition, one believes it was, and still is, inaccurate]. The courts of England repeatedly asserted a complete freedom of contract in the common law regime of seaworthiness [see, e.g., the blatant way this was expressed by Lord Blackburn in Steel v. State Line (1877), 3 App.Cas. 72, 89].

59. [1954] 2 Q.B.⁴⁰² 418.

matter for the parties to decide seems almost self-evident. Let us take, for instance, the cooling chambers mentioned in art.3(1)(c). The most that could be said with any commercial commonsense is that when a carrier accepts for shipment goods which require refrigeration, and in the absence of a clear agreement on the matter, there can be implied a duty on the carrier to use a ship equipped with cooling chambers, and it is then his responsibility to see to the fitness of such chambers. But can the shipper not agree to undertake the refrigeration of the goods by his own means, by mechanized devices, by packing the goods with ice, etc.? Can the parties be 'forced' to use ships' cooling chambers as a means of preserving the freshness of goods in transit? Surely not. Any other answer would go against the basic realities of the maritime industry worldwide. Whether or not the carrier can then relieve himself of the task of maintaining the shippers' machinery during transit is another question, but neither logic nor practicality sustain the imposition of a mandatory responsibility on the carrier in relation to the pre-shipment fitness of such machinery. There is no reason why the same should not be said of containers.

4.2. The CLR

The attitude of the CLR to the allocation of duties between sender and carrier¹ is basically similar to that of the Hague Rules.² 'Handling, loading, stowage or unloading', when performed by the sender transfer to him the responsibility for damages resulting from these operations,³ and nowhere in the convention is there any rule restricting the freedom of the parties to agree that any or all of

1. CLR Chapter 4, especially arts.17-18.

2. See R.Rodi re, 'The Convention on Road Transport', [1970] E.T.L.620, [1971] E.T.L.2,306, at [1970] E.T.L.630-2.

3. Art.17(4)(c).

these operations are to be performed by the sender.⁴ As to 'packing' the language of art.17(4)(b), which exempts the carrier from responsibility for the consequences of 'bad packing', and of art.10, which places this responsibility with the sender, makes it clear that 'packing' was conceived by the drafters of the Convention as an operation performed by the sender. Similarly to the Hague Rules, however, nothing in the CMR seems to prevent the parties from transferring this task to the carrier.

Again, the more problematic subject is that of roadworthiness and cargoworthiness in the CMR. Art.17(3) sets up a rule which is perhaps the strictest and most burdensome of all carrier liability rules in international transport conventions:

"The carrier shall not be relieved of liability by reason of the defective condition of the vehicle used by him in order to perform the carriage, or by reason of the wrongful act or neglect of the person from whom he may have hired the vehicle or of the agents or servants of the latter".

If the language of the rule itself leaves any doubt as to its absolute nature, then its positioning and connection to the other sub-articles of art.17 remove any such doubt. When damage occurs because of the defective condition of the vehicle, the carrier is responsible even if there was no way in which the defect could humanly be discovered and repaired or the damage prevented. Does a defect in the container, then, amount to 'defective condition of the vehicle'?

4. See, e.g., the English summary of a decision by an Arnhem court of 27.11.73, [1974] E.T.L.748 ("The problem as to whether stowage is one of the tasks which devolves on the carrier has not been decided under the C.M.R., an answer to this must be sought in the contract of carriage").

The container itself is not a 'vehicle'. The latter term is defined in art.1 as including 'motor vehicles, articulated vehicles, trailers and semi-trailers as defined in art.4 of the Convention on Road Traffic dated 19th September 1949.'⁵ The only category there which could have conceivably included containers is that of a 'trailer' which 'means any vehicle designed to be drawn by motor vehicle', but a container cannot be drawn by a vehicle. Lacking wheels of its own, it can only be borne on or carried by a vehicle. But can it be considered part of the vehicle when attached to it? The case for an affirmative answer to this question is technically even stronger than that for equating the container with a ship's hold when carried in a ship. The container comprises not most but all of the storage space of the vehicle carrying it. Its walls are the only protection afforded to the goods, except for the packaging of the goods themselves. Functionally, as far as the storage of the goods is concerned, the container performs exactly as the storage compartment of a normal trailer, the only difference being that whereas such a compartment is permanently attached to the trailer's chassis, the container is removable.

One would suggest, therefore, a solution similar to that suggested in relation to the Hague Rules, depending on the sort of service offered by the carrier. If the carrier offers only a traction-unit and a chassis, then it is these that should be considered the 'vehicle' for the purposes of art.17(1). If, however, the carrier undertakes to supply a container as well, then there is very little reason indeed to distinguish between the unit comprised of tractor, chassis and container and a normal tractor-trailer unit. It is upon the carrier, then, that lies the duty to maintain and repair the container and ensure its cargoworthiness.

5. 125 U.N.T.S.22.

whether he chooses to perform that duty by himself or to delegate it to his agents, is for him to decide, but it seems to be the only CIM duty, except for the primary duty to carry, which even an express agreement cannot delegate to the sender.

4.3. The CIM

The CIM appears, on first reading, to contain a wealth of rules relating to the preliminary stages of the rail transport operation. A closer look reveals a position basically similar to that of the Hague Rules and the CMR, as far as containerisation is concerned, in that the convention does not dictate the scope of the contract, leaving it to the local law or to the parties themselves to allocate the various pre-shipment tasks between the carrier and sender.

4.3.1. Packing and Loading

Art.12(2) of the CIM imposes a positive duty on the sender to pack goods which require packaging to protect them from loss or damage. Does this specific duty apply to the operation of 'stuffing'? Can it be argued that 'stuffing' the goods into a container is 'packing' them within the meaning of art.12(2), and therefore falls primarily on the sender when containers are used?

Durand, in his various commentaries on railway containers insistently repeats the theme that the container is essentially a sophisticated sort of packing,¹ distinguished both from the goods themselves and from a wagon, and it seems possible that in his way of thinking the operation of filling the container could have been considered as 'packing'. A literal application of this view to the

1. See P.L.-F.Durand, 'Faut-il Reviser les Conventions de Berne Relatives aux Transports Internationaux', D.1948 Ch.57,59, and the same author's note to Cass. 17.3.53, J.C.P.1953.2.7721 ('Pour nous, cet instrument reste un simple emballage, techniquement perfectionné, plus ou moins spécialisé'). It should be remembered that French railway containers in the early 1950s were much smaller than the modern ocean containers. This difference is accentuated by the classification of the latter in CIM Annex V, art.1(2) as 'large containers'.

CIM would lead to the unavoidable result that none of the 'stuffing' operations could be undertaken by a railway. If this is not perfectly clear from art.12(2) itself, then it should be made so by the brisk and uncompromising language of art.27(3)(b). The latter, like its equivalent in the Hague Rules and the C.I.R., does not seem to permit any mitigation of the defence of 'inadequacy of packing' in cases where packing is performed by the railway, and if it is agreed that it cannot possibly be believed that the authors of the CIM intended to let a party use its own negligence as a defence against a claim based on that negligence, it must be concluded that the authors did not envisage any 'packing' ever to be done by a railway.

It is submitted, however, that 'stuffing' a container is not 'packing' it within the meaning of arts.12 and 27. The important feature in this view is that it is based chiefly on the exclusive interest taken by these articles in only one function of the operation of packing, namely protection of the goods and prevention of loss or damage. Now, in that specific respect, containers are not sufficiently different from a conventional railway wagon to warrant using different terminology. Both are hollow rectangular boxes of fairly standard sizes made of material capable of withstanding the normal environmental and gravitational hazards, and the fact that the railway wagon rolls on its own wheels is of little significance as far as the protection of the goods is concerned. Thus, a sender is faced with very much the same requirements as to the sort and quality of conventional packaging both when a container and when a conventional wagon are used (the possible saving in conventional packaging due to the elimination of handling operations between various modes of transport being irrelevant here, as the CIM takes interest only in the rail leg). '[G]oods which, by their nature, are liable to wastage or to be damaged when not packed, etc.'²

2. Art.12(2).

cannot be protected during rail transport by the container itself any more than they would have been protected by the bare walls of a conventional wagon, and if it is agreed that the latter protection is not 'packaging protection', the same should be said of the protection afforded by the walls of the container.

The resemblance to a railway wagon exists not only on the purely physical plane. It also should be noted that the separation of the storage unit (the wagon) from the traction unit (the engine) is more deeply rooted in the system of rail transport as a whole than in any other mode of transport. The practice of systematically detaching road trailers from their engines is still the exception rather than the rule and the phenomenon of detachable ship's holds can really be attributed only to containers. Railway wagons, however, have always enjoyed a great amount of independent existence. Not only are they easily detachable but they usually have very little or no relation to a specific traction unit. Similarly to the practices of container administration, railway wagons would, as a matter of routine, be hauled whenever needed, detached from the engine, loaded when convenient, attached to a different engine, detached again, unloaded and, frequently, would wait empty for the next operation. As in the case of containers, private wagons are used either by their owners or by lessors, usually loaded and unloaded by the users, but hauled by railway company engines.

Whatever the other legal differences between conventional railway wagons and containers,³ there seems to be little reason to use different legal terms for the almost identical pre-shipment operations performed when a conventional railway wagon and a container are used. And as 'packaging' means preparing the inner

3. See, e.g., Cass.17.5.53, supra. It was decided there that containers could not be equated with private wagons as far as war mobilization compensation went.

goods for shipment, and loading connotes the lifting of the already packed goods onto the wagon and stowing them, the same should be the case with containerised goods; 'stuffing' them should be considered as 'loading' and 'packing' should be restricted to its traditional scope of wrapping, boxing, and crating the inner articles before 'stuffing'.⁴

'Stuffing' qua 'loading' is left, according to art.14(2), to 'the regulations in force at the forwarding station', or to 'a special agreement between the sender and the railway' on whether 'stuffing' 'shall be the duty of the railway or the sender.'

[It should be noticed that RICO⁵ art.6, which deals with the loading of containers, stipulates that '[l]oading includes placing the container on a wagon and operations ancillary thereto, in particular the securing of the container'. Though not an exclusive definition, this stipulation seems to prevent the inclusion of 'stuffing' within the scope of 'loading' there.⁶ However, it is thought that this should not affect the argument in favour of equating 'stuffing'

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4. A German case by a Bielfeld court of 15.11.61., [1963] E.M.L.694, appears to hold an opposite view. There, a copying machine was damaged during rail transit because of the negligent way in which it was secured inside what was described in the English summary as a container. The decision referred to the operation of putting and securing the machine in the container as 'packing' (Verpackung) and relieved the railway from liability under art.27(3)(b). Yet, even if 'container' is the correct translation of the German term Behälter used there, the object was significantly different from the modern standard container. Its size was 190 x 100 x 142 cm, i.e., a very small box indeed in comparison with the containers dealt with in the present work.
 5. International Regulations Concerning the Carriage of Containers, Annex V to the Cll, art.2(2).
 6. This is made clearer by the slightly different emphasis in the binding French text.

with 'loading' within the main text of the CIM, because the RICO seems to be a priori restricted to regulating the handling of the containers themselves, leaving matters concerning the containerised goods to the main text.^{7]}

4.3.2. Cargoworthiness

The cargoworthiness of the container within the CIM is the next, and last, problem to be dealt with in this search for statutory mandatory duties relating to the pre-shipment container operations. Does the CIM, then, impose a non-delegable duty on any party in relation to cargoworthiness?

Considering the extraordinary length and detail of the CIM, it is very surprising indeed that not one article is dedicated to the fundamental problems of railworthiness and cargoworthiness of wagons and containers.

RICO do take considerable interest in the condition of the containers, but this interest is directly concerned only with responsibility for damage to the containers themselves, not to the goods stowed in them.⁸ The relevant RICO articles are as follows:
1) Art.8(1) advises any person who receives a railway container to check its condition and indicate the existence of any defect, the principle being that this person is responsible for any damage occurring to the container while in his possession which is not a result of unavoidable circumstances. The sender is also responsible

7. This impression is not weakened by the French commentaries on the RICO. These include mainly P.-F. Durand works, Les Transports Internationaux (Paris, 1956), 343-350, and Droit et Pratique des Transports Terrestres (Paris, 1971), I, 11. Of particular interest is that author's article, mentioned in note 1, supra, which gives a good indication of the sort of problems which drove railway law specialists to laying down the RICO regulations. See Rodière, Gén. Trans. para.1448 bis, vol.3, fasc.2, p.40.

8. Durand, Droit et Pratique, etc., op.cit., ibid.

for damage during transit which results from his actions [art.8(2)]. As to privately owned containers, they are treated as any other merchandise submitted for carriage,⁹ and a special article (art.14) deals with the problem of the amount of compensation for them.

Theoretically, it is not impossible to argue that the principles of responsibility for damage to the container could be extended to cover damage to the inner goods ensuing from the damaged condition of the container. It is thought, however, that such an extension would go far beyond the original intention of the drafters of the regulations.

2) Art.10, which makes the sender or consignee responsible for servicing any special apparatus with which a privately-owned container may be equipped, appears at first sight to carry considerable importance. If it intends to cover the maintenance of special container equipment, then it may be argued a contrario that the maintenance of the rest of the container falls on the railway; and if this is true of a private container it must also be true of the maintenance of a railway container. Yet, there is another possible interpretation, namely that the article does not deal with general maintenance at all but with the actual running and handling of the equipment during voyage.

The first interpretation would have been of great help in forming some basis for understanding the CII basic principle of allocation of tasks between carrier and sender in container transport. However, the second interpretation has firmer support in the text itself. Firstly, as was shown on a previous occasion,¹⁰ the English translation, though not incorrect, conveys a slightly different impression from that in the French original, and binding,

9. Durand, Transports Internationaux, op.cit., para.268, p.350.

10. See note 6, supra.

version. The latter version is still somewhat ambiguous, but it is much more consistent with the second interpretation. Secondly, the fact that the duty described there is transferred to the consignee on delivery also indicated that art.10 concerns itself not with any broad principle of responsibility for fitness, condition, etc., but with the actual task of running the equipment in transit. As such, the article has very limited scope and indicates little about the problems of cargoworthiness generally.

3) Art.9 rules that '[p]rivately owned containers may be approved by a railway ... if they comply with the conditions laid down for construction and marking', and art.1 makes it a condition for the application of the RICO that the container be thus approved or, if it is a 'large container', that it complies with the 'international standards of construction applicable to large containers'.

What is entailed by the approval (agrément) of a private container by a railway? Bearing in mind that compliance 'with the conditions laid down for construction' is a criterion for approval, does such approval amount to a representation to the public that the container is fit for carriage? Does an approved container become part of the railway's rolling stock? Who is responsible for the maintenance of such containers?

It is unfortunate that all of these questions are left unanswered either in RICO or in the CIM main text. The authors of RICO had an already existing network of privately-owned and railway-owned containers before them, with its own bulk of regulations and customs, and they probably assumed the main principles of the running of such a network to be within everyone's common knowledge. This state of things may be quite satisfactory when a dispute involves, for instance, goods carried in a private container between France and Belgium. In all likelihood, many moot points in the CIM would then be satisfactorily solved by the local

statutes, regulations and tariffs. But if the Contracting States expect a state such as the United Kingdom to take its role in the convention beyond mere ratification, then a revision should take place to put more substance into what may have been considered self-evident to Continental railway law specialists.

Moreover, if the act of approval had some clear purpose within the RICO regulations in their original version, this was lost in the present version. In earlier versions it was not only ruled that a private container had to be approved '[i]n order to be accepted for international traffic',¹¹ but art.1 therein made the regulations applicable only to private containers which have been thus accepted.¹²

In the latest version,¹³ the approval has lost its effect as a condition for acceptance by the railway, and has retained only part of its effect as a condition for the application of the rules. It is contended that these changes have rendered such a blow to the position and effect of the process of approval, that the authors of these changes would have done better service to it if they had let it die completely. As they stand today, the parts mentioning this process only raise a host of new questions: What is the position of unapproved containers? Are they to be refused

11. See, e.g., the 1961 version, Annex VIII, art.10, in Cmnd.2810.

12. Together, these two regulations made the general attitude of the drafters to unapproved containers quite clear. Yet, there existed there an error of drafting, viz. that if an unapproved container was barred from the scope of the regulations altogether, then it was ineffective to regulate that approval was a condition of acceptance for international traffic by the railway.

13. Note that although the latest version of the CIM main text was decided upon in 1970, RICO regulations themselves were revised in 1974 under a special revision procedure [CIM art.69(4)(c)].

altogether,¹⁴ or can they be accepted? And what are the 'international standards of construction applicable to large containers'? Does the status of approval or conformity with standards cling to the container, or is it lost once the container's condition drops below the technical requirement? All these questions cannot but be added to the unanswerable questions mentioned earlier.

This leaves us with art.27(3)(c) of the CIM main text, as the only possible provision in the CIM to deal with an aspect of the cargoworthiness of containers.

Art.27(3)(c) grants the railway an exemption from liability when 'loss or damage arises from the special risks inherent in ... loading in a wagon which has a defect apparent to the sender...', when the loading was carried out by the sender in accordance with the applicable conditions or with an agreement to that effect.

This special ground of exemption was added to the CIM in the 1970 revision and, as often happens with patched-up statutory clauses, it is a bad piece of drafting.

For a start, the brisk, unqualified language of the exemption leaves ample ground for an argument to the effect that the railway is liable whenever the defect in the wagon is not apparent to the sender. It appears to connote, in other words, the principle that the railway is always responsible for the cargoworthiness of the wagon, except for the very limited number of cases in which the

14. Naturally, the change itself, i.e. dropping the approval as a condition of acceptance, could have normally been interpreted as an indication of intention that approval would not function as such a condition. Yet, since the 'other' function of approval, i.e. its being a condition of the applicability of the RICO was allowed to remain in part, the above mentioned change can be interpreted as not more than correcting the error mentioned in the previous note.

sender loads it and the defect is 'apparent to him'. One does not believe, however, that any such rigid principle is part of the CIM system. To take the example which is closer to our main subject, such a principle is clearly incompatible with the concept of private wagons and private containers. And if this is putting the cart before the horse, suffice it to say that one believes that had the drafters of the main text¹⁵ intended such a strict, unqualified principle to apply, they would have stated this expressly. It is more likely, therefore, that the drafters of the 1970 version simply overlooked the cases in which the primary duty of cargoworthiness falls on the sender, and one prefers, for that reason, to restrict the import of art.27(3)(c) only to what it actually says.

But what is a defect which is 'apparent to the sender'? Does it include only defects which were actually known to the sender, or does it also include defects which, though reasonably visible and apparent, were not known to him? And if the second alternative is the correct one, what is the standard of vigilance required of the sender? Do defects become 'apparent' within the exemption if they are discoverable by a thorough check, an external check, a casual look?

A Belgian decision¹⁶ offers meagre help towards solving these questions, but in the absence of any other available decisions it deserves attention. There, packages of tobacco were damaged by rain water penetrating through the wagon's wall on a journey from Poland to Belgium. Polish law governed the loading and according to it the sender performed the loading into the wagon. As the 1970 version of the CIM was not applicable to the case,¹⁷ it was decided

15. I.e. the original text of 1890, and the subsequent major revisions of 1923 and 1952.

16. Tribunal of Commerce of Antwerp, 25.1.72, [1974] 2 Uniform Law Review, 238.

17. The journey took place in 1968. The 1970 version came into force on 1.1.75.

under the older version which only mentioned defects in loading by the sender as an exemption. Yet, the imprint of the 1970 amendment on the decision is unmistakable, as the Tribunal impliedly extended the old ground of exemption to include the new one. It did so, however, through the local Polish law. That law imposes on the sender an obligation to verify whether the wagon satisfies the conditions of carriage and to ensure that the walls, floor and roof of the wagon do not possess apparent defects which may cause damage to the goods. As the wagon walls were patched and many cracks were visible, and as traces of water could be found on the inner walls and floor of the wagon, the Tribunal found

'que les défauts du wagon étaient apparents; que l'expéditeur, en chargeant un wagon se trouvant dans un tel état, a effectué ce chargement de façon défectueuse.'¹⁸

This decision endorses, then, the objective alternative, namely that it is not the subjective knowledge of the sender, but the objective apparentness of the defects which constitutes the relevant criterion. It relies heavily, however, on a positive statutory obligation to check the wagon, stemming from the applicable local law, and this raises the argument that in the absence of an express statutory rule to that effect, such duty does not necessarily exist. However, there is not much to be deduced from this decision. It neither carries great authoritative power nor deals directly with the present binding version of art.27(3)(c).

It remains only to be said that the acuteness of this problem is greatly relieved by the special construction of the burden of proof rules in the CIM. Thus, even if a sender's subjective knowledge of the defects has to be proved, an objective apparentness

18. Ibid.239.

of the defects undoubtedly raises the prima facie presumption in art.28(2), which leaves it to the sender to prove by some positive means a lack of knowledge on his part, a task which is usually quite difficult to carry out.

Restricted in its import and ambiguous as it may be, the new addition to art.27(3)(c) bears a considerable importance in that it positively connotes at least the principle that even when the railway shoulders the primary responsibility for the cargoworthiness of the wagon, a significant part of this responsibility passes to the sender when the wagon is loaded by him.

Does the reference to wagons, then, include containers? As said earlier, one cannot find any provision either in the CIM or in the RICO to solve the basic problem of who undertakes the primary responsibility for railway-owned or private container. But can it be said that, as is the case with conventional wagons, art.27(3)(c) transfers to the sender the responsibility in respect of apparent defects in the containers, even if the primary responsibility for the cargoworthiness of the containers may lie with the carrier? One should think it can and must. One has committed oneself earlier to the view that the 'loading' within the CIM includes the 'stuffing' of containers. This was done mainly by showing the close similarities between a railway wagon and a container, and there is no reason or justification why this analogy should not apply here.¹⁹

The practical reasoning behind this exemption is clear, and it applies to containers in the same way as it applies to conventional

19. Uniformity should not be allowed to become an end in itself. But the lack of it could be sustained only as long as it does not create a logical inconsistency. To say that 'stuffing' is analogous to 'loading' a wagon but at the same time suggest that a container is not analogous to a wagon within the meaning of an article which deals almost exclusively with matters of 'loading' would amount to such inconsistency.

wagons. It is that even if the railway operates a system of regular maintenance, checking and repair for its rolling stock, the chances are still that a great number of apparent defects in the wagons would be discovered during the performance of the actual functions of carriage and transport, and mainly during loading. The loading operation affords an excellent opportunity to discover visible defects, even when no special efforts are made in that direction. Entering the wagon and performing the usual operations of stowing the goods and securing them, puts the party carrying out these operations in a much better vantage point for discovering visible defects than in any other part of the transport and carriage operation.

What the new addition to art.27(3)(c) implies then, is that it is better from the overall economic point of view for the sender, when he performs the loading, to be put in charge of the general state of the wagon as far as visible defects are concerned. If the exemption is restricted to defects which are actually known to the sender (i.e. the subjective alternative explained earlier), it acquires a somewhat different character tending towards the concept of estoppel, the reasoning being that it is inequitable for the sender to be compensated for a damage arising from a defect which was known to him and, arguably, consented to by him. In both interpretations the main practical rationale is the same, namely that a shift in the responsibility for loading to the sender should relieve a carrier who is otherwise responsible for the maintenance of the wagons from a considerable part of the task of discovering the defects in the wagons.

4.4. The Three Conventions - a Synthesis?

The principle described in the previous paragraph, applied to containers, does not go against the basic principle suggested in connection with the Hague Rules, namely that responsibility for

cargoworthiness should fall on the party who either directly or through agents, controls the container. This basic principle can and should remain, while the present principle of the apparent defect can be described as a refinement of it, stemming from the same source of overall economic and technical efficiency. These principles, combined, amount to this: Whoever has control over the container in the long term is primarily responsible for maintaining it in good condition, with the exception that when the defects become apparent to the other party it is only equitable that the latter party should either reject the faulty container or risk losing any legal argument connected with cargoworthiness and ensuing loss or damage. It is ironic that, although one believes that this combination of principles should be the full and correct attitude of the law towards cargoworthiness of containers, one can only leave this, as far as statutes are concerned, to future legislative work. The position at present is that whereas what has here been called the 'basic principle' could be accommodated within the Hague Rules and CMR provisions on cargoworthiness, this could not be done in respect of the CIM which does not deal systematically with cargoworthiness at all. On the other hand, whereas one part of the 'apparent defect' principle could be accommodated within CIM's art.27(3)(c), only the remainder of this principle could be incorporated into the Hague Rules: The CIM permits the concept that a defect apparent to the sender shifts the liability from an otherwise responsible carrier to the sender, whereas the Hague Rules allow its counterpart, namely that a defect apparent to the carrier shifts the liability from an otherwise responsible shipper to the carrier. To combine all these principles, including all their parts, into each of these Conventions may have been desirable, but this could **not** be done here without imposing on the Conventions provisions which they do not contain.

4.5. Mandatory Duties in Local Statutory Law

4.5.1. England

English statutory law does not involve itself in the conditions of carriage beyond repeating the Hague Rules via COGSA, 1924, and the CMR via the Carriage of Goods by Road Act, 1965. Transport by rail, although dominated by absolute state monopoly of the British Railways Board, now enjoys a complete freedom of contract,¹ as does local road transport.

4.5.2. U.S.A.

The situation in the U.S.A. is considerably different in reality because of the strong statutory control by Federal Commissions, but this type of control is indirect. It allows considerable variety in the conditions of carriage offered by the different carriers and, although the controlling commission may put all such conditions to similar tests of fairness, reasonableness and public policy in general, there still does not exist any uniform statutory or quasi-statutory body of rules in the form of standard conditions of carriage. The only two statutes which warrant some attention in the present connection are the Interstate Commerce Act and the Harter Act.

1) The Carmack Amendment

The Carmack Amendment to the Interstate Commerce Act² appears at first sight to put severe restrictions³ on the freedom of parties to agree on the terms of carriage operations governed by that

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1. If this sentence seems paradoxical, it is because of the fallaciousness of the lawyers' myth of freedom of contract when it is examined in reality.
 2. 49 U.S.C.A. Sec.20(11)
 3. Specially noticeable is the Amendment's declaration that any limitation of liability on the part of the carrier is unlawful and void.

Amendment.⁴ This impression is misleading. The purpose of the Amendment was to settle the problems of through-transport, and to make the connecting carriers and initial carriers equally responsible for loss, damage or delay.⁵ It did not create any new regime of responsibility.⁶ If it changed the existing common law in any other respect, it is in the direction of substituting the concept of liability for breach of duty or default for the older insurer's liability.⁷ Freedom of contract was generally very little affected by this Amendment.⁸

The cases interpreting the Amendment agree that the basic common law principle that the shipper is responsible for his own actions still prevails,⁹ and in no decision known to the present writer was it suggested that the range of actions the shipper may thus validly undertake is in any way restricted by the Carmack Amendment beyond the usual criteria of reasonableness and public policy enforced by American courts.

A firm indication of the non-interference of the Amendment with the freedom to agree on the scope of the services offered by the carrier, is the part of the Act which deals with bills of lading. 49 U.S.C.A. secs.100-101 lay down different rules of law for cases in which loading was performed by the shipper and by the carrier, but it is obviously left to the parties to decide whether it would

4. i.e., carriage operations between States of the U.S.A., and from the U.S.A. to an adjacent country.

5. See, e.g., Looney v. Oregon Short Line R. Co., 271 Ill.538, 111 N.E.509(1916); Goliger Trading Co. of N.Y. v. Chicago & N.Y. Ry.Co., 184 F.2d.876(7th Circ.1950).

6. Acme Fast Freight v. Chicago, M.St.P & P.R. Co., 166 F.2d.778 (2nd Circ.1948), reversed on other grounds, 336 U.S.465.

7. Atlantic Coast Line R.Co. v. Sandlin, 75 Fla.,539,78 So.667(1918)

8. Missouri, etc.,R.Co. v. Harriman,227 U.S.657(1913).

9. See, e.g., Model Mill Co., v. Carolina, C.& O. Ry.Co., 136 Tenn., 211,188 S.W.936.(1916); Emery & Co., v. Boston & M.R.R.,230 Mass. 463,120 N.E.106(1918).

be the shipper or the carrier who would perform it. Section 100, for instance, applies 'when goods are loaded by a carrier', but neither this section, nor any other section of the Act dictate in which cases this should occur.

2) The Harter Act

The Harter Act may theoretically play an important role in the present analysis. Since the enactment of the American COGSA 1936 the Harter Act was very much pushed into obscurity. COGSA left it with a narrow scope of application, restricted mainly to matters involving coastal trade and, in international sea-carriage, to matters relating to the pre-loading¹⁰ or post-discharge periods. Thus, it could have been expected that modern phenomena such as containerisation may restore much of the significance of the Harter Act because of the growing involvement of sea carriers in pre-shipment operations.

But what exactly is the scope of pre-shipment operations governed by the Act? One border-line is set up by the 'loading' operation mentioned in COGSA 1936; but what is the other border-line? How far inland does it extend?

Gilmore and Black interpret the responsibility for 'custody and care' in the Harter Act sec.1 as reaching 'from receipt by the carrier until delivery'.¹¹ More popularly quoted is their somewhat more vague statement that the Act applies '[t]o the period ... during which the carrier has custody of the goods, before they are loaded on the ship'. Both formulae, if taken seriously, however, commit

10. The principle that the Harter Act applies before loading has become so commonplace today that challenging it would have required a lengthy discussion the significance of which would have been small in view of the conclusions arrived at in the next paragraphs. See, however, A.W.Knauth, The American Law of Ocean Bills of Lading, 4th ed. (Baltimore, 1953), 163-6, and cases cited therein, to which add Aspen Pictures v. Oceanic Steamship Co., 148 Cal.App.2d.238, 306 P.2d.933 (1957); and see Gilmore and Black's reply to this school of thinking, p.148, n.28.

11. P.148.

the authors to very far-reaching conclusions indeed. Whatever the realities of ocean shipping in 1957, when the original edition was published, these statements were repeated in the 1975 second edition in an age when 'receipt by the carrier' and the beginning of the period when 'the carrier has custody of the goods' may occur many hundred miles away from the sea-port.

The pre-loading Harter Act regime, and Gilmore and Black's account of it, were referred to in a number of American cases in obiter dicta. The only two cases known to the present writer which put this concept into effect, however, involved incidents which took place so close to the ship's rail as to make the difference between the regimes of COGSA and the Harter Act negligible as far as containerisation is concerned. Both in Firestone Int'l v. Isthmian Lines¹² and in Atlantic Banana Co. v. M.V. 'Calanca',¹³ the cargo was on the pier ready to be taken on board, there being nothing separating the goods at this point from actual commencement of the loading operation, a situation which should theoretically have brought these two cases within COGSA. The only reason which prevented the application of COGSA was that the damage occurred to the cargo at this very point in the first case, and that the master refused to load in the second.

Moreover, the Harter Act addresses itself to the owners, masters, etc. of vessels 'transporting merchandise or property from or between ports of the United States and foreign ports'. Does this terminate the jurisdiction of the Act at the port gate? One would have hesitated to answer positively on the basis of this formulation alone, but it certainly serves as a strong indication in that direction.

12. [1964] A.M.C.1284(S.D.N.Y.1964).

13. 342 F.Supp.447(S.D.N.Y.1972), aff'd 489 F.2d.752.

Adding these considerations to the possible clashes between the Harter Act and Federal¹⁴ and State transport statutes, if the Act is allowed to pass through the port gate, one would come to the conclusion that the Harter Act's regime covers only close proximity to the water's edge, namely the sea port. Goods which the carrier receives for carriage come within the scope of the Act as long as this is done within the boundaries of the sea port. The 'custody and care' of the goods outside these boundaries, even if in the custody of the sea carrier, must be governed either by a land-carriage statute or by common law.

This interpretation makes a discussion of the allocation of duties as regards 'stuffing' the container practically unnecessary. The commercial considerations which brought about the increase in shippers' participation in pre-shipment operations occur when shippers perform such operations in their own yard or when their agents operate in inland depots. There is usually little commercial incentive for both parties to let the shipper 'stuff' the container in the sea-port and, though such cases may raise interesting questions of the sort discussed in relation to other statutes, their rarity would make a separate analysis superfluous.¹⁵

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14. Note, e.g., the proviso in the Carmack Amendment, 49 U.S.C.A. sec.20(11), allowing inter alia, the 'laws applicable to transportation by water' to govern when 'the loss, damage or injury occurs while the property is in the custody of a carrier by water'.
15. Theoretically, there remains also the problem of cargoworthiness, but enough was said about it in describing the historical development of the same subject in COGSA. One would have analysed this problem separately here had it not been for the consensus of American courts that the Harter Act's provisions on seaworthiness come into effect only after sailing, i.e. at a period when the Harter Act is superseded in most of the container operations by COGSA.

4.5.3. France

French statutory law has undertaken a much greater role in laying down detailed conditions of carriage by sea, rail and, partly, road, than any of the other two systems discussed here.

1) The 1966 sea-carriage statute

Firstly, there is the statute of 18 June 1966 on carriage by sea, supplemented by the decree of 31 December 1966. In the parts relevant to the present discussion, the system created by these instruments resembles that of the Hague Rules, except for two major differences.

a) The scope of the statute and its mandatory character.

The main statute defines its scope of application as from taking in charge to delivery.¹⁶ But, again, what exactly is meant by 'taking in charge'? Does it include receipt of the goods in an inland depot, thus stretching the regime of the statute far inland? Rodière, though discussing the meaning of the term at length, does not answer this specific question. He sets up a limit as to the latest moment which could be considered as the moment of taking in charge, and that is the famous moment of 'taking in charge under the ship's tackle';¹⁷ but nothing is said of the earliest limit to taking in charge, and if the author's insistence on freedom of contract¹⁸ is read literally, it is not impossible to conclude that it was his view that no such limit existed.

Against such a conclusion there stands the language of the law itself. Art.15 defines a contract of carriage by sea as one according to when the shipper undertakes to pay freight and the carrier undertakes to carry specific goods from one port to another.

16. Art.15.

17. Rodière, Gér.Mar., para.509, vol.2., p.144.

18. Ibid.143-4.

This definition has little direct relevance to the interpretation of the statute, simply because no operative provision therein restricts itself to contract of carriage by sea. Still, one entertains little doubt that the French legalistic approach allows one to use that seemingly purposeless definition as an ample indication of the legislator's intention to apply that statute only to maritime transport. For our present purposes this means that the 1966 statute's regime does not reach outside the port gates.

Indeed, reading Rodière's¹⁹ work, and the work of his predecessor, G.Ripert,²⁰ in greater detail, giving attention to their account of a similar problem in relation to the previous statute of 1936 on carriage by sea, one feels quite confident that French courts and legal writers²¹ have never given serious consideration to the problem of the farthest inland limit of the maritime law regime because of a tacit consensus that this limit lies within the boundaries of the sea port.²² As was the case with the Harter Act, one could not find a single French decision which discussed even the possibility of applying maritime law to the inland leg of the transport operation. All the great legal battles connected with defining the area of application of the Rules were fought over spots in close proximity to the ship, such as the pier or the carrier's warehouse in the port.²³

19. See especially paras.393-395,505-514,581-593,614 bis, 660-1.

20. Droit Maritime, 4th ed.(Paris,1953),paras.1378,1800-2.

21. The scope of application of maritime statutes and law was the subject of a great many articles. See G.Ripert, 'Le Sectionnement du Transport Maritime'(1950),2 D.M.F.471; P.Chauveau, 'Marchandises Avant et Après Palan', J.C.P.1956. 1.1305; R.Rodière, 'Le Transporteur Maritime, etc.', D.1961.Ch.1; J.Calais-Auloy, 'Le Domain d'Application des Textes, etc.(1967), 19 D.M.F.451.

22. But see a different opinion in J.-C.Soyer, 'Le Droit Nouveau des Contrats d'Affrètement et de Transport Maritimes'(1967)20 Rev. Tr.Dr.Comm.1,35.

23. See Cass 17.5.61, 13 D.M.F.519; Cass 17.5.60, D.1960. J.496; Paris 27.1.56, 8 D.M.F.228.

One prefers, however, to leave this question open and assume that a clearer ruling on that point may bring about a situation in which the preliminary operations of the sea transport come under the scope of the 1966 statute, thus including the preparation for transport of a container designated for sea-transport, wherever the place these operations are carried out. Does the statute, then, lay down any mandatory duty in respect of these operations?

The mandatory character of the statute is very ambivalent indeed. On the one hand, it (or rather, its supplementary decree of 31.12.66) is interpreted as compulsorily imposing on the carrier the series of duties equivalent to that included in art.3(2) of the Hague Rules. Nothing in the parties' agreement may transfer the duty to load, for instance, from the carrier to the shipper, according to Rodière's interpretation of art.38 of the decree.²⁴ Yet, the statute as a whole is applicable only from the moment of taking in charge by the carrier,²⁵ and Rodière himself tells us²⁶ that the parties are free to agree on a contractual basis when that moment occurs. This freedom is so far-reaching that the parties are free to agree that what is to all practical purposes 'taking in charge' (e.g., acceptance of the goods into the carrier's warehouse before shipment) is not legally so²⁷ (thus postponing the applicability of this particular statute). To make these

24. Rodière, Gén.Mar. para.514, vol.2. p.149. One is reluctant to challenge this interpretation. The language of art.38 is, to all practical purposes, identical to that of art.3(2) of the Hague Rules and, while the latter was interpreted differently in Pyrene v. Scindia, Rodière obviously opted for the interpretation which, in the words of Devlin J. (as he then was) himself, 'fits the language (of the article) more closely'.

25. Art.15 of the main statute.

26. Rodière, Gén.Mar., para.509, pp.173-4, para.511, p.146.

27. Calais-Auloy, 19 D.M.F. 451,457.

principles compatible, Rodière suggests this principle:²⁸ The freedom to decide on the moment of taking in charge by the carrier extends only to the moment when loading starts. After this moment the statute applies, and imposes the loading on the carrier, regardless of the will of the parties.

This line of argumentation puts immense importance on the exact meaning of 'loading'. Again, one of the questions which are the ultimate goal of this analysis emerges with great intensity: does 'loading' (chargement) include the 'stuffing' of containers? Rodière's implied answer underlines again the paradoxicality of this question or rather the futility of attempts to answer it.

b) Loading

'Loading' (chargement), says Rodière, covers both the taking on board (embarquement) and the stowage (arrimage) of the goods,²⁹ and the moment when taking on board starts 'coincides exactly with what the courts have determined as the instance of taking in charge under the ship's tackle'.³⁰ Immediately below, the author refers to loading as an 'operation aimed at shifting the goods from the quay or lighter onto the vessel'.³¹ Loading, according to Rodière, then, is exclusively connected with the ship. But a few pages later, in a paragraph dealing specifically with containers, he speaks of 'loading' referring to the act of putting the goods in the container;³² putting the container itself on board the vessel is referred to in the same paragraph in such neutral terms as 'placer' and 'manutentions'.³³

28. Rodière, *ibid.*

29. Para.514.

30. Para.509.

31. *Ibid.*

32. Para.513, p.147.

33. Para.513, p.148.

This should not be considered a real conflict, however. Rodière's observations on the meaning of 'loading' in general prevail without doubt over such casual terminology as he happened to use when dealing with containers. His account of containers is generally of far lesser depth and precision than would have permitted one to attach overriding significance to its terminology.

Rodière can be taken to hold the general view that the parties to a carriage by sea transaction are free to agree on the allocation of duties between them, as far as the maritime statutes are concerned, up to the moment when the goods are attached to the sea-going ship's tackle. It follows that, in this context, the parties are free to agree on such arrangements as to the 'stuffing' of the container as suits their interests and needs.

c) Cargoworthiness

Art.21 in the 1966 statute is slightly different from the Hague Rules art.3(1) in that its paragraph (c), dealing with cargoworthiness, omitted the reference to 'holds, refrigerating and cool chambers' as examples of 'parts of the ship in which goods are carried', and also omitted the reference to the duty to make these parts safe 'for[the]reception, carriage and preservation[of the goods]'. None of these omissions is of any material significance, as the operative parts of the provision remain intact. Art.21(c) of the French statute is a direct descendant of the Hague Rules formula and its predecessors as described earlier, and one can see no reason why everything said about that formula should not be applied here. Art.21(c) has not been the subject of any reported decision by an authoritative French court, nor has it been discussed in depth by any legal writer. Until either of these happens, it should be assumed that the adoption of the Anglo-American concept of seaworthiness and cargoworthiness entails adherence to its basic features.

2) Rail transport

Containers carried by the French national railway, the SNCF, were until recently the subject of a special quasi-statutory³⁴ set of regulations embodied in Tariff No.106.³⁵

The whole system of railway tariffs underwent a major reform in 1971 with a view to allowing the national railway greater independence and flexibility in fixing prices and conditions of carriage so as to enable it to compete more efficiently with other means of transport. It was only natural that the container tariff was one of the first to be affected by that trend. Like its British counterpart, the French railway's viability depended and still depends heavily on the success of modern containerisation to regain cargo from other means of transport, and competitiveness was the major key to such success. Tariff 106 was thus abolished and all railway business with containers, except their actual carriage, was transferred to a subsidiary Compagnie Nationale des Cadres (C.N.C.),³⁶ which conducts its business with both the public and the S.N.C.F. on a basis of considerable flexibility. Thus, while it is illusory to speak of true freedom of contract where an enterprise of that magnitude is involved, there no longer exist

34. For a discussion of the legal status of railway tariffs in France see Encyclopedie Dalloz, Répertoire de Droit Commercial, 2nd ed.(Paris,1974), Transports Ferroviaires, paras.18-53.

35. The text can be found in Dalloz's Code des Transports(Paris, 1964),169. For commentary see Rodière, Gén.Trans. paras.619, 1448bis-1451; Durand, Droit et Pratique,op.cit.M7. Jane's World Railways 1974-5,(London,1974),274.

36. The C.N.C. itself is not a novelty. It has existed for about twenty-five years, owning containers, performing groupage services, etc. side by side with the S.N.F.C.'s container services. The novelty is that the S.N.F.C. has now granted the C.N.C. exclusivity over container business in that all dealings with the public go through the latter.

quasi-statutory restrictions on such freedom.³⁷

3) Road transport

Finally, in our search for statutory duties in connection with the pre-shipment stages of container operations, we come to the regime of transport by road in France. This regime is divided at present into two categories: Carriage of goods weighing more than three tons to a distance of 150 kilometres or more is statutorily tariffed by the 'Conditions Générales d'Application des tarifs Routiers'; other road transport operations are left to the free will of the parties.

Article 4 of the General Conditions³⁸ imposes on the sender the duty to load the goods 'in conformity with instructions given to him by the carrier'. Undoubtedly, this is a unique and intriguing provision. While the actual work of carrying out the loading is imposed on the sender, the carrier is charged with the duty to direct the sender's workers ~~as to~~ the proper manner of doing so. The sender is to supply the means, the carrier the expertise. Of course, the exact scope of each of these respective duties is far from self-evident, and many details remain to be filled in by the courts, but this is not unusual. What makes the provision unique is the admirable balance it strikes between the economic means and interests of the parties to the transport transaction; between physical means and the know-how; between the duty to carry out the operation and the responsibility for the consequences.

This allocation of duties and responsibilities can be ideal for the preliminary stages of container operations, especially

37. The present S.N.F.C.-C.N.C.-user arrangement is very similar to the B.R.-Freightliner-User scheme in Britain. Both C.N.C. and Freightliner hire the services of their respective national railway companies on a long-term basis, and fix their prices and conditions to the public according to the market situation.

38. In their version of 1.12.71.

of the FCL (Full Container Load) type. Earlier it was argued that charging the shipper with the duty to load and stow may prove an intolerable burden. But this is so not because of lack of means and manpower, but because of lack of expertise. It would be grossly uneconomical for every manufacturer using containers to employ an expert on loading and stowage, but it would be equally uneconomical for carriers to despatch a team of workers to every shipper's yard to carry out the loading. It is a good solution, then, for the shipper's unskilled workers to carry out the operation following the instructions and under the supervision of an expert supplied by the carrier, ideally the driver himself.

Does art.4, then, apply to the 'stuffing' of containers? Again, the answer should depend on the more general outlines of the agreed transaction. If, for instance, a sealed container is unloaded from a ship in a French port after an ocean crossing, and the services of a local haulier are engaged for carrying the container to an inland destination, the only operation which art.4 could practically refer to as 'loading' is the placing of the sealed container on the lorry. To take a diametrically opposed example, when a road haulier undertakes not only to carry but also to supply the container for a cross-country transport operation, and a vehicle carrying an empty container is accordingly driven into the sender's yard, ready to be filled, or 'stuffed', there can be no reason to distinguish the latter operation from the operation of loading a conventional trailer, and art.4 must apply to it.

The dominant question should be this: Did the road carrier agree with the party with whom the carriage transaction was made to carry a container, or did he undertake to carry goods in a container? In the first case, it would be both impractical and linguistically awkward to call the 'stuffing' of the container, sometimes completed even before the road carrier was contacted,

'loading' within art.4. The second alternative includes cases in which the container functions for the road carrier in question as a conventional trailer, and both equity and linguistic commonsense require that art.4 apply and that the combination of shipper's means and carrier's expertise should be imposed on the parties. So well does this latter combination suit the needs of containerisation that one can only regret that it is confined, at least as far as statutory effect is concerned, to a relatively small number of cases since in France, as in the other countries surveyed here, road carriers are usually given an ancillary role to play in container operations. Hired by shipping companies, groupers and other container operators, they are usually called in to carry previously prepared containers. To use the terminology employed earlier, road carriers usually carry containers, not goods in containers.

4.6. Contractual Duties in Pre-Shipment Operations

Obviously, when there are no statutory or regulatory restrictions imposed, the parties to a container operation are free to agree on the exact allocation of duties between them, subject only to general restrictions on freedom of contract which may apply in the legal system within the jurisdiction of which the case is considered.

Clear agreement, whether oral or in writing, on questions such as who should supply the container, who should ensure its fitness, who should 'stuff' it, seal it, and lift it aboard the means of transport, would be, in the absence of the above-mentioned restrictions, all too welcome by the law. Indeed many of the contemporary container bills of lading answer at least some of these questions in detail. But how should these questions be answered in the absence of such an agreement?

In a great many cases an answer can be readily inferred from the other details of the transaction which are more clearly agreed upon. When, for instance, the shipper and carrier, or their representatives, agree that a container will be unloaded by the carrier at the shipper's yard and collected for shipment two days later, no court will hesitate to infer that the 'stuffing' of the container should be done by the shipper with his own means. Likewise, when a carrier demands and receives from the shipper a detailed description of the goods, there can remain little doubt that this implies that, if the carrier undertakes to supply a container, the container should be reasonably fit for the carriage of the specific goods. But what of the cases in which no such clear indications of the parties' intentions exist?

Container transport may have been carried out in some places in the Western world long enough, and on a sufficiently regular basis, to form its own specific practices. When they can be adequately proved, such practices will have a dominant role to play in filling in the missing details in commercial contracts. For example, judging by present trends, it can be predicted with some certainty that a practice will develop in the container-transport trade according to which it will be the shipper's duty to 'stuff' FCL containers unless, of course, a different arrangement is agreed upon. At present, however, one cannot do more than take note of the trend, as well as of other trends which will be mentioned in the course of the discussion. One's involvement in container practices is too indirect to give weight to a personal account of their existence; nor does such an account bear great legal relevance to research work such as the present. It remains, then, to make some comments on existing practices relating to 'equivalent' operations in traditional modes of transport.

The most relevant and best recorded in court decisions and

text-books is the practice prevalent at least in America and France according to which it falls on the sender to load the wagons in cases of car-load consignments of goods in bulk: '... bulk freight in car load lot ... by the uniform rule and custom of this country are to be loaded and unloaded by the shipper and consignee',¹ other sorts of cargo to be loaded by the carrier. This was confirmed at least twice by the Supreme Court of the U.S.,² and has now³ become the general rule in that country.⁴ The rule in France is almost identical⁵ where non-tariffed⁶ road-transport is concerned.

As to the duty of packing, the question of the party responsible for it rarely concerned courts of law. Indeed, one knows of only one English case which states the existence of a legal duty on the sender to pack the goods.⁷ Yet the reason for this scarcity of

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1. Schumacher v. Chicago & N.W. Ry. Co., 207 Ill.199, 69 N.E.825, 827(1904).
 2. Pennsylvania R. Co. v. Kittaning Iron & Steel Manufacturing Co., 255 U.S.319,323(1919); Adams v. Mills 286 U.S.397,410(1931).
 3. This has not always been so clear. See, e.g., London & L.Fire Insurance Co. v. Rome, W.& O.R. Co., 144 N.Y.200, 39 N.E.79 (1894), where the judge had to rely on his 'own observation' to describe a similar practice; see also Cardozo J.'s very hesitant language on that matter in Lewis v. N.Y., O. & W.R. Co., 210 N.Y.429, 104 N.E.944,945(1914).
 4. See Am.Jur.2d., Carriers, 319, vol.13, p.814; C.J.S. Carriers, 67, vol.13, p.123. See the latter repeated and affirmed in American Cotton Oil Co. v. Davis, 129 Wash.24,224 P.23,28(1924).
 5. See, e.g., A.Chao, 'Transports par Route; Transports Publics de Marchandises'(1973), Juris Classeur Commercial Arts.103-108, No.33, p.6.
 6. For a similar rule for French railway transport see Conditions Générales d'Application des Tarifs pour le Transport des Marchandises, art.5.
 7. Barbour v. South Eastern Ry.(1876), 34 L.T.67,68.

cases is quite obvious. As far as traditional modes of carriage are concerned the allocation of duties according to which packing falls on the sender and stowage on the carrier, naturally established itself so well as the normal course of business, that parties have been rarely inclined to challenge it in court.

How does this affect the position of the law as far as containers are concerned? Again, analogies here are seriously impaired by the fundamental problem of this analysis, stemming from the fact that the preparation for shipment in a container is broken up into stages different from those in traditional modes of transport. True enough, analogies have been used all through this work, but they have been related to matters of law. Practices and usages, however, are basically matters of fact; they either exist or they do not, and they cannot be created by legal analogies. The most that could be said is that the existence of a practice in a certain trade by which senders stow the goods in the carrier's conventional vehicles can serve as some indication that the same is usually done when containers are used. Whether or not such practice exists in reality, however, is a question of fact and, as such, it is beyond the reach of this work so long as it is not recognized by courts of law.

5. THE RESPONSIBILITY FOR THE CONSEQUENCES OF PRE-SHIPMENT OPERATIONS

5.1. The Distinction between Duty and Responsibility

The question which is discussed in the present section is: 'who is legally responsible for the consequences of acts or omissions committed before the beginning of the journey?' The difference between this question and the previous one, i.e. 'On whom does the duty to perform the pre-shipment operation lie'? may seem at first glance negligible; the present writer suggests it is not. Indeed, it is believed that the realities of containerisation may well require a clear distinction between the duty to perform, and the responsibility for the consequences of, pre-shipment operations. This is not to say that the duty and the responsibility necessarily fall on different parties as far as containers are concerned. On the contrary, it is very likely that courts would impose both on the same party in most situations. What is argued here is that some situations, not uncommon in container practice, may require the introduction of such a distinction if a fair and efficient solution, which is also not incompatible with the traditions of transport law, is to be arrived at.

The concept of separation between duty and responsibility is not at all new to transport law even if slightly different terms may have been used in the cases illustrating this. The process of loading, for instance, has always been a potential source giving rise to legal solutions based on such separation for two main reasons:

- 1) It is at this point that the greatest chance of the intermingling of shipper's and carrier's employees at work occurs, thus creating acute problems in the assigning of responsibility to one of the parties.
- 2) As mentioned earlier, the skills and means required for an efficient and successful loading operation are often spread between the parties involved in a loading operation. A common combination

may consist of the shipper having readily available unskilled manpower, and knowledge as to the qualities and peculiarities of the specific goods, the carrier possessing the means for loading and stowage and, most importantly, the professional know-how of the techniques for these operations. The coming together of these means and skills certainly cannot be governed by a homogeneous, single-variant formula of duty - responsibility.

Now these two problems may be embodied in various legal forms. They may arise in connection with problems of vicarious liability, contributory negligence or imputed knowledge; they may involve questions of objective duties to instruct, to supervise or to inspect, or of the import of subjective knowledge about the quality of loading, packing, etc. Basically, however, they can all be accommodated under the separate concepts of duty to perform and responsibility, in varying degrees, for the consequences of the operation.

To illustrate this let us take a series of four American cases dealing with the first problem mentioned above, namely the problem of identifying the party vicariously responsible for mistakes committed by workers performing the operations of loading and unloading.

In Standard Oil Co. v. Soderling¹ a heavy article of machinery was negligently unloaded by a man who assisted the driver in the operation. The assistant, though usually connected with the consignee corporation, was declared by the court to be the carrier's servant for the purpose of unloading, chiefly because it was the carrier's duty, as common carrier, to unload the goods. It is clearly implied in the decision, however, that had the consignee exercised actual control over the assistant's actions during the unloading, it would have been their control, rather than the general

1. 112 Ind.App.437, 42 N.E.2d.373(1942).

duty, which would have dominated the case.

The latter rule was better emphasized in Indiana Union Traction Co. v. Benadum,² where the shipper's servants loaded the shipper's mare onto a railway wagon in a negligent way. They did so, however, under the strict control and supervision of the carrier's agent 'who was there for that purpose and who specifically agreed to do so'.³ It was therefore decided that in these particular acts the shipper's employees became the servants of the carrier.

Diametrically opposed in the facts, but identical in principle is J.H.Denton v. Yazoo & Mississippi Valley R.Co.⁴ There the persons who carried out the work of loading and unloading were the carrier's employees, but both the duty to perform these operations, and the supervisory control over the workers, fell on the shipper, and it was therefore decided that the work should be legally considered as performed by the latter.

Finally, in Rockwell v. Grand Trunk Ry.Co.,⁵ the control test actually brought about the separation between duty and responsibility sought in this analysis. There, a regulation of Inter-State Commerce Commission imposed on the consignee the duty to perform the unloading operation. However, the operation was carried out with the help of a railway-owned crane with its own operator, and the responsibility for the negligence of the operator was imputed to the carrier because the consignee never exercised any control over the operator's work.

Now, these four cases illustrate the different legal consequences ensuing from the various combinations of three factors, namely the duty to perform an operation, the usual affiliation of the persons

2. 42 Ind.App.121, 83 N.E.261(1908).

3. Ibid. 262.

4. 284 U.S.305(1931).

5. 264 Mich.626, 250 N.W.515(1933).

actually performing it, and the element of control or supervision. The principle they advocate, namely that by controlling or supervising the actual performance of an operation a party assumes responsibility for it, even if the duty to perform lies with the other party and the actual performers are otherwise the latter's servants, is immediately relevant to container practices. Such practices have grown and developed according to the needs and interests of the parties and the realities of the transport market, and formed into a great variety of combinations and situations. Containers are 'stuffed' sometimes exclusively by shippers, sometimes by their employees with the instructions of the carrier, and sometimes with the actual supervision and control over the shipper's employees by the carrier's agent. In other cases they are 'stuffed' exclusively by the carrier, but in some cases there may be some instruction from, or even control by, the shipper over the carrier's regular employees, as for instance in the case of a driver who volunteers manual assistance in the 'stuffing' of the container under the supervision of the shipper's employee.

The four cases described above supply an answer to one aspect of a relatively simple problem which may arise in container practices, namely the responsibility for damages occurring during the loading/unloading operation itself. Assuming that the party who carried out the operation is responsible for an immediate damage occurring during its performance, these cases only 'allocate' the work of the persons physically performing the operation either to the carrier or to the shipper/consignee, according to the control exercised over the workers. The present work is more closely interested, however, in the less immediate consequences of pre-shipment operations, i.e. in loss or damage which occurs during the journey as a result of negligence in the performance of these operations. And here the subject is greatly complicated by the further distinction between the initial responsibility (or the responsibility-via-performance), and

the responsibility-via-inspection.

The questions which arise in this connection are these: Assuming that the main responsibility for faulty 'stuffing' lies with the party who actually performed it, is there a responsibility on the other party arising out of an opportunity to inspect the 'stuffing'? If such responsibility exists in principle, what does 'opportunity to inspect' entail? If no active inspection is required, is there a responsibility arising out of the fact that the fault was manifestly visible and could not have been missed even without actual inspection, or of the fact that the existence of the fault can be shown to have been subjectively known to the non-performing party in any other way?

To answer these questions it was necessary to explore the answers to analogous questions in conventional transport. As will be shown, the latter answers vary considerable when given in connection with 'packing', as opposed to 'loading or stowage'. In loyalty to our system of attempting to classify container operations (in the present context the 'stuffing' operation) within traditional rules (here rules on packing, loading and stowage) only after the rationale and the principles embodied in the rules are set out, it was thought advisable to separate the analysis of 'responsibility for the consequences of defective packing' from 'responsibility for the consequences of defective loading or stowage' and only then classify or attempt to apply a synthesis of the traditional rules to container transport.

5.2. Responsibility for the Consequences of Defective Packing

5.2.1. General

Bad packaging is a defence available to a carrier against a cargo-owner's action for damages. As a principle this has become so much a part of all branches of transport law,⁶ statutory and customary alike, that it hardly requires to be demonstrated by authorities.

6. See reference to the history of this and related defences in pp.39-40, supra.

All international conventions and local statutes on transport of goods include this defence, and references to it were made all through the preceding analysis of statutory duties. What will be explored here in greater depth, therefore, are the details of that defence at common law, and mainly the role of inspection and knowledge of defects on the side of the carrier.

Can the defence of 'insufficiency of packing' be claimed when that insufficiency was apparent at the time of delivery to the carrier? Not surprisingly the answers of both English and American common law are as heterogeneous and sometimes even contradictory as can be the intuitive arguments for and against any answer to the question, based on broad principles of justice and commercial fairness. That a man should be responsible for his own neglect is obvious and valid as an argument in favour of the carrier, but it is not less valid to argue that a carrier who is presented with goods which he knows, or should know, to be badly packed and likely to be damaged if handled and stowed in the ordinary way, should either refuse to carry the goods in that condition, or expressly offer to carry them without responsibility for the consequences, or take special precautions in handling the goods; and that by not doing either of these the carrier forfeits his right to raise the defence of 'insufficiency of packing'.

5.2.2. English Law

The position of English common law has constantly fluctuated between opposing attitudes during the last two centuries. At the beginning there was Lord Ellenborough's decision in Stuart v. Crawley.⁷ There, a dog was delivered to the carrier with only a cord round its neck to secure it, and it subsequently slipped its noose and disappeared. In deciding against the carrier, Lord Ellenborough said:⁸

7. (1818), 2 Stark. 323.

8. Ibid. 324.

'The case was not like that of a delivery of goods imperfectly packed, since there the defect was not visible; but in this case the defendant [the carrier] had the means of seeing that the dog was insufficiently secured'.

But in Higginbottom v. The Great Northern Ry.Co.⁹ a carrier was exonerated from the part of the damages to the goods due to defective packing, despite the fact that the defects were visible on delivery to the carrier's porter. And yet one year later, in Cox v. London N.W.Ry.Co.,¹⁰ the court put this question to the jury:

'If there were defects in the casks, had the defendants [the carriers] knowledge or reasonable means of knowledge of such defects'.

In 1920 Lord Atkinson in a dictum in London & N.W.Ry.Co. v. Richard Hudson & Sons,¹¹ adopts the view that obviousness of the defective packing at the time of receipt by the carrier deprives him of the use of the defect as a defence, but Gould v. S.E.& Chatham Ry.Co.,¹² which in the opinion of some leading authors¹³ has come to dominate the common law on this problem, advocates a different view. There, the carrier's agent had full knowledge of the defective packing of one of the articles collected by him for shipment. The court, assuming that an ordinary contract of carriage,¹⁴ pursuant to common

9. (1861), 2 F.& F.796.

10. (1862), 3 F.& F.77,79.

11. [1920] A.C.324,340.

12. [1920] 2 K.B.186.

13. See e.g. Scrutton, art.107,p.225; Carver, para.17,p.16; J.H.C. Morris, in Chitty on Contracts, Specific Contracts, 23rd ed. (London,1968), para.492,p.249. But see A.Leslie, The Law of Transport by Railway, 2nd ed.(London,1928),40. See note 20, infra.

14. 'Ordinary', as opposed to the special 'shipper's risk' contract which was in reality signed in that case, but whose validity was challenged because of doubts as to the agent's authority to agree to such a contract on behalf of the shipper.

law principles, was made between the parties, decided that this knowledge did not prevent the carrier from setting up the defence of insufficiency of packing.

Yet the present writer believes that the case lacks both the quality and authority required for it to gain comprehensively binding effect. Its main reasoning is that defective packing should come under the defence of inherent vice,¹⁵ where a carrier's knowledge is irrelevant; but the accuracy of the latter part of this premise is very doubtful indeed. In no decision was it positively stated that the defence of inherent vice can be set up by the carrier despite his knowledge of such vice. Indeed, some decisions imply the opposite.¹⁶ Furthermore, one strongly opposes the way Stuart v. Crawley was distinguished in the Gould case. There is no reason to assume, as was done in the latter case,¹⁷ that the former merely said that a carrier is under an obligation to take reasonable care of goods even if badly packed; nor is Stuart v. Crawley inconsistent with Barbour v. S.E.Ry.Co.,¹⁸ the case cited in Gould as the latter's only authority. Now, it is agreed that the Barbour case is a valid authority for the actual decision in the Gould case, that 'the facts in the ... [latter] case are precisely the same', and that 'the same result must follow'; but it is argued that both these cases

15. At pp.190-1.

16. See Lister v. Lancashire & Yorkshire Ry.Co., [1903] K.B.878, 881, where the court found it relevant that an inherent defect in a shaft fitted by the shippers to facilitate the transport was 'not known to either party'. And see Jahn v. Turnbull Scott Shipping Co.Ltd. et al., [1967] 1 Lloyd's Rep. 1, 46, where the court exonerated the carrier from responsibility for damages to a consignment of cocoa caused by its own moisture, but warned future carriers that the information uncovered during the hearing of the case as to the quantities and characteristics of cocoa would prevent them from similar exonerations. See also Central Grain Co. v. Canadian Pacific Ry.Co. (1916), 34 West. L.R.899 (Manitoba, 1916).

17. At pp.192-3.

18. (1876), 34 L.T.67.

constitute a special group within the general group of defective packing cases. The special nature of these two cases is that, in both, the condition of the packaging was discussed between the parties before the beginning of the journey in a way which implied that it came to be accepted by both parties that the shipper wished the goods to be sent in that state, that the latter was generally aware of the risks involved, and that he understood that no further precautions would be taken by the carrier and thus accepted the possible consequences. It is in this sense that the Gould case is referred to in the recent case of Ismail v. Polish Ocean Lines.¹⁹

It is therefore suggested that, while the decision in the Gould case is valid, its implications are restricted to its special circumstances, and the more general problem of carrier's knowledge of bad packing remains open. The present writer prefers the view expressed by Lord Atkinson in L. & N.W. Ry. v. Hudson,²⁰ i.e. that the obviousness of a defect should prevent a carrier from setting up that defect as a defence.²¹

5.2.3. American Law

The position of American case law is not less difficult. In a Wisconsin case, Thomson v. Chicago, M. & St. P. Ry. Co. et al.,²² mention was made of a 'well established rule that where a shipper

19. [1976] 1 ALL E.R. 902, 907.

20. *Supra*, n. 11, p. 113

21. As mentioned in note 12, *supra*, some leading writers think differently, but it is submitted that the distinctions made by them (and see also Halsbury's Laws of England, Lord Simonds ed., vol. 4, p. 414) in support of their view are unwarranted. For instance, it is difficult to see the justification for the distinction between cases where the defect in packing, although existing on receipt by the carrier, is discovered (and ignored) only during transit, in which case Carver, (para. 17, p. 16) accepts the authority of decisions making the carrier liable, and a case where the defect is discovered (and ignored) on receipt, where Carver (*ibid.*) accepts the Gould authority for exempting the carrier.

22. 195 Wis. 78, 217 N.W. 927, 929 (1928).

tenders to a carrier goods for transportation, which are insufficiently crated, boxed or loaded, and such insufficiency is discoverable by the carrier upon ordinary observation and inspection, it is the duty of the carrier to refuse to receive the goods, and that if the carrier does accept the goods, it may not thereafter allege that any injury which they sustained in the course of transportation was due to such insufficient crating, boxing, packing, or loading'. A large number of decisions²³ sustaining that rule in various forms leads to the assumption that this, indeed, is the well established rule of American law. And yet a more recent series of cases, somewhat different in nature raises at least a doubt as to the present validity of the statement.

In S.M.Wolff Co. v. Steamship Exiria²⁴ it was argued that the shipowners could not raise the defence of insufficient packing because they were aware of the insufficiency at the time of receipt and should have taken special care in handling the goods. The court rejects this argument, stating that the strength of a previous ruling,²⁵ similar to the one described in the previous paragraph, was 'somewhat diminished'²⁶ in the light of the American COGSA 1936 whose art.3(2) setting out the carriers duties of care for the goods, must be read in conjunction with art.4(2) exceptions, of which insufficient packing is one. But whereas this reasoning could be restricted to cases to

23. Northwestern Marble & Tile Co. v. Williams, 128 Minn.514,151 N.W.419,420,(1915), and Gehrke v. American Ry. Express Co.,61 N.D.668, 24 N.W.321(1931), are direct authorities on the matter. See also Hannibal & St.J.R. Co. v. Swift, 12 Wall 262 (1870); Atlantic Coast Line R. Co. v. Rice, 169 Ala.265, 52 So.918(1910); Larry's Sandwiches v. Pacific Electric Ry., 318 F.2d.690 (9th. Circ.1963).

24. 200 F.Supp.809 (S.D.N.Y.1961).

25. J.Aron & Co., v. S.S. Karlew, 43 F.2d.732 (S.D.N.Y.1924).

26. 200 F.Supp.812.

which COGSA is applicable, there is a more general statement here. Recalling Bache v. Silver²⁷ the court declares²⁸ that 'the shipper cannot cast the burden of extra special stowage on the carrier by simply not packaging the shipment properly'. This is a somewhat simplistic description of Bache v. Silver, but if this general line of argumentation is accepted by American courts of higher authority, it carries a serious threat to the rule described earlier. To say that a carrier may accept a defective package for shipment knowing of the defect, and yet not having to take special care with it, is to say that the defence of defective packing is available to a carrier even if he knows of the defect on receipt. It remains to be seen which view prevails.

5.2.4. French Law

No direct ruling on our present subject seems to exist in French law. Chaiban, whose account of insufficient packing in French maritime law is perhaps the most comprehensive in French legal literature, cites only Lebanese, English and American cases on the problem of carrier's knowledge of the insufficiency,²⁹ and Rodière³⁰ cites an Italian one. The present writer's efforts to discover decisions on the matter in other branches of transport law and in recent maritime case law have come to no better results.³¹ Rodière proposes his personal view that carrier's knowledge should not automatically prevent him from setting up the defective packing

27. 110 F.2d.60,62,(2nd.Circ.1940).

28. At p.812,

29. Chaiban, op.ct. para.703,p.288.

30. Rodière, Gén.Mar. para.643,Vol.2,p.283.

31. In the Aix Court of Appeal decision of 14.5.74, 27 D.M.F.458 the court shared the responsibility for damage caused by insufficient packing between the shipper and the carrier, but the exact legal reasoning behind this compromise solution is not sufficiently clear.

defence, but if, as seems to be the case, he includes in that statement reference to various different bill of lading notations, then the statement is somewhat insignificant in that its content is self-evident.

5.2.5. International Conventions

This, so far, is the state of the common law in England, America and France. What, then, is the attitude of the international transport conventions? Both the Hague Rules, the CIM and the CMR include a defence of insufficiency of packing. None, however, dwells in any direct way on the details of that defence, on whether it is an 'absolute defence' or whether it can be forfeited by the carrier's action or, something of greater interest here, his omissions in the face of knowledge of the insufficiency. Yet, there are some strong hints in the text of the conventions as to the intentions of their authors.

1) The CMR

Consider, for instance, CMR article 10:

'The sender shall be liable to the carrier for damage to persons, equipment or other goods, and for any expense due to defective packing of the goods, unless the defect was apparent or known to the carrier at the time when he took over the goods and he made no reservations concerning it'.

This, of course, applies only to the carrier's action against the sender. But compare this to the language applied to the defence of defective packing, art.17(4)(b). The drafter's complete silence in the latter on the matter of carrier's knowledge raises the impression that such knowledge was meant to be deemed irrelevant.

The same impression arises when comparing article 10 to the general rules on consignment note reservations embodied in articles 8 and 9. The lack of reservations despite the apparentness of the defect is fatal in the carrier's action against the shipper according

to art.10. And yet, art.9(2)³² implies that in the 'normal' cargo-owner v. carrier action the carrier is still allowed to prove that the goods appeared to be in bad condition when the carrier took them over. Now, it logically follows that the bad condition of the goods and their packaging is still a valid defence available to the carrier even if it is apparent; otherwise there would have been no point in allowing the proof of 'apparent bad condition', as was done in art.9(2).

2) The CIM

The CIM's attitude is less clear. There the only clue to the solution of our problem is the construction of art.12. Paragraph 2 of that article, discussed in detail earlier,³³ requires the sender to pack goods which need packaging. Paragraph 3 gives the carrier the right to refuse goods which were not properly packed or to require the sender to acknowledge the consignment note. Now, it could be argued that, since only these two alternatives were mentioned, a third, (viz. that the carrier may carry the defectively packed goods at shipper's risk as to the consequences of that defect, without the defect being mentioned in the consignment note), was excluded. But paragraph 4, similarly to art.9(2) in the CMR, indicates that the absence of a reference in the consignment note to the defect in packing only shifts the burden of proving that defect to the railway. However, this analysis does not justify firm conclusions, and in absence of judicial interpretation one prefers to leave the matter open.

32. 'If the consignment note contains no specific reservations by the carrier, it shall be presumed, unless the contrary is proved, that the goods and their packaging appeared to be in good condition when the carrier took them over'.

33. See section 4.3.1., supra.

3) The Hague Rules

The Hague Rules are completely silent as far as the present problem is concerned. The defence of insufficiency of packing is embodied laconically in art.4(2)(n), and art.3's provisions on the B/L notations offer no solution to the problem. It is not surprising, therefore, that even among the small number of cases dealing with our problem as it relates to the Hague Rules there exist two different views.

In Bruce Mills v. Black Sea Steamship Co.³⁴ the Canadian Federal Court refused the carrier the defence of insufficiency of packing because that insufficiency was apparent on delivery to the ship and could easily have been discovered, had the Captain taken the opportunity to check the cargo and its packaging. In so doing the court apparently implied an unwritten restriction to the scope of the defence in art.4(2)(n). The American court in Wolff v. Exiria,³⁵ on the other hand, refrained from making such an implication. On the contrary, that court asserted that the older doctrine of American common law, depriving carriers of the defence of defective packing where the defect was apparent, had lost its strength due to the enactment of COGSA 1936. None of these cases goes into greater detail in explaining their attitude to our particular problem, and justifiably so. The complete silence of the Rules on the matter leaves any commentator with little to say about it beyond expressing a personal intuitive view. Basically, the answer depends on the commentator's view on the nature of the Rules. If they are to be read as a free-standing independent statute, then art.4(2)(n)'s laconic language may be interpreted as constituting an absolute

34. [1973] F.C.387 (Can.Fed.Ct.Tr.Div.).

35. Supra,^{n.24} p.116.

defence, always available to the carrier. The present writer's preference, however, is for the doctrine which places the Hague Rules within and against the background of the common law which gave rise to the principles embodied in them. It is believed, therefore, that similarly to the introduction into the Rules of the carrier's negligence as an unwritten restriction on art.4(2)'s defences,³⁶ it is legitimate to read into the defence of insufficiency of packing a restriction based on the apparentness of the insufficiency, at least in the common law systems which recognize that restriction outside the Rules.

5.3. Responsibility for the Consequences of defective loading and stowage

5.3.1. General

The fundamental principle in both English, American and French law is strikingly simple: The primary responsibility for the consequences of faulty loading and stowage falls on the party who performed the operation and committed the fault.¹ Yet, as mentioned more than once earlier, this falls far short of a correct description of the law on the matter. It is the theoretically secondary duty of inspection which dominates the scene in many cases, and it is this duty which will occupy the greater part of the following analysis.

The dilemma which presents itself in the present connection is similar to the one discussed in connection with the subject of packing, but it is more acute here.² On the one hand the argument can be

36. See Scrutton, pp.435-7, and references in note 2 p.437, esp. Silver v. Ocean Steamship Co. [1930] 1 K.B.416,435.

1. There are innumerable authorities, direct and indirect for this principle. For example in each of the legal systems mentioned, see Pyrene v. Scindia [1954] 2 Q.B.402,417-8; South Carolina Asparagus Growers Ass'n v. Southern Ry.Co., 46 F.2d.452(4th.Circ.1931); Rodiére, Gén.Trans., para.628, vol.2, p.250.

2. See the uncharacteristically lengthy discussion of the public policy aspects of this dilemma in an American decision: Alabama & Ry.Co. v. American Cotton Oil Co., 249 F.308(5th.Circ.1916). See also Hershel Radio Co. v. Pennsylvania Railroad Co., 344 Mich.75, 73 N.W.2d. 319(1955).

advanced that a man should be responsible for his acts and omissions; that a shipper who carries out an operation of loading and stowing should do so carefully and properly. On the other hand, it could be argued that the vessel/vehicle is the carrier's domain; that he has the greater know-how in matters concerning loading and stowage and, while for economic reasons it may be sometimes better that the work should be performed by the shipper, there still remains a professional responsibility with the carrier for the quality of the work.

5.3.2. American Law

The intricacies of the balance between these two arguments have been the subject of a considerable number of decisions in the United States, forming a body of rules and exceptions, the knowledge of which may well be the key to solving the special legal problems of container 'stuffing'.

The basic doctrine on the subject in American law appears to be the rule of Thomson v. Chicago M.& St.P. Ry.,⁴ put similarly in McCarthy v. Louisville & J.R.Co.:⁵

'If the improper loading by the consignor was apparent - that is, was a fact which addressed itself to the ordinary observation of the carrier's servants ... the carrier would be liable'.

In earlier days there appeared in American law a constant trickle of cases which advocated a different view⁶ in varying degrees of emphasis,

4. Supra, n.22, p.115.

5. 102 Ala.193,14 So.370,372(1893). See also American Cotton Oil v. Davis,129 Wash.24,224P.23,25(1924); Hines v. Buchanan,131 Va.88, 109 S.E.219,225,(1921); Central of Georgia Ry.Co. v. Griner & Rustin,33 Ga.App.705,127 S.E.878,881(1925).

6. See, e.g., Ross v. Troy & Boston RR.Co.,49 Vt.364,370,24 Am.R.144 (1877); St.Louis - San Francisco Ry.Co. v. Glow Electric Co., 35 Ohio App.291,172 N.E.425,429,(1929); Robinson v. New York Central Ry.Co.282 N.Y.S.877,879,(1935). It is not always clear, however, whether these and similar cases advocate an opposite view to the one cited from McCarthy v. Louisville, or whether they belong to one of the recognized exceptions to the rule discussed below.

but the weight of decisions in recent decades seems to rest with the 'ordinary observation' rule (as it will be conveniently called hereafter), even if most of these decisions give more attention to the exceptions rather than to the rule itself.⁷

What, then, is 'ordinary observation'? What is the nature of the 'inspection' mentioned in Thomson v. Chicago? Needless to say, the rule as a whole is of little significance if its main element cannot be confined to some predictable limits. Yet no serious attempt to do so is made in any of the reported American decisions, and it is mainly by looking at the outcome of all these decisions that a general picture emerges with some clarity.

Let us start by a process of elimination. Not only are carriers not expected to break seals, but they are not expected to open closed vehicles at all in order to inspect the loading and stowage; quite possibly they are not even expected to enter for that purpose a vehicle which has not been closed.

In Hines v. Buchanan⁸ a pre-loaded railway-wagon was delivered to the carrier unlocked and loaded in such a way as to leave enough vacant space to enable the wagon to be entered and its contents inspected. However, the court did not consider the imperfect loading 'manifest to ordinary observation'. The criterion which the Virginia court advocated instead, depended on that which could be seen by the carrier's agent as he 'walked by the car'.⁹ If this

7. These decisions will be specifically mentioned in connection with the exceptions in notes 10,17,20,23,25 below. One decision which should be mentioned here is U.S. v. Savage Truck Line Inc. 209, F.2d.442(4th.Circ.1953), cert.den. 374 U.S.952. This unambiguous language ('... if the improper loading is apparent the carrier will be liable notwithstanding the negligence of the shipper', p.445), coming from a court ranking high in the American system is perhaps the most important single authority in favour of the 'ordinary observation' rule. See also Modern Tool Corp. v. Pennsylvania Ry.Co., 100 F.Supp.595(D.N.J.1951).

8. ~~131 Va.88~~ 131 Va.88, 109 S.E. 219(1921).

9. Ibid. at p.225.

criterion prevails then the following decisions become self-evident: A shipper who blocked the only access to the interior of a reactor loaded and secured by him, cannot argue that the carrier should have inspected the bracing, as this could be done at that stage only by entering the reactor;¹⁰ and when goods were delivered to the carrier already loaded in wagons with closed doors 'so that without opening the doors the condition of their contents could not be seen', an Alabama court decided there was 'no duty on [the carrier] to open the cars and inspect their contents'.¹¹ Other cases, speaking somewhat more vaguely about 'such visual inspection as the carrier is able to make',¹² or of 'casual inspection',¹³ do not seem to change this basic impression of the principle embodied in the 'ordinary observation' rule: Carriers are only expected to observe that which can be observed with the minimum of special effort on their part. Walking beside the car, or at the most looking at its interior when this entails no active effort other than simply entering the open car is all that is required. No element of professional superiority, or of the carrier's better ability to judge the quality of the stowage, could be discovered in these decisions and it could be generally maintained that the 'ordinary observation' rule still leaves a considerable part of the responsibility for the consequences of the loading and stowage operations with the shipper who performs them.

Another question in this connection relates to the identity of the observer in the 'ordinary observation' rule. In South Carolina Asparagus Growers Ass'n v. Southern Ry.Co.¹⁴ the consignor overloaded

10. Standard Brands Chemical Industries v. Pilot Freight Carriers, 319 N.Y.S.2d.457(1971).

11. McCarthy v. Louisville, supra, at p.372.

12. Lincoln Farm Products v. The Central R.R. Co. of New Jersey, 81 N.J.Super.161,195 A.2d.200,205(1963).

13. Central of Georgia v. Griner & Rustin, 33 Ga.App.705, 127 S.E 878, 887 (1925).

14. 46 F.2d.452(4th.Circ.1931).

a refrigerated wagon in a manner which resulted in damage to the consignment. The consignor offered evidence that the carrier's agent was aware of that error, but the evidence was rejected, and the carrier exonerated from responsibility:

'Mere knowledge on the part of the local agent of the carrier of the negligent manner in which the shipment had been packed could not impose liability for the negligence on the carrier'.¹⁵

Had this decision stood alone it could have been dismissed as merely one more in the series of decisions which did not adhere to the 'ordinary observation' principle as a whole.¹⁶ Indeed, a later decision by the Second Circuit Court of Appeals quoted the Asparagus Growers case as an authority for its ruling that the carrier did not have a duty to warn the shipper of a considerable risk involved in loading the particular wagon involved there, even if the carrier knew of the risk. But the same ruling viz., that an agent's knowledge of negligent loading cannot be imputed to the carrier, was repeated in two recent cases,¹⁷ both of which did accept the 'ordinary observation' principle in general, and if this trend continues there will arise a need for a clearer understanding of the exact meaning of the Asparagus Growers rule.

15. Ibid., at p.454.

16. The reasoning of the decision revolves round the argument that the consignor undertook the loading and that '[t]he agent did not attempt to undertake on behalf of the carrier the responsibility of proper loading'; *ibid.* This, of course, is irrelevant to the 'ordinary observation' rule which comes into operation only when the primary responsibility is the consignor's, not the carrier's, and then imposes a secondary, inspective responsibility on the carrier without any need for such latter responsibility to be specifically agreed upon by the parties. Had the contract in this particular case explicitly exonerated the carrier from such responsibility, the matter would have been different, but there is no reason to believe that this was so. Note also that the court relied heavily on Ross v. Troy,^{7, 8, 12} *Supra*, which advocates absolute liability of the shipper for his own loading.

17. Minneapolis, St.P. etc. v. Metal-Matic, 323 F.2d. 903 (8th.Circ. 1963); Ass'n of Maryland Pilots v. The Baltimore & Ohio R.R. Co., 304 F.Supp.548 (D.Md.1969).

Theoretically, the Asparagus Growers rule can be made compatible with the 'ordinary observation' rule by explaining the former on the basis of the scope of agency of the 'local agent'. Anglo-American law recognizes a number of restrictions on the imputation of agents' knowledge to their principals, depending mainly on the nature of the agent's authority.¹⁸ However, neither in the Asparagus Growers, nor in the other two cases mentioned above,¹⁹ was it explained what restrictions on the authority of the 'local agent' in question prevented the imputation of his knowledge on the carrier and, generally, it is difficult to see how in fact such restrictions apply to an agent vested with the authority to receive the goods on behalf of the carrier.

Where, as in Yeckes-Eichenbaum v. Texas Mexican Ry.Co.²⁰ the agent is expressly and specifically charged by the carrier with the task of professionally inspecting the goods in the wagons, no doubt can be raised as to whether or not the agent's knowledge should be imputed to the principal. But such a clear-cut situation represents the optimal rather than the minimal requirements as far as our present issue is concerned. 'Local agents' may be vested with very limited authority, but if this includes receiving the goods for transportation it is difficult to see how the principal can be heard to argue against a third party that facts relevant to the mutual responsibilities of the parties, observed by the agent in the course of carrying out the task, are not to be considered as being within the principal's knowledge. Whatever duties the carrier has in connection with the observation and inspection of the goods, they are incidental to, and part of the legal act of receiving the goods, and

18. See The American Law Institute, Restatement of the Law of Agency 2d., para.272; G.H.L.Fridman, The Law of Agency, 4th ed. (London,1976),269-271.

19. Note 17, supra.

20. 165 F.Supp. 204 (S.D.Texas,1957), rev'd on other grounds, 263 F.2d.,791.

if the carrier chooses to perform the act by an agent, these duties lie within the latter's province, unless there exists a specific agreement to the contrary.

If this is true as to receiving agents in general, it is also true as to the actual drivers of the vehicles sent by the carrier to the shipper's yard for loading. In many cases they are the only ones of the carrier's employees to see the goods before they are shut up behind doors and seals. Thus the drivers often hold a key position in the realm of responsibility for pre-shipment operations. Does the 'ordinary observance' test apply, then, to the time prior to the closing of the doors, when there is a driver on the spot capable of observing? And should the driver's knowledge of defects acquired at this stage be imputed to the carrier? The answers to both these questions should normally be affirmative, although this can be stated with greater certainty with regard to the second. In the usual course of events, placing the goods on the vehicle brought to the shipper for that purpose, amounts to the act of delivery to the carrier,²¹ and of all the legal and factual aspects of the act, the ones about which the driver is usually the most knowledgeable and professionally trained to judge are the quality of the loading and stowage.²² It would thus be quite exceptional for a carrier to succeed in convincing a court that knowledge as to the defects in loading and stowage acquired by the driver at this stage can be considered as having

21. See O.Kahn-Freund, The Law of Carriage by Inland Transport, 4th ed. (London, 1965) 312-3.

22. See a decision of the Supreme Court of Austria, 25.10.68, [1973] E.T.L.309, as to the driver's professional skill. The decision as a whole, however, imposes on the carrier, through his driver, a greater responsibility for shipper-performed loading and stowage, than described here.

been acquired outside the scope of the driver's duties.²³

Yet, while one feels certain about the position when knowledge has been subjectively acquired, one is less sure about how the objective 'ordinary observance' test is to be applied to drivers in shippers' yards. Is the driver expected to be present and observe during the whole process of loading and stowage, or does he only have to take a cursory look at the already stowed cargo before the doors are closed? That all depends on the circumstances of the case is one answer, but a more honest one is that this is an open question which may become increasingly acute, and thus receive increasing attention in connection with containers, as will be explained later.

The final matter which requires attention in connection with the 'ordinary observance' rule at the present stage is that of the seal. As was mentioned earlier, it is enough for the vehicle's doors to be closed to relieve the carrier from the duty of inspecting the interior. A seal, however, goes one step further, to the point of an active representation:

'A shipper who uses any device to seal a trailer indicates to a carrier that the cargo was properly loaded; that the goods are in good order and the carrier is not obliged to inspect the cargo'.²⁴

A more radical, but not at all unjustified, view is that the seal

23. See Wayne Knitting Mills v. Delta Motor Lines, 52 Tenn.App. 164, 372 S.W.2d. 419 (1962), where the carrier was charged with knowledge of improper bracing of knitting machines, performed by the shipper and observed in an examination carried out by the carrier's employee before the trailer was closed and sealed. See also U.S. v. Savage Truck Lines,^{n.7, p.123} *Supra*, where the driver checked the cargo of airplane engines, was not satisfied with its stowage by the shipper, but failed to take any action. The driver's knowledge and neglect were imputed to the carrier.

24. Blue Bird Food Products Co. v. Baltimore & Ohio Ry., unreported (E.D.Pa.1973), as quoted by the appeal court, 492 F.2d.1329, 1332 (3rd.Circ.1974).

has the effect of forbidding the carrier to break it and open the doors for ordinary inspection.²⁵ At any rate, it is abundantly clear that when goods are delivered to carriers only after they were sealed inside a vehicle or container, there lies with the shipper an almost absolute responsibility for the loading and stowage operation; the carrier's duty is only to observe that which can be seen from the outside, and this amounts, where modern trailers, railway wagons and containers are concerned, to very little indeed.

5.3.3. English Law

The silence of English law on the matters discussed in the foregoing analysis stands in sharp contrast to the abundance of American cases of which only a few have been mentioned. There seems to be no reported English decision on whether the basic principle that a shipper is responsible for his own faults is tempered by some notion of carrier's responsibility by inspection.

There exists a well established rule about the opposite situation. When the shipper has the opportunity to watch the manner of stowage, as performed by the carrier, the shipper cannot complain of the consequences of patent defects in the stowage.²⁶ An analogous principle relating to the situation discussed here, namely apparent defects in stowage performed by the shipper, recommends itself both on the grounds of legal consistency and of equity, but it is impossible to point to any decision saying so in the context of carrier-shipper relations.

25. See Pilgrim Distributing Corp. v. Terminal Transport Co. 383 F.Supp.204(S.D.Ohio 1974). The reference to lack of authorization to break the seal is made here specifically in connection with a customs seal, but it is believed that the same principle applies also to shippers' seals.

26. Scrutton, art.87,p.167, and references in note 8 therein. The more so, of course, when the shipper insists on the manner of stowage despite the Master's warning. Ismail v. Polish Ocean Lines, [1976]1 ALL.E.R.902.

There exists a large number of decisions relating to our present issue in connection with contracts of charterparty. A frequent source of dispute there²⁷ involves the question of whether the stevedores who actually performed the loading and stowage operation did so as the shipowner's servants or as the charterer's. There is a marked tendency in these decisions to attach the whole of the responsibility for the consequences of negligence in the performance to the party whose servants the stevedores are declared to be, and this despite a clear effort on the part of the charterers and owners to share the duties and responsibilities and make loading and stowage a joint operation to which each party contributes some fixed portion (know-how, instruments, physical work or money). The direct consequence of this to our present issue is that where the charterer does undertake the loading and stowage, and in fact performs it, there is no residual responsibility left with the owner, at least in his relations with the charterer. Canadian Transport Co. v. Court Line²⁸ supports this contention. There a cargo of wheat was negligently stowed by the charterer, and damaged as a result. A clause in the charterparty to the effect that 'charterers are to load, stow, and trim the cargo at their expense', was given full weight, and an express proviso that this should be done 'under the supervision of the captain', was given the odd interpretation that it only conferred on the master the right to supervise, not the duty to do so.²⁹ Needless to say, if this ruling is correct, then no such duty

27. See Carver, para.685-7, pp.591-4: Scrutton, art.87, pp.168-171, and the numerous cases mentioned in both books.

28. [1940] A.C.934.

29. In Ismail v. Polish Ocean Lines,^{n.26} supra, there appears to be a tendency to give a similar clause a more natural interpretation, viz. that the master is responsible for the stowage of the cargo 'so as to ensure its ability to withstand the ordinary incidents of the voyage' (at p.907, per Denning, M.R.). But the case turns on its special circumstances, namely that the charterer's agent insisted on the manner of stowage, and that the cargo was not properly packed and ventilated.

exists when the contract does not mention any supervision by the master at all.

However, it is very rare indeed that a contract of charterparty would dominate the shipment of containerised goods, and the question arises whether the conclusion suggested in the previous paragraph applies to the relations between shipper and carrier, governed by a bill of lading. It is believed that such an analogy should be made with the greatest caution. The whole concept of a shipper-charterer generally implies greater control over the performance of the transport operation than that of a 'normal' shipper, and it is doubtful whether courts would be equally ready in the latter connection to exempt a carrier from all responsibility for the consequences of an operation performed by the shipper, including the residual responsibility for obvious defects.

5.3.4. French Law

French law, if Rodière's account of it is to be taken uncritically, is the most explicit and systematic of the three systems surveyed here.

Its first principle as far as the present problem is concerned is the clear distinction between maritime law and the law relating to other modes of transport. Whereas in carriage by land the operations of loading and stowage fall sometimes on the shipper, sometimes on the carrier, thus giving rise to the question of carrier's inspection of shipper's performance, the law of carriage by sea is emphatic in always imposing these operations on the carrier. As a result, the possibility of loading and stowage performed by the shipper is completely ignored by Rodière, and together with it, of course, the secondary legal questions arising from such a course of action.³⁰

30. Note that this is expressed in a more positive manner in Rodière, Préc.Trans., para.162, p.173, where the author indicates that the stowage of vessels does not involve the question of a post facto inspection because it is mandatory upon the carrier to take an active part in the operation itself.

What, then, is the position of the law of carriage by land? Firstly, when the operation of loading and stowage falls on the shipper, and it is performed negligently, this negligence is a 'fait de l'expéditeur', the results of which the latter cannot blame on the carrier.³¹ Secondly, this principle is mitigated when the carrier has an obligation to inspect the shipper's performance. It is not quite clear, however, whether the fact that the defect should have been observed by the carrier shifts the whole of the responsibility for the damage to the carrier, or whether it only leads to a division of the responsibility between carrier and shipper, which seems, to Rodière as well as the present writer, but not to all French courts,³² the more equitable solution. Thirdly, the duty to conduct an inspection is now recognized as existing in all modes of carriage by land. In rail transport this duty exists by virtue of a specific rule in the General Conditions.³³ 'Dans les autres transports' writes Rodière³⁴ 'il faut rechercher si la convention ou les usages faisaient au voiturier obligation de vérifier l'état du chargement', which was recognized, according to the writer, for road transport by the Court of Cassation in 11.2.1958.³⁵ In fourth place one comes to the scope of the inspection required of the carrier:

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31. Rodière, Gén.Trans., para.916, vol.2, p.494; Rodière, Préc.Trans. para.232, p.232.
32. Rodière, Gén.Trans., para.917, vol.2, p.495; Rodière, Préc.Trans. para.232, p.233, note 2.
33. Conditions Général d'Application de Tarifs pour les Transport des Marchandises, art.13.
34. Gén.Trans., para.917, p.496.
35. Rodière, Gén.Trans., Mise a jour, para.917. The original decision itself was not available to the present writer. See also Paris Court of Appeal, 16.5.69., [1969] E.T.L.896. Tribunal of Commerce of Corbeil-Essones, 18.4.69., [1969] E.T.L.988. See also the mandatory allocation of duties in the carriage of cargo weighing more than 3 tons over more than 100 kms.

'Au moment de la remise au chemin de fer ... des wagons chargés et bâchés ... par les expéditeurs, il est procédé à la reconnaissance du chargement et du bâchage tant au point de vue de l'observation des règlements que ^{de} la conservation de la marchandise, dans la mesure où cette reconnaissance peut être faite de l'extérieur du wagon, tel qu'il est présenté par l'expéditeur'.³³

The basic principle of the inspection rule, then, is the same as in the equivalent rule in American law, namely that the inspection need only be external. The meaning of this is further explained by the Court of Cassation in its ruling that the inspection should be conducted

'en restant dans une position normale sur le quai de départ sans que l'agent de la compagnie ait à monter sur le wagon ou à prendre telle autre mesure pour vérifier l'état du chargement'.³⁶

The criterion for road transport is basically the same.³⁷ It includes only the exterior and applies only to defects which are visible without disturbing the stowage in any way.

Two cases would help illustrate these principles:

In the Paris Court of Appeal decision of 18.11.29,³⁸ it was argued by the carrier that a grinding machine was not properly lashed and secured by the consignor to the wagon on which it was loaded. The court rejected the argument, but added that the carrier would not have been exonerated in any case because:

'l'examen extérieur du wagon sur lequel le broyeur avait été placé eût incontestablement permis aux agents de la gare

36. Court of Cassation, 21.6.1939, as quoted in Rodière, Gén. Trans., para. 617, p. 244, note 1.

37. Rodière, Préc. Trans., para. 162, p. 233.

38. Gaz. Pal., 1930.1.253.

expéditrice de s'apercevoir des defectuosités du chargement si elles avaient existé'.³⁹

The same court decided in 3.6.31,⁴⁰ that, as the cargo was stowed on an open wagon the sides of which were not so high as to prevent the cargo being seen, the carrier should have discovered by a mere external inspection the otherwise exonerating fact that the cargo was not properly cushioned and dunnaged by straw or hay.

The whole structure of principles described above on the basis of Rodiere's work rests on the assumption that the primary responsibility for the loading and stowage falls on the shipper. However, in France, where mandatory statutes and tariffs exist, it is not enough to look at the parties' agreements or to the identity of the party who executed the operation to discover on whom this primary responsibility falls. In a Court of Cassation decision of 8.6.71,⁴¹ a 20 ton machine was negligently stowed and secured by the shipper to the carrier's trailer. Yet the applicable mandatory tariff⁴² imposed this operation on the carrier, 'avec toutes les conséquences de droit', and the fact that the shipper carried it out was deemed totally irrelevant. The responsibility which falls on the carrier in such a case is the primary one, not the responsibility-by-inspection described earlier, the difference being that while the latter's requirements are satisfied by a cursory external inspection the former is only satisfied by proper stowage.⁴³

39. Ibid. at p.254. See for almost identical words Court of Appeal of Paris, 13.4.1931, Gaz.Pal., 1931.2.41.

40. Court of Appeal of Paris, 3.6.31., Gaz.Pal., 1931.2.427.

41. J.C.P., 1971.2.16899.

42. Conditions Générales d'Application des Tarifs Routiers, art.4.

43. See for another example of such primary responsibility the Tribunal of Commerce of Brussels' decision of 26.10.72., [1973] E.T.L.516. No mandatory duty was involved there, but the carrier charged the shipper for the 'chargement chez le client', and thus waived his right to rely on the fact that the shipper carried out part of the operation either by active work or by instructions.

5.3.5. International Conventions

There remains to be dealt with in the present connection the international transport conventions. Can a shipper who loads and stows his own cargo for a journey governed by the Hague Rules, the CIM or the CMR, count on some inspection of the operations to be conducted by the carrier, or is the shipper absolutely responsible for all his faults? The actual language of the specific exoneration provisions in the CIM⁴⁴ and CMR⁴⁵, and the more general 'shipper's act' provision in the Hague Rules,⁴⁶ seem to favour the second alternative. The CMR, for instance, simply exempts the carrier from liability when the damage arises from the consequences of 'handling, loading, stowage or unloading of the goods by the sender', without tempering the absoluteness of the exemption with any hint of a duty to inspect. Furthermore, although the CMR and Hague Rules deal extensively with the contents of the respective transport documents mentioned in them, and the details the carrier has to inspect for himself, none mentions the quality of loading and stowage as an element which should be thus checked.⁴⁷ If, however, it is to be argued that 'the apparent condition of the goods' includes, by implication, their manner of stowage when they are delivered to the carrier already stowed, then it should be remembered that both conventions allow the carrier, where no reservations are made, to prove the 'apparent bad condition' of the goods by positive means.⁴⁸ This indicates that the carrier is not responsible for the bad condition of the goods and their pre-delivery stowage, even if such a condition is apparent.

44. CIM art.27(3)(c).

45. CMR art.17(4)(c).

46. Hague Rules art.4(2)(i).

47. CMR arts.6,8; Hague Rules art.3(3).

48. CMR art.9(2); Hague Rules art.3(4).

However, this analysis of the international conventions, at least in its second part, is much too speculative, its premises too uncertain to justify a firm conclusion on the matter. Other arguments, specific to each of the conventions do not lead to any firmer conclusions, and it was felt that mentioning them would not have added to the discussion. On balance, it is thought that there is enough room left in these conventions to be filled according to the spirit of the common law prevailing outside the specific convention. Thus, the same question, namely whether the consignor alone is responsible for the consequences of bad stowage performed by him according to the CMR, was answered positively by a French court in 1965⁴⁹ and a Belgian court in 1969,⁵⁰ whereas a Dutch court⁵¹ decided in 1973 that the carrier was required to inspect the stowage.

49. Tribunal of Commerce of Namur, 22.7.65, [1969] E.T.L.1039.

50. Tribunal of Commerce of Antwerp, 4.3.69, [1969] E.T.L.1030.

51. An Arnham Court, 27.11.73, [1974] E.T.L.748.

6. 'STUFFING' CONTAINERS - APPLICATIONS
AND CONCLUSIONS

Earlier in this chapter the assertion was made that containerisation has brought about a major shift in the realm of carriage of goods, from the point of view of allocation of liability between carrier and shipper. The container affords the opportunity for better efficiency in protecting the goods against the hazards of transportation in that the environment created inside the container before shipment predetermines, to a higher degree than ever possible before, the environment encircling the goods during transit, its atmosphere, the pressures it generates and its protective element. But this is not to say that containers are inherently safer for the carriage of goods than traditional modes of carriage. A badly prepared and 'stuffed' container will carry within its walls the seeds of disaster throughout the journey, there being very little chance of discovering the hazard after sealing the doors, and the chances of such a disaster occurring are much higher and its potential dimensions much greater in such circumstances than in ordinary methods of transport. This means that most of the professional know-how about the intricate task of cargo-protection must be concentrated in one place, at one time, namely at the time and place of 'stuffing' the container. It is only too obvious therefore, that legal responsibility will tend to concentrate in precisely this time and place, the potentially richest source of negligence and error. In an ideal container operation the place is the shipper's yard, the time the period before delivery to the carrier, and as a result, cargo protection would become almost exclusively the business of shippers (and their insurers). The aim of the foregoing analysis was twofold: To show, 1) that there was no legal obstacle preventing the maritime industry from foisting the task of 'stuffing' on shippers, and 2) that once shippers took on this task the legal consequences would be as drastic as described above.

In the part dealing with mandatory duties it was shown that, whether classified as 'packing' or as 'loading', the operation of 'stuffing' can quite legitimately be undertaken by the shipper, both international conventions and local statutes leaving the parties with the freedom to decide on the matter.¹ Where the Hague Rules or the CMR apply, however, it was asserted that the obligation as to the fitness of the container itself falls mandatorily on the carrier when the latter supplies it.²

The second part of the chapter attempted to show the consequences of the shipper's undertaking to 'stuff' the container. Whatever the unresolved questions in this part, one principle dominated, namely that whoever undertakes an operation on his own behalf (not merely putting his labour-force, etc. at the service of the other party), bears the primary responsibility for the consequences of the operation. 'Stuffing', therefore, is legally within the shipper's responsibility when he performs it. Any error in securing the goods in the container, dunnaging, distributing, mixing, ventilating, or any other error which results in damage to the goods, in whatever stage of transit, and whatever the applicable law, is basically the shipper's error and his responsibility.

What, then, is the role of the carrier's inspection rules discussed in this part?

It should be observed at the outset that even when it is greatest, i.e. under the American and French rules on loading, the carrier's subsidiary responsibility is restricted to those defects which can be observed externally.

1. With the one possible exception of the French mandatory conditions on road transport exceeding 150 km. and 3 tons, discussed in pp.101-3, supra.

2. For the exception to the rule see p.70, at n 56, pp.87-89, supra.

The common ocean container is a rectangular metal box. Different containers have different openings; while the majority of them are equipped with twin rear doors, others have side doors and some are even open-topped or open-sided. Yet, the overwhelming majority of containers travel in a manner which renders their interior and contents completely invisible, since doors are closed and sealed, and 'missing' walls and tops are tightly covered with resilient materials.

There is not the slightest doubt that, when it is in this condition that the container is first put into the hands of the carrier and his receiving agents, existing law practically absolves the carrier from any meaningful responsibility in respect of all aspects of loading and stowage within the containers.

None but the most exceptional errors of stowage are visible from the exterior of the common sealed container, and as repeatedly emphasized in the present work, not even the widest interpretation of the responsibility-by-inspection rule requires a carrier to do any of the things which would reveal the interior of a container. Not only is the carrier not required to break the door's seal in order to inspect the contents, but in all probability to do so would be a breach of contract. Moreover, as the law stands now, carriers are not even required to open non-sealed doors, nor do they have to uncover other openings in the container. And if the 'worker walking alongside car'³ test is to prevail, even the required external inspection is very limited in nature.

It can, therefore, be stated that there are two types of container-transport operations which do not give rise to any serious

3. Supra, pp.123,133.

difficulty as far as internal stowage is concerned, namely 1) cases in which the carrier becomes involved in any way in the transport operation only after the container was prepared for shipment and closed by the shipper, in which case the carrier is exonerated from responsibility for damage resulting from erroneous stowage, and 2) cases in which the goods are delivered to the carrier in their traditional packing, leaving it to the carrier to containerise them, in which case, of course, the carrier is solely responsible for the consequences.⁴

This leaves us with one contentious situation, namely that arising when an empty container is driven into the shipper's yard by the carrier's employee or agent to be loaded by the shipper's workers and taken away afterwards by the carrier. The time before the closing of the container represents the only opportunity for a carrier, through his servant, to observe a shipper-performed stowage and discover errors in it; must he take this opportunity?

Now, the term 'opportunity' used here requires clarification. Firstly, it is used not in the physical sense but in the legal one. After the container is covered and closed the carrier will still have the physical opportunity to open it, but the existing law exempts him from any duty to do so. Secondly, whether or not an 'opportunity'

4. This latter type of operation was not discussed earlier in the text beyond the general remark that it is generally of little interest to this work, in that containerisation of this type is more a private affair of the carrier, a means chosen by him for fulfilling his obligations, whereas a container stowed by the shipper, or by a joint shipper-carrier effort, has far-reaching effects on the contract of carriage. See *supra*, p.109.

to check and observe exists depends primarily on the circumstances of the case. Thus, for instance, when the empty container is brought by the carrier's driver to the shipper and, as the work of 'stuffing' requires a long time, the driver detaches the traction unit, drives away and returns the next day to collect an already 'stuffed' and sealed container, no 'opportunity' to check exists. Another way of putting this is that no possible extension of the existing law can be interpreted as obliging the driver (or rather his employer), to spend costly labour hours on passive observation⁵ of the work in progress, nor does the law oblige the driver to rush back to the shipper's yard to be present before the closing of the doors.

The gist of the 'ordinary observance' test, both in America and in France, one would think, is its casual or rather incidental nature. True, in all the decisions discussed earlier in this connection there is a strong undercurrent conveying the need for minimal efforts at inspection. The external nature of the inspections is one side of that characteristic, but the other side of it, which is more important in the present context, is that the inspection is to be conducted at a time and place convenient to the carrier. In France, in conventional rail-transport, this takes the form of prescribing

5. Needless to say, unless the carrier agrees to it, the shipper is not entitled to any active participation of the driver, or indeed any other of the carrier's employees, in the 'stuffing' at the shipper's yard. Note that the greater the part played by carrier's employees there, the greater the chances that the primary responsibility, not only the responsibility-by-inspection, would be transferred to the carrier. When it is agreed between shipper and carrier, for instance, that 'stuffing' will be carried out by the shipper's workers, under the control and supervision of the carrier's 'stuffing' expert, who will remain at the shipper's yard with the containers, the responsibility for the quality of 'stuffing' must be the carrier's.

this time as the 'moment of delivery to the carrier'.⁶ American case-law does not prescribe such a precise moment in an express manner, but all the decisions mentioned earlier⁷ indicate a rather similar attitude. The inspection is, if not part of, at least closely related in time and place, to the process of delivery by the shipper and acceptance by the carrier. It is this concept, it is suggested, that should dominate the present discussion.

So when does delivery to the carrier occur in container operations? No particular problem arises when the 'stuffing' is left to be performed by the carrier himself. The relevant delivery is that of the uncontainerised goods to the carrier or his agent.⁸ The latter sort of operation, namely delivery of loose packages to an agent, has now become common as many container operators arrange for the goods to be 'stuffed' by independently incorporated firms. It is submitted that when a carrier instructs a shipper to deliver his goods to such a firm, which would then 'stuff' the goods and transfer the container to the carrier without any further duty on the shipper to notify the carrier of the availability of the cargo, delivery to the

6. See n.33,p.132, supra. Note that article 13 also prescribes the place of inspection, namely the rail station of departure, or the private sidings, as the case may be, but this should not affect the present issue. The statutory provision applies to traditional rail transport, and these places are the traditional ordinary places of delivery and receipt of loaded wagons. One does not think that art.13 itself applies to all container operations, and it was brought only as an indication of the spirit of the law.

7. See sec.5.3.2., supra.

8. This is not to say that no legal problems may arise as to when that moment occurs, but these problems are not specific to container transport, and ought not to be discussed here.

Container Depot, Terminal or Base, as these firms are usually named, constitutes delivery to the carrier. Thus, in Norfolk Terminal Corp. v. U.S. Lines,⁹ it was stated that the delivery on the ocean carrier's instructions of 20 cartons of books to a Terminal, to be 'stuffed' there and passed over to the carrier, constituted delivery to the carrier. It was also decided there that when an empty container is supplied by the carrier to the shipper and the latter 'stuffs' it and carries it by his own means to the Terminal, again on carrier's instructions and requiring no further notice, delivery of the container to the Terminal constitutes delivery to the carrier.

This leaves unsolved the more difficult problems arising when the carrier himself, through an employee or an agent carries the container from the shipper's yard after 'stuffing' by the latter. When is the cargo delivered then? If merely placing the goods in the container constitutes delivery, surely the carrier cannot rely on the invisibility of the goods at a later stage, after the container is closed and sealed, if he had the opportunity to check before the closure. If, however, delivery occurs at any stage after the doors are closed, the carrier must be exempted from any responsibility for the condition of the stowage, at least as far as the duty to inspect is concerned. It is less certain, however, whether it could also be said that knowledge of defective stowage, subjectively acquired by, say, a driver who kept a watchful eye on the stowage operation before the moment of legal delivery, even if he was not obliged to do so, is irrelevant. The better view, it is thought, is that since only such knowledge as the carrier's servant acquired in the process of carrying out his duties is imputable to the carrier, then such subjective knowledge as described above is not imputable if it was

9. 215 Va.80, 205 S.E.2d.400(1974).

acquired before delivery, i.e. before the carrier's duty to inspect attaches.¹⁰

Let us posit three types of arrangements as to the collection of the 'stuffed' container by the carrier: 1) The container is driven into the shipper's yard by the carrier's servant for 'stuffing' by the shipper, no specific time of collection being agreed upon at that stage. 2) A generally similar arrangement, but a specific time for collection is agreed upon at some stage before the container is left with the shipper. 3) The driver does not leave the shipper's yard at all but waits for the completion of the 'stuffing' and drives the container away immediately.

1) In the first arrangement, whether or not this was expressly agreed upon, delivery does not occur before notice is given to the carrier to the effect that the container is ready for shipment and awaits collection.

To that effect we have the authority of Dugdale Packing Co. v. Atchinson T. & S.F. Ry.Co.¹¹ There the shipper loaded his goods onto one of the trailers kept by the carrier for that purpose in the shipper's yard, and, while the usual practice of the parties was for the shipper to advise the carrier to collect the loaded trailer, the train for which the trailer in this case was destined was due to depart only two days later and the shipper delayed his notice accordingly. The goods were damaged before any such notice was given and the court decided that there had been no delivery, and the risk therefore never passed to the carrier.

The analogy between the 'piggy back' transport involved in that case and container transport is only too obvious. As to the correctness of the case, it is beyond doubt. Both the specific rule

10. See p.126, supra.

11. 347 F.Supp.1276,1280-1,(W.D.Mo.1972).

on the matter of notice to the carrier,¹² and the more general rule that there is no delivery where there remains something for the shipper to do before transport can be started,¹³ give it ample support.

Of course, a trade usage, or even an established practice between the parties, may dispense with the need for such notice.¹⁴ To give a simple example, an arrangement according to which the carrier calls at the shipper's place at regular times to pick up loaded containers fits the next category of arrangement better than the present one.

2) What, then, is the significance of an agreed time of collection? Does delivery occur at that time or on completion of the 'stuffing'? The present writer prefers the second alternative.

By the time 'stuffing' is completed the shipper has done all that was required of him. Placing his goods in the carrier's container, he has accomplished his side of the transfer of possession to the carrier, namely the delivery per se. Now, the general rule is that there is no delivery without acceptance, but as shown by St. Louis etc. v. Murphy,¹⁵ acceptance is not the physical act of taking delivery, but rather the carrier's consent to carry. And if notice of readiness is a necessary element of such consent, then an arrangement which does away with such notice implies an acceptance in advance.

The majority of the Supreme Court of New York, Appellate Division, thought differently. In Avisun Corp. v. Mercer Motor Freight,¹⁶ the driver of a tractor-trailer arranged with the shipper's agent to leave the trailer on Friday to be loaded by the latter during

12. See the accumulation of cases in 22 ALR, 988-9, 1000-1, of which St. Louis, I.M. & S. R. Co. v. Murphy, 60 Ark. 333, 30 S.W. 419, is the best example on the present point.

13. 22 ALR, 974 et seq., and references therein.

14. Dunnington v. Louisville & N.R. Co., 153 Ky. 388, 155 S.W. 750 (1913).

15. Supra.

16. 321 N.Y.S.2d. 658 (1971).

the weekend, and collected on Monday morning. The majority of the court found that the theft of the trailer during the weekend, after it was duly loaded and sealed by the shipper's agent, was the shipper's risk because 'until the acceptance of the goods by the carrier there was no bailment'.¹⁷ It is suggested here that this view is unwarranted by previous decisions, and that the minority opinion is far more convincing. According to that opinion, the loading of the trailer, as agreed, and "with [the carrier's] knowledge and acquiescence, constituted a delivery to and acceptance by it. The goods were then delivered to the [carrier] 'at the place appointed or provided for their reception' and were 'ready for immediate transportation'."¹⁸

The act of delivery is performed by placing the shipper's goods in the carrier's container, whenever this is done according to an agreed arrangement with the carrier, and when no further notice is required on the part of the shipper to set the transport operation itself in motion.¹⁹

3) The same applies to the third category of cases, i.e. when 'stuffing' the carrier's containers is carried out by the shipper in the presence of the carrier's driver. Delivery is performed then by loading and stowing the goods in the container, not by any formal act performed by the driver, or by setting the vehicle in motion.²⁰ This carries two important results:

17. Ibid. 660.

18. Quoted in Avisun v. Mercer, ibid. 661, from London & L.F. Ins. Co. v. Rome, W. & O.R. Co., 144 N.Y.200, (1894). The majority judges used the same decision to support their view, picking out other fragments of ~~the~~ decision convenient to ~~their own~~ view.

19. This should be made subject to passage of reasonable time. It is unusual that collection without further notice would be fixed for any time later than a few hours or, at most, a few days after 'stuffing', but if cases of longer intervals between 'stuffing' and collection exist, they should be excepted from the rule suggested in the text.

20. See for a close analogy Sadler Bros. Co. v. Meredith, [1963] 2 Lloyd's Rep. 293, 307. ('... the carriage starts not when the movement of the vehicle in which the carriage is taking place starts, but when the goods are placed on the vehicle').

a) In the subjective plane, all actual knowledge which the driver acquired before the closure of the container's doors is, indeed, imputed on the carrier. Such knowledge should be considered as acquired during the process of delivery, and as such it is without doubt within the usual scope of drivers' authority.

b) More importantly, it is submitted that the time of 'stuffing' is the time when any objective duty of inspection attaches in the third category of arrangements.

When the arrangement is that the driver, or any other of the carrier's employees or agents, should stay with the container when it is 'stuffed' by the shipper, and in absence of any other agreement on the matter, the physical, as well as legal opportunity to observe defects in the stowage of the goods inside the container occurs while the 'stuffing' is being carried out.

What this means in practice is that, in the above mentioned situation, the driver cannot 'close his eyes' during the 'stuffing' operation, only to open them after the container is closed and sealed, and then claim that the closed door made any inspections of the interior impossible. He, and through him the carrier, had the physical opportunity to conduct the required inspection, brisk and superficial as it may be, before, not after the doors were closed, and he should have taken that opportunity.

Now, if this is true as to the arrangement described here as the third category, it should in principle, also be true as to the second, and perhaps the first ones. This is not so, however. The first two categories involve constructive, not real delivery, because the element of transfer of actual control and possession is missing, and even if such delivery is a perfectly valid one as far as, for instance, the transfer of risk is concerned, the duty to inspect

must be reserved for such time as an actual opportunity to check presents itself, according to the circumstances of each case. There is no direct authority on this point, but it is contended that it is fully supported by general principles of commercial fairness, as asserted in analogous situations.²¹

What this means is that when it is agreed that the carrier's container is to be left with the shipper for 'stuffing' by the latter without the presence of the carrier's employee or agent, no objective duty of inspection exists before the container is collected for shipment, even if delivery for other legal purposes concurs in time with the process of 'stuffing'.

The main significance of equating 'stuffing' with delivery, then, lies in the arrangement described here as the third category, but it is not without significance altogether for the second and first categories. If the goods are considered as delivered to the carrier on 'stuffing', then the containers should be considered as open to inspection by the carrier as soon as the carrier's employee or agent arrives to collect them. This is not a trivial point. Collection itself may involve a number of activities, the most common of which is the loading of the container itself onto the vehicle in cases where it was unloaded for 'stuffing'. It is conceded that it is the condition of the 'stuffed' container when the driver first arrived to collect it which matters, not its condition after, e.g., it was loaded on the vehicle. It follows then, that if the container is left open by the shipper after 'stuffing', and it is still open when the driver arrives to collect it, the latter must use the opportunity to inspect

21. An obvious example presents itself in the law of sale of goods. There, constructive delivery, such as delivery of the subject of sale to the carrier, or transfer of a B/L, does not preclude the buyer's right to reject the goods after he had an actual opportunity to examine them. See, e.g., ULIS art.38(2); UCC sec.2-513(1); Kwei Tek Chao v. British Traders and Shippers [1954] 2 Q.B.459,485-488; Chalmer's Sale of Goods Act, 1893, 17th ed. (London, 1975), by M.Mark, pp.193,195-7.

it at that point. If this is not done, the carrier cannot succeed in arguing that the driver who chose to inspect on a later occasion found the container closed.

Now, the principle to be derived from the statements made in the previous pages is this: The time in which inspection must be conducted by the carrier is either the time of 'stuffing' the container by the shipper, or, when it is agreed that the 'stuffing' is to be performed in the absence of any of the carrier's employees or agents, the first time after 'stuffing' when one of the latter arrives at the shipper's yard. If the container's doors are open at such time, the inspection includes at least the features of the contents which are visible without entering the container. If the doors are closed, the inspection is restricted to the exterior of the container.

All this is true, however, only if any duty to inspect exists at all, and this varies, as shown in great detail earlier, from one system of law, or one transport convention, to the other, and depending in some cases on the basic question of whether 'stuffing' should be categorized as 'packing' or as 'loading'. Moreover, as was shown in the foregoing analysis, neither category takes a wholly uniform view as to the imposition of duties on the parties and the way responsibility for the consequences of faulty performance should be shared. However, it could be fairly stated that there is a greater tendency in the category of 'loading' to impose duties on the carrier and burden him with the residual responsibility for obvious defects when the operation is performed by the shipper.

Now, the method suggested earlier in this chapter for the process of categorizing the various aspects of container operations within the existing legal categories was to discover, among the different faces^t of the container and containerisation, the one which becomes dominant when projected against the background of the existing legal rules and their rationales^s, or rather the reasons for the differences between them. What is it, then, that often makes

legal rules on 'loading' different from the rules on 'packing', as far as the duty on the carrier to inspect the shipper's work is concerned?

The answer depends largely on the nature of the primary duty to load or pack, and the identity of the party on whom that duty falls more naturally. While statute, custom or contract may change this, 'loading' is the carrier's natural job whereas 'packing' is the shipper's. If 'packing' relates more closely to the goods, and 'loading' to the means of transport, then normally both the general know-how and the specific knowledge about the properties of the subjects of each of these categories lie with the respective different parties. Carriers know more about the properties of their means of transport generally and the methods of stowing the specific goods in it, whereas shippers usually know more about the properties of their cargo.²² Thus, when a shipper 'packs' he is only doing what is basically his own job, whereas when, usually for reasons of mutual convenience, the shipper performs the 'loading', this can be seen, symbolically speaking, as taking the task away from the carrier, as relieving him of a duty which would have otherwise been his. It is only natural, therefore, that the law should impose on a carrier put in the latter position some residue of the primary duty, in the form of a secondary duty to inspect.

It is suggested that the problem of classifying 'stuffing' as 'packing' or as 'loading' be solved on the basis of these observations on expertise and know-how, at least for the narrow purposes of the present chapter. Even if the container performs some of the functions of the conventional package, the art of successful 'stuffing' demands greater know-how of the sort connected with traditional

22. Or, as in Ismail v. Polish Ocean Line, [1976] 1 All E.R. ⁹⁰² they are supposed to possess such knowledge.

'loading' of vehicles and vessels and thus should be regulated under traditional 'loading' and 'stowage' rules, rather than under 'packing' rules, whenever the choice between the categories has to be made.

Now, the purpose of a large part of this chapter was to narrow the scope of cases where such a choice has to be made. It was shown that under some legal regimes, local or international, both the rules on 'packing' and the ones on 'loading' require inspection, whereas in other cases neither 'loading' nor 'packing' rules require it. More importantly, it was shown that in a great number of container operations no dilemma about the general duty to inspect exists at all because even the widest interpretation of the existing inspection rules does not impose a duty to inspect the contents of a container closed before delivery to the carrier.

There remains, however, an area where the choice between rules on 'loading' and 'packing' will have to be made, and it is suggested that it be made in favour of the 'loading' rules.

Chapter III: CONTAINERS AND THE PACKAGE
OR UNIT LIMITATION

1. GENERAL

The impact of the container revolution on limitation of carrier's liability has been greater than its effect on any other legal subject which has been influenced by this revolution. The liability limitation was the first legal issue emanating from the revolution to be brought to courts in various countries and at present is the subject of a considerable number of reported decisions.¹ Yet, on the face of it, there was nothing in the substance of this method of carriage that should have caused such reaction. The reaction was caused by quantity rather than by substance, and it only exposed weak points in old legal instruments. The revolution transferred an old source of legal dispute across a point beyond which no settlement between the parties could be hoped for, even in a field so highly oriented to quick compromises as international trade. Each side has now too much to lose by compromising, and undergoing lengthy litigations is almost unavoidable.

Thus, when 5 boxes containing goods were packed, for additional safety and convenience, in a wooden receptacle, and a dispute arose as to what constituted the 'package or unit' mentioned in art.4(5) of the Hague Rules, it was reasonable to expect some sort of compromise between the parties, even though the legal position was by no means clear. But when 500 boxes are 'stuffed' into a container, which is then lost, and the carrier seriously suggests compensation be limited to one single 'package' (e.g. £200 in England) for the whole consignment, one can hardly expect the parties to reach agreement. Ten years of extensive litigation failed, however, to produce clear rules concerning this

1. There are, for example, already 17 cases reported from American courts concerning this issue. See section 2.1., infra.

issue. Art.4(5), a product of hasty drafting in Brussels Convention 1924, supplies no answer to it, and when courts were called upon they could rely only on their views of a fair balance of interests between the parties, commercial needs and the general intention of the legislature. As in many other legal conflicts of this kind, in which each of the opposite views could be supported by ample reasons, these problems could not be solved without making value and policy judgments of a kind that courts are not well qualified to make, and in many cases courts emphasized their wish that this problem should be solved by the legislature rather than by them.² An early attempt by some governments to amend the article and adapt it to modern needs failed to achieve sufficient international support,³ but there is hope that the matter will be settled when the UNCITRAL draft Convention on International Carriage of Goods by Sea becomes effective.⁴

2. See, e.g., Leather's Best v. S.S. Normaclynx, 451 F.2d.800, 814-5 (2nd.Circ.1971).

3. See section 5.1., *infra*.

4. See section 5.2., *infra*.

2. THE ROLE OF THE COURTS¹

2.1. American Law

Judge Oakes of the Federal Court of Appeal for the Second Circuit stated in a retrospective analysis of the decisions of this Court on our present issue:

'The thrust of our cases has been to seek to arrive at the parties' intent and to search for some degree of certainty and predictability'.²

At present it is doubtful whether either aim has been achieved in any systematic way.

Until recently there governed in American case law a series of rules based mainly on two cases, namely Standard Electrica, S.A. v. Hamburg Sudamerikanische, etc.³ and Leatner's Best v. S.S. Mormaclynx.⁴ These two cases differed in their final conclusions, and on the basis of the factual distinction between them there developed a series of subtle rules and tests. It is impossible to describe this series without going into great detail, but the following main tests are of greatest importance:

- 1) Was it the number of inner packages or of containers that was indicated in the bill of lading?
- 2) Who supplied the container and what part did each of the parties play in the packing and stowing process?
- 3) What was the size and the shape of the container?
- 4) On which basis was freight rate calculated?

These tests, in different variations, formed the basis for most of

1. This survey refers to decisions in France, the United States and Canada. No decision has yet been given on this issue in England.

2. Cameco v. S.S. American Legion, 514 F.2d. 1291, 1297 (2nd.Circ. 1974).

3. 375 F.2d. 943 (2nd.Circ.1967), cert.den. 389 U.S.831.

4. Supra, n.2, p.153

the cases decided in the Federal Courts of the United States.⁵ The tests will be commented upon later; but at this stage it should be generally observed that this system, depending on the most subtle details of each case is practical only when the answers to most of the above mentioned tests lead to the same conclusion (e.g. when a container of the present standard size, owned or hired by the shipper or his agent, is loaded and sealed by the shipper and the number of inner packages is not indicated in the bill of lading). When the circumstances are 'mixed', however, a decision could be reached only if one test were preferred over the other, which would render this system intolerably confusing and unpredictable.⁶

The Court of Appeals for the Second Circuit, apparently dissatisfied with the ambiguity and uncertainty caused by this multiplicity of criteria set about in Royal Typewriter Co. v. M.V. Kulmerland⁷ to establish a "'common sense test' under which all parties concerned can allocate responsibility for loss at the

5. Rosenbruch v. American Export Isbrandtsen Lines, 357 F.Supp.982 (S.D.N.Y.1973); Lucchese v. Melabe Shipping Co., 351 F.Supp.588 (D.of Puerto Rico,1972); Truck Insurance Exchange v. American Export Freight, [1972] A.M.C.2509 (N.D.Ill.1972); Sperry Rand Corp. v. Norddeutscher Lloyd [1973] A.M.C.1392 (S.D.N.Y.1973). United Purveyors v. M.V. New Yorker, 250 F.Supp.102 (S.D.Fa. 1965), was decided before Standard Electrica, but it has little effect as a precedent. Encyclopaedia Britannica v. The Hong Kong Producer, 422 F.2d.7(2nd.Circ.1969) was given before Leather's Best, but only the minority opinion there is relevant to our issue. Inter American Foods v. Coordinated Caribbean Transport, 313 F.Supp.1337(S.D.Fa.1970), was also decided before Leather's Best, but it adheres to the tests described in the text above.

6. See, e.g. the 'left open' case in Leather's Best, 451 F.2d.800, 815, and the deadlock in which the court found itself in the Rosenbruch case, supra, at p.984. See also the note in (1972) 4J.M.L. & Comm., 159, 160, and W.D.Angus, "Legal Implications of the 'Container Revolution', etc." (1968), 14 McGill L.J.395 (the author's remark in p.410 about the confusion emanating from courts' decisions is not less correct today).

7. 483 F.2d.645(1973).

time of contract, purchase additional insurance if necessary, and thus 'avoid the pains of litigation'".⁸ It is submitted that the 'functional economic test' it produced has failed to achieve this aim.

'The first question in any container case', according to this test, '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'.⁹ An affirmative answer would lead to an assumption that a per-inner-package limitation should prevail, whereas a negative one would shift 'the burden ... to the shipper to show why the container should not be treated as a package'.

This test is based on an equitable ground. If a container enables the shipper to save on packaging materials and methods,¹⁰ it can be said to function as a package, and if there is no limit to the size of the 'package' mentioned in art.4(5),¹¹ then there is no reason why such a container should not be considered as an art.4(5) 'package'.

Yet, however useful the 'functional economics test' may appear to be as an instrument for judicial retrospective examination of the given facts of legal disputes, it is wholly unsuitable for actual use in international trade. The deficiency of the test lies not only in the fact that to answer the question on which it is based (i.e. whether the goods would have been shipped in the same packages had a container not been used) the actual manner of

8. Ibid. 649. The quotation is from Standard Electrica, 375 F.2d. 943, 945.

9. Ibid. 648.

10. See chapter 2, sec.1.4.

11. See the cases mentioned in note 61, p.179 , infra.

packing must be known to all the parties interested in the amount of the carrier's liability, but also in the fact that in most of the cases the answer requires some evaluation, based sometimes on knowledge of other overseas shipments¹² of the same merchandise by the same shipper, sometimes on wider knowledge of methods of packaging, and sometimes on pure speculation. Moreover, the predictability of the test will decrease in direct relation to the expansion of container transport. The more universal containerisation will become, the more speculative will be the answers to the present test which is based on comparison with packing for conventional transport.

Perhaps the best indication of the disadvantages of the test is the courts' 'effort', to use the words of S.Simon¹³ 'to leave the door open to a contrary result' by stating that 'the new rule shall be deemed merely a presumption which may be rebutted'. By doing so the court has rendered the 'functional economics test' even more unpredictable. Presumptions and rules on burden of proof may be useful in litigation, but they can hardly avoid litigation because parties cannot be expected to 'purchase additional insurance', or refrain from doing so, on the basis of presumption.

The 'functional economics test' has become the binding rule in the Federal Second Circuit in America,¹⁴ although this has not

12. As in The American Legion,^{n.2, p.154} supra, and Insurance Co. of North America v. S.S. Brooklyn Maru, [1974] A.M.C.2443(S.D.N.Y.).

13. 'The Law of Shipping Containers'(1974), 5 J.M.L.^{a Comm.}507.

14. See The Brooklyn Maru, supra; The American Legion,^{n.2, p.154} supra. But see Shinko Boeki Co. v. S.S. Pioneer Moon, 507 F.2d.342, 345(2nd.Circ.1974), where it was decided that the test can afford 'little help with respect to the bulk shipment of a liquid'.

always been welcomed there with enthusiasm.¹⁵ However, the allusion of Judge Oakes,¹⁶ the architect of the test, to outside support for it has been somewhat premature. The decision of the Havre Tribunal of Commerce of 19.10.73¹⁷ which, as mentioned by Judge Oakes, endorsed the test, was later reversed on its facts by the Rouen Court of Appeal.¹⁸ While the latter mentioned the 'functional economic test', it attached at least as much importance to the older test of the intention of the parties and to the bill of lading particulars.¹⁹ Lufty v. Canadian Pacific Ry.Co.,²⁰ decided by the Canadian Federal Court supports the test, but its value as precedent on our issue is arguable. The part relevant to the present problem is an obiter dictum because it is finally decided that the defendant-carrier is not entitled to the 'package or unit' limitation at all. Moreover, the plaintiff's argument that the carrier's liability should be limited per freight unit, and not per container is rejected by the court on grounds which have nothing to do with the container problem, namely that Canadian law does not recognize the American notion of 'freight unit' at all.²¹

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15. See, e.g., Judge Feinberg's short concurring opinion in The American Legion, 514 F.2d.1291, 1300, in which he declared himself bound by the Kulmerland authority, but showed clear dissatisfaction with the test both expressly and by referring to two articles bitterly attacking the 'functional economics test', namely M.E.De Orchis, 'The Container and the Package Limitation, etc.' (1974), 5 J.M.L. 251, and S.Simon, 'The Law of Shipping Containers', supra, n.13.
16. In The American Legion, 514 F.2d.1291, 1298.
17. 26 D.M.F.304.
18. Decision of 14.2.75, 27 D.M.F.473.
19. See next page.
20. [1973] F.C.1115.
21. In that the court endorsed J.A.Johnston v. The Tindfjell [1973] F.C.1003 (Can.Fed.Ct.Tr.Div.), also dealing with containers in the present context.

2.2. French Law

The effect of the 'functional economics test' on French law may have been even more counterproductive than its effect on American law. With the Court of Cassation deciding on the issue of containers and the 'package or unit limitation' as early as 1964,²² it has been quite clear there until recently that the application of the limitation depended on whether the container(s) or the inner goods were enumerated in the bill of lading.²³

The 'functional economics test' was introduced into the decision of the Havre Tribunal of Commerce decision of 19.10.73^{23a} because the American COGSA 1936 governed the case and the Tribunal felt compelled to apply American case law to it. A later decision of the same Tribunal²⁴ mentioned this test in connection with the Hague Rules, but decided the case in direct opposition to it (i.e. that the carrier's liability should be limited per container when the inner packages were enumerated in the B/L under an S.T.C. reservation, although the packages were perfectly adaptable for transport without the protection of the container), preferring the 1964 decision of the Court of Cassation. However, a different interpretation of the same Court of Cassation decision by the Rouen Court of Appeal²⁵ revising the 19.10.73 decision enabled the Rouen Court to base its decision in favour of a per-inner-package limitation both on the 'functional economics test' and on the older enumeration test, despite the fact that the circumstances there were similar to those in the 15.11.74 Havre decision (the inner packages were adaptable for transport, and the bill enumerated them under an S.T.C. reservation, but the court ignored the reservation).

22. Decision of 12.10.64, 17 D.M.F.18.

23. See the Casablanca Tribunal of 1st.Instance, 25.5.57, 10 D.M.F. 52; Rouen Court of Appeal 16.3.73, 25 D.M.F.594.

23a. 26 D.M.F.304

24. 5.11.74, 27 D.M.F.352.

25. Decision of 14.2.75, 27 D.M.F. 473.

This has made the position in French law unclear. If the Rouen decision is to be interpreted as applying the 'functional economics test' to French law in general, side by side with the older test, then the same uncertainty caused in America by the multiplicity of tests and criteria would prevail in French law as far as our present issue is concerned. However, the better view seems to be that the Rouen court introduced the American test only in the context of the American COGSA discussed there, and that the older rule should be allowed to prevail.

3. ARTICLE 4(5) - ITS RATIONALE AND APPLICATION

3.1. The Drafting of Article 4(5)

The Hague Rules were drafted in 1921-4. It was, therefore, only predictable that their application to subsequently developed means of transport would be troublesome. The criteria of 'package or unit' were ill-suited to various sorts of cargo and raised many legal disputes even at the times of traditional modes of transport.¹ The main problems in this connection were those of bulk cargo and huge articles which were carried unpacked or loosely wrapped. The early draft of the Hague Rules intended to meet these problems by suggesting three alternative criteria of limitation, i.e. package, volume or weight.² Following some opposition and hurried re-drafting, the last two alternatives were replaced by the vague term 'unit' - 'in order to establish the limitation of liability when goods are not shipped in packages'.³ Maritime trade has not gained by this short-sighted compromise, which has led to costly

1. See, e.g., E.Selvig, Unit limitation of Carrier's Liability (Oslo, 1961), of which at least 80 pages are dedicated to the interpretation of the terms 'package or unit'.

2. Ibid., at p.25.

3. Ibid., at p.39. F.Berlingieri, note in (1971)2 J.M.L.^{Comm.}413, 415. See also the text of the American COGSA, 46 U.S.C.A. sec.1304(5).

litigations over the last fifty years.⁴

The question normally asked when containers are involved is entirely different from the one asked when traditional modes of carriage were concerned. The traditional question generally was: Should a certain article be considered a 'package or unit'? No such question arises in connection with a container, as it is undoubtedly a 'package'. Yet, so could be the articles it contains. Thus, the question is: Which is the 'package', the container or the inner articles? As already said, art.4(5) itself gives no clue to this specific question.

Yet, it would be grossly unfair to blame the drafters of the limitation clause for not adapting it to the special issue of carriage by containers and other means of unitization, as it is quite obvious that the use of such devices could not reasonably be envisaged at that time.⁵

Unfortunately, this legal gap resulted in severe consequences for parties to international trade. Uniformity, being the main characteristic of carriage by containers, has been badly obstructed by the inability of courts to supply the parties with uniform, as well as equitable, rules regarding carrier's liability limitation. The inevitable consequences of such uncertainty are costly double insurance, difficulties in fixing freight rates and even in financing the transaction.

4. For an excellent survey of American case law on the issue see P.R.Recupero, 'The Shipper's Right to Recover under COGSA for Damage to Containerized Cargo'(1973), 15 Boston College Ind. & Comm.L.Rev.51,55-57.

5. See, e.g. Standard Electrica, 375 F.2d.943,945; 'Containers, Pallets and the Law', The Jour. of Comm. Annual Rev.,1968,339, 340-1. Berlingieri, 2 J.M.L. & Comm.413,422 and K.Grönfors, 'Container Transport and the Hague Rules', [1967] J.B.L.298,303 observe that packages weighing over 40 tons were actually referred to in the Brussels Conference, but these contained bulk cargo or huge single articles of machinery, and were not 'packages for smaller packages' as modern containers are.

3.2. The Intention of the Legislature

The rationale behind art.4(5) is twofold: It was intended to protect carriers against excessive claims, and yet to ensure a reasonable amount of compensation for cargo-owners in most ordinary cases. In other words, the idea is that carriers should normally pay fair compensation when they are liable for loss or damage, except when the goods are of exceedingly high value per package (and no special arrangement is agreed upon).

From earlier times⁶ it was recognized that carriers ought not to be taken as absolute insurers of the goods carried by them. They should be normally liable for loss or damage or they will have little incentive for taking good care of the goods while in their custody,⁷ but this should not include goods of high value, unless such value is disclosed (in which case a higher freight rate is usually paid). It seems that the main factor in this issue is predictability. The risk involved in any journey plays a significant part in its cost to the carrier, and he is entitled to some predictability as to the amount he would be liable to pay in case of loss or damage.

Yet, it seems that prior to 1924, carriers, using better bargaining power, exercised this right as an instrument for evading liability by inserting in the bills of lading nominal amounts as liability limitation. This practice was declared in the courts of the United States contrary to public policy when it was not accompanied by adequate reduction in freight rate.⁸ Yet,

6. See, e.g. the Carriers Act 1830, sec.1. Since the 1890 original version of the CIM (art.35), all international transport conventions concerning carrier's liability include a limitation provision.

7. For the economic side of carrier's liability limitation, see Lord Diplock 'Conventions and Morals, etc.' (1969), 1 J.M.L. 525.

8. Robinson, Handbook of Admiralty Law (St. Paul, 1939), 540-3, and references therein; Hart v. R.R. Co., 112 U.S. 331 (1885).

in France or England, for instance, where judicially developed public policy limitations concerning our issue never existed, carriers were free to limit or exclude their liability, and most of the authorities on the issue point out a 'complete freedom of contract which, generally speaking, was taken advantage of by shipowners throughout the world.⁹

It seems, therefore, that the positive aspect of art.4(5), the limitation of liability, was not an innovation in 1924. Thus, it is the article's negative aspect, establishing a fixed sum which could not be lowered by agreement, that is generally considered the main goal of the legislature.¹⁰ Clearly, the whole rationale of the carrier's liability limitation disappears when the right to limit liability is used in substance to avoid liability. Only few will not admit that there must be some limit, but it is none. the less clear that the majority of the normal cases of loss or damage should be placed below this limit. This, apparently, was the intention of the drafters of the Rules:

'The original figure of \$500 in American COGSA was based upon an estimate of value which was unlikely to be exceeded by a package or unit of the ordinary cargo shipped in the conventional manner in 1924.'¹¹

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9. 'Containers, Pallets and the Law', The J. of Comm Annual Rev. 1968, 339. See also Standard Electrica, 375 F.2d. 943, 945; Encyclopaedia Britannica, 422 F.2d. 7, 11.
10. S.Simon, 'The Latest Developments in the Law of Shipping Containers' (1973), 4 J.M.L. 441, 444; Leather's Best v. S.S. Mormaclynx, in the District Court, 313 F.Supp. 1378, 1381 (E.D.N.Y. 1970); Rosenbruch, 357 F.Supp. 982, 983.
11. Lord Diplock, 1 J.M.L. & Comm. 525, 529. Selvig's view on the issue is not clear, op.cit., at pp. 37-8. See also K.Grönfors, 'The Hague-Visby Rules', [1968] J.B.L. 201, 202; D.Goedhuis, La Convention de Varsovie, (The Hague, 1933), 210 (concerning the amount of limitation in the Warsaw Convention).

It is submitted that when container transport becomes an increasingly 'conventional manner' for carrying 'ordinary general cargo', the intention of the legislature would be ignored if it becomes the rule rather than the exception to allow carriers to pay only \$500 for the loss or damage to the contents of a whole container.

In sum, the main factor to be borne in mind when applying art.4(5) to container cases is that the article was originally based on the assumption that when carriers are liable for damage, they would normally pay a fair amount of its actual value. Otherwise, there would have been little need for the rest of the Rules. As long as the courts have to make do with the present text of art.4(5), their main goal should be to eliminate the possibility of reoccurrence of nominal compensation as a widely-spread phenomenon. Undoubtedly, container transport poses new situations which were not taken into account in 1924, but many of them are irrelevant to the issue of liability limitation. This chapter will attempt to single out and analyse only those new circumstances which actually change the balance of interests of parties to container transport.

4. THE EFFECT OF PRACTICAL AND ECONOMIC FACTORS¹

4.1. General

J.R.Woods,² dealing with the practice of limiting liability as per container, writes:

'Ocean carriers have ... virtually insulated themselves from liability, and created a different standard of liability for containerized cargo than for other cargo.'

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1. For short comment on most of the factors considered here, see A.L.Marchisotto, note in (1973), 6 Vand. J. of Trans.Law.646-8.
 2. 'The Container Revolution'(1972), 6 J. of World Tr. Law, 661, 681.

The main question, therefore, is this: Is there anything in the practices of carriage in containers, as opposed to carriage in traditional receptacles, to justify such a change of standard? The answer to this question was divided into sub-issues, and thus we shall deal with questions such as: Who initiated the revolution and who has gained by it? What are the practical changes? How do the insurance issues affect the problem? Why is uniformity needed? etc.

4.2. The Relative Advantages

Bearing in mind that our issue is one of policy rather than of mere interpretation, we should consider to whose advantage is the use of containers, and whose initiative started it. As will be shown later, the balance of various arguments on both sides is so delicate that, consciously or subconsciously, a final decision is bound to be influenced by the answer to these questions.

The relative advantages of containerisation were discussed in detail in the introductory part of the previous chapter.³ It is therefore sufficient for the present purposes to repeat the main points of this issue.

Containers were designed and brought into use by carriers in order to reduce the increasing cost of cargo handling. With few exceptions, this aim has been achieved. Containerisation has brought about drastic cuts in the turn-round of ships in ports, and has reduced the proportion of handling costs in the overall cost of transport.

The direct benefits which cargo-owners could derive from the use of containers, although not to be ignored, are less significant. True enough, goods shipped in containers usually do not require the amount and quality of protective packing applied to non-containerised shipments. Nevertheless, this difference is not to

3. Chapter 2, section 1, supra.

be exaggerated for various reasons. These include - 1) The fact that not all the shipments are actually carried by the ideal door-to-door system, and even a short-distance carriage outside the container necessitates a normal packing. 2) The fact that stowing goods inside a container requires costly experts' know-how in order to avoid damage. As to pilferage, it seems that a major reduction would not be achieved; thefts of small amounts were replaced by cases of whole containers hi-jacked or stolen by means of forged documents, etc. As to other causes of damage, it seems that for almost every reduction in one risk there is an equivalent increase from an unexpected source. Deck-carriage aboard conventional vessels, sweat, lack of ventilation, the fact that damage to goods is not discovered before arrival, are all sources of doubt as to the advantages of the container to the cargo and its owner. It seems, therefore, that the only actual benefit to shippers occurs when a reduction in freight rate is offered to them by carriers as an incentive to use containers.⁴

Only a change resulting in severe disadvantage to carriers from the use of containers could have justified a claim on their side to reduce their limit of liability⁵ when goods are carried in containers. Practice, however, shows a contrary position. Carriers benefit from carriage in containers, and actually their relative advantage is much greater and clearer than that of shippers.⁶

4.3. The Knowledge of the Carrier as to the Contents

It seems that the only change in shipping practices which is

4. See Recupero, 15 Boston College Ind. & Comm. L. Rev. 51.

5. This, of course, is the effect of identical limit per greater volume of cargo.

6. See Leather's Best, 313 F. Supp. 1373, 1376.

relevant to our issue emanates from the fact that, when receiving a closed container, the carrier cannot tell from the appearance of the container what the number of packages contained therein is,⁷ and thus, unless it is the container that is considered a 'package', he has no means of ascertaining his limit of liability for the cargo.

It is contended that this, the carrier's knowledge, should constitute the main criterion according to which art.4(5) should be applied in most of the cases, as it seems consistent both with the legislature's intention and the practical needs of the parties.

The legislature's intention is to protect shippers, but by no means is it to impose unjustifiable mischiefs on carriers. By all notions of justice and commercial commonsense, a carrier is justified in refusing to take responsibility for the unknown. For that reason, for instance, he is exempted by Hague Rules, art.3(3) from the duty to state in the bill of lading any numbers, marks, etc. 'which he has had no reasonable means of checking'.

Yet, this should apply only when the carrier actually has no knowledge of the contents. He should not be able to raise a per-container limitation when he loads the goods into the container or when his employee or agent is involved in the 'stuffing' process done by the shipper or his agent.

The reflection of this rule in the bill of lading would promote predictability and certainty about the amount of the carrier's liability not only between the direct parties to the transport transaction, but also among subsequent holders of the bill of lading. When the carrier has direct knowledge of the contents of the container, he is under an

7. See H.Schadée, 'Le Contenu Juridique du Container'(1967),19 D.M.F. 602; J.Goldring, 'The Container as a Package or Unit under the Hague Rules'(1974), 2 Aust.Bus.L.Rev.127,129. See also Chapter 6, section 2.2., *infra*.

obligation to acknowledge the details of the cargo in the bill of lading. No such obligation exists when he has 'no reasonable means of checking' the contents of the container, and it is then within the carrier's discretion whether or not to record the carrier's information about the cargo in the bill of lading.

Are the rulings of courts consistent with the suggested rule as a whole? The answer is somewhat ambiguous since on the one hand in none of the decisions cited earlier has the court come to its decision solely on the ground of this rule, and the carrier's knowledge, as such, was expressly mentioned only in few of the cases, but on the other hand the outcome of these decisions is perfectly consistent with the rule.

In Inter American⁸ and Leather's Best⁹ the carrier's employee or agent who took part in the 'stuffing' process had actual knowledge of the contents of the container and even gave a receipt for the same. In The Pioneer Moon¹⁰ and The American Legion¹¹ the carrier's employee or agent was present in the 'stuffing' operation, and in the Court of Cassation decision of 12.10.64¹² the carrier actually tallied the contents. The court in all three cases treated them as 'normal' cases of carriage, declaring each box or bale to be the relevant package. The result seems to us perfectly just. The only relevant difference between a container carriage and a normal one, namely the inability of the carrier to ascertain the contents, never existed in these cases simply because the carrier actually knew the number of inner packages. This basically was the ground for the court's decision in Inter American, although the language used was somewhat different; the court stated that the 'first determination' in our issue 'is what was delivered to the carrier'.¹³ The fact that

8. Supra, n.5, p.155.

9. Supra, n.2, p.153.

10. Supra, n.14, p.157.

11. Supra, n.2, p.154

12. Supra, n.22, p.159

13. 313 F. Supp. 1337

separate packages were delivered to the carrier, through his driver, rendered the carriage a perfectly 'normal' one. In Leather's Best, however, the decision was based also on other factors. In distinguishing the case from Standard Electrica the court considered¹⁴ facts such as the size of the container, the part taken by each of the parties in the loading and the notations in the bill of lading. Yet, when mentioning the last factor, the court, after citing a passage from Standard Electrica, concluded: 'Indeed, there seems to have been nothing in the shipping documents in that case that gave the carrier any notice of the number of cartons'. In the abovementioned Court of Cassation decision it was the enumeration of 275 packages in the B/L that was considered crucial to the decision.¹⁵ Yet, the court had clearly taken into consideration the carrier's actual knowledge; it stressed the fact that the list of inner packages had been prepared after a check by the carrier's employee. When the carrier does not know the number of inner packages through his own sources, he can still be deemed to know this number when he accepts the shipper's enumeration of inner packages and inserts it in the bill of lading. The bill, including the details indicated in it, is the carrier's responsibility. Although the details are usually inserted by the shipper or his agent, the document is signed by, or on behalf of, the carrier, and both the original duty to state the details and the option to refrain from doing so when the details are unverifiable, rest with him.¹⁶ Admittedly, the notations have no probative value when qualified by a 'said to contain' reservation,¹⁷ and only a prima facie one when unqualified,¹⁸ but it is suggested that, concerning the present issue, the enumeration of inner packages puts

14. 451 F.2d.800,815.

15. Supra,n.22,p.159

16. Hague Rules, art.3(3).

17. See chapter 6, sec.2.2.1.

18. Hague Rules, art.3(4).

the carrier in the same position as though he knew the number of packages through his own sources. Here, again, considerable support could be found for the suggested rule in the outcome of legal disputes.

Both in the Canadian case Johnston v. The Tindefjall,¹⁹ and in Du Pont de Nemours Int'l, S.A. v. S.S. Mormacvega,²⁰ the whole 'stuffing' process was handled by or on behalf of the shippers; the carriers received sealed containers, and thus had no actual knowledge of their contents. Yet, the courts limited the carrier's liability per inner packages and not per container on the basis of the carrier's acceptance of the shipper's description, despite the fact that both bills of lading were qualified by a 'said to contain' reservation.

The outcome of other leading cases supports the suggested rule in a negative way. In Standard Electrica,²¹ Lucchese²² and the 16.3.73 decision of the Rouen Court of Appeal,²³ in all of which there was no indication of any actual knowledge,²⁴ nor had the bill of lading submitted any information about the number of packages contained in the container, the courts found in favour of the carriers and limited their liability as per container.²⁵

19. Supra, n. 21, p. 158.

20. 367 F.Supp. 793, 796 (S.D.N.Y. 1972), aff'd 493 F.2d. 97.

21. Supra, n. 3, p. 154. 22. Supra, n. 5, p. 155. 23. Supra, n. 23, p. 159

24. In Standard Electrica, however, it seems that the number of cartons could have been known to the carrier because the pallets were not covered and the cartons were visible. Simon, 'The Latest Developments, etc.', 4 J.M.L. & Comm. 441, 444.

25. A note attempting to derive a rule from Inter American,^(supra, n. 5, p. 155) Leather's Best^(supra, n. 2, p. 153) and Royal Typewriter (The Dist. Ct. decision, 346 F.Supp. 1019), supra, finds a 'strong inference' in the court's ruling that when 'the carrier has knowledge of the specific contents of the container, the container will not be considered the package'; (1972) 4 J.M.L. & Comm.¹⁵⁹, 162. United Purveyors and Encyclopaedia Britannica^(supra, n. 5, p. 155) do not adhere to the suggested rule but the first is an obiter dictum and the second offers only a minority opinion on our issue.

As to the specific issue of the 'said to contain' reservation,²⁶ two French courts express opposite views. While the Havre Tribunal of Commerce declares in the 5.11.74 decision²⁷ that, as a result of such a reservation, the carrier there is deemed to have taken in charge only three containers, and not the 1200 sacs^k stowed in them, the Rouen Court of Appeal ignores the reservation in its 14.2.75²⁸ decision, and limits the carrier's liability per inner package. The second view seems preferable. There is no denying the fact that the 'said to contain' reservation shifts the burden to the cargo-owner to prove the quantity of goods delivered to the carrier,²⁹ but this has no bearing on what the carrier has actually taken in charge. For our present purpose, the enumeration of the inner packages in the bill of lading means that the carrier has been informed of the number of such packages, and is, therefore, in no disadvantage, as far as the liability limitation is concerned, in comparison with conventional carriers. If loss or damage occurs, and the carrier is found liable, the cargo-owner may still have to prove the verity of the qualified declaration before being able to receive compensation on the basis of each package mentioned in the declaration, but the reservation cannot be considered as changing the basis of the limitation altogether.

4.4. Uniformity and Predictability

A major advantage of the container revolution to both carriers and shippers is standardization and uniformity in carriage practices. Is this trend to be carried on to legal issues concerning carriage by containers? The answer seems to be that international carriage law

26. Note that this analysis is concerned only with S.T.C. reservations when justifiably inserted, not with cases such as Leather's Best, (supra), where the knowledge of the carrier's employee about the number of inner packages made the insertion of the reservation wholly unwarranted. See chapter 6, section 2.2.1, *infra*.

27. Supra, n.24, p.157. 28. Supra, n.18, p.158 29. See Chapter 6, sec.2.2.1, *infra*.

could benefit from greater uniformity more than most of the commercial law fields, but that this should not be allowed to impose on it artificially over-simplified solutions. Undoubtedly, extreme uniformity and predictability could have been achieved by declaring the container (or trailer, pallet, etc.) as the art.4(5) package,³⁰ regardless of any other factor in any given legal dispute. This could help not only the direct parties to the contract of carriage, but also the endorsees of the bill of lading, the bankers who finance the transaction and, above all, the insurers. All these indirect parties are at present in a state of confusion³¹ about what actually is the amount of carrier's liability. Such confusion leads to double insurance and unnecessary litigation. As could be expected, the opposite views about the relative merits of uniformity and justice have found their way to our subject. Rodière describes the issue of liability limitation as '... une métier ou l'ordre est plus important que la justice'.³² Judge Feinberg,³³ however, observes that '... certainty at the expense of legislative policy and equity is undesirable and often turns out to be ephemeral.'

30. See Judge Hays' dissenting opinion in Encyclopaedia Britannica, 422 F.2d.7,20, and the majority opinion in Standard Electrica, supra, n. See note 33, infra.
n.3, p.154.

31. The court's decision can be predicted only in a few cases (e.g. when the carrier 'stuffs' the container and mentions in the B/L the number of inner packages, which are themselves strong enough to sustain the rigours of the journey without the container). The series of precedents, taken as a whole, offers little help to the confusion in the rest of the cases.

32. 'Les Responsabilités dans la Legislation Nouvelle, etc.' (1967), 19 D.M.F.323,387. These, generally, are also the outlines of Lord Diplock's article on 'Conventions and Morals', supra, n.7, p.162.

33. In Standard Electrica, 375 F.2d.943,948. The remark was directed at the majority opinion which justified its decision by stating that a different one 'would only contribute to confusion', ibid, at p.947.

The best solution could, naturally, be a rule that will serve both purposes - certainty and equity, and it is believed that such a rule is not impossible to achieve. A rigid rule which ignores the special circumstances and declares the container as the 'package' in all cases would be uniform but grossly inequitable, because in many cases it will drastically reduce the carrier's liability when there is nothing in the relevant circumstances to distinguish it from traditional carriage. An opposite rule³⁴ would be equally unjustifiable. A rule which, on the other hand, would take into account a small number of relevant circumstances, known to the parties at the beginning of the journey and easily recorded in the bill of lading, could be much more equitable and still retain a sufficient degree of uniformity. It was suggested earlier that such a rule could be based on the carrier's knowledge as to the contents of the container. It was explained why it is believed such a rule would be just. It would also be fairly uniform as it leaves very little to future unpredictable legal or factual discretion of courts.

4.5. The Element of Insurance

The connection of insurance to our issue is merely derivative of the uniformity and predictability problems discussed earlier, but as it has been given a special significance in some cases it is advisable to deal with it separately. The American court in Nichimen Co. v. M.V. Farland,³⁵ deciding in favour of the shipper on an issue very similar to ours, declared:

'Most cargo damage actions are really battles between insurers, and there is thus no need for shedding crocodile tears on behalf of the shipper or consignee!'³⁶

34. Such rule, i.e. that liability should always be limited per inner packages, is suggested by Recupero, *supra*, n.4, p.161.

35. 462 F.2d.319(2nd.Circ.1972).

36. Ibid. at p.335.

This view, in different wording, repeats itself in some of the container cases. In Leather's Best,³⁷ for instance, it is argued that -

"... the standard argument about the economic power of the carrier and the weak bargaining position of the consignor may be simply a recitation of an ancient shibboleth ... The shipper insures for any value in excess of the limitation (or perhaps for the whole value) and, for all we know, a ruling that each bale constitutes a 'package' may simply be conferring a windfall on the cargo insurer, admittedly the true plaintiff here, if it based its premium on the assumption that Mooremac's liability was limited to \$500"³⁸

What seems to be forgotten in the last two quotations is that insurance is paid for by the insured and that premium rates are based on the legal position of the insured when damage occurs. A court called upon to decide on an issue of such significance to international trade as a whole should not ignore the applications of its decision on future practices. Thus, although in a given case the true parties to it are the insurers, the true parties to international carriage transactions in general are still shippers and carriers, and in the absence of a statutory rule, any change in their relative legal position should be made with great caution. Any such change could have an economic effect on the parties. Hence, it is no answer to our basic problem to 'send the shipper to his insurer' and it is no justification for an artificially uniform rule that it will at least enable the shipper to obtain sufficient insurance.³⁹ The shipper will have to

37. 451 F.2d.800,815.

38. The argument, although brought forward by the court is finally rejected in the decision.

39. See Standard Electrica, 375 F.2d.943,947.

pay his insurer higher premiums than he used to pay when he shipped his packages separately. For such a change independent reasons should be given. In other words, the mere fact that additional insurance is obtainable suggests nothing as to whether the shipper should be put in a legal position necessitating such an additional burden.

As already said, such a change should be allowed when a considerable mischief would otherwise be caused to the carrier, namely when the carrier has no knowledge of the contents of the container delivered to him, and he is facing an unknown amount of liability, should damage occur. In these cases it is more sensible that the shipper, being able to supply his insurer with better information, will insure the cargo for damage in excess of one package limitation amount.

Yet, when dealing with economic factors concerning container transport, another factor should be mentioned, namely the reduction in freight rate offered by some carriers as incentive for shippers to use containers. In such cases it could be argued that a shipper has only himself to blame if he had not used the sum saved by such reduction to cover any increase in premium rates which would have taken into account a per-container limitation. It is doubtful whether this factor should be taken into account in cases in which consignees or bankers, who do not have detailed information about the negotiations between the shipper and carrier, are involved, but there seems to be no reason why it should not have an effect on disputes between the original parties, at least in marginal cases. Still, this factor should not be allowed to form the basis for a general uniform per-container interpretation of art.4(5) unless it is proved that the reduction in freight rate is uniformly granted whenever containers are used.

4.6. The Declaration of Value

According to art.4(5). the shipper can declare 'the nature and value' of the goods in the bill of lading. By such declaration the 'package or unit' limitation can be avoided altogether, thus eliminating the difficulties which are the subject of the present chapter.⁴⁰ In many of the container cases mentioned above, the courts used the existence of this option and the fact that it had been ignored by the shipper to justify a decision in favour of the carrier. The blame for a result that probably seemed somewhat disturbing to the court itself actually has been put on the shipper, reminding him that he could have avoided this result in advance simply by using the option offered by the statute.⁴¹

This, however, seems to us grossly unfair for reasons very similar to those mentioned in connection with the issue of insurance. In practice the declaration of value costs the shipper a considerable amount of money; according to Selvig,⁴² it is even greater than that of insuring the full value of the goods. Although it is not perfectly clear whether it corresponds with the legislature's intention,⁴³ a practice developed among carriers⁴⁴ to charge an ad-valorem freight

40. Yet, the precise effect of such declaration is not altogether clear, the sensible suggestion being that it has the effect of 'raising the relevant limit up to the amount of value declared'. Selvig, op.cit. at p.195.

41. Standard Electrica, 262 F.Supp., 343, 346 (S.D.N.Y. 1966); Lucchese, 351 F. Supp. 588, 590. See also 'Containers, Pallets and the Law', The J. of Comm. Ann. Rev. 1968, 339.

42. Op.cit. at pp.200-1.

43. L.J.De Gurse, Jr., 'The Container Clause in Article 4(5) of the 1968 Protocol to the Hague Rules' (1970), 2 J.M.L.^{Comm.} 131, 133.

44. The fact that the practice was never seriously challenged is explained by De Gurse, ibid., at p.134, in accordance with the history of the American Harter Act, 1893 and the Canadian Water Carriage of Goods Act, 1910.

rate whenever a declaration of value is made, a rate which in most, if not all, of the cases exceeds the customary per-volume or per-weight rates.

There can be little doubt that the intention of carriers was to impose this special rate in order to 'discourage shippers from exercising the option to declare excess value'⁴⁵ ...'. Practice shows that shippers were deterred from declaring value in all cases.⁴⁶ The option has been 'seldom exercised' and has never become a general practice among shippers.⁴⁷ Hence, if it is suggested that when goods are carried in containers, the way for shippers to retain their prior position (i.e. the position they held had the inner packages been sent separately) is to embark on a practice traditionally repugnant to them, then there should be given some reasonable justification for it. Again, except in cases in which the use of a container, in itself, worsens the position of the carrier, there is nothing to justify such an additional burden on shippers, especially when it is the carrier who lays the burden and directly benefits from it.⁴⁸ We would agree with the District Judge in Leather's Best,⁴⁹ who stated that the mere ability to declare the value of the goods '... does not justify depriving a shipper of the benefits which were

45. Selvig, op.cit., at p.202.

46. For other causes of reluctance to declare value, see UNCTAD's report on Bills of Lading, U.N.Doc. TD/B/C.4/ISL/6, at p.103.

47. Lord Diplock, 1 J.M.L. & Comm. 525, 529.

48. Admittedly, when value is declared the shipper might benefit from higher compensation if damage occurs, but insurance for the same risk is normally cheaper, and the choice has been, and should stay, the shipper's.

49. 313 F. Supp. 1373, 1382.

intended to be given by the provision of COGSA'.^{50 51}

4.7. The Intention of the Parties

The intention of parties as to what should constitute the art.4(5) 'package' in case of loss or damage has clearly become a dominant factor in the courts' decisions mentioned above. This was either expressly declared by the courts or implied by laying down tests which plainly were designed to serve as evidence of the parties' intention.

In Johnston v. Tindefjall⁵² Mr. Justice Collier stated -

'I think it proper in a case like this to determine if the cargo-owner and the carrier intended the container should constitute a package for the purposes of limitation or whether the number of packages in the container was to be the criterion.'

Similarly, The Pioneer Moon,⁵³ Standard Electrica,⁵⁴ Leather's Best,⁵⁵ Royal Typewriter,⁵⁶ Lucchese,⁵⁷ the Rouen decision of 16.3.73,⁵⁸ and the Court of Cassation decision of 12.10.64,⁵⁹ all rely, in various degrees, on the parties' intention, the main evidence to it being,

50. See also Judge Feinberg's answer in Standard Electrica (ct.of App.), 375 F.2d.943,948, to the majority's remark concerning the ability of the shipper to declare value: "...if each carton was a package there would be no occasion for a special declaration ... since each carton was worth less than \$500. Thus, finding significance in failure to declare merely begs the question of how to construe the word 'package'".

51. Interestingly enough, American courts tend to remind shippers of the declaration option whenever a difficulty arises in the interpretation of art.4(5). See, e.g. Mitsubishi Int'l Corp. v. S.S. Palmetto State, 311 F.2d.,382,384(2nd.Circ.1962),cert.den. 373U.S.922.

52. [1973] F.C. 1003,1009

53. 507 F.2d 342,346.

54. In Dist.Ct., 262 F.Supp.343,345; in Ct.of App., 375 F.2d.943,946.

55. Mainly by way of distinguishing Standard Electrica, Dist.Ct., 313 F.Supp.1373,1381; Ct.of App., 451 F.2d.800,815.

56. In Dist.Ct. (supra^{n.25 p.170}), practically the whole judgment is based on tests evidencing the parties' intention.

57. 351 F.Supp.588,594. The dominant element, however, is the basis upon which freight was calculated.

58. 25 D.M.F.594,595-6.

59. 17 D.M.F.18,19.

naturally, the notations in the bill of lading and other documents. Enumeration of the number of inner packages and its acceptance by the carrier has been taken as clear evidence that the parties intended each package to be the criterion for liability limitation.

Other tests laid down in various decisions can also be explained mainly as means of providing evidence of the parties' intention. The 'size and shape' test,⁶⁰ for example, if having any meaning at all,⁶¹ must be aimed at this objective, i.e. as evidence of the way the parties, as reasonable persons, treated the container.⁶² The same could be said about the various tests concerning the process of loading the container.⁶³ Factually, they point out what was described in the present chapter as the actual knowledge of the carrier, but the courts in many cases have gone one step further and used the 'packing tests' as means of ascertaining the parties' intention. For example, the fact that the shipper (or his agent) chose to ship the goods in a container, packed them therein on his own premises and delivered the container locked and sealed to the carrier indicated that it was the intention and understanding of the shipper that the

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60. Great significance was given to this element in Royal Typewriter (Dist.Ct.) 346 F.Supp.1019,1024, and in The Pioneer Moon, 507 F.2d 342,345. See also Rosenbruch, 357 F.Supp.982,984; Sperry Rand v. Norddeutscher Lloyd, [1973] A.M.C.1392,1393; Grönfors, 'Container Transport, etc.', [1967] J.B.L. 298,304.
61. See severe criticism of this test by Simon, 'The Latest Developments, etc.', 4 J.M.L. & Comm. 441,448. See also Lucchese, 351 F.Supp.588,593; Whaite v. Lancs. & Yorks. Ry. (1874) L.R.9 Exch.67,70; Mitsubishi Int'l, 311 F.2d.382,384; Aluminio Pozuelo v. S.S. Navigation, 407 F.2d.152,155 (2nd.Circ.1968).
62. This is probably the court's meaning when stating in Johnston v. The Tindejall, [1973] F.C.1003,1012, that the intention of the parties should be ascertained from, inter alia, 'the type of the container'.
63. These tests, i.e. Who loaded the container? Did the carrier interfere? Was the container sealed? etc., are mentioned in most of the cases as criteria for decision. They played a decisive role in Inter American, 313 F.Supp. 1337. See also The American Legion, 514 F.2d.1291,1299.

whole consignment would be treated as one 'package or unit'.

Ownership and possession of the container also seem to be nothing but a subsidiary element pointing out the parties' intention.⁶⁴ Finally

it is apparent that mainly the same idea lies behind the test relying on the way freight was calculated.⁶⁵ The criterion used by the

parties in calculating the price of the carriage transaction could very reasonably be deemed dominant and used as good evidence of what exactly was considered by the parties to be the subject of the carriage. Still, there is a crucial question to be answered:

Should the intention of the parties, expressed or implied, play any role, and if so what, in our issue? In Leather's Best an expressed stipulation between the parties, contained in the bill of lading, to the effect that 'Carrier's liability is limited to \$500 with respect to the entire contents of each container' was deemed 'an invalid limitation of liability under COGSA'.⁶⁶ It was, however, made clear that this decision was given 'under the circumstances of the case'. Prima facie, it could be understood that the court meant that the objective circumstances of the transaction, rather than the subjective will of the parties, should govern. Yet, strangely enough, there could be found in the decision, among the 'circumstances of the case' which were considered most relevant, references to the way 'the parties regarded' the container, the way 'the shipper described the goods', etc. In other words, although a clear expression of the parties' will is rejected, the case is decided mainly on facts from which their

64. Rosenbruch, 357 F.Supp. 982, 984; Leather's Best (Ct. of App.), 451 F.2d. 800, 815; Grönfors, 'Container Transport, etc.', [1967] J.B.L. 298, 304. But see criticism of the tests in Royal Typewriter (Ct. of App.), 483 F.2d. 645, 647; Simon, 'Latest Developments, etc.', 4 J.M.L. & Comm. 444, 447.

65. See the decisive effect given to this test in Lucchese, 351 F.Supp. 588, 590, and probably in United Purveyors, *supra*, n.5, p.155. See generally P.V.C. Springings, 'Container Shipments Set New Problems in Equating Freight Rates', Jour. of Comm. Annual Rev. 1968, 129, 131.

66. Leather's Best (Ct. of App.), 451 F.2d. 800, 816.

intention can be inferred. This ambiguity symbolizes the perplexing situation in which courts found themselves when called upon to rule on our issue. The *raison d'être* of the Hague Rules disappears when freedom of contract is allowed to play an overly significant role in matters that are clearly governed by the Rules. The legislature seems to have intended to leave very little to the will of the parties in our matter. Yet, crucial elements should not be ignored, namely, that the terms 'package or unit' were not defined in the rules, that these terms are extremely flexible and that attempts to introduce uniform criteria were rejected by the parties to the Brussels Convention.⁶⁷ Moreover, facing a problem of interpretation to which the text of the Rules itself offers no clue whatever, it seems inevitable that at least in marginal cases the intention of the parties should be allowed to play some role. It is, however, important that this element should be used only when it is absolutely necessary.

Thus, as was done both in Leather's Best,⁶⁸ The Pioneer Moon,⁶⁹ and in Lufty v. Canadian Pacific,⁷⁰ clauses in the bill of lading declaring the carrier's liability to be calculated as per-container should always be deemed invalid when they are arbitrary and have no connection with the circumstances of the case. If such clauses are allowed there can be little doubt that they would be indiscriminately inserted by carriers' conferences into most of the standard bills of lading, thus drastically reducing carriers' liability. What role, then, should the parties' intention play in the 'circumstances of the case'? Here again it should be used only when absolutely necessary. As already said, there is no reason to allow any reduction in liability

67. See section 5.1., *infra*.

68. *Supra*, n. 2, p. 153.

69. *Supra*, n. 14, p. 157.

70. *Supra*, n. 20, p. 158.

to a carrier when he actually, and through his own sources, knows the number of packages he has received. All the tests laid down by courts, i.e. the part each party played in the loading process, the size and shape of the container, the calculation of freight and the notations in the bill of lading, should be used to indicate this knowledge, the last test usually having a decisive significance since the carrier is legally bound to state the number of inner packages when he actually knows this number.

Only when there is no such knowledge, and the only information concerning the number of packages is supplied by the shipper, should the intention of the parties be allowed to govern. Then it should be at the carrier's discretion to overlook his ignorance and indicate the number of packages as stated by the shipper or to refrain from doing so.

To sum, we suggest that when there is actual knowledge it should prevail over the intention of the parties. This suggestion was never tested by courts dealing with our issue, as in all of the reported cases, when the carrier knew the contents of the container, it also seemed to be understood by both parties that each inner package should be considered as art.4(5) package, and thus 'knowledge' and 'intention' were never actually confronted with each other in our connection.

5. NEW LEGISLATIVE EFFORTS

5.1. The Brussels Protocol

The second meeting of the 12th session of the Diplomatic Conference on Maritime Law, convened in Brussels, Feb.1968, produced a protocol known as the Visby Amendment to the Hague Rules. It included, inter alia, significant amendments to art.4(5), namely:

- 1) The 'package or unit' limitation amount would be raised to 10,000F.
- 2) A new alternative standard of limitation, '30F per kilo of gross weight' would be added, and would apply when producing a higher amount of liability than the 'package or unit' standard.
- 3) A new clause

would be added, according to which the number of packages stated in the bill of lading as carried in a container would indicate what would constitute the 'package or unit' mentioned in the article.

In order to clarify the rationale of the new system of liability limitation it is advisable to survey the main developments in the history of the amendment. Clearly, the original idea behind the amendments had been the adaptation of the old standard to new circumstances, since the £100 limitation itself hardly suited its purpose.¹ At the first meeting of the conference, a suggestion was made by some delegations² to substitute the 'package or unit' limitation with a weight standard, the main motives being the urge for uniformity and for adaptation both to new means of carriage and to other international transport conventions.³ Other delegations doubted the suitability of this standard to goods of low weight and high value. Several compromise suggestions were made, and the second meeting produced the present text of the Protocol, including the alternative standards. Naturally, 'the first limit is intended to apply to light valuable cargo, while the second limit is intended to apply to heavy cargo'.⁴ Still, there was very little in either alternative to solve the container problem. It was understood that the 30F per kilo standard, being much lower than in any other transport convention, was not meant to serve for ordinary goods shipped in containers but for heavy articles 'such as big machines, trucks, etc.'⁵

1. See Lord Diplock, 1 J.M.L. & Comm. 525, 530, et seq.

2. For the history of the suggestions, see E. Schmeltzer and R.A. Peavy, 'Prospects and Problems of the Container Revolution' (1970), 1 J.M.L. & Comm. 203, 224.

3. See De Gurse, 2 J.M.L. & Comm. 131, 137. A \$3.70 per pound limitation was suggested to match the standard in the CMR Convention, art. 23(3).

4. UNCTAD's report on Bills of Lading, TD/B/C.4/ISL/6, p. 105.

5. Schmeltzer and Peavy, supra, *ibid.*

It is only the additional container-clause which suggested a convenient solution. It 'enables the cargo-owner and the carrier to select the maximum which will be applicable to the particular contract of carriage',⁶ and provides a fair degree of uniformity and predictability for both sides.⁷ The practical effect of this system would be as follows:

- 1) When only the container is mentioned in the bill of lading, the weight basis would prevail. Even an extremely light container load weighing one ton would produce a higher liability limitation when the latter is calculated on the basis of weight (1,000 kg x 30F),⁸ than on the basis of 'package or unit' (1 container x 10,000F).
2. When the number of inner packages is mentioned the prevailing standard of limitation would be established on the basis of an interplay between the weight and the number of packages. For instance, in an average container load, weighing 12 tons, the 'unit or package' limitation would prevail if there are more than 36 packages in the container.

This system appears complicated, and it is not free of problems,⁹ but the present writer believes it is workable. However, the prospect of it being made effective, at least in the exact present form, is small. Until the time of writing only the United Kingdom

6. Lord Diplock, 1 J.M.L. & Comm. 525, 531.

7. C.H.Schmitthoff, in his 'Carriage of Goods by Sea Act 1971', [1971] J.B.L.191,194, refers to the amendment as an 'ingenious solution'. P.Manca writes in International Maritime Law(Antwerpen,1970),vol.2, p.276: 'The rule is crystal clear and lays down a simple method of measuring the limitation of liability'. See, however, Recupero, 15 Boston College Ind. & Com. L. Rev. 51, 68-9, who believes that the suggested system is unworkable.

8. This assumes loss or damage to the whole container load. Pre-shipment prediction of the limit of carrier's liability must be calculated on the basis of such an assumption.

9. See, e.g., the problems mentioned in connection with the UNCITRAL draft, p.187, infra, all of which apply here.

has taken steps towards ratification and legislation¹⁰ and similar steps are unlikely in any of the major maritime powers.¹¹ This has been clear for some years now, but has become more so when the legislative effort of the international community has been channelled onto drafting a new Convention on International Carriage under the auspices of UNCITRAL.

5.2. The UNCITRAL Draft

UNCITRAL's Working Group on International Legislation on Shipping adopted in its sixth session¹² a suggestion to limit the carrier's liability according to a similar system to the one suggested in the Brussels Protocol, based on the alternative standards of weight and 'package or unit', including the special provision on containerised cargoes.

However, at the final stages of the Group's work¹³ the suggestion of a weight basis as a single criterion was re-introduced, and gained enough support to be included in the draft Convention as an alternative to the dual-basis system.¹⁴ An analysis of comments by governments and international organizations on the draft¹⁵ indicates greater support for the weight basis system, but the final decision

10. Carriage of Goods by Sea Act 1971, has been passed, but has not come into force.

11. See, e.g., the editor's note to correspondence in (1971), 3J.M.L. & Comm. 209. Yet the Protocol has had some persuasive effect and has been referred to in some decisions. See Lucchese, 351 F. Supp. 588, 594; Inter American 313 F. Supp. 1337; Royal Typewriter (Ct. of App.), 483 F.2d. 645, 648; Rouen Court of Appeal 16.3.73, 25 D.M.F. 594, 595.

12. 2.4.73, U.N.Doc.A/CN.9/76, p.6 et seq. See also the analysis in the report which formed the basis for the Group's suggestions, A/CN.9/76/Add.1.

13. In the 8th session, 1.4.75, A/CN.9/105, p.36.

14. A/CN.9/105, Annex, art.6.

15. A/CN.9/110.

on the matter would only be taken in the Diplomatic Conference which will discuss the draft at a later date.

The arguments which have been advanced in favour of the latter system are as follows:

- 1) Including only a single criterion, it would afford greater simplicity.
- 2) It would promote uniformity with other transport conventions, namely the CIM, CMR and Warsaw Convention, all of which adhere to the weight basis system.
- 3) The 'package or unit' criterion has proved troublesome and arbitrary.¹⁶
- 4) The weight basis system has been tested in practice and proved satisfactory whereas the dual-basis system has never been tested.¹⁷
- 5) The weight basis would not necessitate any special provision about containerised goods.¹⁸

Against these arguments one can only advance the original argument in favour of the dual system, namely that its flexibility enables it to deal equitably with all variations of weight and value, whereas the single-basis system is unfair to the owners of light but valuable cargo. Both lines of argumentation are plausible and preference between the systems, so it seems, would depend on purely subjective views about the respective merits of certainty and equitability in commerce in general.

It remains to mention the following problems:

16. For the first three arguments see A/CN.9/110, pp.40-41.

17. A/CN.9/76, p.8.

18. A/CN.9/76/Add.1, p.34. But see the first problem stated in the text below.

1) What is the role of the container itself in the limitation?

The UNCITRAL Group improved on the Brussels Protocol amendments by suggesting that when the container itself is lost or damaged it should be considered as a separate shipping unit 'when not owned or otherwise supplied by the carrier'.¹⁹ This would solve the problem as far as the 'package or unit' criterion is concerned. But should the weight of the container be included when the limitation is calculated according to weight?²⁰

Both the Brussels Protocol suggestions and the UNCITRAL ones speak of the 'gross weight of the goods lost or damaged'. 'Gross weight' includes the weight of the packaging,²¹ and this immediately raises the question of whether or not the container is a package.

In the present context, common sense requires that only containers owned or otherwise supplied by the shipper should be included in the weight, but an opposite argument is not impossible, and it is preferable that the matter should be cleared by an express provision.²²

2) If the 'package or unit' criterion is retained, can a carrier charge a higher freight rate when goods are carried in a container and the shipper requires the enumeration of inner packages in the bill of lading? There seems to be nothing in the wording of the suggested

19. A/CN.9/105, Annex, art.6, alternatives c,d.

20. See the problem stated by J.Wong Kong Kee in 'Containerisation - its Legal Implications' (1970), 12 Malaya L.Rev.364,367.

21. Bouvier's Law Dictionary, 8th ed.(St.Paul,1914); E.Jowitt, The Dictionary of English Law(London,1959); London Transport Co. v. Trechmann Bros., [1904] 1 K.B.635,646.

22. See the solution mentioned in section 5.3., infra.

clauses to prevent it,²³ and there is no general restriction of freight rates either in the Hague Rules or in the new draft Convention.²⁴ Yet, it is almost certain that a higher freight rate will deter shippers from using the option and render it a dead letter.²⁵

No attention has been given to this question in the course of preparing the UNCITRAL draft. As to the intention of the drafters of the Brussels Protocol, it seems that there has been a misunderstanding between certain delegations. De Gurse,²⁶ relying on the official report of the American delegation, writes that the original draft of art.4(5), suggested by the British delegation, was opposed by the majority of the delegations, on the ground that its similarity to the value declaration proviso would lead to recurrence of the special rate charges. The present text has been suggested and accepted, but in concluding speeches by chairmen of involved committees²⁷ they entertained no doubt that carriers would be able to charge more when the number of inner packages is indicated in the bill of lading. Commentators,²⁸ however, differ among themselves in their views on this matter which would become crucial if the dual-basis system comes into force.

23. See, however, Grönfors, 'The Hague Visby Rules', [1968] J.B.L. 201, 202.

24. Admittedly, the significance of this problem to private law is somewhat doubtful. Disputes as to the legality of freight rates are bound to arise mainly in administrative tribunals where rates are controlled by the state.

25. Lord Diplock, 1 J.M.L. & Comm. 525, 532.

26. 2 J.M.L. & Comm. 131, 142-3.

27. Ibid. --

28. Grönfors, *supra*, *ibid.*, rejects any possibility of increasing the freight rate. Manca, *op.cit.* at p.276, and Lord Diplock, *supra*, *ibid.*, take the opposite view.

5.3. The ICC Rules on Combined Transport

ICC's Uniform Rules for a Combined Transport Document²⁹ include a single weight criterion as a basis for the Combined Transport Operator's limitation of liability when the stage of transport where the loss or damage occurred is not known. According to Rule 13(c) therein, 'Compensation shall not exceed 30 francs per kilo of gross weight of the goods lost or damaged ...'

Some container bills of lading incorporating the ICC Rules provide that the term 'goods' should include 'any container not supplied by or on behalf of the carrier'.³⁰ An application of this provision to the weight limitation clause obviates, of course, the problem mentioned earlier as to the inclusion of the weight of the container in the basis of limitation.

29. ICC Brochure 298.

30. See, e.g., OCL combined transport bill of lading, clause 1.

Chapter IV: THE DECK STOWAGE OF CONTAINERS

1. GENERAL

Carriage on-deck has been considered, from the early days of shipping until recently, as an exceptional practice, adopted on rare occasions. Containerisation, however, introduced into the shipping industry an entirely different situation. While deck-stowage of containers became popular even before the introduction of container-ships, it is the latter which brought about substantial change in traditional maritime transport practices. The designers of container-ships have made deck-stowage of containers a necessary part of most of the container operations at present and in the foreseeable future.

Yet, at least at first glance, this developing practice found the existing national and international legal systems totally unprepared. Traditionally, the law treated deck-carriage with almost unparalleled hostility. Unjustified deck-carriage entails, at least in common law systems, drastic consequences to the legal relations between all the parties involved in the transport operation. More importantly, the basic principle which lay behind all deck-carriage rules was that such carriage was unjustified, and prohibited, unless specifically authorized by consent, custom or statute.

Such an attitude was clearly understandable at times when deck-carriage was normally associated with recklessness and greed on the part of carriers who exposed the goods to considerably greater risks, simply in order to earn more freight. Deck-carriage at present, however, deserves a fresh look.

What is vitally important in any attempt to review and, if necessary, revise the traditional deck-carriage rules is to get down to their roots, to restate the rationale of the basic

prohibition and its exceptions, and to discard the factual prejudices and the unduly dogmatic rules which accumulated over the years and attached themselves to the law of deck-carriage. It is such prejudices and dogmas, for instance, which brought about such an abnormality as the characterization of the deck-stowage of a container in The Mormacvega¹ as a 'not unreasonable deviation', whereas the carriage could have merely been declared as a simple, non-deviative breach of the obligation to stow the cargo properly and carefully.

It was about fifty years ago that the Supreme Court of the U.S. first declared a carrier who stowed on-deck liable 'as for a deviation',² on the ground that such stowage changed the character of the contemplated carriage by adding to it greater risks and hazards. During the subsequent half-century the stigma of deviation adhered to deck carriage increasingly until it was automatically attached to every unauthorized deck-carriage regardless of the actual risks involved in such carriage.³ Hence, the contradiction between, on the one hand, the Court's emphatic statement in The Mormacvega to the effect that the deck-carriage in that case was not more hazardous than the under-deck carriage aboard the same vessel,⁴ and, on the other hand, the elaborate effort in the same case to decide upon the reasonableness of the 'deviation'.

1 Du Pont De Nemours International S.A. v. S.S. 'Mormacvega', 367 F.Supp. 793, [1973] 1 Lloyd's Rep. 267 (S.D.N.Y. 1972); aff'd, 493 F.2d.97, [1974] 1 Lloyd's Rep. 296 (2nd. Circ., 1974).

2 St. Johns N.F. Shipping Corporation v. S.A. Companhia Geral Commercial Do Rio De Janeiro, 263 U.S.119, 68 L.Ed. 201 (1923).

3 Typical of this trend is the fact, insignificant in itself, that American courts today no longer treat deck-stowage as merely 'similar to' deviation (as was clearly the attitude in The St. Johns N.F.'s case, id.), but speak of deck-stowage as if it actually was a deviation. See e.g. Encyclopaedia Britannica, Inc. v. S.S. 'Hong-Kong Producer', 422 F.2d. 7, [1969] 2 Lloyd's Rep. 536, 544, (2nd Circ, 1969) ('The stowing... on the weather deck was...an unreasonable deviation').

4 367 F.Supp. 793.800.

What made the legal rules governing deck-stowage unique was that, unlike other alleged faults in carriage of goods, little or no proof was required of the plaintiff in order to establish the fault of the carrier in stowing the goods on deck. It was normally enough to prove that the goods were stowed there, since in very early days⁵ it became a universally recognized fact that the deck of a vessel was unsafe for stowage,⁶ and that except for special cases, stowage there constituted a breach of the general obligation to stow the goods properly.

It is this very fact, namely that deck-stowage is automatically presumed to be unsafe and risky, that should be challenged today. If it can be factually shown that deck-containers are roughly as safe as those stowed in the holds, the goods packed in the former should be treated in the same way as goods packed in the latter i.e. whoever claims that the obligation to stow properly was broken must prove some fault or negligence beyond the mere deck-stowage; if, however, on-deck stowage, even in containers, is still significantly more hazardous than under-deck stowage, there would be no reason for any change in the traditional attitude of the law.

Now, no comprehensive, reliable data exists as yet about the relative safety of deck-containers, and this is reflected in the different attitudes of individual underwriters towards insuring containerised deck-cargoes, but as experience about deck-stowage

5 See, e.g., the history of the rule regarding jettison of deck-cargo in Lowndes and Rudolf on General Average, 10th ed. (London, 1975), by C.T.Ellis, C.S.Staughton and D.J.Wilson, para. 106, p. 56 et seq.

6 Deck-stowage is usually associated not only with risks to the cargo, but also with risks to the crew and the vessel as a whole. See A.Gaillet, 'Étude de la Notion de Responsabilité dans le Cas d'un Chargement de Marchandises en Pontée' (1972), 24 D.M.F.515,515-516.

of containers grows over the years, it becomes more and more clear that although such stowage is generally safe, and 'the dangers historically associated with on-deck stowage...are substantially reduced',⁷ containers stowed on deck are still somewhat less safe than those stowed under deck.

The degree of special on-deck risks naturally depends on the suitability of the vessel's deck for such stowage, and it is the emergence of the container-ship, either originally designed or reconstructed for carriage of a considerable number of containers above-deck, that brought about the general reduction in the traditional deck-risks. Yet, even to a layman, it must seem obvious that there are some disadvantages in deck-carriage, even aboard such vessels, as compared to under-deck stowage aboard the same vessels. In The Mormacvega, for instance, the American Bureau of Shipping approved the safety of the deck-stowage of containers 'except with respect to possible damage from atmospheric conditions, freezing or dampness',⁸ and yet the container involved in the case was lost overboard. The carrier originally asserted that 'the loss was occasioned by...an unusually severe ocean swell', etc.,⁹ but this assertion was abandoned at the trial,¹⁰ and, in any case, it is enough to observe that all the containers stowed below-deck on the same vessel, on the same voyage,

7 The Mormacvega, 493 F.2d.97,103.

8 367 F.Supp. 793,800.

9 Ibid, p. 796.

10 It cannot pass unnoticed that a very similar trend (i.e. the carrier chooses not to dispute the cause of damage or any other matter which may involve a full account of the actual circumstances of the accident) appears in the other American deck-container cases. See The Hong-Kong Producer (^{supra}), and Rosenbruch v. American Export Isbrandsten Lines, 357 F. Supp. 982 (S.D.N.Y.1973).

were delivered intact.¹¹ In Evans & Sons v. Andrea Merzario¹² two containers were lost overboard in the port of Rotterdam in what was described as a 'slight swell'.¹³ Even more striking is the case of Rosenbruch v. American Export,¹⁴ where thirty-two containers stowed on-deck were lost when the vessel, 'designed for container carriage',¹⁵ encountered heavy seas.¹⁶

The number of such special risks obviously increases when containers are stowed aboard conventional vessels. Hence, for instance, the very careful phrasing of IMCO's Maritime Safety Committee in the introduction to one of its recommendations -

'Noting that...containers are being carried safely under certain conditions on vessels which are not normally fitted with securing arrangements generally found in special purpose container vessels, the Committee considers that particular attention must be given to the stowage and securing of such containers when carried on deck.'¹⁷

Taking these observations into consideration, it is submitted that the situation as to the deck-stowage of containers could be stated as follows.

11 367 F.Supp. 793,798.

12 [1976] 2All. E.R. 930.

13 Ibid, p. 932.

14 Supra, n.14.

15 357 F. Supp. 982, 983.

16 The decision does not reveal, however, any further details as to the causes of the damage. See note 10, supra.

17 See IMCO's Assembly, 8th session, Resolutions and other Decisions, pp. 222-223. The recommendation was adopted by the Assembly on 20 November 1973.

As in the past, certain goods can be safely carried on-deck under certain circumstances, when due care is given to their stowage there, even when not packed in containers. The revolutionary aspect of containerisation lies in the facts that the number and variety of goods which can be thus carried is greater, less special care is needed in each specific case to ensure their safe arrival, and the general probability of loss or damage is lower. In other words, safety on-deck, although not equivalent to safety of goods stowed below deck, is the norm rather than the exception, where the goods are containerised.

This situation is sufficient to justify at least the removal of some of the assumptions that lie behind the basic deck-prohibition and its derivatives.

In any reasonable categorisation, unsafe deck-stowage would be only one among many other possibilities of improper stowage. Every technical book on stowage of goods aboard ships includes hundreds of examples of bad stowage and, indeed, many of these resulted at one time or another in litigation. Yet only deck-stowage was singled out by legislators and courts as a distinctive category of improper stowage. Continental Codes indiscriminately forbid carriers to stow goods on deck without the shipper's consent;¹⁸ English common law has formed a similar prohibition, allowing, though for greater flexibility;¹⁹ American courts have carried the prohibition as far as treating

18 See, e.g. the German HGB, art. 556, and the French Code of Commerce Art. 229, replaced by art. 22 of the law no. 66-420 of 18 June 1966 on Contracts of Affreightment and Maritime Transport.

19 Carver, para. 699, p. 602, et seq.; Scrutton, art. 85, p. 163, et seq.

unauthorized deck cargo as a deviation;²⁰ the law of insurance calls for special arrangements where deck-cargo is concerned;²¹ ICC's Uniform Customs and Practices for Documentary Credits advise banks to refuse a Bill of Lading evidencing deck-stowage, unless specifically authorised in the letter of credit;²² and finally, but most crucially, the drafters of the Hague Rules²³ found deck-carriage so distinctive that they chose to allow carriers freedom of contract when carrying on-deck.²⁴

The crucial question which will lie behind all the subsidiary questions posed in this chapter are, then, these: to what extent has the law allowed itself to be prejudiced by the facts as they existed when the deck-carriage rules were formed?

20 See notes 2, 3,^{P.191}supra.

21 Marine Insurance Act 1906, schedule I, rule 17.

22 Art. 22(a) of the 1974 version. But art. 22(b) allows the acceptance of bills of lading including a 'liberty to stow on deck' clause, thus rendering most contemporary container bills of lading acceptable in principle, as long as no deck-carriage statement is added to them after actual shipment.

23 Art.1(c); see pp.242-4, infra.

24 INCOTERMS and the York-Antwerp Rules are the only major sets of legal rules in the relevant spheres of international trade which do not directly mention deck-carriage. The former, though, require a clean Bill of Lading in connection with C.I.F. and C & F contracts [and see G.H.Treitel in Benjamin's Sale of Goods (London, 1974), A.G.Guest Gen. ed., para. 1451, p. 741, on deck-carriage and contracts of sale at common law] York-Antwerp Rule I requires carriage "in accordance with the recognized custom of the trade", but the 1890 version referred expressly to jettison of deck-cargo, and the present text was originally drafted in the 1924 version. An attempt to refer to deck-carriage of containers in Rule I was rejected when the 1974 revision of the Rules was discussed. K.Pineus, 'The York-Antwerp Rules 1974', [1974] E.T.L. 349, 353-4.

Is the law, despite a traditional bias against deck-stowage, still flexible enough to deal with new circumstances in an equitable way? Is safety, allegedly the basic and only valid criterion in the deck-stowage issue, still a relevant issue in any deck-carriage case, or has the law relapsed into assuming that any deck-carriage must be unsafe, and thus lost its viability?

The prohibition incorporated in the basic deck-carriage rule in English common law, as stated in Carver, is:

'Goods ought not to be carried on deck if they are there exposed to a greater risk than when stowed in the usual carrying part of the ship...'²⁵

The equivalent part in the basic French statutory rule²⁶ simply states that:

'le transporteur commet une faute si...il arrime la marchandise sur le pont du navire'.

These basic rules suggest two opposite but clear answers to the questions mentioned earlier. Whereas the French rule apparently assumes the unsafety of deck carriage, the English one makes unsafety a condition of its own application. In practice, however, the rules governing the many aspects of deck-carriage are far more complex.

The flexibility and viability of traditional deck-stowage rules, and their application to container transport, will be discussed in the following pages with special attention to four of the major aspects of the problem, namely the question of

25 Carver, para. 699, p. 602.

26 Law of 18 June 1966, Art.22 (see note 18, supra).

causality, the definition of 'deck', the consent of the shipper and the role of custom and usages.

2. DECK STOWAGE AND THE QUESTION OF CAUSALITY

2.1 Causal Connection and Containers

Does the mere fact that goods were damaged while stowed on deck render the carrier responsible, or must a causal link between the deck-stowage and the damage be established? In other words, is a carrier exempted from liability if it can be proved that the damage had nothing to do with the method of stowage and that the same damage would have occurred even had the goods been stowed under deck?¹

The connection of this issue to the factor of safety mentioned earlier is obvious. Even in a system which presumes that deck-stowage is unsafe, such a presumption is for all practical purposes rebuttable if the carrier is relieved from liability when he can show that such 'abstract' unsafety had no real effect on the specific accident involved. The actual effect of the presumption, then, would be this: that although it would be presumed that deck-stowage is unsafe and that damages and losses may ensue, it would not be presumed that every damage to deck-cargo necessarily resulted from such stowage.

The practical importance of this issue to container operations is enormous, since a rule requiring a causal relation, if applied to deck-cargo, might play a major role in the legal normalisation of deck-stowage of containers. The situation, put in a somewhat oversimplified way, is as follows: if container-ship operators believe that the risk involved in deck-stowage of containers is not much higher than the risk attached

¹ The carrier may naturally be then found responsible for a different fault (i.e. a fault that has nothing to do with the deck-stowage itself), but this is irrelevant to the present discussion.

to under-deck carriage, and that only rarely would an accident actually be caused by deck-stowage as such, then they could certainly overcome financially whatever hardships the law might inflict upon them in such rare cases. If, however, no causal link is required, and an insurer's liability is imposed on carriers of deck-cargo, whatever the cause of damage, container-ship owners may find themselves facing an unbearable risk of having to pay the full value of every loss or damage occurring on-deck, with or without the carrier's or his employees' negligence. (It must be stressed, however, that this analysis is concerned only with unauthorized deck-carriage, i.e. deck carriage performed without the shipper's valid consent²).

What, then, is the position of the law at present?

Neither English nor French maritime law give direct attention to the question of causality in this connection, and it is preferable, therefore, to start with American common law, whose attitude is clearer.

2.2 American Law

In The Delaware,³ one of the classic American deck-carriage cases, it was stated by the Supreme Court of the U.S.:

'Goods, though lost by the perils of the sea, if they were stowed on deck without the consent of the shipper, are not regarded as goods lost by the Act of God...unless...it affirmatively appears that the manner of stowage did not, in any degree, contribute to the disaster.'⁴

2 See infra, p. 237 et seq.

3 14 Wall. 579, 20 L.Ed. 779. (1871).

4 20 L.Ed. 782.

The same attitude, i.e. that a defence based on relevant excepted perils is available to a carrier where deck-stowage did not contribute to the damage, still applies in American law after the attachment of the stigma of deviation to unauthorized deck-carriage. The decision in The St. Johns N.F.⁵ even incorporated the notion of causality within the rationale behind treating deck-carriage as deviation:

'By stowing the goods on deck the vessel broke her contract.

...she exposed [the goods] to greater risk than had been agreed, and thereby directly caused the loss. She accordingly became liable as for a deviation.'⁶

The notion of causality is also invoked in The Salvore,⁷ where the carrier was relieved from liability for fire damage to deck-cargo, which did not result from the mere deck-stowage. Very similar is the decision in the case of The Ida, which allowed the carrier the benefit of a fire statute, despite an alleged deviation by stowage on-deck, because 'it has been established that there was no causal connection between the deviation and the fire.'⁸ Even clearer is the case of The Margaret Lykes.⁹ There, a truck which was stowed on-deck during the voyage was damaged during the discharge operation and the court stated:

5 Supra, note 2, p.191.

6 68 L.Ed.203. Note, however, that an increase in the risk is not a necessary requirement of a deviation in its original, geographical sense.

7 60 F.2d.683, 685(2nd. Circ. 1932), cert. den.287 U.S.653.

8 75 F.2d. 278,279 (2nd.Circ.1935).

9 57 F.Supp.466 (E.D.La.1944).

"the injury done to the truck resulted in no wise from its having been carried on-deck. The damage sustained would have occurred even though there had been no such alleged 'deviation'. Under such a state of facts no responsibility attaches to the carrier 'as for a deviation'.¹⁰

American courts did not hesitate to impose the purely American notion of non-geographical deviation on the interpretation of art.4(4) of the Hague Rules.¹¹ The general rule is that, except for one or two statutory clauses,¹² deviation renders void all statutory exception and limitation clauses.¹² Yet the requirement for causal connection stays intact. To begin with, art.4(4) itself speaks of liability 'for any loss of damage resulting from the deviation'.

As to court decisions, The Ocean Liberty¹⁴ applied the principle of The Ida¹⁵ and The Salvore¹⁶ to the fire clause (art.4(2)(b)) in COGSA 1936 and relieved the carrier who stowed the goods on deck from liability because of lack of any causal relation between the actual damage and the deck-stowage. Lack

10 Ibid, p. 470.

11 Its equivalent in the U.S. is art.4(4), COGSA 1936, 46 U.S.C.A., sec. 1304(5).

12 Articles 3(6) and 4(5) of the Rules, both expressly state that they stay valid 'in any event'. As to art.3(6) and deviation, see Potter v. North German Lloyd, 50 F.Supp.173 (N.D.Cal.1943); Singer Hosiery Mills of N.Y. v. Cunard White Star, 102, N.Y.S.2d,762(1951). As to art.4(5), see Atlantic Mutual Co. v. Poseidon Schiffahrt, 206 F.Supp.15 (N.D.Ill.1962), aff'd 313 F.2d., 872 (7th Circ.1963); Nassau Glass Co. v. Noel Roberts, 249 F.Supp.116 (S.D.Fla.1965). Later cases, however seem to have overruled the latter two cases. See note by M.P.Klein, (1970), 1.J.M.L.&Comm.473.

13 Gilmore and Black, p. 180. See also Stag Line v. Foscolo, Mango, & Co., [1932] A.C.328.

14 A/S J.Ludwig Mowinckels Rederi v. Accinato, 199 F.2d.134 (4th Circ.1952).

15 Supra, n.8.

16 Supra, n.7.

of causal relation was not established in any other reported American case dealing with deviation and the COGSA 1936, but numerous cases emphasized the existence of such a relation as an essential element in deciding against the carrier. Such, for instance, was the attitude of the court in Jones v. The Flying Clipper,¹⁷ clearly the leading authority on deck-stowage deviation and COGSA 1936, and a note on this case,¹⁸ comparing the circumstances involved, and the conclusions drawn, to those in Potter,¹⁹ Singer²⁰ and The Ida,²¹ sensibly concluded that "if an unreasonable deviation occurs which has no causal connection with the damage to the cargo, the limitation of liability per package provision should not be affected by the deviation".

There is nothing in later cases to contradict this conclusion,²² and it could be fairly asserted that the matter was settled in The Mormacvega, where the undisputed, but much emphasized, causal relation between the damage and the deck-stowage was treated as one of the main factors constituting an unreasonable deviation.²³

17 116 F.Supp.386 (S.D.N.Y.1953). See there, on p. 387, the emphasis on the fact that the causal relation was not in dispute.

18 (1954), 102 U.of Pen.L.Rev.797, 800-801.

19 Supra,n.12.

20 Supra,n.12.

21 Supra,n.6,p.2a

22 See, e.g. St Ioannis Shipping Corp. v. Zidell Explorations, 222 F.Supp.299,302 (D. Oreg.1963); Searoad Shipping Co. v. E.I.Du Pont De Nemours And Co., 361 F.2d.833,835-6(5th Circ. 1966), Cert. den. 385 U.S.973; The Hong-Kong Producer, 422 F.2d. 7, 18; World Wide Steamship Co. v. India Supply Mission, 316 F.Supp.190 (S.D.N.Y.1970).

23 367 F.Supp. 793,798. The argument of unreasonable deviation failed there on different grounds. See p.234, infra, at notes 53, 54.

2.3. English Law

The attitude of English law to the question of causal connection in the present context is less clear, and can only be guessed at by deduction and analogy.

In Evans & Sons (Portsmouth) v. Andrea Merzario,²⁴ where a forwarder failed to secure under-deck carriage for his client's containers, it was repeatedly mentioned that the loss was causally connected to the deck-carriage and that it would not have happened otherwise.²⁵ This, of course, can serve as some indication of the state of the law on our present problem, but standing independently it cannot be considered a conclusive one.²⁶

Somewhat more indicative is the case of Royal Exchange Co. v. Dixon,²⁷ decided by the House of Lords in 1886. There, the carrier broke his contract by stowing the goods on deck, but argued, inter alia, that he could avail himself of the exception of jettison in the contract, due to the lack of causal connection between the breach of contract and the accident. The court dismissed the argument on the factual ground that 'the jettison of this cargo was the direct result of its being stowed upon deck',²⁸ but Lord Halsbury stated in an obiter dictum that he would have dismissed such argument even in different circumstances.²⁹ Lord Watson,³⁰ concurring, dismissed the causal

24 [1976] 2 All.E.R.930.

25 Ibid., at 934 by Roskill L.J. and 936 by Geoffrey Lane L.J.

26 Note also that both in the Court of Appeal and in Kerr J.'s decision it is stressed that the contract involved there between the plaintiff-importer and the defendant-forwarder is not a contract of carriage. See [1975] 1 Lloyd's Rep. 162, 168.

27 12 App.Cas.11.

28 Ibid, p. 17.

29 Ibid.

30 Ibid., p. 19.

connection argument merely by referring to the general principle of Davis v. Garrett,³¹ namely that the harsh consequences of deviation on the carrier's liability can be avoided only when it can be proved that the damage 'must have happened' (as opposed to 'may have happened') even in the absence of a deviation.

Now, Davis v. Garrett itself is only partially relevant today as far as the problem of causal relations is concerned, as later decisions qualified and amended³² the principle contained in it. But more important to us is the very fact that this decision, dealing with geographical deviation, was cited in a deck-carriage case, namely Royal Exchange Co. v. Dixon. Can we do the same today, and apply the principles of deviation, as they stand at present, to the problem of deck-carriage?

American law treats unauthorised deck-carriage as deviation.³³

Kerr J. , in an obiter dictum in Evans & Sons v. Merzario,³⁴ declares that 'to carry goods on deck is a breach, which has the character of a wrongful deviation.' Scrutton³⁵ and Carver³⁶ are somewhat more cautious, and it is perhaps the best description of the position of English law to say that, as in earlier days in American law,³⁷ deck-carriage should not be completely equated with deviation, but treated as analogous to it unless, in a specific aspect of deck-carriage, such an analogy is unwarranted.³⁸

32 Mainly Joseph Thorley v. Orchis Steamship Co., [1907] 1 K.B.660; Hain Steamship Co. v. Tate & Lyle (1936), 55 Ll.L.Rep.159; Morrison & Co. v. Shaw, Savill & Albion Co., [1916] 2 K.B.783.

33 See p. 200, supra.

34 [1975] 1 Lloyd's Rep. 162,168. Rev'd on a different ground, [1976] 2 All. E.R. 930.

35 Art. 85, p. 164.

36 Para. 700, p. 604-5.

37 See p. 200, supra.

38 For example, analogies between deck-carriage and deviation may be unwarranted where questions connected with bill of lading clauses and statements are concerned, because bills of lading are usually issued after deck-stowage is performed, but before any geographical deviation occurs.

What, then, is the attitude of English law towards the question of causal relations between loss or damage and deviation? When the cargo-owner chooses not to bring the contract to an end despite a deviation, the carrier may exempt himself from liability for any loss or damage attributable to the contractual exception clauses.³⁹ He will then be liable only for loss or damage which is a direct consequence of the deviation itself. When, however, the cargo-owner chooses to terminate the contract, the carrier may rely only on the traditional common law exceptions of a common carrier, and even that only if he can convince the court that the damage must have occurred even had there been no deviation.⁴⁰

The restriction on the availability of exemptions in the latter category places upon carriers a burden which is significantly heavier than in American law, where even contractual exemption clauses may be used by a deviating carrier⁴¹ when it can be shown that the damage was not attributable to the deviation. [It is perhaps expedient to note, however, that despite the apparently narrow language used in Scrutton,⁴² the common law exemptions do include the one which is of crucial importance in container transport, namely the shipper's fault].

The second requirement, namely that the damage would have occurred even in absence of a deviation, is somewhat more intriguing. American case law, apparently adhering to this

39 Hain Steamship Co. v. Tate & Lyle, *supra*, n.32.

40 Morrison v. Shaw, Savill, *supra*,^{n.32} Thorley v. Orchis Steamship Co., *supra*,^{n.32} Temple Steamship Co. v. V/O Sovfracht (1945), 79 Ll.L.Rep.1.

41 The Delaware (*supra*,^{n.32}), requires a causal link in connection with a purely contractual exemption clause, and the same applies to The Hermosa, 57 F.2d.20,27(9thCirc. 1932), and Globe Navigation Co. v. Ross Lumber & Mile Co., 167 F.228,231 (N.D.Cal.1908).

42 Art. 123, p. 259.

requirement,⁴³ has translated it into causal relation terminology,⁴⁴ and so was done in Scrutton.⁴⁵ '[T]hat the...loss or damage must equally have occurred even if there has been no deviation' was translated by the latter into 'that the loss or damage was not, and could not have been, occasioned by the deviation'.⁴⁶ Logically, this translation is somewhat inaccurate. Lack of causal relation between the deviation and the damage does not indicate beyond doubt that the damage would have occurred even in the absence of the deviation, but it is submitted that this doubt is narrowed considerably where the present specific category of deviation is concerned. In geographical deviation the difference between circumstances in the planned route and in the one actually used is often a matter of pure conjecture, whereas the difference in circumstances between carriage above and under the deck of the same vessel can be easily specified in many cases. In deck-carriage, a very good indication of what would have happened in the hypothetical situation (i.e. under-deck carriage of the damaged goods) can be obtained by observing a real situation, i.e. the under-deck carriage of similar goods in similar containers on the same journey.

2.4. French Law

2.4.1. Deck Carriage as 'Faute'

The position of French law is **simpler**.

43 See, e.g., The San Giuseppe, 122 F.2d. 579, 586 (4th.Circ. 1941); The Hermosa, *supra*; Globe Navigation v. Russ Lumber, *supra*, n.41.

44 See, e.g. World Wide Steamship v. India Supply Mission, ~~316~~ 316 F.Supp.190, 192-3 (S.D.N.Y. 1970).

45 Art. 123, p. 259.

46 *Ibid.*, in note 75.

R.Rodiére in his 'Précis de Droit Maritime'⁴⁷ states:

'Quand le chargement en pontée est irrégulier, les dommages subis par la marchandise du fait de ce mode de chargement sont dus à une faute commerciale et le transporteur en est responsable'.

Yet, in his more detailed treatise on maritime law,⁴⁸ Rodiére wonders whether the carrier is responsible for damage to unauthorized deck-cargo 'in every case, and completely' ('dans tous les cas et complètement'). He asserts here that no textbook or precedent ever dealt with this issue,⁴⁹ but suggests his own view that:

'La réponse affirmative supposerait qu'une peine privée est prononcée contre le transporteur. Or aucun texte n'autorise une solution aussi contraire à nos principes'.

It seems, therefore, that the statement made in 'Précis de Droit Maritime' reflects Rodiére's personal conviction that responsibility for deck-damage is subject to causal relations between the deck-stowage and the damage. Yet, since none of his books supply any authority on the subject, it is advisable to try and substantiate Rodiére's statement with the aid of more general principles of French maritime law.

According to art.22 of the 1966 statute,⁵⁰ a carrier who stows on-deck without authorization commits a 'faute'.

47 Para. 353, p. 276.

48 Gén.Mar. para 525, p. 160.

49 P.Chauveau, in his Traité De Droit Maritime (Paris 1958), at p.471, asserts that irregular deck-stowage involves responsibility 'pour tous dommages survenant aux marchandises', but it seems obvious that, in making this rather sweeping statement, the author did not have in mind the problem posed by Rodiére.

50 See supra, note 18, p.195.

Gaillet⁵¹ states quite sensibly that it is very difficult to establish a distinction between a 'faute' committed by stowage on deck and one committed by bad stowage below deck. Thus, the deck-stowage 'faute' should be classified, generally, as a 'faute d'arrimage' (and consequently, as a 'faute commerciale').

Now, Rodière states that

'La faute [d'arrimage] établie n'entraîne obligation de réparer que les dommages qui en sont la suite. C'est le droit commun en l'absence d'une disposition édictant une peine privée'.⁵²

And, as mentioned above,⁵³ no authority suggests the infliction of such 'peine privée'.

But modern French carrier's responsibility rules are so framed that a carrier, even if not responsible for the deck-damage fault because of lack of causal relation, may still be held responsible for the damage if he cannot, or is not allowed to, prove that one of the excepted perils is the cause of damage. As in Anglo-American common law and in the Hague Rules system,⁵⁴ it is enough for the cargo-owner to prove a loss or damage to goods which were delivered to the carrier in good condition, and it is the carrier who has to exonerate himself, relying on one of the statutory exceptions. The question is,

51 24 D.M.F. 515, 519-20.

52 Gén.Mar., para. 518, p. 153.

53 See previous page...

54 Scrutton, art.103A, p. 218; W.Tetley, Marine Cargo Claims (Toronto, London, 1965), p. 30 et seq.

then, are the statutory exceptions⁵⁵ available to a carrier who committed a 'faute' by carrying on deck, where it is one of the excepted perils, not the mere deck-stowage, that caused the damage? It is thought that they are.

Art. 27 of the 1966 statute, after listing all the excepted perils, adds

'Le chargeur ou son ayant droit pourra néanmoins, dans ces cas, faire la preuve que les pertes ou dommages sont dus, en tout ou en partie, à une faute du transporteur...'

It follows that it is not enough for the cargo-owner to prove that a 'faute' has been committed. He must also prove that such 'faute' caused or contributed to the damage, in order to prevent the carrier from invoking an excepted peril.

There is no similar provision in art.4(2) of the Hague Rules, but it is believed that the position there is the same.

Art. 4(2) itself contains no express restriction on the operation of the excepted perils listed in it.⁵⁶ Some restrictions,

55 We are interested in this context mainly in statutory provisions, as contractual clauses are likely to be discussed in French courts only in the rare cases when neither the Hague Rules nor the local 1966 law apply. As to the latter, it allows contracting out of its provisions in case of deck-carriage, but only when such carriage complies with art.22 therein, i.e. when the stowage does not constitute a 'faute', whereas we are concerned in this part only with cases of irregular and unlawful deck-stowage.

56 G.H.Lafage, in 'La Preuve de la Faute dans les Cas Exceptés, etc.' (1961), 13 D.M.F.323, goes as far as to assert that the lack of such express restriction should be taken to mean that no fault of the carrier, even if it contributed to the damage or to the occurrence of the excepted peril, could deprive the carrier of the exonerations mentioned in art. 4(2), paragraphs (c) to (p) of the Rules. Insofar as this opinion appears to rest itself upon the international character of the Rules, it is erroneous, since the international community adopted a solution similar to that of French local law, viz. that a carrier cannot escape liability when his own fault brought about the otherwise excepted peril, or contributed in any other way to the damage (see text below). French jurisprudence seems also to go against Lafage's assertions. Compare, e.g. Tribunal of Commerce of the Seine, 9 July 1964, 17 D.M.F.242, and Lafage's opinion on the effect of prior negligence on the exception of 'force majeure' (ibid., p. 326).

connected with the carrier's fault, were imposed by courts on many of the excepted perils⁵⁷ but it is quite clear that such restrictions always involved an element of fault or negligence which caused or contributed to the accident. There is no reason to believe that French courts would adopt a different position, if it is borne in mind that such is also the rule under French local law.⁵⁸

It can be thus concluded that, although unauthorized deck carriage is automatically considered in France as 'faute', such 'faute' has no practical effect on the legal relations between shipper and carrier when there is no causal relation between the 'faute' and the actual loss or damage.

This conclusion is valid also in cases where the deck stowage 'faute' amounts to 'faute dolosive' ('dol') or 'faute lourde' (A situation which is unlikely to occur in connection with modern container transport). Firstly, unlike the Anglo-American concepts of fundamental breach of contract and deviation,⁵⁹ the French aggravated 'fautes' do not have the effect of sweepingly setting aside contractual and statutory clauses.⁶⁰ Secondly, neither 'dol' nor 'faute lourde' has any effect at all when not causally connected with the actual loss

57 For an account of these restrictions see UNCITRAL's report on Responsibility of Ocean Carriers for Cargo: Bills of Lading, U.N. Doc. A/DE.9/63/Add.1, pp. 70-79.

58. See pp. 209-210, *supra*.

59 See e.g. J. Offerhaus, Carrier's Liability under Uniform Hague Rules (Göteborg, 1955), 19. The author explains the American notion of non-geographical deviation as deriving from a 'quite different view of the problem of non-fulfilment of contract in the Anglo-Saxon and continental world'.

60 But an express provision in art. 22 of the 1966 statute deprives the carrier of the benefit of the statutory limitation of liability.

or damage. This principle has never been challenged either in the voluminous literature on the aggravated 'fautes', or in any of the numerous decisions involving such 'fautes', and can be considered as self-evident in view of the general role of the 'fautes' in French law.

2.5. Causal Connection - Conclusion

The issue of causal connection can thus be summed up as follows. The question with which the discussion began was whether the deck-carriage rules, designed at a time when most cases of deck-stowage involved extreme risk, became so rigid as to make carriers liable for loss or damage which had not resulted in any way from such stowage. It is submitted that they did not, and that lack of causal connection between deck-carriage, even unauthorized, and the actual damage, allows the carrier at least some opportunity to escape liability, or to limit it, in American, English and French law.¹ The frequent mention of the element of causality in American decisions leaves little doubt as to the validity of this proposition in American law, and there is reason to believe that an English court would take a similar position once the question was raised. Unlike American law, however, it seems that English law would restrict a carrier who stowed on deck without authorization to the common law exceptions of common carriers even in absence of causal relations between the deck-carriage and the damage. As to French law, unauthorized deck-stowage is considered there as a 'faute', but without causal connection between it and the actual damage this 'faute' has no effect on the legal relations between the shipper and the carrier, even when it amounts to 'dol' or 'faute lourde'.

(Continued on page 223)

1 Assuming, of course, that there is nothing in the carrier's behaviour, except the mere deck-stowage, to prevent such exoneration or limitation.

3. THE DEFINITION OF 'DECK' - THE SCOPE OF THE DECK STOWAGE PROHIBITION

3.1. 'Deck' and the Safety Factor

Is carriage of goods, packed inside a closed container which, in turn, is stowed on-deck, to be considered as "deck-carriage"? Does the same answer apply to such carriage aboard a container-ship? The answer to these questions lies in the definition of "deck" and the relevance of the actual safety of any specific alleged deck-stowage to that definition.

The position of Anglo-American law regarding this issue is best described by Astle:¹

'It is difficult, if not impossible, to make any general definition of what is and what is not deck stowage, but it might be said that such stowage is not always implied when the goods are stowed above the main deck. A better guide would probably be the consideration as to whether covered stowage, even though above the main deck, gives the cargo the same security as if it were stowed below deck'.

The question whether any specific stowage amounts to 'deck-stowage' is undoubtedly 'rather a nautical than a legal question',² which should ultimately 'be left to be decided as a matter of fact in each case' as it arises.³ Yet, some general principles and guidelines can be derived from the decisions⁴ which have

1 W.E.Astle, Shipowners Cargo Liabilities and Immunities, 3rd ed. (London, 1967), p. 43.

2 Loundes and Rudolf, 9th ed. (London, 1964), para. 123, p. 68.

3 Ibid, p. 309.

4 See the decisions mentioned in Carver, para. 699, p. 603; Rodiére, Gen. Mar., para. 519, p. 155; A.W.Knauth, The American Law of Ocean Bills of Lading, 4th ed. (Baltimore, 1953), p. 236; UNCITRAL report on Bills of Lading, A/CN.9/63/Add.1, p. 26. Some of the decisions referred to in this connection deserve comment. Tetley, op.cit., p. 191, disposes of the issue of the definition of 'deck-stowage' by referring to The Lossiebank, [1938] A.M.C. 1033 (Sup.Ct.Cal.1938), stating that in that case stowage

/cont. overleaf

dealt with this issue.

The basic principle which emerges quite clearly from Anglo-American and French decisions is that 'below-deck stowage' does not necessarily mean stowage in the hatches or holds below the main deck of the vessel. The main deck as a sole, categorical, criterion for the distinction between 'on' and 'below' deck spaces suited the simple construction of sailing vessels, the functions of the decks and the safety of the goods aboard such vessels.⁵ It is not surprising, therefore, that older authorities insisted on the strict interpretation of 'deck-stowage',⁶ but that doubts as to the validity of such interpretation arose with

4 cont.

of cargo in the ship's hold was declared to be 'proper under-deck stowage'. The description of this case in Carver, *ibid*, is similar, and it is referred to in this connection also by Knauth, *ibid*, and in UNCITRAL's Report, p. 27. The Lossiebank imports, however, a different, if not opposite, principle. It was very clearly stated there that the stowage in the ship's hold should have been treated as deviation, and that such deviation 'was cured by the shipper assenting to Clause 4 in the bill of lading' (p. 1041), which rendered the Bill 'unclean'. Knauth, and UNCITRAL's Report mention also The Fred W. Sargent, 32 F.Supp.520 (E.D.Mich.1940), but this case has nothing whatever to do with the deck-stowage problem. Carver, p. 604, Lowndes and Rudolf, *ibid*. pp. 123-4, and Astle, *op.cit.*, p. 238, refer to Royal Exchange Shipping Co. v. Dixon as a case dealing, *inter alia*, with the question whether stowage in a 'deck house' is to be considered as below-deck stowage. It seems that these writers drew their information from a fuller unpublished report of the decision of the Court of Appeal since none of the abridged published reports mention this issue. See the reports in The Times, May 19, 1885, sub. nom. Dixon v. Royal Exchange, etc.; 1.T.L.R.490, sub. nom. Dixon v. Royal Exchange. See also the report of the trial in The Times, Dec. 12, 1884. The issue was not raised in the House of Lords' decision (1886), 12 App.Cas.11.

5 See The William Crane, 50 F.444,445,(D.Md.1889).

6 See authorities referred to by Rodière, *ibid*, and in The Kirkhill, 99 F.575,577 (4th Circ.1900).

the introduction of steam vessels in the second half of the nineteenth century. To borrow the words of the court in The William Crane, the traditional rule ceased to be the rule 'because the reason for it ceased.'⁷

The consideration of the safety of the goods and of the vessel has always lain behind the prohibition of 'deck-stowage', but whereas it was formerly irrefutably assumed that any space above the main deck is unsafe,⁸ the new approach was to decide the matter according to the relative safety of the space where the cargo was stowed in any specific case, whether or not it was technically above the main deck. Some courts gave a full meaning to this concept in replacing older technical criteria with the simple and flexible criterion of safety -

'The question in this case, to my mind is...not whether the cotton was carried under the hatches in the main deck, but whether it was carried in a protected place, under cover, and where experience had demonstrated it would be safe'.⁹

Or,

'The question is not whether this deck was built when the ship was originally constructed, but whether it afforded security and protection to the goods within the meaning of the bill of lading, as underdeck.'¹⁰

7 Note 5,^{supra} ibid., See also Harris v. Moody, 30 N.Y.266 (1864), for an example of an old rule which, though suitable to the realities of sailing vessels, has been replaced by a new rule, see Koufos v. C. Czarnikow, [1969] 1 A.C.350 esp. 419-420, 428-429.

8 See the authorities cited in The Kirkhill, *supra*, n.6

9 The William Crane, *supra*, n.5

10 William v. Mora, Fed.Cas. no. 17,730 (S.D.N.Y.1858).

Not all the authorities, however, adopted this approach. In fact some, although also motivated by the consideration of safety, merely replaced the old categorical technical criteria with new categorical technical ones.

3.2. The 'Built in Structure' Test

Most typical of the latter trend is the 'built-in structure' test, and although this test did not survive the years, it deserves to be mentioned.

Rule I of the York Rules 1864 which provided that 'no jettison of deck cargo, other than timber...shall be made good as general average' added

'Every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel.'¹¹

This arbitrary definition was retained in the York-Antwerp Rules of 1874 and 1890, and was disposed of only in the 1924 version.¹² There is every reason to believe that, although at the time it was contained in the Rules, the 'built-in structure' test had some influence beyond the scope of the general average issue,¹³ the test has no significance today.¹⁴

3.3. The 'Covered Space' Test

Another test which was developed in the courts is that of the 'covered space', but unlike the previous one this test has many variations, ranging from the strict requirement of a

11 See The Fairhaven, [1923] A.M.C.481 (N.D. Cal.1923) for the application of the Rules to a space on deck which seems to have been fairly covered, enclosed and protected.

12 For an account of the history of Rule I see Lowndes and Rudolf, (10th ed.) op.cit.para. 605, p. 279 et seq.

13 See e.g. Spencer Kellogg & Sons, Inc. v. Buckeye S.S. Co., 70 F.2d.146 (6th Circ.1934), cert.den.,293 U.S.563.

14 See E.P.Deutsch, 'Deck Cargo' (1939), 27 Cal.L.Rev.535, 537-8.

permanent all-round enclosure (which is not much different from the requirement of the previous test), to simple requirements of various kinds of shelters (which are closer to the requirements of the flexible safety-test described earlier).

In The Neptune,¹⁵ stowage in a space between the main and upper decks was considered proper stowage because, inter alia, the space was 'bulwarked entirely around, and covered by the upper deck'. The decision in The William Crane¹⁶ is similar but further details regarding the construction of the alleyways where the cargo was stowed¹⁷ made it clear that not only was it not required that the construction should be 'built in with the frame' of the vessel, but it was not even necessary that the space should be completely enclosed. The court in The Kirkhill,¹⁸ however, insisted on the latter condition, and treated the William Crane's decision as confined to steamers navigating the inland and coastal waters. The court in this case condemned stowage in alleyways similar to that in The William Crane because 'such spaces are covered over, but cannot be permanently closed in, as the doors at the end have to be opened by the crew in passing in and out. They cannot be made water-tight because they cannot be covered, as are the hatches, by tarpaulin covers which prevent possibility of leakage.' This approach seems to have

15 Fed.Cas., No.10,118 (Circ.Ct.S.D.N.Y.1868).

16 50 F. 444.

17 Viz, that part of the alleyway was enclosed only by wooden shutters, fitted-in only when cargo was carried in this space, that the forward end was closed by heavy doors, and that the rear end was open.

18 supra,n.6,p.214.

been generally approved in The Velma Lykes¹⁹ where the court found it necessary to distinguish The Kirkhill on the basis of the special facts of that case, and emphasized that in the case before the court 'the space...was fully inclosed, had secure doors and protected hatches.'

It seems, therefore, that the 'covered space' test in its final form in American law requires that the cargo be stowed in a space enclosed in such a way as to make it watertight²⁰ (either during the whole journey, or, by an adequate device, during most of it) but not necessarily built-in with the frame of the ship. Neither is it required that such enclosures be constructed homogeneously of metal etc., and openings are allowed, as long as they are sufficiently covered to preserve the isolation of the goods from the elements.

As to English law, Lord Esher's remark in Dixon v. Royal Exchange Co., as described in Lowndes and Rudolf,²¹ seems to be the only judicial reference to the definition of 'deck stowage'.

Attention should be given to the definition of 'deck cargo' in Regulation 14 of the Merchant Shipping (Load Lines)(Deck Cargo) Regulations 1968,²² which provides simply that

"'deck cargo' means cargo carried in any uncovered space on the deck of a ship".

This definition would probably have very little binding effect in private disputes,²³ but there is no reason why its flexible

19 6 F.Supp.886,891(S.D.Texas,1934).

20 See also The Salvore, [REDACTED] 60 F.2d.683,685.

21 10th ed., op.cit., para. 122, p. 67.

22 S.I.1968 No.1089. For earlier versions see sec.10 of the Merchant Shipping Act 1906.

23 A contravention of the Regulations amounts to a criminal offence. Merchant Shipping (Load Lines) Act 1967, sec.4. See St. John's Shipping Corp. v. Joseph Rank [1951] 1 Q.B.267.

and untechnical approach should not be adopted as a guideline, possibly with the aid of the American 'covered space' test to give fuller meaning to the definition of 'deck carriage'.

A similar approach seems to prevail in France, according to Rodière.

's'il y'a sur le pont un local où les marchandises soient à l'abri, leur arrimage en ce lieu est correct, car les marchandises y seront aussi bien protégées que dans la cale. La Jurisprudence paraît en ce sens.'²⁴

and similarly -

'On peut charger les marchandises sur les parties du pont présentant des abris couverts, tels que rouf²⁵ et dunette,²⁶ destinés a recevoir des marchandises.'^{27,28}

It can be thus fairly concluded that the 'covered space' test is generally valid in American and French law, and possibly also in English law. But has it become the only valid test? It is believed it has not. Rather the basic criterion always was, and still is, the degree of safety afforded by the space in which the cargo is stowed. The 'covered space' test, like the 'built-in structure' test or the older main deck test, should not be taken as anything more than a technical guideline designed at a specific time to suit specific circumstances, and exactly as the 'reason ceased' for the older tests, it may cease for the 90-year old 'covered space' test, when new circumstances arise.

24 Gén.Mar. para. 519, p. 155.

25 Deck - house.

26 Poop.

27 Juris Classeur Commercial, C.Comm., art.190-396, Droit Maritime (1962), "Du Capitaine", p.36.

28 It is regrettable that, as none of the French precedents cited here and by Rodière could be checked in the original, it was impossible to look into the definition of 'deck stowage' in France in greater detail.

Moreover, it is difficult to see how the latter test can be applied to container cases at all, as it is not clear which is the 'space' which is relevant to the test - the space in which the container is stowed or, if the container is considered as 'part of the ship', the space inside the container.²⁹ Similar questions in connection with, e.g., the seaworthiness problem³⁰ and the 'package or unit' limitation³¹ would have to be answered by courts by classifying the container within the traditional categories of 'package', 'cargo', 'ship', etc, inadequate as this classification may be. Here, however, courts can easily dispose of the 'relevant space' problem by ignoring the 'covered space' test altogether and deciding cases involving containers according to the basic criterion of general safety.

3.4. Back to the Safety Factor

Most instructive in this connection is the case of The Steamship Neptune.³² There the court stressed all through the decision the need for adaptation to the changing circumstances in the trade (i.e. in that case, the steam revolution) and,

29 The answer to this question is crucial to the test. Although most of the containers on the deck of a container-ship are covered and surrounded by other containers, the deck can hardly be conceived of as anything but an 'open deck' according to the 'covered space' test (see The William Crane, 50 F. 444, 445). Conversely, the inner space of the container satisfies even the strictest requirements of the test.

30 See Chapter 2, sec. 4.1.3, supra.

31 Chapter 3, supra.

32 16 L.T.36 (E.D.N.Y.1867). This decision should not be confused with that in the case bearing the same name, mentioned in note 15,^{p.227} supra. Both cases refer to the same steamer and the same accident, but each was tried in a different court. It is regrettable that the District Court in The Mormacvega, 367 F.Supp.793,799, mixed the two cases ('The Neptune, cited by Carver' is not the 'appeal decided in 1868 in the Southern District of New York', but rather the case referred to in the present note), because the 'other' decision, (i.e. the one made in the Eastern District, N.Y.) is much more forceful and suited to the arguments raised in The Mormecvega.

with minor changes, this decision could be easily applied in whole to the problem of deck-carriage of containers aboard container ships. Most significant are the emphases on the following considerations:

- 1) That the construction of the ship 'necessarily requires that a large quantity of freight be carried on' the main deck;³³
- 2) That the vessel 'would be of little or no value without the use of a deck';³⁴
- 3) That the deck is safely protected from the regular deck risks;³⁵
- 4) That shippers 'who seek far more rapid transit of their goods than sailing vessels furnish, must be deemed to assent to such method of carriage';³⁶
- 5) That 'the right to carry freight on the main deck without violating any implied clause of the bill of lading results...not from a mere usage, but from the necessities of the trade'.³⁷

All these considerations, taken together, should play a very significant role in the application of the definition of 'deck-stowage' to container transport. Like those of the steamers which were the subject of The Neptune,³⁸ The Velma Lykes,³⁹

33 Ibid. p. 36.

34 Ibid.

35 Ibid.

36 Ibid., pp. 36-37.

37 Ibid., p. 36.

38 Supra, note 15, p. 227, and note 32, p. 230.

39 Supra, n. 19, p. 228

Gillet v. Ellis,⁴⁰ Harris v. Moody⁴¹ and The William Crane,⁴²

the decks of container ships are constructed for the carriage of cargo; they are 'the usual carrying places'⁴³ aboard such ships, and, indeed, such vessels 'would be of little or no value without the use of' their decks.⁴⁴

This is not to say that the safety factor should be ignored. No court or legislature should hesitate to enforce the traditional prohibition on deck-carriage if such carriage eventually proves to involve the same basic hazards which originally brought about the deck-stowage prohibition, even if the ship involved was designed for deck-carriage and even if such enforcement may result in heavy losses to the shipowner. Yet, facts such as that the designer of the ship intended her to carry deck-cargo and designed her accordingly, that she was so constructed (or that she was later converted for deck-carriage), that a reputable authority approved the deck carriage,⁴⁵ that the deck-space was included in

40 (1850)11 Ill.579.

41 Supra, n.7, p.225.

42 Supra, n.5, p.224.

43 Scrutton, art.85. p. 163. See the strong emphasis on this point in Guadano v. Hamburg Chicago Line [1973] F.C.726 (Can.Fed.Ct.Tr.Div.).

44 Supra,^{at} note 34. Unlike the steamers mentioned above, container ships carry only a minority of their cargo on deck, but the full capacity of the ship is so essential to container operations that they will actually have little economic value if deprived of the use of the decks.

45 See Lagerloef Trading v. U.S., 43 F.2d.871,872 (S.D.N.Y. 1930); The Velma Lykes, 6 F.Supp.886,891; The Salvore, 60 F.2d. 683,685. But see Searoad Shipping v. Du Pont, 361 F.2d.833, where the approval of the American Coast Guard, without proof of any of the other elements mentioned in the text above, was declared insufficient to exonerate the carrier from absolute liability.

the registered tonnage of the ship,⁴⁶ and that the deck was previously used under similar conditions without any special accidents occurring⁴⁷ - all these should surely play a significant role in proving the relative safety of any specific deck carriage, at least to the extent of shifting the burden of proof to the cargo-owner, who would have to bring evidence to the effect that despite all these considerations, the deck-carriage in the specific case was still hazardous.⁴⁸

This approach can be best demonstrated by the case of The Mormacvega.⁴⁹ A container containing a chemical known as Teflon was lost from the deck of a vessel which was 'converted and reconstructed...so as to permit ocean shipping containers to be stacked in tiers, three high, and so lashed and carried in safety'⁵⁰ on the weather deck. The vessel was surveyed by the American Bureau of Shipping and 'her conversion for...open carriage of containers on deck was approved'.⁵¹ The District Court accordingly found that 'containers on the deck of

46 See the Merchant Shipping Act 1906, sec. 10(5)(c). (The section was replaced in 1932); The William Crane, 50 F. 444, 445; The Rondo, [1935] A.M.C. 1220, 1221 (Arbitration, N.Y. 1935).

47 See Lagerloef Trading v. U.S., 43 F.2d 871, 872; The Velma Lykes, 6 F. Supp. 886, 891; The William Crane, 50 F. 444, 445; William v. Mora, Fed. Cas. 17,730, p. 1383.

48 An intriguing question in this connection is whether the existence of causal relations between the damage and the deck-stowage necessarily implies that stowage on deck aboard the vessel involved is unsafe. The court in The Mormacvega answered this question in the negative; 493 F.2d 97, 102. See S. Simon's note on the case, (1973), 4 J.M.L. 441, 449 et seq., for severe criticism of this attitude. It is believed that the answer differs according to the circumstances of each specific case, e.g. the ratio of the damaged containers to the total number of deck containers, etc.

49 Supra, n.1, p. 191.

50 367 F. Supp. 793, 795.

51 Except for certain risks, irrelevant to the circumstances of the case (see at note 8, p. 194, supra). The stowage was also approved shortly before departure by a surveyor from the American National Cargo Bureau, 493 F.2d 97, 102.

Mormacvega were not necessarily subject to greater risks than those stowed under deck.⁵²

The court described at length the practice and realities of the container revolution generally and of deck-stowage specifically, and stated that the rule according to which it is an unreasonable deviation to stow on-deck 'should not, in reason, be applied to a ship specifically constructed or reconstructed to carry her cargo as does Mormacvega,⁵³ because 'to hold that unreasonable deviation arises' in this case and similar ones 'flies in the face of the theory or reason upon which deck carriage was originally considered a deviation'.⁵⁴

This decision gave the carrier in the case everything he asked for. He admitted his liability for the loss, the causal relation between the deck-stowage and the loss, and even that such stowage constituted a deviation. He only sought a declaration that the deviation was not 'unreasonable' and that he was entitled to limit his liability according to art.4(5) of the Hague Rules. But The Mormacvega has considerable general importance beyond this instance in that it reaffirmed and applied to the container revolution the same approach which prevailed when the steam revolution took place in the previous century. It reaffirmed that understanding of a legal system, according to which it must follow the interests and needs of the industry, insofar as they do not

52 367 F.Supp.793,800. The present writer disagrees with most of Simon's (supra, note 48) criticism of this finding. It is not the carrier's intent to stow on-deck, but his intent to build a ship suitable for such stowage, which, together with other factors (such as the approval of authoritative organizations), and in the absence of positive evidence to the contrary, sustained the court's findings.

53 Ibid., p. 798.

54 Ibid, p. 800. The Circuit Court decision (498 F.2d.97) is chiefly a repetition of this argument.

conflict with the basic needs and interests of shippers; new circumstances necessitate a fresh approach and, most importantly, every legal rule has its roots in a certain setting of circumstances, so that if a rule is not flexible enough to cope fairly with new situations, it loses its viability.

Containerised deck-cargo is simply not the sort of 'deck-cargo' which justified the special attention that the issue of deck-stowage always received. It is possible that some risks ~~are~~ still attach^{ed} to stowage of containers on deck but the number and frequency of occurrence of such risks no longer justifies any special rules of law. The whole matter of container deck-stowage should, then, be dealt with according to the general principles of carrier's responsibility.⁵⁵ The attitude should be that it may be proved in any specific case that the stowage of containerised goods on deck was an instance of improper stowage and that such stowage, not, e.g., the perils of the sea, was the real cause of the damage; but there should not exist any a priori assumption to that effect. Similarly, such stowage should be declared a deviation or a fundamental breach of contract if, and only if, it was proved, in any specific case, that the difference in risks between the on- and below-deck stowage on the same vessel was actually so great that it 'changed the character of the voyage so essentially as to amount to an entirely different venture from that contemplated by the parties.'⁵⁶

It should be realized that the container revolution, and modern equipment generally, offer more possibilities of

55 See J.P. McMahon, in a note on The Mormacvega, (1973), 4 J.M.L. 323, 328. See also the suggestions at pp. 266-8, *infra*.

56 Jones v. The Flying Clipper, 116 F. Supp. 386, 387.

relatively safe deck-stowage; that such cases of safe deck-stowage should be distinguished from the bulk of the cases involving unsafe deck-stowage; and that there is no logical reason to apply the deck-stowage prohibition, as a whole, in cases of safe deck-stowage.

Although it is believed that there is ample support for this argument in the authorities cited earlier,⁵⁷ its rationale is far from being ideally implemented, and it may be safely predicted that the traditional qualifications of the deck-stowage prohibition, i.e. shipper's consent, customs of ports and usages of trades, will play a significant role in the future of stowage of containers on-deck, however safe such stowage may prove to be.

57 See esp. Guadano v. Hamburg Chicago Line, ~~1973~~, [1973] F.C.726. And see pp. 237-8, *infra*.
(n.43, p.232, *supra*)

4. THE CONSENT OF THE SHIPPER

4.1. General

The use of the consent of the shipper to deck-stowage, as a ground for exemption from the general rule prohibiting such stowage, is probably as old as the rule itself.¹ In English,² American³ and French⁴ law this exemption still effectively exonerates carriers, at least from the normal inherent deck-risks, but a recent decision by an American court⁵ raises serious doubts as to whether the shipper's consent is valid also under the Hague Rules. Furthermore, the rules regarding the form, validity and effect of shipper's consent are far more complex than appears at first glance, and only great caution in formulating consent clauses, and in the practices of obtaining the shipper's consent, will prevent the consent being rendered invalid or ineffective.

As will be shown later, the present practice of including a 'liberty clause' as a matter of course in all container bills of lading does not in itself ensure a simple solution to the problem of legalising the deck-carriage of containers. To avoid the risk of being at least partly invalidated as repugnant to art.3(8) of the Hague Rules,⁶ the 'liberty clause' must appear on the bill of lading actually issued to the shipper (i.e. not

1 See Gould v. Oliver (1837), 4 Bing(N.C.),134, and old references cited therein, at p.142; Lawrence v. Kinturn, 58 U.S.100, 15 L.Ed.58 (1854), and references at p.64.

2 Carver, para, 699 p.602; Scrutton, art.85, pp. 163-4.

3 Astle, op.cit. p. 330; Knauth, op.cit. p. 237.

4 Art.22 of the 1966 statute(supra, note 18 p.195); Rodière, Gen.Mar. para.521, p. 156 et seq.

5 The Hong-Kong Producer, ^{n.p.191}supra, see pp254-6, infra.

6 An otherwise excellent report by the Law Council of Australia on 'Containerization', 5 The Law Council Newsletter, April 1970, 10,16 ignores this risk when suggesting the omission of 'on-deck statements' and the subsequent applicability of the Hague Rules as a means of 'normalizing' the deck-carriage of containers. See also C.H.Schmitthoff, 'Deck Cargo and Containers' (1970), 120 N.L.J.757

on a 'long form' bill incorporated by reference in a 'short form' one issued to the shipper), and it must be accompanied by an 'on-deck statement'. This statement has the effect of barring the application of the Hague Rules as a whole, and may thus be considered by many carriers as too drastic a remedy for the deck-carriage problem.⁷ Moreover, in the realities of container transport an 'on-deck statement' can only be stamped on the bill of lading after actual stowage aboard the ocean-going vessel or very shortly before it, and this may interfere with the ideal, although not yet universally implemented, arrangement of issuing one transport document at the beginning of the combined transport operation, thus enabling the shipper to make use of the document immediately after surrendering possession of the goods.

4.2. Consent and the Safety Factor

Before reverting to the actual problems it seems advisable to try and connect the issue of consent with the central issue of deck-carriage, namely the factor of safety. If the principle advocated in the previous section, namely that the deck-carriage prohibition does not apply to safe deck-carriage, is correct, then we should proceed in this section upon the assumption that consent of the shipper is necessary and relevant only in connection with cases of inherently unsafe deck-carriage. While this assumption has only a theoretical value where pre- or

⁷ Note the conflict of interests between the law of carriage and of commercial credits. Adding an 'on-deck statement' to a liberty clause would make the position of the carrier safer, but at the same time render the bill of lading unacceptable to bankers according to ICC Uniform Customs and Practice for Documentary Credits, rule 22.

ex-Hague Rules cases are concerned, it may play a significant role in deciding whether a clause of consent in the bill of lading is valid, under these Rules.

A case which deals expressly with this assumption is Davidson v. Flood Bros.⁸ The court considered the validity, under the Harter Act of a clause in the Bill of Lading permitting deck-stowage, and decided that it was valid despite the fact that 'goods, from their nature cannot safely be carried on deck',⁹ because -

'If the goods can be 'safely' carried on deck, the shipper's consent would be wholly needless'.¹⁰

What, then, is the role of shipper's consent in the containerisation problem? If the assumption that no consent is needed when the deck-stowage is generally safe is correct, and if, as was assumed earlier, carriage of containers aboard container-ships is generally, although not absolutely, safe, it follows that container operators could be advised not to bother at all with obtaining shipper's consent to deck-stowage. Such advice, however, is premature as none of these assumptions, neither the legal nor the factual one, are as yet correct beyond doubt. Neither is the binding effect of Davidson v. Flood Bros.¹¹ strong enough to sustain the former assumption, nor can the owner of the most modern container-ship be sure of the findings of a court as to the general safety of the decks.

8 30 F.2d.279 (9th Circ. 1929).

9 Ibid. p. 280.

10 Ibid.

11 30 F.2d.279(9th. Circ.1929).

4.3. On Deck Statements and Containers

The realities of container transport are such that it is practically impossible in most cases¹² to ensure either on or below-deck stowage of a specific container before all the containers designated for one container-ship are delivered to the carrier.¹³ Only then can a detailed loading plan be designed, taking into account various considerations such as the nature of the goods, their number, the port of destination, and, most intriguingly, the size and weight of each of the containers:

'containers stowed on-deck must carry a substantially higher load than those carried below deck. In addition, the cargo, whether it be containers or break-bulk cargo, must be stowed so as to insure the proper trim of the vessel. The location of a particular container on a fully containerized vessel is determined by its weight and size in relation to the size and weight of other containers to be carried on the same voyage.'¹⁴

Disregarding such considerations and allocating containers on some other preferential basis may well amount, in the U.S.,

12 Excluding containers designated for vessels which carry containers either only above-deck or only below-deck.

13 And in a case of a multi-functional ship, before the amount of break-bulk cargo, which must necessarily be stowed below-deck, is ascertained. See The Normacvega, 367 F.Supp. 793,795.

14 T.Bissell, 'The Operational Realities of Containerization, etc.' (1971), 45 Tulane L.Rev.902,918. See also J.F.Bannister, 'Containerisation and Marine Insurance' (1974), 5 J.M.L.&Comm. 463,470 (summary of a Report by the Advanced Study Group No.196 of the Insurance Institute of London).

to an offence against the shipping Act of 1916.¹⁵ Thus a request, whether oral or in writing, by a specific shipper, that his container be stowed below-deck must be disregarded, if it does not conform with the above-mentioned criteria, and it seems that shipping companies actually adhere to the policy 'to make no commitment for under deck stowage.'¹⁶ Theoretically, the element of discrimination itself can be overcome by granting, by the terms of the bills of lading, the right to demand below-deck stowage to all shippers,¹⁷ but as most of the criteria mentioned earlier involve the safety of the ship or its smooth management, meeting the shipper's requests without regard to these criteria may render the vessel unseaworthy.

This entails the following consequences:

- 1) The only practical way of obtaining the shipper's consent to deck-stowage, 'expressed in a form to be available as evidence under the general rules of law',¹⁸ is by a general 'liberty to stow on deck' clause (hereinafter referred to as a 'liberty clause') included uniformly in all the bills of lading issued to shippers of containerised goods.
- 2) 'Received for shipment' bills of lading, which would become

15 46 U.S.C.A.sec. 814(4)(a). See The Mormacvega, 493 F.2d.97,100.

16 The Mormacvega, 367 F.Supp.793,798; and see Rosenbruch v. American Export, [redacted], 357 F.Supp.982, where the carrier deleted from the bill of lading the request 'stow under deck only' typed by the shipper's agent, and disregarded the request. See also the statement of a witness in The Hong-Kong Producer, 422 F.2d.7,18. See, however, Evans & Sons v. Merzerio, where the Court of Appeal ([1976] 2 All.E.R.930) seems to have assumed, against Kerr J's different opinion ([1975] 1 Lloyd's Rep.162), that it was within the defendant-forwarder's powers to control the place of stowage of his client's containers.

17 See the clause discussed in The Hong-Kong Producer, supra.

18 The Delaware, [redacted], 20 L.Ed.784.

the backbone of container transport if the container revolution is to achieve one of its main goals, namely door-to-door uniform documentary coverage, cannot be endorsed at the time of issue with the traditional master's statement to the effect that the goods are stowed on deck (an 'on-deck statement'), even when the container is ultimately stowed there. This does not apply, of course, to bills of lading issued after shipment or returned to the carrier to be endorsed with a 'shipped' statement.

Whereas the first factor, namely the uniform 'liberty clause', causes little or no difficulties, the absence of an 'on-deck statement' from the face of a bill of lading is crucial, as the application or non-application of the Hague Rules depends upon such a statement.

4.4. The On Deck Statement and the Applicability of the Hague Rules

Art.1(c) of the Hague Rules excludes from the definition of 'goods', to the carriage of which the Rules apply,

'cargo which by the contract of carriage is stated as being carried on deck and is so carried'.

The language of the definition leaves no doubt as to its interpretation: nothing less than a clear statement to the effect that the goods are in fact stowed on-deck would satisfy it.¹⁹ But the requirement is twofold: the statement must refer to an actual situation, not to a legal liberty, and it must be included in the 'contract of carriage'.

¹⁹ It is unnecessary to deal with the theoretical question whether such statement is effective for the purposes of art.1(c) in absence of a shipper's consent. See, e.g., The California, 67 F.Supp.719,720 (E.D.Pen.1946), and Civ., 13 May 1964, 16 D.M.F. 538,540. Whatever the answer to this question, the legal consequences of unauthorized deck-stowage are similar, whether it falls within the scope of the Hague Rules or not.

As to the first requirement: the common clause granting the carrier an unqualified right to stow on deck, is not an 'on-deck statement'. Thus in Svenska Traktor Aktiebolaget v. Maritime Agencies (Southampton),²⁰ where the bill of lading included a clause of this kind, the court decided that the Hague Rules were applicable because the legislature intended 'to leave the shipowner free to carry deck cargo on his own conditions and unaffected by the obligations imposed on him by the Act'²¹ only when all holders of the bill of lading, other than the shipper have a clear warning, by way of an 'on-deck statement', that the carrier actually opted to exercise the liberty and stow on deck.

This ruling was applied in the U.S. in The Hong-Kong Producer²² and in Canada, in Sept Iles Express v. Clement Tremblay,²³ and was accepted without comment by the major English writers.²⁴

As to the second requirement, namely that the statement be included in the contract of carriage, its practical import in most of the cases is that the statement should be noted on the bill of lading. But the Canadian Federal Court in Grace Plastics v. Bernd Wesch II²⁵ excluded the deck-carriage of two reactors from the scope of application of the Hague Rules on the basis of an 'arrangement'²⁶ included in a shipping note, deciding that

20 [1953] 2 Q.B.295.

21 Ibid., p. 300.

22 422 F.2d.7,15 (it should be noted that the court in this case stressed the fact that the bill of lading at bar was a 'contract of adhesion', as the main reason for its decision on this issue). See the note by Klein, (1970) 1 J.M.L. & Comm. 473,475-6. In Com. 23.6.58., 10D.N.F.708, the American COGSA was applied to a case where the B/L included a 'liberty clause' but not an 'on-deck statement'.

23 [1964] Ex.C.R.213,220,222 (Quebec Adm.Dist.Ct.1962)

24 See Carver, para, 254, p.220, Scrutton, p.419. See also UNCITRAL report, A/CN.9/63 Add.1. p.27.

25 [1971] F.C.273.

26 Ibid.276. The exact wording of the arrangement was not disclosed. It would be assumed for the present purposes that it took the form of an 'on-deck statement' rather than a 'liberty clause'.

the note was the governing 'contract of carriage' for the purposes of art.1(c), despite the fact that the plaintiff there was an assignee of the bill of lading. However, both the broad principles of privity of contract in carriage by sea²⁷ and the rationale behind art.1(c), viz. that deck-cargo should be excluded from the scope of the Rules only when all the holders of the bill of lading have sufficient warning about the exclusion, require that the right to rely on pre bill of lading documents and arrangements should be restricted to the direct parties to these documents and arrangements. What renders Grace Plastics v. Bernd Wesch II itself plausible is the fact that the assignor there seems to have acted as an agent of the assignee in forming the contract of carriage with the carrier.

4.5. The Validity and Effect of the Shipper's Consent

4.5.1. General

The importance of the applicability or non-applicability of the Hague Rules to the legal relation between the parties to a deck-carriage transaction has been stressed many times above. It is advisable, therefore, to compare at this stage in greater detail the validity and effect of the shipper's consent within and outside the scope of the Rules.

For convenience's sake, and to avoid duplication, it will be assumed in the section dealing with the position of cases not falling under the Rules that an 'on-deck statement' was included in the bill of lading. Conversely, the second section, dealing with the position of cases which do fall under the Rules, assumes the absence of such a statement. It is recognized, however, that the applicability of the Rules does not depend solely on compliance with art.1(c)

²⁷ Scrutton, art.13, p. 28, art.29, p. 53; Carver, para.58, p.42 et seq.

4.5.2. The Shipper's Consent Outside the Hague Rules

The consent²⁸ of a shipper to his goods being stowed on-deck is perfectly valid and its effect is to exonerate the carrier from liability for damage which occurred because of the normal hazards inherent in deck-stowage. This is true both in a case where only the consent per se is expressed, and in a case, such as the one described in Evans & Sons v. Merzario,²⁹ where it is expressly specified that the deck-stowage is 'at shipper's risk'.

There is, naturally, no doubt as to the validity of shipper's consent in English Law, where an almost complete freedom of contract prevails. The position is similar in France where the local statute itself makes the deck-prohibition conditional upon lack of shipper's consent 'mentioned on the bill of lading'.³⁰ The position in the United States is somewhat more difficult. Although this is not completely clear, it may be that a carriage transaction which was taken out of the scope of the COGSA 1936 still has to comply with the older Harter Act which forbids, in its section 1, the insertion of clauses which relieve the carrier from 'liability for loss or damage arising from negligence, fault or failure in proper...stowage' of the goods. American

28 It did not seem necessary to consider here the various forms and wordings a consent clause may assume.

29 [1976] 2 All.E.R.930,932. Lord Denning M.R.'s statement in this connection that '[n]o claim lies against the ship-owners' (id.) is an obiter dictum. note that the expression 'at shipper's risk' appeared in an 'on-deck statement'. Normally, this alone does not amount to a shipper's consent without some additional indication of such a consent. Such consent was apparently assumed here from 'the fact that on repeated occasions the bill of lading has shown that containers were being carried on deck' without protest on the part of the shipper; [1975] 1 Lloyd's Rep.166. But see p.260 infra, note 13. See also note 38, infra.

30 Law of 18 June 1966, art.22.

courts, however, have at least twice³¹ declared a consent clause to be valid and effective in exonerating the carrier from normal deck-risks even when 'the goods from their nature cannot safely be carried on deck',³² provided the carrier does not expose the goods to additional risks.³³

Both³⁴ in the case of a mere consent or 'liberty clause', and in the case of an expressed 'at shipper's risk' clause, the carrier is exempted from liability for loss or damage which resulted from 'the necessary exposure of the property',³⁵ 'the usual expected hazards to an on-deck shipment',³⁶ or from the risks inherent in the deck-carriage.³⁷

The carrier is not relieved, however, by such clauses, from the implied or expressed duty to exercise due care in stowing the goods on deck.³⁸ Thus, failure to provide proper and adequate dunnage,³⁹ or failure to cover the goods with

31 Davidson v. Flood Bros., supra^{n. 11, p. 239}; Blanchard Lumber Co. v. S.S. Anthony II, 259 F.Supp. 857 (S.D.N.Y. 1966).

32 Davidson v. Flood Bros., 30 F.2d 279, 280.

33 Blanchard Lumber, 259 F.Supp. 857, 864.

34 French writers mention this similarity expressly. See De Juglart, op.cit. p.399; Rodière, Gen.Mar. para.524, p.159. As to American law, the same conclusion is reached by comparing the various decisions mentioned in the following notes.

35 The Delaware, 20 L.Ed., 784.

36 The Ponce, 67 F.Supp. 725, 730 (D.N.J. 1946), aff'd, 160 F.2d 107, 3rd Circ. 1947).

37 Court of Appeal of Aix, 29 March 1960, 13 D.M.F. 525, 527 ('... l'exonération ne peut donc être valable qu'au cas où les avaries causées à la cargaison seraient dues au mode exceptionnel du chargement').

38 Compahnia de Navigacion la Flecha v. Braber, 168 U.S. 104, 42 L.Ed. 398, 407 (1897); Colton v. N.Y. & Cuba Mail S.S. Co., 27 F.2d 671 (2nd Circ. 1928); Court of Appeal of Paris, 21 June 1972, 24 D.M.F. 677. Roskill L.J.'s statement in Evans & Sons v. Merzario, [1976] All.E.R. 930, 934, that the container there 'was shipped on deck and was not properly stowed', if it means that there was improper stowage in addition to the mere stowage on deck, is puzzling in view of the Court's consensus that the carrier there was exempt from liability for the ensuing loss.

39 The California, 67 F.Supp. 719, 721.

tarpaulins,⁴⁰ or stowing in an exceptionally exposed part of the deck,⁴¹ or stowing heavy cargo on top of the cargo involved in a specific dispute⁴² - all these instances of negligence rendered the carrier liable for damage to deck-cargo, despite the shipper's consent to the deck-stowage itself.⁴³

There is, however, a different type of a consent clause. Some carriers insert in their bill of lading an express clause of non-responsibility for loss or damage to deck-cargo, whatever the cause.⁴⁴ To avoid misunderstandings, such a clause usually states expressly that the carrier is not responsible even for his own, or his servants' or agents' negligence.

The validity and effect of such a clause differ. It seems to have the fullest effect under English Law.⁴⁵ There is nothing in this system which prevents a shipper and a carrier from agreeing upon the latter's complete exoneration from liability for goods carried in a certain way.⁴⁶

Under the French system, such a clause is generally valid, but, according to the general rule of civil law, it cannot include an exoneration from 'faute lourde' or 'dol' of the carrier or the master.⁴⁷

40 Pioneer Import Corp, v. The Lafcomo, D.C., 49 F.Supp.559,562 (S.D.N.Y.1943), aff'd, 138 F.2d.907 (2nd Circ.1943).

41 Ibid.

42 Blanchard Lumber, 259 F.Supp. 857,864.

43 And, indeed, the same applies when the fault or negligence occurred before or after the deck-stowage, e.g. during the loading operation, Comm., 19 May 1969, 21 D.M.F.716, or the discharge operation, Shaw, Savill & Albion v. Electric Reduction, [1955] 1 Lloyd's Rep. 264 (Sup.Ct.Montreal, 1954).

44 UNCITRAL report, A/CN.9/63/Add.1, pp.27-8.

45 For a survey of the English common law on this point, see British India Steam Navigation Co. v. T.P.Sakkalal Rom Sait, [1953] I.L.R.Mad.,396.

46 Lord Chorley and O.C.Giles, Shipping Law, 6th ed. (London,1970), p. 106.

47 Rodiére, Gén.Mar.para659,p.294; Gaillet, 24 D.M.F. 515,518 ; Grace Plastics v. Bernd Wesch II, [1971] F.C. 273 (Can. Fed.Ct.Tr. Div.).

American law, however, takes a different position. Firstly, clauses of complete exoneration contravene the provisions of the Harter Act, and would be annulled where the Act applies. Secondly, where the Harter Act does not apply, such clauses would have to undergo the tests of reasonableness and conformity with public policy. Clauses of complete exoneration from liability, including the carrier's negligence and that of his servants, are looked upon unfavourably in American case law,⁴⁸ but it cannot be stated categorically that all such clauses would be invalidated when included in a contract for carriage on deck.

Before concluding this part, special attention must be given to the duty, imposed by French courts, in the case of a 'liberty clause', to inform the shipper, well before departure, that the goods are to be carried on deck, so as to enable him to obtain special insurance. The King's Bench Division decided against the imposition of such a duty, in the case of Armour & Co. v. Leopold Walford,⁴⁹ but in France it is the attitude of the majority of the courts and writers that 'an interest of good management (*bon~~ne~~ économie*) entails the conclusion that a master, who eventually exercises the liberty given to him must advise the shipper accordingly.⁵⁰ This duty can, however, be easily avoided, as an expressed exemption

48 See e.g. The N.Y. Central Railboard Co. v Lockwood, 17 Wall.357, 21 L.Ed.627,641 (1873). Bank Of Kentucky v. The Adams Express Co. 3 Ott.174, 23 L.Ed.872,874 (1876).

49 [1921] 3 K.B.473,480.

50 Rodière, Gén.Mar. para.522, p.158. See also references in D.1920.1.181.

51 Comm. 16.12.65, 18 D.M.F. 269.

from such duty, contained in the bill of lading, is perfectly valid.⁵¹ Moreover, it can be expected that this duty, a product of case-law, would not be imposed at all on container operators if insurers would abandon,⁵² as far as containers are concerned, their traditional attitude of requiring special arrangements for insuring deck-cargo.⁵³

4.5.3. The Shipper's Consent Under the Hague Rules⁵⁴

One of the obligations stated in art.3(2) of the Hague Rules is that '...the carrier shall properly and carefully... stow...the goods'. Art.3(8) provides that -

'Any clause...in a contract of carriage relieving the carrier... from liability for loss or damage...arising from negligence, fault or failure in the obligations provided in the article or lessening such liability...shall be null and void and of no effect'.

When the validity of a consent clause is considered in any given case the two questions which must arise, then, are: 1) Did the stowage on deck, in itself, and in the circumstances of the case, amount to 'negligence, fault or failure' in respect of the obligation to 'properly and carefully stow the goods'? 2) Did the consent clause relieve the carrier from 'liability for loss or damage arising from' negligence, etc., in fulfilling the above-mentioned obligation, or lessen such liability?

52 The close connection between the duty to inform the shipper and the requirements of insurers is emphasized by all the authorities mentioned earlier.

53 See 'Use of Containers, Liability of Carriers, and the Effect on Cargo Insurance' by a Marine Underwriter, Containerization Data Book, 1969, 69, 70. The author suggests that shipment of containers on deck is such a common occurrence that it should be deemed within the insurer's knowledge.

54 Tetley's awkward argument (op.cit.p.194-5) that 'a general deck carriage clause without a statement of deck carriage is an option not exercised and a fundamental breach of the contract and the rules', can be classified here, but neither the argument nor any part of its reasoning seems to the present writer valid to any degree deserving a full discussion.

The answer to the first question depends solely on whether or not the deck and cargo were suitable for deck-carriage, or in other words on whether such carriage was generally safe. If it was generally safe, the carrier did not fail in his obligation to stow properly, and, consequently, a shipper's consent to such stowage is perfectly valid. But this is not to say much, because, as suggested earlier, a safe deck-stowage probably does not require the shipper's consent at all.⁵⁵ It is only when such carriage is inherently unsafe that the shipper's consent may be crucial. Yet there can be little doubt that in such a case the obligation in art.3(2) is breached. It is on the basis of this assumption that the next question will be dealt with.

There is no doubt that a clause of complete exoneration from any liability, whatever the cause of loss or damage, sometimes added to a consent clause, is null and void under art.3(8). The more difficult problem relates to the validity and effect of a clause which simply states the shipper's consent, or one which puts the deck-cargo 'at shipper's risk'.

As mentioned earlier, the traditional import of such clauses is that, although the carrier is not relieved from liability for negligence in the way the goods were stowed on deck, he is exempted from liability for losses or damages which resulted from the deck-stowage itself, i.e. from the risks which are normally inherent in deck-stowage.⁵⁶ But, once the

⁵⁵ See pp. 237-9. *supra*.

⁵⁶ See p. 246, *supra*.

existence of such inherent risks in the carriage at bar is admitted, the unavoidable consequence must be that relieving the carrier from the results of these risks amounts to a breach of art.3(8). Art.3(2) makes it imperative for the carrier to stow the shipper's goods safely, and it is in direct opposition to the intention of the Rules that the shipper should be allowed to relieve the carrier from the consequences of a breach of such a duty.⁵⁷ If the deck of a specific vessel is inherently unsafe for stowage of certain goods, and even if such risks are no more than the normal inherent risks traditionally involved in such a method of carriage, then it is inconceivable that the shipper should be allowed to assume such inherent risks.

It is submitted, therefore, that the part, sometimes implied, sometimes expressed, of consent clauses which conveys an exemption from liability for losses or damages which resulted from normal inherent deck risks cannot stand under art.3(8).

What survives, then, in any consent clause is the consent itself, seemingly 'stripped' of any positive effect. Such consent is ineffective in exonerating the carrier from any risks for which he would have been responsible in the absence of the consent. The carrier would be held responsible for damage which occurred because the deck was inherently unsafe, even had the strictest measures applied in securing and covering the

57 It should be stressed at the outset that this argument does not attempt to deny the parties' freedom to decide upon the scope of their contract (Pyrene v. Scindia [1954] 2Q.B. 402), as it will be conceded in the next paragraph that the mere consent to deck-stowage should not be invalidated.

cargo there, as well as for damage which occurred because of a failure to use reasonable measures in the deck-stowing process. What effect, then, has the 'stripped' consent clause? It may still play a significant role in determining the legal relations between the carrier and cargo-owner, by preventing the imposition of an 'insurer's liability' on the carrier. The contract may be then read as implying 'deck carriage at carrier's risk', meaning that it is the carrier who assumes responsibility for deck hazards, but that when such a hazard materializes, there is no reason to treat the contract as fundamentally breached or deviated from.⁵⁸

The decision in Svenska Traktor⁵⁹ may be interpreted in more than one way as to its subtler aspects, but it seems that the most logical and systematical interpretation of its rationale⁶⁰ fully supports the argument outlined in the previous paragraph. In this case a clause reading 'steamer has liberty to carry goods on deck and shipowners will not be responsible for any loss, damage or claim arising therefrom', was severed into two parts and, while the second one was found repugnant to art.3(8), the first part 'which purports to give the ship liberty to take deck cargo' was allowed to remain.⁶¹ The invalidity of the

58 This, if correctly understood, is K.Grönfors' view, as expressed in his 'Container Transport and the Hague Rules', [1967] J.B.L. 298,302.

59 [1953] 2 Q.B.295

60 See Carver, para.278, p.244; Astle, op.cit., p. 46.

61 [1953] 2 Q.B.²³⁵301. See a decision of the Supreme Court of Canada where the principle of severing a 'liberty clause' was confirmed, but the admission of the respondent-shipper made a clear decision whether the consent part could remain unnecessary; St.Simeon Navigation v. Couturier & Fils, [1974] S.C.R.1176.

second part resulted in the court stating that even had it believed the master's view that the damage would have occurred even had the cargo been properly secured to the deck, it would still have found the carrier in breach of the statutory obligation under art.3(2).⁶² In other words, the court refused to relieve the carrier from the responsibility for the normal risks inherent in deck-carriage.

More importantly, however the court accepted the carrier's view that in allowing the first part to remain 'it could not be said that, in shipping some tractors on deck, the owners had committed such a fundamental breach of their obligation under the contract of carriage as to disentitle them from relying on any of the statutory exceptions...'.⁶³

Applied to the realities and interests of containerisation, it seems that this solution is the fairest to all parties. It would contribute more than any other solution to normalisation of deck-carriage of containers, simply because normalisation is the rationale behind the solution. The shipper's consent, under this suggestion, equates cargo stowed on deck to cargo stowed below deck in that if the specific deck in dispute is inherently unsafe or if the stowage on deck was handled negligently the carrier is responsible for loss or damage arising therefrom, exactly as he is responsible for stowage in an unsafe hold or for unsafe stowage in a safe hold. Yet this responsibility should be treated as normal, viz. subject to the limitations and exemptions from liability usually available

62 Ibid., p.302.

63 Ibid., p.301.

under the Rules.⁶⁴ It would thus be fair to shippers because they would get what they contract for, no more, or less. It would also be fair to carriers because they are expected under the Hague Rules to provide a reasonably safe service, and that is what carriers claim container-ships can provide. It is only fair that carriers should assume the special risks of deck-carriage, if such risks exist. Yet there is no reason to punish carriers any further and deprive them of the normal limitations and exemptions available under the Rules.

Two American Federal Courts of Appeals apparently decided differently. The views of these courts, however, were diametrically opposed to one another. The Court of Appeals for the Ninth Circuit decided, in Davidson v. Flood Bros.,⁶⁵ to give full effect of a 'liberty clause', relieving the carrier from responsibility for damage which occurred because of the strongly emphasized inherent unsafety of the deck-carriage, despite the provision of sec.1 of the Harter Act which is substantively similar to articles 3(2) and 3(8) of the Hague Rules. Conversely, in The Hong-Kong Producer⁶⁶ it was decided that a consent clause was null and void, as a whole; no part of it was allowed to remain, and a full insurer's liability was imposed upon the carrier.

64 Practically, it is the availability of the limitations [i.e. art.4(5) and 3(6)], rather than of the exempted risks [art.4(2)], which is more important. The latter have every chance of failing, even if the carrier is theoretically free to raise them in his defence, where the deck-stowage contributed in any way to the loss or damage, especially when the carrier is expected to assume the burden of proof as to lack of negligence on his part. Svenska Traktor (supra), is a good example of this.

n.59, p.252

65 30 F.2d.279.

66 Supra, n.3, p.191.

It is contended that the first decision is erroneous, or at least inapplicable where the Hague Rules apply.⁶⁷ The main practical ground for the court's decision in that case seems to have been the apparent fairness of the transaction, viz. that the shipper had the choice between a safe and expensive mode of carriage (in the holds) and a less safe but cheaper mode (on-deck).⁶⁸ This factor is irrelevant under the Hague Rules. It is part of the essence of the Rules that a shipper should not be allowed to give up his right to be indemnified by the carrier when loss or damage occurred because of an objectively unsafe stowage, whatever the reductions in freight offered by the carrier.

As to the decision in The Hong-Kong Producer, it is believed that it does not provide a general rule applicable to all consent clauses. Firstly, it is manifestly clear that the court was greatly influenced in its decision by the gross unfairness in the method by which the carrier attempted to obtain the shipper's consent,⁶⁹ and in many paragraphs of the decision it is impossible to distinguish criticism of the form of dealings between the parties from criticism of the contents of the consent clause. Secondly, the only operative paragraph⁷⁰

67 As to the interrelations between the Harter Act and the Hague Rules in this respect, see Carver, pp. 210-213, 242, n.39.

68 30 F.2d.279, 280.

69 The clause containing the consent was included only in the 'long form' bill of lading, referred to in the 'short form', the only document actually issued to the shipper. It is not only that the 'short form' contained nothing whatever to indicate the existence of such a clause, but this document was issued after the goods were delivered to the carrier, and loaded, whereas the clause in the 'long form' gave the shipper the option of requiring below-deck carriage, in writing, before the delivery of the goods to the carrier.

70 422 F.2d.715.

which relates specifically to the contents of the 'liberty clause' and its validity under art.3(8) is obviously open to review since it makes no attempt whatever to sever the 'consent' portion of the clause from the offending parts. There is no reason, therefore, why in different circumstances, where the consent is obtained by a fair method, and where due attention is given by the parties' counsels and the court to the possibility of severing the consent clause, the decision could not be different from that in the Hong-Kong Producer.

5. CUSTOM OR USAGE OF STOWING ON DECK

5.1. Existing Practices and their Significance

The second traditional source of exemption from the general deck-stowage prohibition is a usage of a trade or a custom of a port to stow goods on deck.¹ Unlike the shipper's consent, however, this exception is valid only in Anglo-American Common law,² not in France.³

Some passages in the two leading cases on deck-stowage of containers, namely The Hong-Kong Producer and The Mormacvega, may create the impression that it is only a matter of time before the existence of such a custom or usage where containers are concerned will be established.⁴ It is suggested, however, that such an impression is premature and that a closer look at the problems raises some serious doubts.

1 Scrutton, para.85,p.163; Carver, para.699,p.602; Deutsch, op.cit., p. 546; Royal Exchange Shipping Co. v. Dixon, (1886) 12 App.Cas.11,16,18; Gould v. Cliver, (1837) 4 Bing.(N.C.),134,142-3; Da Costa v. Edmunds (1815) 4 Camp.142; Chubb v. 7800 Bushels of Oats, Fed.Cas.No.2,709(S.D.N.Y.1864).

2 Rodière's description of the position of American law is somewhat confusing. There is an apparent contradiction between the text in Gén.Mar., p. 155,, lines 10-11, which state that 'in the U.S., only an irrevocable consent of the shipper may render a deck-carriage legal', and note 3 therein which mentions The St.Jons N.F. which, in turn, clearly recognises a custom or usage as an exception (██████, 68 L.Ed.201,203).

3 The only comparable exception in French law is that of 'petit cabotage', embodied in all the general statutory deck provisions since the Code of Commerce, art.229. The practice of carriage above deck in small vessels sailing on short coastal routes was first 'introduced by usage', then 'confirmed by the jurisprudence' and finally 'incorporated into the text' of the statutes; The Paragon, Fed.Cas.,10,708 (D.Main,1836) . See also Gould v. Oliver, supra, *ibid.*

4 The Court of Appeals in The Hong-Kong Producer, 422 F.2d.7,18, n.12, speaks in an obiter dictum about a possible 'established custom for container ships' to stow containers on deck. The District Court in The Mormacvega, 367 F.Supp.793,797, admitted generally the existence of such a custom in the port of New York, but refused it full recognition because the custom was not 'sufficiently ancient'.

Containers are regularly carried on deck. Indeed in any but the fully cellular container vessels, equipped for under-deck carriage of containers in specially designed cells, more containers are stowed on deck than under deck. As in the case of the Cape Sar Vincent,⁵ multi-purpose vessels are usually equipped with container fittings only on their decks, and Justice Kerr's observation,⁶ referring to the early days of containerisation, that 'it was a feature of this then new form of transportation to carry containers on deck' is still valid today, as even cellular container vessels carry a large proportion of their containers on deck.⁷

But the mere practice of carrying on deck is legally almost meaningless. If it is to count, such a practice must involve the issue of a clean bill of lading (i.e. in the present context, a bill which does not authorize deck-carriage). By a practice of stowing on deck in conformity with the shipper's consent no custom or usage is created⁸ except for the 'custom'

5 In Guadano v. Hamburg Chicago Line, [1975] F.C.726(Can.Fed. Ct.Tr.Div.).

6 Evans & Sons (Portsmouth) v. Andrea Merzario, [1975] 1 Lloyd's Rep.162. The Court of Appeal, reversing the decision on other grounds, refrained from stating any view about this, [1976] 1 All.E.R.930,935.

7 Note that there are already at least six reported cases involving containers carried on deck. In addition to The Hong-Kong Producer, The Normacvega, Guadano v. Hamburg Chicago Line and Evans & Sons v. Merzario, mentioned in the previous notes, see Insurance Co. of North America v. S.S. Brooklyn Maru, [1974] A.M.C.2443, and Court of Appeal of Paris, 21.6.72, 24D.M.F.675.

8 See Searoad Shipping v. Du Pont, 361 F.2d.833,837 ; The Paragon, Fed. Cas.10,708,p.1087. In both cases there was no evidence sufficient to show that the practice authorized deck-carriage, in spite of a clean B/L. Consider also that the combination of this requirement and the requirement that the custom or usage be universal [see e.g. Deutsch 27 Cal.L.Rev.535,546] raises an acute problem of evidence. It may be easy to find experts to testify to the fact e.g. that large quantities of goods of a certain kind have been stowed on-deck in a certain port over a long period of time, but it may be much more difficult to find an expert who would be able to testify that he knew the details of all, or almost all, carrier-shipper agreements whenever such a practice was followed, and that the universal practice has been to remain silent as to the place of stowage.

to abide by the contract. On the other hand, it must be clear to all the parties participating in the custom or usage that the latter does not operate in defiance of the contract. Again, if e.g. a practice of carrying certain goods on deck develops, but cargo-owners are in the habit of bringing actions for damages whenever deck-damage occurs to such goods, or shipowners readily pay for such damages, then no significant custom or usage is created,⁹ except for the 'custom' of assuming responsibility for one's breaches of contract. In the words of the Circuit Court in The Hong-Kong Producer:

'The fact that containers are carried on deck does not create a custom. They could be on deck pursuant to contract or in violation of contract, as well as pursuant to a custom'.¹⁰

A significant custom or usage can, therefore, be created only when a mutual understanding develops between carriers and shippers that, although nothing is specifically and expressly agreed as to the place of stowage, the goods may be stowed on deck without the carrier incurring liability for damage which results solely and directly from such a mode of stowage. It is doubtful whether such a custom or usage is in the process of being formed in connection with containers and deck-stowage.¹¹

As to the first requirement, it is difficult to envisage it being fulfilled when all contemporary container bills of lading expressly authorize the deck-stowage of

9 See Gould v. Oliver (1840), 2 Man. & G., 208,236; Royal Exchange v. Dixon, supra, n.4, p.222.

10 422 F.2d.7,18. See also Roskill L.J. mentioning in Evans & Sons v. Merzario, [1976] 2 All.E.R.930,935 a hypothetical 'custom or practice under which containers may be shipped on deck without express permission from the cargo owners to do so'.

11 See a similar argument in Chapter 6, section 4, infra.

containers.¹² In Evans & Sons v. Merzario¹³ there is an account of a Dutch forwarder who, in 1968, refrained from demanding under-deck stowage for his clients' containers, assuming that the carriers would not stow on deck unless specially authorized. No such assumption is likely to arise today, but not because a practice has been established of stowing containers on deck without the shipper's authority, but because authorization is now uniformly obtained from all shippers of containerised goods by way of the above mentioned bill of lading clause.¹⁴

As to the second requirement, it is even more difficult, under present circumstances, to envisage the growth of a practice among shippers to refrain from bringing actions for deck damages, or of any other kind of tacit understanding that deck-carriage of containers is 'at shipper's risk', even when a clean bill is issued. Indeed the number of cases already reported and the very fact that deck-carriage has become one of the most extensively discussed legal problems of container transport, indicate an opposite trend.

12 The factual findings of the District Court in The Mormacvega, 367 F.Supp.793,797, are ambiguous and almost contradictory. It is strange that the court apparently accepted the existence, according to one witness, of 'a standard practice of issuing clean bills of lading with respect to containers stowed on deck', while a few lines earlier it was submitted by the court, without comment, that the defendant Moore-McCormac itself, one of the major American container operators, did not follow such a practice. A possible explanation is that the term 'clean bill of lading' was used there in the narrow sense, i.e. signifying a bill of lading which does not include an 'on-deck statement' on its face.

13  [1975] 1 Lloyd's Rep.162,165.

14 The doubts expressed earlier as to the validity of this authorization under the Hague Rules have no bearing on the present problem.

5.2. 'Custom of Port' or 'Trade Usage'?

Much of the development of custom or usage as a possible source of exemption in the present connection may depend on whether the efforts of future carriers are directed into attempts to prove a 'custom of the port' or a 'usage of the trade'. Both entail similar legal consequences, but the difference lies in the scope of application and method of proof.

Proving the existence of a custom or usage for the first time is a burdensome task. It requires expert's evidence, and often develops into a major battle between numerous expert witnesses. Once the custom or usage is proved, it may be taken in subsequent disputes to be within the court's judicial notice, but this applies only within the exact limits of the originally proved custom or usage. Thus, a custom of the port of New York is not necessarily the custom in any other port, and the latter must be proved independently.

Containerisation, however, is a world-wide phenomenon, and if the assumptions made earlier are wrong, and a meaningful custom or usage evolves, it is likely to do so on a much larger scale than that of a port custom. An attempt may be made then to prove the existence of a 'usage of the trade', with the possibility of much wider and quicker recognition of the usage by courts, once such usage is established. Admittedly, a 'trade' usually means, in connection with sea-carriage, the carriage of a certain commodity,¹⁵ and in many cases some other

15 A frequently mentioned commodity customarily stowed on deck is timber. See e.g. Burton v. English (1883), 12 Q.B.D. 218, 223-4. For other commodities see e.g. Da Costa v. Edmunds, *supra*; Searoad Shipping Co. v. Du Pont, 361 F.2d 833 (5th Cir. 1966) n.1, p.257

distinctive characteristics such as specific routes¹⁶ or specific types of ships¹⁷ are added in connection with usages of a trade. This, however, should not be too great an obstacle to recognizing a usage, e.g. to stow containers on-deck aboard ocean-going container ships pursuant to a clean bill of lading. Containers are used for the carriage of all kinds of commodities, but the containers themselves are distinctive enough to become the subject-matter of usages. The terminology and definitions in the field of customs and usages is fairly loose,¹⁸ and it is the rationale behind the terms which should determine their scope.

What then is the rationale behind the 'custom or usage' exception? The general common-law rule according to which clean bills of lading imply below-deck stowage, has its roots in a universally recognized conventional custom¹⁹ of the maritime world.²⁰ This custom indicates what has presumably been the intention of the parties in any case where their express agreement remained silent as to the place of stowage. Where it can be shown, however, that a different practice developed in a certain commercial or geographical area, to such a degree that

16 See e.g. Chubb v. 7800 Bushels of Oats, supra; Barber v. Brace (1819), 3 Conn., 9.

17 See e.g. The Neptune, 16 L.T. 36 (1857); Gillett v. Ellis (1859) 11 Ell. 579.

18 Terms such as 'general custom', 'legal custom', 'local custom', 'custom of a trade', 'usage of a trade', 'trade practice', etc. are used somewhat differently in almost every textbook. Compare, for instance, the following: Salmond on Jurisprudence, 12th ed. (London, 1966), by P.J. Fitzgerald, p. 189 et seq; R.W.M. Dias, Jurisprudence, 3rd ed. (London 1970), p. 152 et seq; C.K. Allen, Law in the Making, 7th ed. (Oxford, 1964), pp. 124-156; K. Smith and D.J. Keenan, English Law, 4th ed. (London, 1973), pp. 8-9;

19 See Salmond on Jurisprudence, p. 193.

20 See The Paragon, Fed. Cas. 10,708 p. 1087; Chubb v. 7800 Bushels of Oats, Fed. Cas. 2,709, p. 663.

all traders in such an area may be presumed to conduct their business according to the different practice, the latter is recognized as an exception to the general rule. Such a practice must be distinctive enough not to pose a threat to the general rule itself,²¹ and 'customs of ports' and 'usages of trades' are good examples of practices with a distinctive character of this kind. But there is no reason to assume that such a distinctively defined commercial area as carriage of goods by containers aboard ocean-going container-ships, whether it is characterized as a 'trade' or not,²² cannot qualify as the subject-matter of a usage, different from the general rule.²³

Proving such a general usage of the container transport trade naturally requires a much greater amount and variety of evidence than that required to establish a port custom, but once the existence of such a general usage is recognized by an authoritative court, the recognition is likely to spread fast.

21 See e.g. Meyer v. Dresser (1864), 16 C.B.(N.S.), 646, 660 ('it is a self-evident contradiction to say that the general law does not allow a certain deduction, and that there is a universally established usage to allow it').

22 Although the majority of the authorities refer specifically either to a 'custom of a port' or to a 'usage of a trade', there are cases where more general terms are used. See e.g. The Delaware, 81 L.Ed. 779, 182 (1871), where 'commercial usage' is mentioned in this connection.

23 The argument in The Normacvega, 367 F.Supp. 793, 797, however was concerned with a 'custom of a port', and Bonassies' optimism in his 'l'Arret 'Hong Kong Producer' et le Transport de Containers en Pontée' (1971), 23 D.M.F. 177, 184, following a reference in The Hong-Kong Producer, 422 F.2d. 7, 18, n.12, to a general usage aboard container ships, was premature.

6. SUMMARY AND SUGGESTIONS

The Working Group on International Legislation on Shipping entrusted by UNCITRAL with the task of ~~re~~vising the law of international carriage by sea,² suggests some radical changes in the present law of deck-carriage. Whatever the extent of the amendments which will finally become effective, it is quite clear at this stage that there is a strong commitment of the international community to changing the existing law on the subject.

The Group suggested the following amendments:

- 1) Deleting any reference to deck-cargo in art.1(c), thus including all deck cargo within the Rules, regardless of an 'on-deck statement'.³
- 2) Including in the Rules the following provisions:⁴
 1. The carrier shall be entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper with the usage of the particular trade or with statutory rules and regulations.
 2. If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier shall insert in the bill of lading or other document evidencing the contract of carriage a statement to that effect. In

1 To avoid duplication, a summary of the main points of this chapter, some suggestions and personal opinions, and a description and criticism of recent suggestions by UNCITRAL's Working Group (see the text below) have been interwoven and combined in this last part.

2 For the amendments, in form of a new draft Convention on the Carriage of Goods by Sea, see U.N.Doc.A/CN.9/105, Annex 1.

3 U.N.Doc. A/CN.9/63, para 23, p.9; para 26, p.11.

4 U.N.Doc. A/CN.9/105, Annex 1, art.9.

the absence of such a statement the carrier shall have the burden of proving that an agreement for carriage on deck has been entered into; however, the carrier shall not be entitled to invoke such an agreement against a third party, who has acquired a bill of lading in good faith.

3. Where the goods have been carried on deck contrary to the provisions of paragraph 1, of this article, the carrier shall be liable for loss or damage to the goods, as well as for delay in delivery, which results solely from the carriage on deck in accordance with the provisions of articles 6 and 8.⁵ The same shall apply when the carrier, in accordance with paragraph 2 of this article, is not entitled to invoke an agreement for carriage on deck against a third party who has acquired a bill of lading in good faith.
4. Carriage of goods on deck contrary to express agreement for the carriage under deck shall be deemed to be an act or omission of the carrier within the meaning of article 8.⁶

The defect in the existing law which was the main reason behind the Group's interest in the deck cargo problem was that 'clauses that disclaim all responsibility for deck cargo are widely used and are generally valid. The practical result is that carriers rarely are legally responsible for loss or damage

5 Articles 6 and 8 deal with limitation of liability. See next note.

6 According to article 8 the limitation of liability does not apply to an 'act or omission done with intent to cause damage or recklessly and with knowledge that such damage would probably result.

to deck cargo, regardless of the cause or extent of loss or damage'.⁷ While doubting the accuracy of this statement as to the frequency of occurrence of such complete exoneration from liability,⁸ the present writer fully concurs with the Group's main suggestion to bring all deck-cargoes within the Rules. The exclusion of deck-carriage from the Rules may have been justified when such a method was rarely used, but it has no justification today. Many articles of transport cannot physically be stowed below deck. Many others are safer when stowed on deck. Sophisticated methods of securing and covering the cargo allow safer deck-stowage than before and, above all, container ships are especially constructed for such a method of stowage. In sum, deck-carriage is no longer an occasional and exceptional practice and there is no longer a reason or a justification for excluding it from the scope of the Rules.

More controversial, however, are the Group's suggested rules of liability for deck-cargo under the Rules. It is submitted that such rules are wholly unnecessary and that the matter could be dealt with satisfactorily under the general

7 A/CN.9/63.add.1, p.28; A/CN.9/63, p.8.

8 To recall the cumulative legal and practical barriers facing such an exoneration: 1) the shipper must consent to the deck-stowage; 2) the consent clause must state the intention to exonerate the carrier completely in unambiguous language (mere 'at shipper's risk' will not suffice); 3) the contract of carriage must include an 'on-deck statement'; 4) the exoneration clause must be held valid and effective under the local law governing the case.

provisions of carrier's liability.⁹ At present such general provisions consist, in their relevant part, of the obligation to stow carefully and properly art.3(2) , of the prohibition on agreements to relieve carriers from liability for damages which resulted from failure to fulfil this obligation art.3(8) , and of the list of excepted perils art.4(2) . If the Working Group's amendments become effective, the general principle will be simply that carriers are responsible for all losses or damages caused by their fault or negligence.¹⁰ For our purposes, there is no substantive difference between these two. In either case the carrier's responsibility for loss or damage to deck-cargo would depend solely on whether he acted as a reasonable carrier should have acted, and, whether, taking into account the nature of the cargo, the security measures available on the deck, the stability of the vessel, etc., the deck-stowage was reasonably safe. This simple principle would sufficiently cater for all bona fide needs and interests of modern shipping regarding deck-carriage. 'Reasonable', 'proper', or 'unfaulty' stowage does not imply absolute safety. As in the case of sea-worthiness, for instance, such a requirement

9 This is the attitude of ICC's Uniform Rules for a Combined Transport Document (ICC's Brochure No.298). The Hague Rules are made applicable to deck-cargo under certain circumstances, according to ICC's Rule 13(b)(2), and apparently the matter is left to be dealt with under the general provisions of the Hague Rules. An advisory report on the scope of application of the TCM, submitted by AMHennebicq to UNCTAD's Intergovernmental Preparatory Group, which was entrusted with the task of revising the TCM convention, completely ignores the deck-cargo problem, although dealing with similar matters, such as live animals and mail (U.N.DOC.TD/B/AC.15/7. add.5).

10 This, roughly, is the suggestion included in art.5 of the draft.

is relative and flexible enough to allow for a very wide range of standards, taking into account the needs and realities of the industry. What is vitally important, if an erosion of the mandatory character of the Rules is to be avoided, is that such standards must be judged objectively, e.g. by a court, and not subjectively, by an agreement between carrier and shipper.

Applied to container transport this approach implies that the presence or absence of the shipper's consent is irrelevant to the carrier's responsibility, and the ultimate criterion is whether the carrier stowed the containerized goods properly, when stowing the containers on deck. Considerations such as the function of the vessel's deck, as originally designed or later reconstructed, the practices and usages developing in the trade, and even the common understanding of the parties, may well serve as indications of what is 'reasonable' or 'proper', but the ultimate decision must stay with the court.

The Working Group, however, chose a different attitude, and devised the provisions quoted above, whose implications, as compared with the present rules, are as follows:

- 1) Full legitimation is given to the shipper's consent, regardless of any objective element.
- 2) It is made clear that no 'on-deck statement' is required. Although the second paragraph mentions a statement, a careful reading leads to the conclusion that what is actually required is no more than that the agreement to stow on-deck be included in the contract of carriage.
- 3) It is made clear that such is the requirement even in case of an optional agreement in the form of a 'liberty clause'.
- 4) It is also made clear that the consent or 'liberty clause' may be included in a document other than the bill of lading,

provided it evidences the contract of carriage.

- 5) The non-inclusion of such a clause in the contract of carriage is conclusive only in a dispute involving a holder of the bill of lading, other than the original shipper. Against the latter, the carrier may invoke an agreement in any form, if such was entered into.
- 6) It is made clear that the only consequence of a breach of the provision mentioned above is that the carrier is responsible only for damage which results directly from the deck-stowage.
- 7) Most importantly, this responsibility is normally limited according to the general provisions for the limitation of liability, except in cases of wilful misconduct, of which deck-stowage in defiance of an express contract to the contrary is an example.

Such provisions, if accepted, would improve the position of container carriers considerably, as they would find under the Rules all the protection they could hope for. Admittedly, carriers would be 'deprived' of the rather theoretical opportunity to exonerate themselves completely from liability, but this loss is trivial. Maritime transport, as a whole, is far from being a free supply and demand market, but container transport is, at present, one of its most competitive branches, and container operators are more concerned with attracting cargo than with unfair and excessive means of exonerating themselves from liability.

What container carriers do try to achieve at present is exoneration from inherent deck risks. It is contended that these attempts too should be discouraged, and that container operators should accept liability for such risks. Such acceptance would certainly conform more closely with the image of container operations as a modern, safe and efficient method

of transport.

In any case, whereas under the present law carriers may succeed in achieving such partial exoneration only when the Hague Rules do not apply, the suggested amendments would enable them to achieve such exoneration simply by inserting a 'liberty clause' in their standard container bill of lading. If lacking in equity , this arrangement would have the certain advantage of normalising the deck-carriage of containers and avoiding the variety of legal problems attached to it under the existing system.

Chapter V: THE CONTAINER BILL OF LADING
AS DOCUMENT OF TITLE

1. THE DEVELOPMENT OF THE
CONTAINER BILL OF LADING

1.1. The Need for a New Document

With the advent of containerisation there has arisen the need for modifications in the document governing the transport operation. The perfection of container systems into the full scale house-to-house operations later necessitated the introduction of a newly designed document altogether, but even the more modest operations involving port-to-port operations raised a number of difficulties. These stemmed not so much from the mode of transport, as this was still basically an operation of carriage of goods by sea, but rather from the physical qualities of the container and the vessel carrying it, combined with different variants related to shipping the container and 'stuffing' it.

Perhaps the most important single factor in understanding the peculiarities of container transport documentation is that the number of such peculiarities may range from zero to a very large number indeed, depending on a number of variants. The container itself is no more than a large metal box and the mere fact that it is used for the storage of goods in transport does not, in itself, raise any problems in connection with documentation. When a carrier receives a consignment of conventionally packed goods from the shipper in a sea-port for shipment and delivery in another sea-port, and he then packs the consignment into his own containers and carries it aboard a conventional ship, there is not one element in the circumstances which justifies any derogation from the traditional pattern of documentation. The shipper should receive a dock-receipt on delivery to the port and in due time should be issued with a 'clean', 'shipped'

ocean bill of lading, describing such details of the consignment as were apparent on receipt, and evidencing the carrier's obligation to carry from port to port. The nearer the operation approaches the ideal container operation, however, the greater the number of peculiarities reflected in the transport document.

Firstly, there are the various irregularities in documentation which become necessary whenever the container is delivered to the issuer of the document already 'stuffed' and sealed. As will be explained in the next chapter, the informative side of the transport document is then quite different from that customary in conventional methods of carriage, in that most of the information given here under the carrier's guarantee relates to the container itself. On the contractual side, explained in the first chapter, the 'stuffing', and therefore most of the task of protecting the goods from the hazards of the journey, becomes basically the shipper's responsibility, and when the container is 'stuffed' by the shipper or his agent, especially when this is not done in the presence of any carrier's representative, it becomes impossible to issue to the shipper more than one bill of lading, even if the container holds different consignments.

Secondly, there are the special aspects of carriage on a container ship. The problem of deck-carriage may be reflected both on the face of the document and in its contractual clauses. Furthermore, as the economic viability of container ships depends on extreme efficiency in loading operations, and on drastic cuts in the time spent in ports, the operators of such ships encourage the delivery of 'stuffed' containers to the port well before the arrival of the ship, to allow them ample time to plan the loading operation and to prevent delays once the ship arrives. It has therefore become not uncommon that a bill

of lading is required and issued a few days before the arrival of the ship, and is then in a 'received for shipment' form, rather than in 'shipped' one.¹

Thirdly, there are the aspects of ownership of the container which must find expression in the contractual clauses to avoid confusion as to the responsibility for the container itself.

Fourthly there is the maze of problems which accumulate as the issuer of the document stretches his province of responsibility beyond the ports' gates. The 'received for shipment' form becomes then a necessity rather than an option. On the face of the document allowances must be made for greater flexibility in geographic details than in conventional bills, and most importantly, the contractual aspect of the document must be drastically changed to cope with the problems of through, combined transport.

Thus, by contrast with the carrier-'stuffed' port-to-port container operation described earlier, a shipper-'stuffed' door-to-door operation requires a document which differs in very significant ways from the conventional, acceptable ocean bill of lading. Contrary to the common image of container transport as comprising uniform, fairly standardised operations, there lies between these two extreme types of container operations an almost infinite variety of types, the lowest common denominator of which, as far as the present work is concerned, is that the part of the transport operations covered by the document analysed here, is carried out in a container.

¹ See Moyer Stainless & Alloy Co. v. Canadian Overseas Shipping, [1973] 2 Lloyd's Rep. 420 (Can. Sup. Ct. Dist. Montreal).

Understanding this variety is essential to understanding the growth and development of container documentation. As long as containers were used merely as better handling devices in operations which were still based on conventional means and concepts, there was no reason why carriers could not use their traditional ocean bills of lading. But with the arrival of container-ships, the growing numbers of containers owned by the ocean carriers, the expanding experience of shippers in 'stuffing' containers, the automation of container terminals, and other developments, the pattern of container operations has increasingly deviated from traditional patterns of transport operations, and traditional bills of lading could not properly reflect these patterns without undergoing some changes.

Naturally, these adjustments were made at first in a haphazard, casual manner. A typewritten house-to-house delivery note was added onto an ordinary ocean bills of lading which was used for covering a combined container-transport operation.² A vague 'container documentation' note was stamped on another bill.³ The abbreviated 'BTC' (said to contain) and 'SLC' (shippers load and count) have started to become commonplace in bills used for container transport, frequently supplemented by stamped statements enumerating the long list of details declared as

2 Cameco v. S.S.American Legion, 514 F.2d 1291 (2nd.Circ.1974); Leather's Best v. S.S.Mormaclynx 313 F Supp. 1373 (E.D.N.Y. 1970); Paquet and Co. v. Dart Containerline, 343 N.Y.S. 2d.446 (1973). In none of these cases, however, was the operation a full 'house-to-house' one. In Rosenbruch v. American Export Isbrandtsen Lines, 357 F.Supp.882 (S.D.N.Y.1973), the 'house-to-house' note was apparently used for a port-to-port operation.

3 Rosenbruch v. American Export, *ibid.*

unknown to the carriers. When the uncertainty about the containers and the 'package on unit limitation'^{3a} started to attract the attention of both the industry and the courts, lengthy stamped clauses began to appear on the face of bills of lading, declaring the container as the relevant 'package' or 'unit'.⁴ Later, stamped clauses appeared, to cope with the problem of deck-carriage. All in all, the transport documents generally used in the late 1960s and early 1970s were very clumsy instruments indeed. Full of stamped and typewritten notes and clauses, making important points about the scope of liability and about the cargo in ways likely to escape the attention of the unwary reader,⁵ frequently using vague or incorrect terms,⁶ and lacking any uniformity in the classification of the various descriptive particulars of goods and containers under the traditional titles,⁷ these patched up documents were by far the less attractive aspect of containerisation in its finest hour.

Yet, documents used in international trade have shown, during centuries of use, exceptional capacity to withstand revolutions and pseudo-revolutions and emerge from them in basically the same form. Can the same be said of the documents which emerged when carriers sat down in earnest to devise suitable documents to cover container operations? Most of the problems described in the previous pages could have been coped with with minor adjustments in various parts of the conventional

^{3a.} See chapter II, *supra*.

⁴ Lufty v. Canadian Pacific Ry. Co., [1973] F.C.1115. (Can.Fed.Ct. Tr.Div.); Leather's Best v. Mormaclynx, *supra*, n.2.

⁵ Chief among these is the abbreviated 'S.T.C.' reservation when preceding a detailed description of the cargo.

⁶ The frequent misuse of the 'house-to-house' note is the best example of this. See note 2, *supra*.

⁷ Compare, for instance, the bill of lading in J.A. Johnston Co. v. The Tindelfjell, [1973] F.C.1003 (Can.Fed.Ct.Tr.Div.), to the one in Standard Electrica S.A. v. Hamburg Sudamerikanische, etc., 375 F.2d.943 (2nd.Circ.1967), as to the classification of details under 'Marks', 'Number of Pckgs.', 'description of the Goods', etc.

ocean bill of lading, printing the stamped clauses among the small print, referring to the containers themselves in the titles of the descriptive part of the document, etc. The one single element which brought about what is, according to one view, a new breed of transport documents altogether, is the development of combined transport by container as a regular service operated by the largest conglomerates ever known in the history of international transport. Even if historically founded by ocean carriers, the new container consortia had to move a considerable part of their activities ashore, and the document covering their services had to cease being a wholly marine animal. It had to adapt itself to at least temporary spells of life on land.

When in 1972 it became clear that the then 25 year old effort to achieve international consensus on the law of combined transport⁸ would not yield any effective result for some years to come, and that the law was unlikely to take the lead and produce within that period any comprehensive set of rules on either combined transport in general or container transport in particular, the pattern of container documentation for the near future became clear. Those container operators who ^{had} waited until then for the law's lead joined others who were less patient in designing their own documents for use in container operations. In a few years the use of such documents became so widely spread that conventional bills of lading have become rare even in port-to-port container transport.⁹ What made this possible was that, though differing in many minor aspects, most of the new

8 Both the CMI and ICC were already active in this field in the late 1940s.

9 N.Nishikawa, Bankers' Protection in Letters of Credit Transactions, a thesis submitted to Oxford University, 1975, p. 188.

type documents shared one basic quality, namely great flexibility. Both the informative parts on the face of the document and the new contractual clauses were drafted so as to suit the whole range of container activities, both combined and single-mode transport, both shipper-'stuffed' and carrier-'stuffed', using the shippers' containers as well as the carriers', FCL containers as well as LCL ones. Those documents have thus become popularly known as 'Container Bills of Lading'.

1.2. The Novelty of the Container Bill of Lading

Is the use of the term 'container bill of lading' justified? Surely, there is little harm in using it as a convenient manner of referring to this type of document, simply because it covers transport operations carried out by means of a container. Indeed, use has been made of this convenient term all through the present work, and this practice will be adhered to hereafter, except when it would lead to confusion. But labels and titles may also have far-reaching legal consequences and should be approached with great care when actual questions of law depending on categorisation are concerned. Later we shall discuss the question whether these documents deserve the label of bills of lading. But do they deserve a separate generic title at all? Do they create a really new species of transport documents?

At one stage in the development of containerisation, the revolutionary zeal of the advocates of the system brought about a sweeping trend of categorising all things containerised as

a new species. With the sobering realisation that the container is not really a new mode of transport, but rather a far more efficient method of utilising the existing modes, came other realisations. The work of international organisations on combined transport problems, at one stage in the early 1960s being at risk of total absorption by containerisation

and its peculiarities, resumed its work on the Combined Transport Document by 1965.¹⁰ The drafters of the 1974 version of the York-Antwerp Rules resisted earlier attempts to give containers a special status in their Rule I.¹¹ And despite the popularity of the coinage 'container bill of lading' drafters of legal documents avoided it. Thus, even if B.S.Wheble, who has written more about containerisation than any contemporary English writer, refers in his introduction¹² to the new version of ICC's Uniform Customs and Practice for Documentary Credits¹³ to 'Container Bills of Lading', the actual rule commented upon¹⁴ carefully speaks of 'Bills of Lading issued by shipping companies... covering unitized cargos, such as those in pallets or in containers'. Similarly the Hague Rules, art.4(5)(c), as added by the Brussels Protocol: 1968 speaks only of a 'bill of lading... [used] [w]here a container, pallet or similar article of transport is used to consolidate goods.' Most indicative of all, even the container operators themselves preferred to entitle their new documents, designed specially for container-transport, 'combined transport bill of lading' rather than 'container bill of lading'.

The newly designed document does not form a new species of transport documents. It is basically a combined transport

10 See for a short history of the work of international organisations on the subject prior to the 1972 UN/IMCO Conference, U.N.Doc.E/Conf.59/3, and the introductory remarks to UNIDROIT Doc., U.P.L. 1969 - paper XLII, Doc.37.

11 See K.Pineus, 'The York-Antwerp Rules 1974', [1974] E.T.L. 349, 353-4.

12 [1976] Lloyds Mar. & Comm. L.Q. 8,9.

13 ICC Brochure 290 (1974).

14 Rule 19(b)(3).

document adjustable to the realities of carriage by container, and none of its aspects is new in any significant way. As to the through, combined transport, aspect of it, two articles by Carver¹⁵ and Bateson,¹⁶ respectively, dealing with, in the latter's words, "the modern form of 'Through Bill of Lading'",¹⁷ mention all the main points which could be made in the present connection, and yet they were written almost 90 years ago. The crop of English court decisions of the year 1921 reads as an excellent list of many of the other major problems which we now attach to container documentation. Two major decisions were devoted in that year to the problem of 'received for shipment' bills of lading,¹⁸ three to the issue of transport documents issued by the non-carriers¹⁹ and one case dealt with the difficulties of obtaining commercially acceptable separate documents for smaller consignments within one large consignment which can only be covered by one bill of lading.²⁰ Clauses and reservations giving the carrier the liberty to stow on deck are known to the transport industry for at least a century, and the same can be said with certainty about clauses and

15 'On Some Defects in the Bills of Lading Act, 1855' (1890), 6 L.Q.R. 289.

16 'Through Bills of Lading' (1889), 5 L.Q.R. 424.

17 Ibid 425.

18 The Marlborough Hill [1921] 1 A.C., 444; Diamond Alkali v. Bourgois [1921] 3 K.B. 443. See on this problem Carver, para. 1061, n. 84.

19 Gagniere & Co. v. Eastern Co. of Warehouses, etc. (1921), 7 Ll.L.R. 188; Troy v. Same. (1921), 8 Ll.L.R. 17; Emilio Clot & Co. v. Compagnie Commerciale du Nord, S.A. (1921), 8 Ll.L.R. 830; D.J. Hill, Freight Forwarders (London, 1972) Ch. 13., esp. paras. 314, 328-9, 332-336.

20 In re Denbigh Cowan & Co., and R. Atcherley & Co., (1921) 90 L.J.K.B. 836. See G.H. Treitel 'Overseas Sales' in Benjamin's Sale of Goods (London 1974), paras. 1382-1397, pp. 707-711; N. Teare 'Ship's Delivery Orders', [1976] Lloyds Mar. & Comm. L.Q. 29.

reservations having the effect of relieving the carrier from responsibility for the accuracy of the description of the cargo.²¹ References to the shipper's part in loading have been much less known in England, but there is abundant evidence that clauses relating to the issue and reservations such as the now famous 'shipper's load and count' were in regular use in America at the beginning of the century.²²

If there is any real novelty about the new container document, it is quantitative rather than qualitative. In evolutionary process terms, the new document has combined within itself most, if not all, of the abnormalities which appeared from time to time among individuals in the species of bills of lading; but it carries within itself no real mutation. Does the qualitative element, then, the sheer accumulation of peculiarities, have any direct importance to the status of the document. One thinks not. If one aspect, such as the combined transport one, prevents the container document from being a document of title, it matters little that there are quite a few other aspects of that document which may produce the same result under the existing law. But there is another quantitative novelty about the new documents which may have, at least theoretically, a role to play in the question of whether it would be declared a document of title, and that is the ever increasing universal use of the new container documents as a replacement for conventional bills of lading. If it is not

21 See e.g. E.Leggett, Bills of Lading (London, 1880), 334-340.

22 See the Uniform Bills of Lading Act (1906), sec.23,4 U.L.A. (1922), and annotation thereon.

already so, the container bill of lading has better chances of becoming a document of title through the practice of merchants, simply because this bill of lading would be the only document covering a large proportion of the international transport operations, and if the reasons which made the conventional bill of lading a document of title centuries ago still persist today in relation to container transport, then it is perhaps logical to expect that the document which would replace the conventional bill for containers transport would also be treated as a document of title.

1.3. The Container Bill of Lading as Document of Title -
The Practice

The element of replacement mentioned in the last paragraph is essential to the present issue. For example, mate's receipts and delivery orders of various kinds have been candidates for the status of document of title at common law for quite a few generations. Yet they never acquired the status in any categorical way²³ because, it is submitted, they never replaced the ocean bill of lading in any significant way. With these bills of lading still in existence, there have never been any overriding need by merchants to confer the preferred status on other documents issued in the same journeys, valuable as these documents may have been for other mercantile functions. This is perhaps best demonstrated by the fact that in the one case where mate's receipts did take over completely from

²³ i.e. except for special cases, as in Merchant Banking Co. of London v. Phoenix Bessemer Steel Co. (1877), 5 Ch.D.205.

bills of lading as the main, indeed the only, document governing the trade between two ports, merchants did make it their document of title.²⁴ Will merchants do the same when left only with container bills of lading to cover a large portion of their international transport transactions?²⁵

A positive answer would presuppose that merchants need some documents of title for their international trade business. But is this presupposition valid? Many argue it is not any more, ~~neither~~ in the general context of modern transport realities²⁶ nor in the context of container transport in particular:

- 1) It is frequently argued²⁷ that there is a direct relationship between the length of the time passing from shipment to delivery, and the need for documents of title, and therefore that as container transport cuts drastically on that time, the need for such documents will lessen accordingly.

The argument is perfectly logical, and its first premise beyond dispute. The absence of documents of title in land and air transport can be attributed to a large extent to the fact that carriage in these methods usually takes hours or days instead of the traditional weeks in sea transport.²⁸ This is only accentuated by the fact that

24 Kum v. Wah Tat Bank, [1971] 1 Lloyd's Rep. 439.

25 It should be mentioned at the outset that this part of the analysis deals only with the formation of a practice. Whether or not this would become a binding confirmed custom is dealt with later.

26 See the report of the U.K. Committee for the Simplification of International Trade Procedures (SITPRO), H.M.S.O. 1970.

27 See e.g. 'Combined Transport Contract, etc.' a note by the Secretariat of UN/IMCO conference on International Container Traffic, U.N.Doc. E/Conf.59/21, 18.4.72; J. Ramberg, 'The Law of Carriage of Goods, Attempts at Harmonization' [1974] E.T.L.2, 22.

28 G. Gilmore, 'The Commercial Doctrine of Good Faith Purchase' (1954), 63 Yale L.J. 1057, 1078.

where rail-transport, for instance, has been adopted as a long distance mode of carriage, as in the case of the cross-continent railways of America and India, the documents issued by the railway companies did develop into documents of title in the hands of merchants and bankers.²⁹ True enough, documents of title bridge not only the time gap, but also the geographical gaps, both between the parties and between them and the carrier in possession of the goods, but it seems clear that the problem of the geographical gap is incidental to that of the time-gap. Once the reluctance to advance the other party with either money or goods is made less acute because of the very short differences in the time involved, there can be found sufficient financial arrangements to bridge the geographical gap.

Yet, the drastic shortening of the time between shipment and delivery in container-transport, being the second premise of the present argument, is much more doubtful. No reliable statistical data exists yet, but it is quite clear that, taken as a whole, container operations are not spectacularly swifter than conventional transport ones.

True enough, if only the port-to-port leg of the journey is taken into consideration, container-transport in container ships is by far faster than conventional transport both because of the greatly reduced time of

29 As to the U.S. railways see Gilmore and Black, pp.94-5; Shaw v. Merchants' Nat. Bank of St. Louis, 101 U.S.557(1880). As to India, see the excellent analysis by Mukherjea, J. in Commissioners for the Port of Calcutta v. General Trading Corp. A.I.R.1964 Cal.290,306 et.seq.

loading and the speed of the giant vessels. What ensures the utilisation to full capacity of these two physical advantages is the fact that these vessels are otherwise not economically viable. But container documentation would have had no purpose if issued only for port-to-port journeys, and the real test of container documents is their life-span when covering full door-to-door operations. An exporter may not have any great interest in the nature of the document he receives at the sea-port for a four-day cross ocean transport operation, but if he receives at an inland point a document covering the whole combined transport operation, and if past experience tells him that, whatever the speed of the sea-leg, the whole operation is rarely completed in less than a fortnight, he may well be interested in the commercial advantages a document of title status would bring to the transport document and to the transaction as a whole.

- 2) It is argued that the need for documents of title would be greatly reduced in container-transport as the classic seller/buyer set up exists in an exceptionally small proportion of container operation. The great majority of containerised goods, it is said, are merely transported within a commercial close-circuit, manufacturers regularly sending export products to their agents in overseas markets for storage and distribution, buying agents supplying their home market, subsidiary manufacturers sending parts for assembly by the parent company, etc. The economic logic of this phenomenon is that the efficiency of a container operation depends on the users as much as on the operator, and the system achieves perfection only when efficient handling facilities exist both at the point of entry and

departure. The expertise and capital investment required for such handling facilities can be justified only by regular use, and it is only too obvious that only operations of the type described above can ensure such regularity at both ends of the operation. It is ~~against~~ this background that one can attach credibility to an estimate, mentioned by K.Gronfors,³⁰ that as much as 85% of the containerised goods between Europe and the USA are dispatched between members of the same commercial enterprise.³¹

- 3) It is finally argued that the practice of selling goods in transit is predominantly related to commodities shipped in bulk.³² These include basic commodities such as grain, ores, cement, etc., which rapidly change their commercial value and can be easily bought and sold. These commodities, however, are rarely containerised, the greater part of container operations involving manufactured goods. The latter are far less commercially transferable, being often manufactured to specification, etc., and the element of time in buying and selling them is significantly less important. This argument refers, however, only to the selling function of the document of title, ignoring its very important value as a means of securing payment between the

30 'Simplification of Documentation and Document Replacement', [1975] E.T.L. 638,641.

31 See examples in Sperry Rand Corp. v. Norddeutscher Lloyd, [1974] 1 Lloyd's Rep.122 (S.D.N.Y.1973) (Goods manufactured in Germany by subsidiary sent to parent company in America), and Encyclopaedia Britannica v. S.S.Hong Kong Producer, 422 F.2d.7 (2nd Circ.1969) cert.den.397 U.S.964 (Books sent by parent company in America to an affiliate in Japan).

32 Ramberg, *supra*, n.27, p.282.

original parties, and of obtaining credit from bankers.

Now, what does this inquiry into the needs and interests of merchants amount to? Had the question whether or not to confer a status of document of title on container documents been a matter for legislators to decide, these needs and interests would have been taken into consideration in a positive way. Outside the scope of legislative work, in that remote corner of the law where customs as potential sources of legal rule are kept alive more in theory than in practice, the needs and interests of merchants are more likely to play a negative than a positive part. If businessmen will have no need for documents of title in container-transport, neither a practice, nor a binding custom of treating container documents as symbols of the goods will evolve. But the opposite is not necessarily true. Contrary to the widely held opinion it is submitted that even if such a practice does evolve,³³ the gap between it and a status of a binding custom will be bridged, if at all, only with great difficulty.

33 See a leading banker's view that, despite a general decline in the need for documents of title, there is still a need for what he calls a 'bankable through bill' in connection with container transport; R.L.Ogg, Thoroughway for Boxes(1969) p. 5., appended to The Three Banks Review, Sept. 1969.

2. THE STATUS OF CONTAINER BILLS

OF LADING IN ENGLISH LAW

2.1. The Container Bill of Lading as Document of Title - a Custom?

Ever since container bills of lading started to appear on the international transport scene there has evolved a general air of expectation that it is only a matter of short time before they are universally recognised by courts as documents of title through mercantile custom.¹ To judge the justification for such optimism it is expedient to quote Carver again. It is 86 years ago that he wrote²

'(I)t is the fact that for many years past through bills of lading have been treated by business men as documents of title, negotiable in the same manner as ordinary bills of lading. There can, I should think, be little doubt that custom has extended the rule of negotiability in this sense to these documents'.

How grossly too optimistic the estimation in the latter sentence was, can be best shown by the fact that the editors of the last edition of Scrutton still repeat it in 1974,³ and still without any sign of confirmation by a court. Will as many generations of commercial lawyers be brought up on a never-materialising expectation that a similar custom will be legally established in connection with container bills of lading? It is unlikely that either Carver or the new editors of Scrutton misjudged the existence of the practice itself.⁴ But they overestimated the

1 See, e.g., 'Report on Containerization'(1970), by the Law Council of Australia, The Law Council Newsletter, vol.5,no.1, p.10,11.

2 'On Some Defects, etc.', **6 L.Q.R. 289, 296.**

3 'There would now be little difficulty in establishing that through bills of lading are by custom treated as transferable documents of title', art.179,p.377.

4 Note that Bateson, **5 L.Q.R.**, 424, describes the existence of the practice in his time, with no lesser conviction.

capacity of Custom to produce new Law. Commercial law has become accustomed to looking somewhere else for ways of reproducing and re-vitalising itself.

2.2. The Role of Custom in Modern Commercial Law

A massive body of relatively well organised, written-down rules, crystallised and categorised by professional lawyers in Parliament, in the courts and in law schools have come to dominate mercantile law; and when practitioners have not found satisfaction in the general rules thus produced, they have had their legal advisers produce specific ones in written contracts. Customs have had little chance of survival as law-producers in such an environment; they have been stifled by what could be called the over-legalism of the modern business world. Every case in which a commercial lawyer, willing to ensure a certain legal result for his client, preferred recording an existing mercantile practise in an express contractual clause, to the possibility of having to have the practice confirmed by a court as a binding custom in case of a dispute, was not only one missed opportunity for such confirmation, but also a direct blow to its chances of ever materialising. A custom, to become law, must be shown to be considered by the business world as binding in its own right; when expressly recorded in a contract, however, it is the contract rather than the custom itself which binds the parties, and as the number of such contracts grow, it becomes impossible even for the most experienced of experts to testify in court with any honesty to the existence of a binding custom. Not only is he unlikely to know a sufficient number of cases where the binding effect was put to the test at all, but he is even less likely to know what exactly it was that made the offending party bow to the custom, a recognition of the binding effect of the custom itself, or a contractual

clause.⁵

Now, unless the judiciary, motivated by a call for greater correlation between law and practice, relaxes its criteria on the confirmation of custom as law, the only real chance of a trade practice to reach maturity and become law is that it would exist long enough to make merchants consider themselves bound by it before the law intervenes in any way. As far as the present issue is concerned, this had apparently happened in 18th Century England⁶ and in the trade between Sarawak and Singapore;⁷ but can it be expected to happen in the 20th Century highly sophisticated world of container transport, massively attended as it is by lawyers? It is submitted that by using contractual rules to give container bills of lading the semblance of documents of title for some specific purposes, commercial lawyers have already intervened in the process of custom-forming in an irreversible way.

2.3. Commercial Acceptability and the Status of Container Documents

We shall never know whether or not bankers consider themselves bound by a practice of treating container bills of lading issued by shipping companies as acceptable documents under letter of credit arrangements, because they are already bound to do so, unless otherwise instructed, by an express provision in the ICC Rules for Documentary Credits,⁸ incorporated

5 See Wilson Holgate v. Belgian Grain and Produce Co. [1920] 2 K.B.1; P.Devlin 'The Relation Between Commercial Law and Commercial Practice' (1951), 14 M.L.R.249.

6 See Lickbarrow v. Mason (1794), 5 T.R. 683.

7 See Kum v. Wah Tat Bank, [1971] 1 Lloyd's Rep.439.

8 Rule 19.

by reference or expressly into most of the letters of credit of the present day.

Likewise we shall never know whether carriers consider themselves bound by a practice of treating their container bills of lading as documents of title as far as the arrangements for delivery of the goods (to whom and whether or not against surrender of the bill) are concerned, because they are bound to do so by the contracts of carriage evidenced by all the container bills known to the present writer.

Now, it is quite obvious that, as in the case of the delivery warrants in Sterns v. Vickers,⁹ the purpose of clauses in the new container bills of lading promising to deliver the goods only to the holder of the bill of lading, duly endorsed, and only upon surrender of one copy of the document, is to give these bills the 'characteristics of documents of title at common law'.¹⁰

That such characterisation is in the interest of container operators is almost self-evident; at little cost to the operators themselves, this will have ensured for the users of their services the best possible document from the commercial point of view. But can the words of the bills of lading themselves achieve this? It is submitted that the undertaking to deliver only against surrender of the document goes a long way towards achieving one of the most essential characteristics of documents of title, namely control over the goods, but the terms of the document cannot confer upon it the status of document of title.¹¹

9 [1926] 1K.B.78.

10 Treitel, op.cit., para.1391, p.708.

11 Treitel, ibid.

They may give the document some commercial value and make it acceptable for specific business purposes; indeed, the terms of the document may serve as the basis upon which a custom of treating it as a document of title would be formed, but mere acceptance of the document in the course of business transactions should not, in itself, be necessarily taken as a sign of such custom building up. Much depends on the exact circumstances of acceptance, mainly on whether or not the document is accepted on the assumption that it possesses the maximal qualities of documents of title.

A document of title would give a banker, for instance, with whom the document is deposited as security, both negative control over the goods (i.e. a guarantee that, the bank being in possession of all copies of the document, no one else will be able to obtain the goods from the carrier), constructive possession (i.e. the right to gain actual possession of the goods from the carrier against surrender of the document) and, in some cases, property in the goods; but the mere fact that banks do accept a document as reasonably good security does not necessarily mean that they regard it as document of title, simply because they may be quite satisfied with, e.g. negative control over the goods.

Let us examine this hypothesis against the realities of English banking.

2.4. English Bankers and the 'Selective Judgement'

Principle

The main feature of the attitude of English bankers to container documentation is uncertainty and caution. They still ask questions about the nature of container bills of lading, and the more lucidly they define their doubts and

hesitations,¹² the smaller the chances of a custom being formed. This does not mean that the banking system has lapsed into complete inactivity where container-transport has been concerned; but the line of activity adopted, described by Wheble¹³ as 'the exercise of selective judgement', demonstrates better than anything else the underlying general uncertainty.

As in the case of Forwarders' House Bills of Lading, bankers have now developed a system of approving some container bills of lading, rejecting others 'on the basis of criteria having to do with the issuer and the details of the actual document itself'.¹⁴

Thus it was that in September 1969 the London clearing banks released a press announcement in which they expressed willingness to evaluate 'with due regard to all the relevant circumstances in the same way as any document presented as collateral',¹⁵ the container bills of lading then being issued by the two container consortia operating in Britain, covering shipments to and from Australia, "provided that these documents are in order and are suitably amended by the words 'shipped on board on..., at..., ' such amendment to be dated and signed or initialled by the issuers."¹⁶

12 See, e.g. the excellent analysis by B.S. Wheble 'Documentation for International Multimodal Transport' (1974), prepared for UNCTAD's Intergovernmental Preparatory Group in International Transport, U.N.Doc.T.D./B/A.C.15/7Add.2, p.3. See also by the same author 'Combined Transport - a Banking View', [1975] E.T.L. 648; 'Container Banking Documentation' in the reports of 1st International Conference on Containerisation, Geneva, Oct. 1967 p.3., and 'Containerisation and its Impact on Banking', J. of the Inst. of Bankers, Feb. 1970, 16.

13 'Documentation for Int'l Multimodal Transport', *ibid*, at 26.

14 *Ibid*.

15 The original statement deals with both acceptance for documentary credit purposes and with acceptance as security. It seems that only the latter function survives, as the documentary credit regime is now covered by the ICC Rules referred to in p.289 *supra*.

16 See for text and commentary 'Container Documents' (1969), 32 Export 14.

This statement has achieved its very limited immediate purpose in that it has given commercial legitimacy to certain bills of lading on a certain route, and under specific circumstances. But by doing so the issuers of the statement, being the indisputable world leaders in international trade practices, have formalised and institutionalised for years to come the basic doubts as to the status of container bills of lading in general. They have established the concept that bills of this sort are not universally acceptable and that each must be considered on its own merits. And the status of the new documents benefited little from the fact that in the seven years since this statement was made, it was extended only once to include the bills of one other shipping company.

The statement is neither expressly exclusive, nor does it purport to limit the individual bank's discretion in accepting other documents of the same sort, and so it is the principle embodied in it, namely the 'selective judgment' acceptance, which is of direct importance to us.

Bankers are primarily interested in the repayment of the sums advanced to the customers. Success in litigation, actual possession of the goods or the ability to re-sell them play a secondary role, even if it is this category of functions of documents taken as security which receive the greater academic attentions. Bills of lading are considered second rate securities anyhow, and it is doubted whether they would have achieved their unique universal popularity with bankers had it only been for advantages in the above mentioned category, or even in the much avowed priority in bankruptcy. What has made bills of lading so popular is the fact that, when in a transferable form, possession of them by the bank effectively prevents the buyer-debtor from obtaining the goods before settling the loan, or making another satisfactory arrangement. In conditions of

normal economy there is hardly any better incentive for the customer to repay the bank, and it is to this factor that the finance of international trade in general owes its astonishingly smooth running.

A container bill of lading, whatever its content, if it is not a document of title cannot give the banker a pledge in the goods for which it was issued.¹⁷ Subsequently, the banker taking such a document does not acquire by possession of the bills a right to re-sell the goods, nor does he have any priority to the goods in case of bankruptcy of his customers.

Still, it is submitted that a container bill of lading issued by a reputable organisation and contractually undertaking, as do all contemporary container bills of lading, to deliver only against surrender of the document,¹⁸ may be quite attractive to a banker, without necessarily possessing the true status of document of title. The main criterion in selecting acceptable container bills as far as the identity of the issuer is concerned must be the issuer's commercial status, i.e. its financial standing and reputation, and whereas the financier's primary objective in assessing the quality of such reputation is the issuer's ability to fulfil the contract of carriage (and mainly by his own means, not relying too heavily on other carriers), another objective, perhaps best represented as an integral part of the issuer's reputation, is that he would stand by its obligation and always insist on surrender of the bill against delivery. By obtaining actual possession

17 Barclay's Bank v. Commissioners of Customs and Excise, [1963]

¹ Lloyd's Rep. 81, 88 (status of bills of lading as documents of title held decisive on the question of whether effective pledge of the goods they represented could be made by

18 See the twin criteria mentioned by Wheble, 'Documentation for Int'l Multimodal Transport', n.12, p.292, *supra*; text cited on p.292, *supra*, at n.13.

deposit of
the bills
with a banker

of the goods against surrender of the bill in the bank's possession, straight consigned or duly endorsed to it, the bank can obtain a pledge in the goods with all the consequent advantages, but even assuming that such a course of action would rarely be undertaken, the bank may be satisfied with the negative control afforded by possession of the bill, ensured by a lien on the document itself.

But if the mere acceptance of a container bill of lading as security by a bank does not necessarily indicate a belief that it is a document of title, the state of mind of bankers can perhaps be ascertained by looking more closely at the details of such acceptance. On the one hand there can be observed a tendency in English banking today to accept even recognised container bills of lading only when stamped with a 'shipped' notation. A 'received for shipment' container bill of lading issued at the beginning of a combined transport operation provides, as from that moment, both 'continuous documentary cover'¹⁹ and a reasonably safe notion of the date of shipment and the ship which would be used. It is submitted, therefore, that the tendency to take only 'shipped' container bills as security indicates an intention to retain in as much as possible the old order and accept only documents whose status as true bills of lading, and therefore as documents of title, has been already well established.²⁰

On the other hand, there is a marked tendency among English bankers to insist that container bills of lading would be consigned to them directly. This practice is used sparingly where

¹⁹ Treitel, *op.cit.*, para 1513, p. 779. Contemporary container bills of lading provide for carrier's responsibility from the moment of receiving the goods till delivery.

²⁰ See sec. 2.6, *infra*, esp. p. 212.

conventional bills of lading are concerned, and its fairly systematic application even to recognised, 'shipped', container bills of lading would indicate a distinct lack of confidence in the status of such bills.

2.5. The Formation of a Custom - an Assessment

Perhaps the main obstacle impeding the formation of clear patterns of business practice in relation to container documents is the overriding sense of temporariness characterising the behaviour of businessmen, emanating from the marked expectancy that the legal status of such documents would be determined from above. Notably, and despite all outward signs, the hope still looms high among merchants, bankers and carriers alike that an international treaty on combined transport ~~will~~ materialise in the not too distant future, and that the question of the status of container bills of lading would then be settled.

When the UN/IMCO conference decided in December 1972 not to implement the draft TCM convention, it had done so in order that 'further studies be carried out and completed by the end of 1974' on a series of economic subjects connected to multi-modal transport, giving special attention to the needs and requirements of developing countries.²¹ According to this resolution, UNCTAD's Trade and Development Board has established the Intergovernmental Preparatory Group on International Intermodal Transport, and the original intention was that the Group should implement the studies in a preliminary draft which would be examined by a U.N. organized Diplomatic Conference before the end of 1975. At the time of writing not one clause has been drafted, nor had any serious discussion in that direction been reported. Ten reports were produced,²²

21 Resolution No.7., U.N.Doc.E/Conf./59/44.

22 Seven of the reports were published as addenda to U.N.Doc. TD/B/AC 15/7.

mainly by private experts, on the various aspects of multi-model transport, and excellent as most of them are, it is difficult to see in what ways they throw a truly new light on the economic issues involved. If developing countries fear the effect of containerisation on their economy, none of these reports goes far towards dispelling these fears, and there are no outward signs that the Third World suspicions about unitized transport systems are waning. International consensus, so it seems, would come only with the understanding that, as much havoc as the lack of a systematic set of legal rules may cause in some aspects of container transport, and the business transactions surrounding it, this itself would have little effect on the advent of the new system as a whole.

Meanwhile, the ICC Uniform Rules for combined Transport Document would serve as the only unifying force in the world of container documentation. The ample room left in the spheres of combined transport liability for the intention of the parties (where specific transport conventions or local statutes do not apply mandatorily) can now be filled satisfactorily, and in a uniform way, by reference to the model of the ICC Rules. But can the Rules play a similar role as far as the status of their combined transport document (CTD) is concerned? In the introduction to the Rules their issuers admit that whether or not any CTD is considered 'a worthwhile instrument' from the commercial point of view depends upon the commercial and financial standing of any issuer, but they do seem to assume a wide power on the part of any issuer to determine the legal status of his own document.

Rules 2(c), 3 and 4 establish a system according to which any CTD can be 'negotiable' or 'non-negotiable' as the issuer

sees fit.²³ The negotiable one is made out to order or bearer²⁴ and purports to be 'transferable by endorsement',²⁵ in the former case and without endorsement in the latter.²⁶ If more than one original is issued the number of originals is indicated and delivery can be obtained from the issuer against surrender of one of the original, duly endorsed if necessary,²⁷ such delivery discharging the issuer.²⁸ Where copies are issued in addition to the originals, they are marked 'non-negotiable copy' and play no role in the process of delivery.²⁹ Non-negotiable CTD's indicate a named consignee,³⁰ delivery to whom discharges the issuer.³¹

Now, these rules were drafted with the intention that they should be part of a statute. Had the TCM been adopted internationally and locally, there can be little doubt that the 'negotiable' CTD would have been recognised as^a document of title for all intents and purposes, although a more expansive wording of what are now rules 3(b) and 3(c) would have made this clearer.³² As model rules, however, the ICC Rules cannot confer a status upon the CTD. Each document incorporating them governs

23 Rule 2(c).

24 Rule 2(a).

25 Rule 3(b).

26 Rule 3(c).

27 Rule 3(f).

28 Rule 3(g).

29 Rule 3(e).

30 Rule 4(a).

31 Rule 4(b).

32 Strictly speaking these rules deal only with the transferability of the CTD, but it is difficult to believe that the drafters intended ~~it~~^{them} to be interpreted so narrowly. Note that all the early drafts left the status of the document to the applicable local law, and that the present text is the result of a deliberate decision to settle the matter of the status in the Convention. See the development in U.N.Doc.E/Conf./59/3, and in addenda 1-3 to this document.

only the direct relations between the issuer and the shipper, and thus can only insert into the carriage transaction and the related ones, by its own content, some of the characteristics of a document of title. But only custom or statute would make the CTD in time a document of title.

2.6. The Container Bill of Lading as Bill of Lading

In the foregoing analysis it was theoretically assumed that the container bill of lading is not a bill of lading. If it is, there is no need to prove a custom as to its status at common law. The status of bills of lading as documents of title was established almost two centuries ago,³³ and has not given rise to any serious doubt ever since. A bill of lading is 'a document relating to goods the transfer of which operates as a transfer of the constructive possession of the goods, and may operate as a transfer of the property in them'.³⁴ This makes the provisions of the Bills of Lading Act 1855 applicable, thus perfecting the transferability of the attached contractual obligations, in addition to the possessory rights.

The power to symbolize the goods and the quality of transferability are not just functions of the bill of lading; they are the very reason why bills of lading were brought into use originally. The Ship's Register or the Book of Lading served as written proof to the acceptance of the goods by the master at the beginning of the journey and constituted the shipper's entitlement to his cargo at the end of the journey. But this arrangement sufficed only when shippers travelled with the goods. When a growing number of shippers refrained from doing so the Bill of Lading detached itself from the Register

³³ Lickbarrow v. Mason(1794), 5 T.R.683.

³⁴ Treitel, op.cit. para 1363, pp.688-9.

and assumed the unique role it has played to the present day,³⁵ i.e. an instrument giving both certified information about, and close control over, goods carried by sea, making it possible to perform all the main business transactions while the goods are in the custody and actual possession of the sea carrier.

This unique role has become so much a part of the distinctive character of the bill of lading that any attempt to answer the present question i.e. whether a container bill of lading is a bill of lading, by reference to a definition of the latter term is bound to lead the argument in circles. Attempts to define bills of lading have been scarce³⁶ and have put the emphasis on one or the other³⁷ of the three main characteristics of bills of lading, namely serving as evidence to the shipment of goods, as evidence of the contract of carriage and as documents of title to the goods. Of these, the first two functions do not distinguish the bill of lading from other transport documents such as consignment notes and air waybills, and the third, though the most important distinguishing feature of bills of lading, is the very thing we attempt to ascertain here. Had we known whether a container bill of lading is a document of title, there would have been little need to ascertain whether it is a bill of lading.

35 This account of the origin of the bill of lading based on W.P.Bennett, The History and Present Position of the Bill of Lading as a Document of Title to Goods (Cambridge, 1914) pp.6-7; H.E.Purchase, The Law Relating to Documents of Title to Goods (London, 1931), p.24; W.S.Holdsworth, A History of English Law, vol.VIII pp.255-7; McCardie J. in Diamond Alkali v. Bourgeois, [1921] 3 K.B. 443, 449.

36 See, for a collection of such definitions, Purchase, *ibid.* at 25-6.

37 Compare, for instance, Lord Loughborough's definition in Mason v. Lickbarrow (1790), 1 H.Bl.357, 359 to that in Blackburn on Sale, 3rd ed.(London, 1910) by W.N.Raeburn and L.C.Thomas, 421. Cf. also the French Commercial Code, Article 222.

It is suggested, therefore, that an alternative pattern of inquiry be adopted here, which would be less formal but far more accurate and suitable for our present purposes. Instead of attempting to test the container bill of lading against some general, vague definition of a bill of lading, it should be tested against a model of the bill of lading approved as a document of title in Lickbarrow v. Mason. This would add details to the model tested against, thus making the analysis less abstract and, more importantly, would be legally more accurate; the exact purpose of the analysis would be to ascertain whether the authority of the special verdict of the jury in that case can be stretched to cover container bills of lading. If it cannot, the status of the container bill of lading will have to be established anew by either custom or statute; if it can, the container bill of lading can be considered a document of title in the common law sense with all the normal results. Obviously, ^{the nature of such an analysis requires that we deal with real} factual similarities, not with analogous elements which may deserve to be treated similarly by merchants. If a characteristic of a container bill of lading makes it factually different from our model bill of lading, it has no claim to the status conferred by Lickbarrow v. Mason which was a mere factual finding of custom, and if such characteristic deserves to be treated similarly, only a contemporary custom or statute can remedy this. Some limited leeway will be given to analogies, however, by separating the significant distinctions from the insignificant.

The bill of lading which had given rise to the dispute in Lickbarrow v. Mason is not reproduced in any of the reports of the various stages,³⁸ but its form and content can be

³⁸ The case was decided in the King's Bench, (1787), 2 T.R. 63, reversed in the Exchequer, (1790) 1 H.B.L. 357, 359, and restored by the House of Lords, (1793) 4 Bro.P.C. 57, ordering a venire de novo, which resulted in the special verdict, (1799) 5 T.R. 367. Buller J.'s opinion, advising the House of Lords on the present case, was reported in (1805). 6 East. 17, no. 21.

constructed with reasonable certainty on the basis of statements in the proceedings and information about bills of lading of that age. The bill of lading there was issued on 22.7.1786 by the master of the 'Endeavour' for goods shipped on board on the same day. It was issued 'for carriage from Middlebourg to Liverpool, to be delivered there to order or assigns. The description of the bill as being 'in the usual form'³⁹ makes it almost certain that it belonged to the type of bills reproduced in earlier editions of Scrutton.⁴⁰ This type of a short, compact bill of lading reigned in the English dominated world of sea-transport all during the 18th and at least part of the 19th Century, remaining practically unaltered in content and, with the exception of expressions of piety, in wording.⁴¹

Let us, then, compare the main features of this model bill of lading to the contemporary container bill of lading:

1) The model bill of lading is for carriage by sea, whereas the container bill of lading is designed to cover also inland transport. It is submitted that this difference alone is quite sufficient to make the latter significantly different from the former.

A bill of lading is a marine species. Evolutionary adaptation in the form of gradually developing customs may adapt it to life on land and the same can result from a more radical deliberate effort under the hand of a surgeon-legislator.

39 (1787)2 T.R.63.

40 See the 1766 bill reproduced in the 17th.edition, p.446

41 M.B.Crutcher, 'The Ocean Bill of Lading, etc.' (1971), 45 Tulane L.R. 697,701 gives an example of a bill issued in 1713 in Barbados, which is virtually identical to the one reproduced in Scrutton, issued in London. Crutcher mentions an 1861 bill, issued in New York which is identical to the first two. The great influx of contractual exceptions changed the appearance of bills of lading from the latter part of the 19th Century, but the essence of the earlier bills can easily be detected in present day bills, sometimes retaining the old language.

Without the help of either process, the bill of lading's place is at sea.

The multi-modality, it is submitted, is purer and much more fundamental an element in the comparison between the documents, than the two closely related to it, namely the 'received for shipment' element and the through-transport one in its narrower sense (i.e. allowing for carriage by more than one carrier, but not necessarily by more than one mode of transport).

What is involved here is not a mere uncertainty as to whether the goods are in motion, or as to the identity of the actual carrier, but the utilisation of modes of transport which have deliberately rejected bill of lading type documents for generations.⁴² True enough, as most contemporary container bills of lading are issued by shipping companies, for routes whose main part is the ocean-leg, the temptation is high to present such bills merely as extended ocean bills of lading.⁴³ Such attitude is untenable. A document covering a mode of transport other than sea-carriage is not a bill of lading, under the existing law. The present domination of container transport by sea-transport as its major part raises, however, two related questions, which deserve a more serious attention.

a) Can a container bill of lading be considered a 'legitimate' bill of lading if it is used for port-to-port transport only,

42 Note, for instance, the strong opposition of air carriers even to the flexible provisions of the draft TCM on the 'negotiability' of the CTD.

43 See, e.g. Cameco v. American Legion, 514 F.2d.1291,1293. where a bill of lading issued at an inland point for combined carriage by road and sea is described as 'ocean bill of lading'.

assuming, of course, that all other requirements, as will be discussed presently, are fulfilled? The answer depends very much on whether the bill can be dissected under the 'blue pencil' principle, so that the basic features of an ocean bill of lading, can be cut out and attributed to the actual transport. All the contemporary container bills of lading known to the present writer enable such an operation to be performed with little difficulty. Some carriers, conscious of the advantage of making this possibility abundantly clear have headed their bills accordingly with titles such as 'Bill of Lading for Combined Transport or Port to Port Shipment',⁴⁴ or have left the full title to be filled up according to the circumstances of each operation.⁴⁵

b) Can a container bill of lading, covering a multi-modal operation change its status and become a legitimate bill of lading at the beginning of the sea journey? Theoretically, there is no reason why the answer to the question should not be similar to the previous one. The concept of a transport document undergoing changes in its status and in the law applicable to it at some theoretical moment, and while still in circulation, is not at all unfamiliar to the law of carriage of goods. A combined transport document is deemed to cover a 'contract of carriage', subject to the Hague Rules, for example, only 'in so far as such document relates to the carriage of goods by sea'.⁴⁶ A bill of lading taken by the charterer pursuant to a charterparty covers a 'contract of carriage' in the same meaning only when endorsed (if necessary) and

⁴⁴ The present Overseas Containers Limited bill of lading for the UK/Europe/Australia container route.

⁴⁵ See the bill of lading reproduced in 357 F.supp.986-7.

⁴⁶ Hague Rules art.1(b).

delivered to a third party.⁴⁷ And, of course, a 'received for shipment' bill of lading becomes a 'shipped' one when stamped accordingly, and, according to the dominant view, only then assumes a full bill of lading status for certain purposes.⁴⁸ Nor has the mercantile world shown any noticeable reluctance to conduct business on the basis of such converted documents. Indeed, both ICC Rules for Documentary Credits⁴⁹ and the above mentioned Clearing Banks Statement,⁵⁰ show a clear willingness to do so with converted 'shipped' bill, for instance.

Yet, if a combined transport document becomes a bill of lading at the commencement of the sea-transport, it seems that this status is lost when the document covers a further inland transport operation. Courts and legislators are at present involved, if at all, in such elementary problems of container documentation that any further discussion of this statement would be purely speculative. Suffice it to say at this stage that, if this view is correct, the temporary status of bill of lading, and the ensuing ^{temporary} status of document of title, would be of little mercantile value. The advantage of a document of title is the possessory rights and complete control it affords from the moment it is duly taken by a holder to the moment of actual delivery, and if both rights and control are at a danger of being lost before the actual transfer of possession, the document affords no more overall security than a document which had never been a document of title.

47 Ibid.

48 Hague Rules art.3(7); pp. 279, 295, supra.

49 Article 20(b).

50 pp. 291-3, supra.

2) Our model bill of lading is issued by the carrier who actually performs the whole journey, whereas container operations, even when covered by one document are rarely actually performed by the issuer only.

This distinction must be divided into two -

- a) A transport document is undoubtedly not a bill of lading within our present meaning when its issuer only undertakes to procure transport on the shippers' behalf. This has been repeatedly decided in connection with such documents issued by forwarding agents,⁵¹ but it is perhaps also true as to carrier bills of lading which allow their issuers a free choice of transshipment at the sole risk of the cargo-owner.⁵²
- b) All the container bills of lading of the present generation allow the issuer an unreserved right to perform the operation by sub-contracting with other carriers, a right which is exercised extensively. Unlike the previous type of documents, the issuers of the present ones retain full responsibility for the cargo from receipt to delivery; but does the right to surrender actual possession prevent the document from being considered a bill of lading?⁵³

Strictly speaking, the answer should be affirmative. The very essence of the bill of lading is that it functions as an 'open attornment' by the bailee in actual possession of the goods for the benefit of any due holder of the bill, thus creating a machinery for the effective transfer of secure and easily

51 See Scrutton, art.179,p.378; C.M.Schmitthoff, The Export Trade, 6th.ed.(London,1975),p.320,and references in note 19,p. 279, supra.

52 See Scrutton, art.179,p.377-8.

53 This should not be confused with the problem of multi-modality, although the problems are often intertwined in practice.

exercisable constructive rights of possession. A right of the bailor to transfer actual possession of the goods to another is alien to this concept, even if the contractual relations between the issuer and the original bailor remain unaffected.

Yet, even if strict adherence to our model bill of lading requires unbroken actual possession by the issuer, this requirement seems now obsolete. The statement in The Marlborough Hill that '[t]he liberty to tranship is ancient and well established, and does not derogate from the nature of the bill of lading',⁵⁴ is perhaps too sweeping, but it is true that the ideal issuer-bailor set up has been abandoned in the organisational realities of modern shipping. Goods covered by a bill of lading come into the actual possession of constantly changing, independently incorporated, bodies connected to the issuer in many different ways, performing for him various parts of the duties owed by the latter to the shipper. There has never arisen any doubt as to the effect of such transfers of possession on the status of the bill of lading,⁵⁵ and once the derogation from the ideal position have been acquiesced in, there seems to be no difference in principle between the transfer of possession to an independent body for the performance of lighterage, loading or stowage, and a similar transfer for the performance of part of the carriage operation itself, as long as none affect the bill of lading issuer's responsibility vis-a-vis the holder of the bill.

54 [1921] 1 A.C. 444, 452.

55 See, e.g., Glyn Mills & Co. v. E. & West India Dock Co. (1882), 7 App.Cas.591, on the effect of transferring possession to an independent warehouseman.

But if this is recognised in principle as to the cases where the issuer is himself a carrier and performs part of the operation, should it not be also recognised as to cases where the issuer reserves the right to perform the whole of the operation through sub-contractors, himself being in actual possession of the goods only for the performance of ancilliary services? The strong implication of mere forwarding, and the traditional rejection of forwarder's documents as bills of lading, would prompt an intuitive negative answer, but it is submitted that this deserves a fresh look.

The move towards the creation of what has become known as the Combined Transport Operator has come almost simultaneously from two opposite directions. Carriers have started to undertake what was traditionally forwarders' function, namely services which they themselves could not perform, and forwarders have started to undertake a traditional carrier's function, namely responsibility for the safe arrival of the cargo to its destination. The function of the large combined transport operators of the present day, whether the container consortia established by carriers, or the forwarding houses, has become strikingly similar. They all undertake responsibility for the whole of the journey, but rarely perform it themselves. Both consortia and the large forwarders restrict themselves to owning depots, terminals, and the containers themselves, and leave the actual carriage to others, and the fact that the consortia keep greater organisational links with the ocean carriers who have established them matters little to our present issue.

The business world has always been reluctant to treat forwarders' documents as a safe substitute for the goods, not so much because of their legal position in relation to the goods, but because of a natural reluctance to rely on documents issued

by a body lacking significant assets of its own. The more subtle legal reasoning behind the failure to recognise forwarders' documents as true bills of lading and documents of title has been based on the nature of their function. It goes without saying that forwarders' documents have not been treated as symbols of the goods when the issuers restricted themselves to performing as agents; but the law has been extremely reluctant to treat them differently even when the forwarders performed as principals, because they have never made, until the advent of containerisation, a genuine systematic effort to take full responsibility for the transport operation. In accord with Hill,⁵⁶ one believes that the firm establishment in recent cases⁵⁷ of a third type of forwarders , performing neither as agents nor as carriers but as 'transportation contractors',⁵⁸ would both make the courts' task easier in declaring forwarders as principals as opposed to agents, and still leave room for the small number of cases where forwarders deserve to be treated, at least for certain purposes, as carriers.

Containerisation has spelt for forwarders both danger of extinction and hope of expansion.⁵⁹ Full scale containerisation has no need for forwarding in its traditional form, and so forwarders who could afford this had to meet the carriers-turned-container-operators on common ground; they have become container

56 D.J.Hill, 'Forwarding and Sub-Contracting Complications', [1976] Lloyd's Mar. & Comm. L.Q. 63.

57 See e.g. Lee Cooper v. Jeakins & Sons, [1964] 1 Lloyd's Rep.300; J.Evans & Sons (Portsmouth) v. Andrea Merzario, [1975] 1 Lloyd's Rep.162, rev'd on other grounds [1976] 2 All.E.R.930.

58 Evans & Sons v. Merzario, ibid. at 168.

59 See, as to the role of forwarders in container transport, 'International Transportation and the Freight Forwarders' (1967),⁷⁶ Yale L.J.1360; C.W.G.Wilson, 'Documentation, Groupage and the Role of the Forwarding Agent' in a symposium by the Institute of Materials Handling, Manchester 1968, entitled Packing Containers for Export; G.H.Ullman, 'The Role of the American Ocean Freight Forwarder in Intermodal Containerized Transport' (1971), 2 J.M.L. & Comm. 625.

operators themselves. While some still adhered to the tradition of discarding liability for the actual transport, restricting themselves to owning the containers and some facilities,⁶⁰ others have revolutionised their concept altogether. Thus, it came about that the International Federation of Forwarding Agents Association decided in 1970 to issue the document which has become known as the FIATA Combined Transport Bill of Lading.⁶¹

This document is similar in essence both to the ICC combined transport document and to the contemporary container bills of lading in use by the container consortia. The details of liability differ, but the principle remains the same. All these documents undertake the transport of goods from one point to another, either by the means of the issuer or by others, but assuming general responsibility for safe arrival at the destination point. They all undertake, in as far as the content of the document itself can achieve, such arrangements for control and delivery as are compatible with the characteristics of documents of title (reserving, however, the right to do otherwise by expressly heading the document 'non-negotiable').⁶² It is submitted that all these documents, whether issued by carrier-connected consortia or by forwarding houses, should stand or fall together, as far as the status of bill of lading and document of title is concerned. They may well all fall because of the reason mentioned in the previous section, i.e. their multi-modality, but as far as the present issue is concerned they should all stand. The actual possession of the goods by the same legal entity issuing the document of transport, and the

60 In Evans & Sons v. Merzario, supra,^{n.57} there is a good account of the integration of one such forwarder into the container era.

61 See the text in Hill, Freight Forwarders, op.cit. at 652.

62 See the ICC Rules of Combined Transport, Brochure 298, rules 2(c) and 4. The FIATA bill, art. 3.

actual performance of the whole of the contract by this entity, have ceased to serve as a significant criterion for the status of bills of lading, as long as continuous responsibility cover was retained. The non-vessel-owning container-operator bill of lading is only the last stage in a process which has started when the business of issuing and signing bills of lading was taken ashore from the ship and its master, and transferred to the offices of increasingly complex transport corporations.⁶³

One problem which remains to be discussed in this connection is the possible simultaneous existence of more than one document of title for the same goods. This may occur when a container operator issues a document to the shipper as principal, and then himself takes a document as a principal from the actual carrier, and if both documents are considered documents of title. This situation is unsatisfactory even if it is to be assumed that the second document would normally be used by the operator only to take delivery of the goods on destination, or enable the shipper to do so if the operator's duties end at that point. Still, the existence of two sets of keys to the same warehouse, to use the time-honoured metaphor,⁶⁴ is a disturbing prospect which does not seem to have been realised in the course of preparing the TCM draft or its successors, i.e. the ICC Rules and the contemplated new UNCTAD draft. A partial solution to this would be an undertaking on the part of the operator in his own document, vis-à-vis any holder of that document, that any document he may have to take in the course of

63 Cf. on a similar problem Rodière, Gén. Mar. para.440,p.51.

64 Bowen L.J. in Sanders Bros. v. Maclean & Co. (1883), 11 Q.B.D. 327.

carrying out his duties will be taken in a non-transferable form, i.e. straight-consigned to the operator himself and not to order, and that, for further security, he will not surrender that document to anyone but its issuer, except in exchange for a full set of the operator's documents. If, however, banks and buyers decline to substitute this undertaking for the security of possessing all possible documents of title for the goods, and refuse to advance money or pay, unless the bills of lading, as well as the operator's documents, are deposited with them, the whole purpose of declaring the latter as document of title will be lost.

3) Our model bill of lading is in the 'shipped' form whereas many container bills of lading are issued originally in a 'received for shipment' form. This issue is strongly related to the previous two but should not be confused with them, not only for the sake of analytical clarity but because situations may arise which would involve neither a problem of multi-modality nor one relating to the identity of the issuer of the document and the actual performer, but a 'received for shipment' form of the bill of lading would throw doubt as to the exact status of document.⁶⁵

The issue itself has been dealt with sufficiently in the course of this work. It is the present writer's view that a 'received' form alone should not destroy the identity of a document as a bill of lading. An opposite view has perhaps a

65 The facts of Moyer Stainless & Alloy Co. v. Canadian Overseas Shipping [1973] 2 Lloyd's Rep.420 (Can.Sup.Ct.Dist.Mont.) are an example of such a situation, although no question arose as to the status of the 'received for shipment' bill issued on behalf of the actual carrier at the sea-port.

somewhat stronger support in contemporary English law,⁶⁶ but the matter can by no means be considered as settled.

4) The model bill of lading acknowledges receipt of specified goods in a specified apparent order, whereas container bills of lading often acknowledge only the receipt of the container itself, mentioning further specification only 'as furnished by the shipper', without warranting their accuracy in any way. This is a quantitative rather than a qualitative distinction. In acknowledging receipt of the container the container bill of lading retains a semblance of its function as receipt for the goods, and on the other hand even our model bill of lading has often described only the external features of the various receptacles or packages which have enclosed the actual goods. ✓ It is therefore less immediately clear why this issue has been raised in the present context. It is submitted, however, that the implications this deficiency will have on the status of container bills of lading will be at least as profound as the ones mentioned earlier.⁶⁷

The connection between the functions of the bill of lading as receipt and as document of title needs no lengthy exposition.⁶⁸ The latter is virtually a derivative of the former in that the bill of lading, unlike other documents, is an acknowledgement

66 The balance between the two views represented in the text tips towards the second one because of the number of cases in which the value of a 'received' bill as good tender in a c.i.f. contract turned on whether or not a trade usage sanctioned this form. See the cases cited in Scrutton, para,179,p.378,n.30.

67 See D.Thompson, 'International Carriage by Container', J.of World Trade Law, 434,460-2. The author suggests that neither the whole of a combined transport operation, nor its sea-leg can be covered by a document of title, the former because of the multi-modality, the latter because no valid bill of lading can be issued without the shipowners having an opportunity to examine the contents of the container.

68 See UNIDROIT study on Les Titres Représentatifs dans le Transport de Merchandises y Compris Les Transports Combinés (1957), U.D.P. 1957 - Etude XLII,pp.10,51.

of the possession of the specific goods not only vis-a-vis the shipper but vis-a-vis any holder of the bill. Without such effective acknowledgement the bill has no mercantile value. It will be submitted in the next chapter that the business world is late to recognise this deficiency, perhaps because of some *ignorance* of the total lack of value, as far as the issuer's liability is concerned, of details appearing after an abbreviated code-word such as 'S.T.C.'. It remains to be seen whether a well-publicised court decision in which a carrier would succeed in discarding liability, say, for the disappearance of the content of a whole container, on the basis of genuine ignorance of the contents on receipt, would not stir the whole community of transport users, their financiers and insurers, in the same way as the first decisions which impressed on them the entirely new realities of the £200 per container liability limitation.

The element which does make the container bill significantly different from the model conventional one, as far as the receipt-function is concerned, lies not within the document but without. Both types of documents usually describe receptacles, but whereas the description of the conventional ones gives at least some indication of the contents, the description of the standard, re-usable, metal containers usually indicates nothing. If a bill of lading is an 'acknowledgement' of the number and quality of the goods taken on board'⁶⁹ then it is doubtful whether a document acknowledging receipt of 'A Container Said to Contain Machinery'⁷⁰ deserves to be treated as a bill of lading.

69 Desjardins, cited in Purchase, op.cit.⁴⁵26.

70 Royal Typewriter Co. v. M.V.Kulmerland, 483 F.2d.648. (2nd.Circ.1973).

Let us sum up. Whether or not the authority of Lickbarrow v. Mason extends to confer a status of a document of title qua bill of lading depends to a large extent on the circumstances of issuance of any specific bill. There can be no doubt that the present generation of container bills of lading, including as they do such obligations on the part of the issuer about control and delivery as are compatible with ~~the qualities of~~ documents of title, can draw on the fact-finding authority of Lickbarrow v. Mason for a recognition of such status where they cover a port-to-port operation, acknowledge receipt and shipment of the contents and are issued by or on behalf of the actual carrier. It is doubted whether this status should be lost merely because the bill is in a 'received for shipment' form or because it is not issued by or on behalf of the actual carrier himself, but these doubts are somewhat theoretical because it is submitted that the authority of the above mentioned decision does not extend beyond the vicinity of the sea. The authority for a document of title status for multi-modal documents, at least as far as their ~~past~~ covering inland transport is concerned, can only come from a new source, either a statute or a specific binding custom. But legislation is not forthcoming, and as to binding custom, the present writer is less optimistic than current opinion that one is indeed growing up according to the exact patterns which would lead to recognition by law.

3. THE STATUS OF CONTAINER BILLS OF LADING IN FRENCH LAW

As the special status of bills of lading as documents of title originated in the ancient transnational Law Merchant, it should not be surprising that the attitude of French law to the subject is similar in most aspects to that of English law. Unlike the American system, both the English and French ones have allowed existing customs to crystallize through the judiciary, which has adopted a restrictive attitude as to the number of transport documents which assumed the status of document of title. This has been more so, however, in the French system than in the English one.

Possession has been revered in France as the cornerstone of the law of transfer of moveables in a much more accentuated way than in England,¹ and though the principle that transfer of a bill of lading is tantamount to transfer of actual possession has been recognised there,² it has been repeatedly stressed that this was an exception and an infringement on the purity of the concept of possession.³ Rodière thus warns that ' [o]n ne saurait à la légère multiplier de parailles dérogations sans troubler la sécurité des transactions sur les choses mobilières corporelles,'⁴ and though he does not deny the theoretical

1 Articles 1141 and 2279 of the Civil Code have made the transfer of possession a condition of the right to defend the title in the goods against third parties. See G.Ripert and J.Boulanger, Traité de Droit Civil (Paris, 1957) Vol2, para.2452, p.861.

2 Court of Cassation, 31.5.1892, S.94.1.81; P.Chauveau, Traité de Droit Maritime (Paris, 1958), para.726, p.487; K.Hermann, Les Ventes à l'Embarquement en Droit Allemand et Français (Paris, 1963), 6; J.Heenen, Vente et Commerce Maritime (Brussels, 1952), 17.

3 See, e.g., J.A.M.Ligonie, Le Connaissance et le Lettre de Voiture Maritime (Paris, 1963), 44; Rodière, Gén.Mar. para.490, p.121.

4 Ibid.

power of a consistent custom to bring about, in the long run, the conferment of similar qualities on documents other than bills of lading, he takes a very restricted view of the practicality of such^a development.

In one place⁵ Rodière states with reference to our present subject:

'...it is a fact that it is only in the shipping business that such a custom has existed for any length of time. The bill of lading used in carriage by sea, is the document par excellence which serves this function. Nowhere else...are the goods identified with the document...', and in his main treatise⁶ he states that '[e]n l'état actuel de notre droit positif, aucun autre document délivré par le transporteur...ne menace de concurrence le connaissement...' as the only document of title in transport law.

But despite an uncompromising attitude against conferring the status of document of title on other documents, French law has been as hesitant about the definition of 'bill of lading' as English law. The debate about the three persistent claimants to the title of bill of lading, namely the 'received for shipment' bill, the through, and the combined-transport ones, has been as long there and as inconclusive as in the English system.⁷

'Received for shipment' bills of lading have had both supporters and assailants for many years,⁸ and Rodière's

⁵ Introduction to Transport Law and Combined Transport (1972), International Encyclopedia of Comparative Law, Vol.12, Chapter 1, para.32, p.28.

⁶ Gén.Mar. para.490, p.121.

⁷ A good demonstration of this is in the fact that the 1889 L.Q.R. article by Bateson (supra), which has initiated the debate on the American cotton trade through bills, was published in French in 6 Revue Internationale de Droit Maritime, 600, and has been still relevant enough to be cited 81 years later by Rodière, Gén.Mar. vol.3, para.987, 194

⁸ Compare G.Ripert, Droit Maritime, 4th ed. (Paris, 1953), Vol.2, para.185a, p.757, to Ligonie, op.cit., at 41.

view⁹ that the 1966 revision of maritime statutes has resolved the question in favour of the former is untenable. The fact that the Decree of 31.12.66 on carriage by sea states in art.33 that '[1]e connaissement est délivré après réception des marchandises' is no novelty. An identical provision, both in the Hague Rules art.3, and in the French older statute on carriage by sea, of 2.4.1936, art.2, has failed to bring about any agreement on the question, and the value of Rodière's personal account of the development of the 1966 provision through the drafting stages is doubtful. However, Rodière's prestige in contemporary French transport law is such that it is not impossible that his firm opinion would culminate the even-sided debate, and that 'received for shipment' bills would be recognised in France as true bills of lading and documents of title.¹⁰

Through bills of lading have been traditionally denied the title of bill of lading.¹¹ Yet, one is in full accord with the attitude taken by Rodière¹² that this denial was embedded in the traditional reluctance of carriers to take responsibility for parts of the journey performed by other carriers, beyond the responsibility of forwarders. A document in which the issuing carrier undertakes to perform by his own means part of the journey deserves a fresh look. If such a document becomes the dominant one, i.e. its holder does not run the risk of being exposed to additional contractual exceptions in any of the

9 Gén.Mar. para.441, p.53, para.490, p.121.

10 See, already, Dalloz's Répertoire de Droit Commerciale, 2nd ed. (Paris, 1974), Transports Maritimes, para.22, p.3.

11 See, e.g. J.Rerand, 'Le Connaissance Direct' (1924), 5 Revue de Droit Maritime Comparé, 1,5; Ligonie, op.cit., at 42.

12 Gén.Mar. (Vol.3, 1972), para.987 et seq.

successive carrier's documents, and if the main document is enforceable against the issuing carrier without need to prove the place of damage, then 'le connaissement direct peut remplir pleinement sa fonction de titre représentatif de la marchandise et servir les intérêts de l'expéditeur, du destinataire et du porteur du document, c'est-à-dire pratiquement les intérêts des acheteurs successifs de la marchandise ou des banquiers en cas de crédit documentaire'.¹³

Rodiére finds two container bills of lading¹⁴ approaching this ideal position, failing to achieve it only because they make the responsibility of the issuing carrier for damage which is traceable to an on-carrier subject to his contract with the latter. It is submitted that the more recent through bills, incorporating ICC Brochure 298 rules, would eliminate this peculiarity by applying, where the place of damage can be proved, an international convention or national law, not the private contract between the carriers.

But if one agrees with Rodiére's analysis of the through transport aspects of bills of lading, and their effect on the status of the bills, it is more difficult to agree with his view on the multi-modality of documents of transport. He proposes¹⁵ to put combined transport documents to exactly the same tests mentioned above in connection with ocean-transport through bills

¹³ Ibid. para.988, p.196.

¹⁴ One issued by Compagnie Fabre, a French carrier, the other by ACL, an international container-transport consortium. Ibid., para.980, pp. 199-200, n.7.

¹⁵ Ibid., para.992 et seq.

(with the only addition of a third test relating to the uniformity of the applicable law), giving no sufficient attention to the mere fact that different modes of transport are involved which, according to his own much emphasized point in the above mentioned analysis,¹⁶ never developed a custom of treating their transport documents as documents of title. In extending the scope of documents of title to combined transport documents in a process of logical analogy Rodière appears to have ignored his own earlier warning against creating new documents of title by 'création doctrinal'.¹⁷

It seems, therefore, that the position in France in relation to container bills of lading is similar to that in England. Existing authority seems sufficient to vest such document with full document of title status for port-to-port transport. Only custom or legislation, however, would suffice to extend such status to these documents while covering inland transport.

16 Note 5, p.317, *supra*.

17 Mar. Gén. para.490, p.121.

4. THE STATUS OF CONTAINER BILLS
OF LADING IN AMERICAN LAW

American law appears, at first sight, to supply a simpler solution to our present problem. A better look would indicate that there too the authority for the conferrment of a status of document of title upon container bills of lading would only stem from the practices of the business world. However, a pattern is developing there of sanctioning business practices in an extremely lax way, and it is thus believed that, if indeed a universal practice is building up of treating container bills of lading as documents of title, it would be first given full legal recognition in America.

Container bills of lading are undoubtedly 'bills of lading' within the extremely broad definition of the Uniform Commerical Code Sec.1-201(6),¹ as they all are 'document [s] evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods'. Are they also documents of title? sec.1-201(15) provides:

"'Document of title' includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee..."

¹ Note that this definition can only be used in connection with the document of title problem, which is also dealt with by the U.C.C. Questions of carrier's liability as such are governed either by the Federal Bill of Lading Act, 49 U.S.C.A. secs.81-124 or by the Uniform Bills of Lading Act, 4 U.L.A.(1922), and both statutes include much narrower definitions of 'bill of lading'.

One minor point which must first be made about the application of this definition to our present problem is that the last sentence of the definition denies the status of document of title to a document which is issued by a container operator who confines himself exclusively to procuring transport and other services for the shipper, never taking the goods into his custody.² Presumably, the original intention in extending³ the definition of 'bill of lading' in sec.1-201(6) to documents issued by forwarders was only limited to forwarders of the NVO (Non Vessel Owning) type who usually take possession of the goods (for warehousing, groupage, inland transport, etc.).⁴ The timing of the extension⁵ corresponds to the timing of the movement to equate the position of forwarders of this type with ocean carriers in many aspects of Federal regulatory control. However, this intention was not made explicit in the definition of 'bill of lading', and the proviso to the definition of 'document of title' is valuable in clearing the question in connection with our present problem.

A more important question is whether the definition of 'document of title' automatically includes all bills of lading

2 See Highway Freight Forwarding Co. v. Public Service Commission, 108 Pa.Super,178,164A.835(1953), for the possession of the goods as one criterion for the distinction between a 'mere forwarding agent' and a carrier.

3 According to the official comment, the U.C.C. definition is based on the one in the Uniform Bills of Lading Act, *ibid.*, which includes only documents issued by common carriers.

4 See 'Freight Forwarders and Intermodal Carriage in American Administrative Legislation', [1972] E.T.L.208,212-3, for the distinction between the types of forwarders in U.S. regulatory law.

5 Between the May 1949 and Spring 1950 drafts of the U.C.C.

or whether it limits its scope only to bills of lading which 'in the regular course of business or financing are treated as adequately evidencing that the person in possession of them is entitled to receive, hold and dispose of the document [s] and the goods they cover.' A literal interpretation of the definition would favour the first alternative. However, in full accord with Nishikawa,⁶ it is submitted that such interpretation would be contrary to the legislator's intention. This intention is made fully clear in the official comment, where it is stated that a 'dock warrant', another document mentioned specifically in the definition, is not a document of title because 'current commercial practice' does not treat it as such when no warehousing is involved. It seems quite clear that 'commercial recognition' is a condition of all documents of title; new documents can gain the status of document of title by acquiring such recognition, but older documents can lose it by losing recognition.

However, various American courts seem to have taken such a loose view of what constitutes such recognition in the regular course of business that the question of whether or not the recognition is a condition of the status of bill of lading is rendered largely academic.

Similarly to the case of First National Bank in St. Louis v. American Insurance Co.⁷, presumed by Nishikawa⁸ to rely awkwardly on a supposed recognition as document of title of a

6 Op.cit.(supra,n.9,p.276), at p.150.

7 280 F.Supp.620 (E.D.Mo.1968).

8 Op.cit.,pp.151-2.

third copy of a straight-consigned bill of lading signed by a railway agent, in Lofton v. Mooney⁹ a straight-consigned non-negotiable warehouse receipt is declared as document of title, giving the bank-consignee priority in bankruptcy. Even more surprising is the case of R.L.Rothstein Corp. v. Kerr Steamship Co.¹⁰ which invokes 'the fact...that the mate's receipt by the stipulation of the parties controlled the issuance of the bill of lading and thus indirectly the goods' to declare the mate's receipt, notably not one of the documents mentioned explicitly in the U.C.C. definition, as 'document of title at least between immediate parties to the receipt.'¹¹ The only reported case in which the status of document of title under U.C.C. was denied to a document involved a 'certificate of title or manufacturer's or importer's certificate of origin' for an automobile.¹²

The assessment that container bills of lading stand a good chance of gaining legal recognition as documents of title in the U.S.A. is based also on the fact that the existence of documents of title outside the marine-transport circles is not a novelty there.¹³ Rodière¹⁴ very aptly observed that it was

9 452 S.W.2d.617(KY.1970).

10 251 N.Y.S. 2d.81(1964).

11 Ibid.,85.

12 Levin v. Nielsen, 306 N.E.2d.173,186.

13 Gilmore and Black, pp. 94-5.

14 Gén.Mar.para.992,p.202.

not accidental that combined rail-sea documents were brought into regular use for the first time in America, where both modes of transport have enjoyed the use of documents of title. Indeed, the official commentator of the U.C.C. in commenting on through bills of lading in sec.7-302, assumes as a matter of course that such bills are documents of title. In American terminology 'through bills' includes both documents for successive single-mode carriage, and documents for all combinations of inland and sea transport,¹⁵ and there seems to be little difficulty in including container bills within this term.

¹⁵ See J.Libouton, 'Les Transports Successifs et les Transports Combinés en droit Americaine', [1972] E.T.L.922.

Chapter VI: THE CONTAINER BILL OF LADING
AS A RECEIPT

1. THE PROBATIVE FUNCTION AND CONTAINER TRANSPORT

1.1. General

The value of bills of lading as receipts for the cargoes they represent does not lie only in their commercial usefulness as reliable sources of information about the cargoes. The probative function of bills of lading is also crucial to the whole structure of carriers' liability, and this would become immediately clear if they ceased to function as receipts in any significant way. Bills of lading may then still look the same; they may still overflow with the usual multitude of small-print provisions, conditions and reservations. The bulk of statutory rules, local and international, may not undergo any substantial changes. And yet, without the probative function of the bill of lading, both statutory and contractual provisions on carrier's liability for loss or damage will be of little practical value. They will exist in theory and, indeed, will come into effect whenever the shipper succeeds in proving by positive means, and without the help of any presumptions arising from the bill of lading, such elements as are required in order to activate the abovementioned provisions. But containerisation will create a very unattractive situation here: rendering a fatal blow to the probative function of the bill of lading on the one hand, it will seriously obstruct the shipper's substantiation of his claim by any other means on the other.

1.2. The Probative Function - the Condition of the Cargo

Let us take the example of Aetna Insurance Co. v. General Terminals Transfer & Storage Inc.¹ There, various items of furniture and woodwork were collected in Florence from various parts of Italy, 'stuffed' in eleven containers which were then

1. 225 So.2d.72(Ct.App.La.1969).

trucked to Leghorn and shipped to New Orleans. The containers were further carried by land to the consignee's premises, and there, on the containers being opened, the goods were found to be loosened, scratched and broken.

As both the shipping company and the American motor carrier² issued clean bills of lading, the consignee³ sued them both for the damages.

Now, whether or not he could have succeeded against any of the carriers had he been allowed to raise any substantive arguments, is a different matter. But the distinctive element of this case is that the suit was never allowed to get off the ground at all. Whatever the content of their contract, for all practical purposes neither carrier had any significant responsibility for the goods he undertook to carry:

'Where the goods are packed in containers and where the damage is of the kind that could have been present without being observable from the exterior of the container at the time the goods were delivered to the carrier, the bill of lading relates only to the external condition of the cargo i.e., to the containers themselves and not to their contents. Under these circumstances it is incumbent upon the consignee to offer further evidence relative to the good condition of the contents upon receipt by the carrier.'⁴

Not surprisingly, no such evidence was available. The very reason why the carrier was prevented from stating the condition of the contents of the containers on the bills of lading, i.e., the fact that at the moment of delivery the contents were invisible, prevented, of course, the most natural means of proving that condition positively, i.e., by eye-witnesses.

2. Nothing is mentioned in the decision about the position of the shipper as against the carrier who performed the Florence to Leghorn part of the journey. See next page.

3. The actual plaintiff there was the consignee's insurer.

4. 225 So.2d.72, 74.

Aetna Insurance v. General Terminals contains at least a grain of realism in that the goods were carried over some distance on land before they were delivered to either of the carriers being sued, and there existed a real possibility that the damage occurred at that stage. This element, however, is greatly reduced when the carrier who succeeds in shaking off all liability on similar grounds to those in Aetna Insurance v. General Terminals is the carrier who receives directly from the shipper, as in the case of Blue Bird Food Products Co. v. Baltimore & Ohio R. Co.⁵

There, the shipper stowed the goods in the carrier's trailer, sealed it, and the trailer was collected by the carrier, a railway company, for 'piggy-back' transport. A clean bill of lading was duly issued, but when the goods were found damaged on the trailer being opened, the carrier defended himself against the shipper's action on the ground, inter alia, that not even a prima facie case could be made against him so long as the good condition of the goods upon receipt was not proved. The court agreed:

'When merchandise is delivered to a carrier in a sealed trailer, it is not "open and visible"...[I]n the circumstances the consignee who sues the carrier for damages to the goods cannot establish a prima facie case by means of the "apparent good order" representation in the bill of lading'.⁶

What this means is that, whereas in Aetna Insurance v. General Terminals the totality of the effect of what is implied by the decision is mellowed by the fact that there existed a stage, between shipment and receipt by the defendants, about which little was made known in the decision, here in Blue Bird v. Baltimore & O. R., the import of the rule is shown with piercing clarity. The damage could have occurred only at one of two stages, namely when in the

5. 492 F.2d.1329(3rd.Circ.1974).

6. Ibid. 1332.

defendant's possession or when in the shipper's, the second alternative actually meaning that the shipper stowed already damaged goods in the trailer or himself damaged them while stowing. If, by closing the trailer or container before delivery to the first carrier the shipper loses the benefit of any bill of lading presumptions as to the condition of the goods, he is then left with very little practical cover for the goods as far as carrier's liability for damage is concerned.

Realising the drastic effect of this is one thing. Disputing its validity in the existing framework of carriers' liability is another matter, the futility of which becomes only too evident when reading an attempt in that direction made by a New York court in 1973.

In Paquet & Co.Inc. v. Dart Containerline Co.Ltd.⁷ the court rejected the carrier's argument of the ineffectiveness of a clean bill of lading as evidence of the condition of the goods on receipt by the carrier, with the astonishing statement that "[n]o persuasive authority has been cited by the defendant nor discovered by independent research to support the proposition that the rule[that a clean bill of lading evidences receipt in good condition] is in any way abrogated where 'containerized' cargo is involved."⁸ The court does go on to mention the self-evident principle that 'apparent good order' refers only to what is apparent, but continues:

'Literally interpreted, this language would seem to indicate that when goods are containerized and sealed prior to delivery on board, the clean bill of lading would only be referable to the apparent good order and condition of the container and not the goods within. It is clear, however, that such an interpretation, in this day of increasing use of containerization would nullify the statutory rule of 1303(4) COGSA'.⁸

7. 343 N.Y.S.2d.446(1973).

8. Ibid. 449.

Indeed, such a literal interpretation would have exactly these consequences. One does not see, however, how any but a literal interpretation could be sustained in this case unless interpretation is to be turned into mockery. No manipulation of language will render goods locked behind six metal walls and a seal 'apparent'.

1.3. The Probative Function - the Quantity of the Goods

1.3.1. The Problem Stated

The deficiency of the container bill of lading as a meaningful receipt extends not only to the matter of proving the condition of the goods, but also to the more fundamental matter of the quantity of the goods received. "If a shipper may now fill an ocean shipping container at some inland point", observes Judge Brieant in Du Pont, etc. v. S.S. Mormacvega,⁹ "under circumstances where the carrier cannot tell if it contain 99 or 999 cartons of leather (cf. Leather's Best...) and recovery in the event of loss is to be determined by the unverified words 'said to contain 38 packages', on the bill of lading, then severe practical difficulties will arise."

This statement was an obiter dictum in Du Pont v. Mormacvega, the circumstances of the case giving rise to no such difficulties. Such, surprisingly enough, were the circumstances of many other reported cases involving containerised cargo. Some did involve loss of goods from the container or trailer, thus obliging the shipper to prove that the number of items he originally delivered to the carrier was as claimed by him in court. But in most of the cases there was some element which saved the shipper from the difficulties mentioned in the statement quoted above from Du Pont v. Mormacvega.

1.3.2. The Unknown-Contents Problem Averted

Leather's Best v. S.S. Mormaclynx,¹⁰ for instance, was in

9. 367 F.Supp.793,796(S.D.N.Y.1972), aff'd 493 F.2d.97.

10. 451 F.2d.800(2nd.Circ.1971).

Judge Brieant's mind when he made the abovementioned statement. It did involve both a container filled at an inland point, and 99 cartons of leather, but in the circumstances the carrier could tell that only 99, not 999, such cartons were loaded. His agent, the truck driver, was present in the 'stuffing' operation and issued a receipt for 99 cartons. It has to be noticed, however, that the case could have easily gone the other way. The question of whose agent the driver was had no clear and obvious answer. It was finally decided in favour of the shipper only after a serious debate and, had the circumstances relevant to the latter question been even slightly different, the whole case could have been decided differently. Had the carrier chosen to do so, he could have then relied not only on his subjective ignorance of the number of cartons received, but he could also have called attention to the fact that the bill of lading mentioned the number of cartons under the reservation 'said to contain', and that a printed clause in the bill of lading read '[w]eight, measurement, quality, quantity, contents, condition, marks, numbers and value, although declared by the shipper in the Bill of Lading, shall be considered as unknown'.¹¹ A similar factual situation occurred in Inter American Foods v. Coordinated Caribbean Transport.¹² There, again, the bill of lading mentioned the number of cartons received inside a trailer only under a 'said to contain' notation. The bill of lading also included the reservation 'Shipper's weight load and count'. Can such a document support a shipper's allegation that the carrier delivered to the destination port 339 cartons less than what he received at the shipper's premises? Undoubtedly not. Yet, here, as in Leather's Best, the driver, being the carrier's agent, supervised the loading

11. One would have thought that these two reservations would warrant at least an attempt to deny receipt of 99 cartons, even when the driver was declared the carrier's agent. In the published decisions, however, there is no record of such an attempt; see the lower instance decision in 313 F.Supp.1373(S.D.N.Y.1970).

12. 313 F.Supp.1334(S.D.Fa.1970).

and gave a receipt for the separate cartons. The bill of lading did not reflect this knowledge on the part of the carrier, but the court rightly observed¹³ that the carrier 'did not receive a sealed trailer, contents unknown, but accepted delivery of and gave receipt for specific numbers of master cartons'. In other words, even if an attempt to build the shipper's case on the basis of a presumption emanating from the bill of lading would have failed, the shipper could resort to the positive evidence embodied in the driver's receipt.

Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampf-schiffahrt Gesellschaft¹⁴ is another case where only one detail (in this case a factual, not a legal one) prevented the abovementioned unknown-contents situation from materialising. 2160 TV tuners were packed in 54 cartons, stowed on nine pallets and delivered to the carrier for shipment. The bill of lading mentioned only nine pallets as 'No. of Pkgs.', but when seven pallets were found to be missing on discharge the court referred freely to 42 cartons missing, apparently facing no opposition on the part of the carrier.

Could such an objection succeed had it been raised? The bill of lading itself would have given rise to no presumption on the matter, but the number of cartons on the two surviving pallets could have given rise to a presumption, (although not a strong one) that the missing pallets contained the same number of cartons as the ones which were actually delivered.¹⁵ Had the last two pallets also been stolen, the shipper could have found himself in considerable difficulty in trying to establish even a prima facie case as to the number of cartons lost.

13. In connection with the 'package or unit limitation' problem; Ibid. 1338.

14. 375 F.2d.943(2nd.Circ.1967), cert. den. 389 U.S.831.

15. See, e.g., Att.-Gen. of Ceylon v. Scindia Steam Navigation Co. [1962] A.C.60; R. & W. Paul v. Pauline (1920), 4 Ll.L.Rep.221; Hogarth Shipping Co. v. Blyth, Green, Jourdain & Co., [1917] 2K.B. 534.

1.3.3. The Unknown-Contents Defence in Action

If the analysis of the previous three cases involved mainly theoretical speculations, the following two cases involved very real attempts to win the case on the basis of the unknown-contents argument. They are Norfolk Terminal Corp. v. United States Lines, Inc.¹⁶ and Sperry Rand Corp. v. Norddeutscher Lloyd and oth.¹⁷

The story of Norfolk Terminal v. U.S. Lines is perhaps the most complex and challenging among the container transport cases. There, the carrier sent three containers to the shipper's yard. The carrier instructed the shipper to 'stuff' as many of 351 cartons of cotton goods as the containers would take, and send the containers, together with the rest of the cartons, to a container terminal, where the loose cartons would be 'stuffed' by the terminal operator, and all the containers handed by the latter to the carrier. In the event, three containers were filled with cartons at the terminal, but 19 loose cartons were never 'stuffed' in any container. They were later found in the terminal, and the carrier paid the shipper for the damage caused by the short-delivery. In the proceedings under discussion the terminal operator asserted that the carrier was not legally bound to compensate the shipper because, inter alia, the bill of lading only acknowledged receipt of six containers 'said to contain 351 ctns.', and thus the carrier could have denied liability for any alleged short-delivery, on the basis of 49 U.S.C.A. sec.101,¹⁸ as he did deliver six containers. If the carrier paid the shipper, then he did so only voluntarily, argued the terminal operator, and the latter was therefore not bound to

16. 215 Va.80,205 S.E.2d.400(1974).

17. [1974] 1 Lloyd's Rep.122.

18. This section, known also as the Pomrene Bill of Lading Act, art.21, relieves the carrier from responsibility for the accuracy of B/L details supplied by the shipper concerning 'package freight or bulk freight' loaded by the latter.

reimburse the carrier,¹⁹ even if it was because of the terminal's negligence that the 19 cartons were left behind.

The court rejected this argument for two reasons, namely:

1) 49 U.S.C.A. sec.101 deals only with 'bulk freight...loaded by a shipper', which was not the case as far as the 19 cartons were concerned and, 2) This statutory provision 'does not disclaim liability for goods which are actually received by a carrier'.²⁰

The first reason is literally correct, but it becomes relevant to the special circumstances of the case only in conjunction with the second one. Let us explain.

It is quite obvious when comparing 49 U.S.C.A. sec.101 with 49 U.S.C.A. sec.100,²¹ that the rationale behind both sections is that a carrier should not be made responsible for particulars in the bill of lading which he did not have the opportunity to verify, and which he only included on the basis of information submitted by the shipper himself. Even assuming that all Norfolk Terminal's knowledge is imputed to United States Lines, the latter did not know how many cartons it received, for the simple reason that, even if it did count the loose cartons delivered to the terminal, it could not know how many cartons were contained in the three containers 'stuffed' by the shipper. Had the 19 cartons disappeared altogether, the carrier would have been as ignorant of this when making out the bill of lading, as he was in the event; he would have issued exactly the same bill of lading (i.e. 'Six containers s.t.c. 351 cartons'), and could have, and as far as a third party is concerned, should have attempted to refuse payment to the shipper

19. This point, i.e., that the carrier was not entitled to reimbursement if he paid voluntarily, does not seem to have been challenged here.

20. 205 S.E.2d. at 404.

21. This section makes it the carrier's duty to ascertain the details of cargoes loaded by him, and invalidates clauses disclaiming responsibility for such details.

on the ground that he could not pay for alleged short-delivery without knowing how many cartons were delivered to him in the first place.

But the cartons did not disappear. They were later found in the terminal; and it is around these cartons, not some unspecified ones, that the case revolves. The whole issue of unknown-contents is, therefore, a bogus one. The carrier may not have known the total number of cartons he received, but, as far as the shipper was concerned, the carrier did receive the 19 cartons²² and should have known so since these cartons were delivered in loose form, not inside a container. The unknown-contents rule, in other words, is only a rule of evidence (and a prima facie one), not a principle of liability. Hence, the almost self-evident rule embodied in the second part of the above-quoted court statement that, despite sec.101, the carrier is still responsible for goods which he actually received from the shipper.²³ Whatever the contents of the bill of lading, if it can be proved that the carrier received a quantity of goods and later failed to deliver it, he is prima facie responsible for the ensuing damage.

Now, if one explanation²⁴ of the fact that the somewhat²⁵ graceless, but legally valid, unknown-content argument was advanced in Norfolk Terminal v. U.S. Lines after being totally ignored in the

22. It is an important point in this decision that, in the circumstances, the delivery to the terminal operator was considered as delivery for transport to the carrier. This was so mainly because the shipper followed the carrier's instructions in delivering to the terminal operator and because there 'remained no act precedent to carriage which the shipper was required to perform'; 205 S.E.2d.403. See chapter 2. sec. 6 , supra.

23. See also Boatmen's Nat. Bank of St.Louis v. St.Louis Southwestern R. Co., 75 F.2d.494(8th Circ.1935), cert. den. 295 U.S.751.

24. See p.347, infra.

25. The argument is graceless because, unlike most of the other arguments which have to do with burden of proof, it rarely stems from a genuine dilemma about the facts.

three earlier cases, namely Leather's Best, Standard Electrica and Inter American, is that here it only formed part of a hypothetical, rather than real, defence, no such explanation can be offered about Sperry Rand v. Norddeutscher Lloyd.²⁶ The argument of unknown-contents was brought there in full force against the cargo-owner, obliging the court to give the matter serious consideration, and start building up the set of rules on this issue which is certain to become central to the law of container transport.

Sperry Rand's subsidiary in Saarbrücken obtained a container from a third party, 'stuffed' it with cartons containing shavers, closed and padlocked it, and arranged the inland transport to the port of Bremen, where the sea-carrier had the first opportunity to see it. The container was discharged at the destination port, but was stolen before being opened, and the shipper brought an action for the value of the consignment. The carrier, however, argued 'that there [was] no proof that the container 325522 that was delivered to it in Bremen actually contained the 9500 shavers that [the plaintiff claimed] to have lost',²⁷ and that therefore not even a prima facie case was established.

The first interesting thing to observe in the decision is that, all along, it is taken for granted that the shipper's employees in Saarbrücken did load 9500 shavers into the container. Their own testimony to this effect is accepted by the court without any sign of hesitation, or of any objection on the part of the carrier. The latter, so it seems, prefers to remove the sting from the argument by taking it to neutral ground. Rather than challenging the shipper's credibility, the carrier points to the inland leg of the journey in Germany, calling attention to facts such as that little was made known in the case about the security measures at that stage of the journey, etc.

26. *Supra*, n. 17, p. 333.

27. [1974] 1 Lloyd's Rep. at p. 125.

The main point of the decision is in the answer to this specific line of argumentation: 'In the absence of any evidence that there was anything wrong with the container or its contents when it was delivered to [the defendant] it is fair to assume that the goods in the container when it left the [shipper's] plant were still there when it arrived in Bremen'.²⁸ The assumption that the container has not been tampered with during the road transport is expressed, however, not only in this negative form but also positively, by pointing out the fact that the container 'was in apparent good order and padlocked'.²⁹ And this, it is asserted is the most important part of the decision, as far as the law of container transport in general is concerned. Let us explain.

1.4. The Exterior of the Container - its Probative Value

A favourable factual presumption is usually all a party needs to win the case in the world of containers, where little is made known by positive evidence about the condition of the inner goods in the different stages of the transport operation; and if the condition of padlocks and seals and the apparent condition of the containers themselves acquire a pivotal position on the basis of which presumptions arise and fall, then they, and the bill of lading particulars evidencing them, rather than the particulars referring to the inner goods, will dominate the scene in the law of carriage by containers.

Now, it is interesting to compare Sperry Rand v. Norddeutscher Lloyd to Aetna Insurance v. General Terminal.³⁰ In both cases there existed the distinctive element that a stage of transport

28. Ibid.

29. Ibid.

30. ^{p. 326} Supra, n. 1. A basically similar comparison was made in Sperry Rand v. Norddeutscher Lloyd itself, *ibid.*, but there it relates more to the specific features of the case (i.e. that the container disappeared altogether from the defendant-carrier's custody thus pointing to that carrier as a responsible party), whereas the comparison made here leads to more general conclusions.

intervened between 'stuffing' by the shipper and receipt of the sealed container by the defendant-carrier. Yet, the two cases were decided differently, and rightly so. A padlock or a seal can serve as a prima facie indication that the container was not opened since it was originally closed; hence, its importance in cases such as Sperry Rand, where the quantity of the inner goods is at stake. Not so when all the inner goods arrive but are found damaged, and the question then is whether that damage occurred before or after receipt by the defendant-carrier. The delicate goods in Aetna Insurance v. General Terminal, wrapped as they were, could have suffered the damage discovered on discharge at any stage of the journey without the slightest effect on the seal or the external condition of the container. Any note on the bill of lading relating to either of these was deemed, therefore, irrelevant.

Needless to say, no rigid rule is denoted in this respect. When it can be shown that the sort of damage involved in a specific case could not have been inflicted without the container being opened (as in the case of signs of damage caused to the inner goods by human hand), or without the container changing its external appearance (as in the case of damage to the inner goods caused by a fork-lift piercing the container wall), then, as in cases of alleged short-delivery dealt with earlier, the bill of lading details concerning the condition of the seal or the apparent condition of the container itself are invaluable.

Still, this does not solve the whole of the problem. Rather, one is left with a far more disturbing aspect of it, one which was averted in Sperry Rand v. Norddeutscher Lloyd as was mentioned earlier, but will undoubtedly appear in future cases: What is the position when the carrier challenges the very fact that the quantity of goods alleged by the shipper to have been put by him, the shipper, in the container, was ever put there? Or that the goods found

damaged at the end of the journey were not so damaged when originally 'stuffed' in the container? An untouched seal may serve as a good indication that the container was not opened between 'stuffing' by the shipper and receipt by the carrier, and thus that it did not contain on receipt less than on 'stuffing', but this, the carrier may argue, is no proof that it contained on 'stuffing' what the shipper says it contained. Likewise, the apparent good order of the container on receipt by a carrier is some indication that the goods were not damaged between 'stuffing' and receipt, but not that they were 'stuffed' in good condition.

How can the shipper, then, prove the quantity of the goods and their good condition on 'stuffing'?

1.5. A Prima Facie Case - Other Means of Proof

One potential source of information on these matters is, of course, the evidence of the persons who were involved in 'stuffing' the container, and documents used or prepared during that operation. Coming from an independent party, such evidence may be very valuable indeed. If, for instance, a driver employed by a land-carrier is present at the 'stuffing' operation, gives a receipt for the inner packages, and a consignment note is then signed by the carrier reading, e.g., 'x packages stuffed in one container...', each of three sources of information ie. the driver's oral evidence, his receipt and the consignment note, may serve as good evidence of the contents of the container in the shipper's action against, say, a sea-carrier who received a properly sealed container, but later lost it. Evidence originating from the employees of the shipper himself is of much lesser value, of course. In this category one includes the employees' oral evidence, documents prepared by the shipper for internal administrative purposes, invoices and, of course, transport documents, such as bills of lading, which mention the number of inner packages only on the basis of information submitted by the shipper

himself. The latter category will be discussed in some detail later, but the principle can be stated here that such documents do not serve even as prima facie evidence against the carrier. As to the evidence of shipper's employees and documents, its probative value is entirely within the discretion of the court deciding the case. The present writer's personal opinion is that such sources of information should normally be rated very low indeed. That containerisation may well bring about the collapse of transport documents as relatively objective and reliable sources of information about the quantity and condition of goods in transport is regrettable, but this cannot be remedied by resorting to sources of information which are usually anything but objective.³¹

One is mindful of the fairly drastic legal results which may emanate from this view. If subjective i.e. shipper-originated, evidence as to quantity and condition on 'stuffing' is unacceptable in most cases, then the shipper can rely only on independent, objective sources, and these are usually scarce at present. The reference made in the previous paragraph to a first carrier whose driver is involved in the 'stuffing' operation, is not just one example of an independent³² source of information. It is perhaps the only instance of such a source which occurs in any regularity at all in the transport world of today, and even it can be estimated to occur only in a small minority of cases. The unavoidable result

31. This does not refer only to the relations between carrier and shipper. When action is brought against the carrier by the consignee he must rely on the shipper's testimony on the quantity and condition of the goods upon 'stuffing', which is hardly objective even if the shipper is not a direct party in the proceedings. An admission on his part of misrepresentation would involve the shipper in responsibility vis-a-vis the consignee. See 'Report on Containerization' (1970), by the Trade Committee of the Law Council of Australia,⁵ The Law Council Newsletter, No.1, p.10.

32. 'Independent' - in the relations between the shipper and subsequent carriers who are sued by the shipper. If the person who takes part in the 'stuffing' is the agent of the same carrier who is sued, 'stuffing' and delivery occur simultaneously and the carrier cannot deny the accuracy of the bill of lading details, or at least he has the burden of proving their inaccuracy.

of this is that only in a fraction of the cases involving shipper-'stuffed' containers can the condition and quantity of the goods on 'stuffing', and consequently a prima facie case, be established by the shipper; and this is so not only in the context of an action against one of the carriers performing the transport operation: a shipper who closes and seals the container on his own (or his agent's) premises, out of the sight of any independent observer, may eventually fail to establish a prima facie case against each and any of the carriers involved in the whole operation. Carrier's liability would, in such cases, be reduced to mere theory.

Two more things remain to be said on this matter:

1) A comparison between the state of the goods at the moment of 'stuffing' and at the moment loss or damage is discovered is, of course, not the only way of establishing a case against the carrier. This comparison is only one method of showing that the loss or damage occurred while in the custody of the carrier.

Dealing with the realities of containerisation, one has naturally ignored in the foregoing analysis the possibility that the place of occurrence of loss or damage could be proved by some positive means. The chance of such a possibility materialising may not be statistically high,³³ but it would be wrong to ignore it altogether.

Even among the reported cases involving container transport known to the present writer, some give consideration to facts which can point to a specific stage of the journey as the likely place of the occurrence of the damage. In Lufty v. Canadian Pacific R.Co.³⁴ this was even a major issue around which most of the evidence in the case seems to have revolved. The container in that case had holes

33. See E.Schmeltzer and R.A.Peavy, 'Prospects and Problems of the Container Revolution' (1970), 1 J.M.L.203,223.

²Comm.

34. [1973] F.C.1115(Can.Fed.Ct.Tr.Div.).

in its roof which allowed water to penetrate and wet the cargo. The contract of carriage between the shipper and the two carriers involved there (a sea-carrier and a rail-carrier) was of the sort making each of the carriers independently responsible for damage occurring while the container was in his custody. Where, then, did the water penetrate? At sea or on land? A major part of the decision concentrates on the intricacies of expert evidence on laboratory tests aimed at establishing the percentage of salt in the water-soaked wrapping paper. Subtle hypotheses such as that some salt was deposited on the container roof at sea, but was later washed in through the holes by rain water on land, or that sea-water first penetrated but was later diluted by rain-water, are discussed at great length, only to find a surprisingly small role in the ratio decidendi itself which was mainly based on a presumption emanating from a bill of lading acknowledgment of the apparent good order of the container on receipt by the rail-carrier.³⁵ Slight traces of salt, the court finally decided, are not enough to rebut that presumption.

The theme of sea-water v. rain-water repeated itself in a number of other container cases. The Paris Court of Appeal decision of 5.1.72.,³⁶ for instance, deals with events almost identical to those in Lufty v. Canadian Pacific, and arrives at a similar decision on basically similar grounds; but one's criticism of this line of argumentation is tempered here by the fact that the evidence showed more positively that the damage resulted from rain-

35. One finds the reliance on this presumption unacceptable. None of the aspects of the damage which occurred could have been discovered on receipt by the railway. The cracks in the container roof could have been discovered only by climbing on top of the container, which the carrier could not have been expected to do. The apparent good condition note had, therefore, nothing to do with the subject of the case.

36. 24 D.M.F.456, aff'd Cassation, 8.10.73., [1974] E.T.L.261.

water alone.³⁷

The degree of ~~oxidation~~^{oxidation} of the galvanized wire in Paquet & Co., Ltd. v. Dart Containerline Co.Ltd.³⁸ closes this short list of examples of facts helping to establish the time and place of loss or damage, but one is confident that many more examples will accumulate in the years to come, as more container cases reach courts of law around the world.

2) The 'first driver involved in "stuffing"' set-up was described earlier as practically the only instance of objective information on the contents of containers in the present realities of container transport. Depending on the severity of the consequences of the downfall of the bill of lading as a receipt, however, there may well develop in the future a new institution: third-party, independent inspection conducted with a view to ascertaining the quantity and condition of goods on 'stuffing', and perhaps also the quality of stowage inside the container.

True enough, such an idea may seem alien to the spirit of containerisation, which contrives to bring about greater simplicity in the world of international transport, not to burden it with yet another procedure. But the transport industry, like all branches of commerce, develops according to needs as they arise, not according to theoretical goals. If buyers, bankers, and insurers, refuse to deal with bills of lading which, they will be told by the courts, really acknowledge only the receipt of containers, the

37. See also the Havre Tribunal of Commerce, 5.11.74, 27 D.M.F.348, where laboratory analysis identified sea water as the cause of damage, and Encyclopaedia Britannica v. S.S. Hong Kong Producer, 422 F.2d.7(2nd.Circ.1969), where a rough sea caused considerable damage to the containers themselves and therefore there existed no controversy as to the kind of water which damaged the inner packages.

38. 343 N.Y.S.2d.446.

shippers themselves may find it expedient to arrange for independent inspectors to certify the contents of shipper-'stuffed' containers, and perhaps issue a document which, in conjunction with the bill of lading, will satisfy the need for objective information about the consignment.

One is not alone in suggesting the possibility of such a development occurring in the future. Angus³⁹ mentions suggestions to that effect by underwriters. Indeed, the court in Cameco v. American Legion⁴⁰ tells us that the shipper in that case has already introduced such a system into his 'stuffing' operation. Still, the whole matter is yet too theoretical, its implementation depending on too many practical considerations of market behaviour, etc., to warrant any more detailed discussion here.

1.6. Proving a Prima Facie Case Against the Receiving Carrier

The seal and the container's apparent good condition were described earlier as weapons in the hands of shippers to counter a carrier's argument relating to the period between 'stuffing' and receipt by the defendant-carrier. This, however, applies only to the specific set-up where such an interim stage exists in the first place. A different picture may occur when the defendant-carrier is the carrier who receives directly from the shipper. An unbroken seal, or the apparent good condition of the container on delivery to the consignee or to another carrier may then serve the defendant-carrier as a good line of defence. The fact that the container was sealed by the shipper on 'stuffing' and delivery to the defendant-carrier, the latter would argue, and that the seal was still intact when the defendant discharged the container from his custody, is a

39. W.D.Angus, "Legal Implications of 'The Container Revolution' in International Carriage of Goods" (1968), 14 McGill L.J. 395, 407. This suggestion refers specifically to inspection of the quality of stowage.

40. 514 F.2d.1291(2nd.Circ.1974).

very good indication that, despite the cargo-owner's allegation of short-delivery, the container contained on arrival the exact quantity 'stuffed' into it. The apparent good condition of the container on discharge may serve as a rather weaker indication that the inner goods were not damaged while in the custody of the defendant-carrier, but the structure of the argument is similar to that of the previous one: if the container was received from the shipper in apparent good condition and was later discharged in the same apparent condition, it can be concluded that at least such damage which could not have been caused without considerable damage to the container itself, **was** not caused while in the custody of the defendant-carrier, but before 'stuffing' even began.

Now, this is only the basic principle from which analogies can easily be made to suit different circumstances. If the container, received properly sealed and in apparent good condition, is discharged either in apparent bad condition or with a broken seal, this is quite a good indication that the damage or loss, as the case may be, occurred between these two points. Such a position would pass to the carrier the very difficult task of proving otherwise. By another analogy, a container received by the defendant from the shipper in apparent bad condition, and discharged with no apparent indication of further deterioration in that condition, signifies basically the same as the container received and discharged in apparent good condition, ie. that no damage to the inner goods of a magnitude which would have brought about such a deterioration occurred while in the defendant-carrier's custody.

Yet, if these suggested rules convey the impression that in cases such as the ideal door-to-door operation undertaken by one container-operator, the question of whether the loss or damage occurred before or after 'stuffing' can always be answered by

looking at seals, padlocks and the apparent condition of the containers at the beginning and the end of the journey, this impression is misleading.

To begin with, even without reliable statistical data, it is quite clear that a large proportion of the accidents which damage the inner goods, leave no sign on the exterior of the container. Severe atmospheric conditions, inherent vices of the goods themselves, chemical⁴¹ and biological injurious elements are only too obvious examples of hazards which may affect the cargo but not the container. But this is also true of many of the accidents caused by physical shocks of various sorts, simply because containers are usually made of more resilient materials than the inner goods and their packaging⁴² and thus a rough landing of the container on the quay, for instance, may leave it without a mark and yet cause devastation inside it. References to the apparent good condition of the container during the journey signify nothing, then, about the place of occurrence of damage or about whether the goods were not already damaged on 'stuffing'.⁴³

Another difficult situation is that of total loss of the container itself, occurring before an opportunity to check the seal on destination presents itself. In such cases, as of course in the now rare cases where no seal is applied at all, shippers can

41. See, e.g., the Havre Tribunal of Commerce, 19.10.73, 26 D.M.F. 304, where Parathion gas penetrated a container and contaminated the rice stowed in it.

42. See, e.g., the Paris Tribunal of Commerce, 13.2.74, 27 D.M.F.90, where containers filled with tins of paint stood up to high seas aboard a ship without any outward effect, whereas the tins, apparently stowed in a negligent way, suffered badly.

43. But note that the interior of the container may well serve as a positive indication on the latter question. In the case mentioned in the previous note, for instance, the damage to the goods could be shown to be causally connected with the damage to the interior of the container, making it clear that the damage occurred after 'stuffing'.

hope to be able to count either on some positive evidence as to the quantity of the goods on 'stuffing', or on the good will of the carrier who would refrain from challenging the accuracy of the information supplied by the shippers themselves. Failing both, shippers may find great difficulty in establishing a prima facie case against carriers as far as the inner goods are concerned.

Let us, then, finish this part of the chapter with the question of carriers' willingness to challenge the shipper's information in this way.

Strictly speaking, this challenge is a very logical sequel to the already established practice of carriers of refraining from mentioning in the bill of lading the contents of a container delivered to them closed and sealed, or to mention the details of such contents on the basis of the shipper's information with a clear indication that no responsibility is thereby undertaken as to the accuracy of such details. If there is the will on the part of the carriers to do this, surely they must intend to make use of it in court and do the very thing which this disclaimer of responsibility entitles them to, namely to challenge the accuracy of the information. Why they have not done so frequently so far is something of a mystery to the present writer.

Certainly, the opportunities of making such a challenge have present^{ed} themselves. Some previous examples showed situations where, according to one's estimation, such a challenge could have eventually been met successfully had it been made. Not so, however, in a case such as Royal Typewriter Co. v. M.V. Kulmerland et al.⁴⁴ The sea-carrier there received a sealed container from the shipper

44. 346 F.Supp.1019(S.D.N.Y.1972), aff'd 483 F.2d.645(2nd.Circ. 1973).

via a forwarding agent and a rail-carrier.⁴⁵ The bill of lading did not mention the number of inner packages under the now customary 'said to contain' reservation, and refrained completely from mentioning the number, reading merely '1 container said to contain machinery...'.⁴⁶ And yet, when the container was later stolen from the carrier's custody, the latter does not seem to have raised any objection to the cargo-owner's assertion that the container had 350 boxes of typing machines 'stuffed' into it. Had he done so, the shipper could have counted only on the testimony of the freight forwarder's employees who 'stuffed' the container in their warehouse, if such testimony was available. They were the last persons ever to see the contents of the container,⁴⁷ and any other evidence (such as the evidence, heavily relied upon in the decision, concerning the state of the seals and the outward appearance of the container during the voyage) would have been inherently inefficient to establish the quantity of goods on 'stuffing'. Now, whether or not the court would have given the agents' testimony sufficient credibility and weight is only a matter for speculation, but the chances of such testimony being endorsed were certainly not high enough to explain why the carrier refrained entirely from challenging the shipper's figures.

45. To avoid confusion it should be noted that this example deals with the set-up analysed in the earlier stages of this chapter, namely the one involving an interim stage of transport between 'stuffing' and delivery to the defendant-carrier. The nature of the present specific problem is such, however, that no significant difference exists here between this set-up and the one analysed in the last pages, in which the defendant-carrier receives directly from the shipper.

46. For good measure it also read 'Shipper's Load, Stowage and Count'.

47. Except for the New York thieves, of course.

Why was it so? And why was it that the court in Du Pont v. Mormacvega⁴⁸ could state that in that 'case there [was] no real dispute as to the honesty of shipper's declaration that it had 38 packages within the container'?

'Trial tactics' and similar considerations may answer these questions in specific cases. Observed as a general trend, however, this phenomenon can perhaps be explained on the background of the spirit of pioneering and newness, still dominating the world of container transport, which prevents carriers from raising arguments which may at least appear to dispute the honesty of shippers' declarations.⁴⁹ However, whether explained in these general terms, or as a coincidence, this phenomenon cannot be expected to last. Rather, it should be expected that the unknown-content argument, and a general decline of the bill of lading as a receipt, would become a dominant feature of container transport.

2. CONTAINER BILLS OF LADING - DETAILS AND RESERVATIONS

2.1. General

Grönfors, in his 'Container Transport and the Hague Rules',¹ draws a clear and simple picture of the Hague Rules provisions on bill of lading descriptions applied to the contents of containers. With a few swift strokes he makes the following two observations:

1) carriers have no obligation under art.3(3) to mention the quantity of goods they did not have the means of checking, and they have therefore an unquestionable right to mention the number of inner packages, etc. under a 'said to contain' reservation, etc.

48. 367 F. Supp. 793, 796.

49. Note, however, that 1) Carriers have hardly shown such a spirit of excessive fair play in connection with the 'package or unit limitation' disputes, 2) It is often the insurers, not the carriers who determine the direction of the argumentation in legal disputes, and their motivations are usually quite different from those of the carriers.

1. [1967] J.B.L.298,300.

2) The bill of lading remarks on the condition of the goods refer only to the apparent condition as seen from the exterior of the container.

True enough, the same two assumptions formed the basis of much of the analysis in the present chapter, and one's belief is that they are ultimately correct. But, if only because of their crucial position in the law of container transport, they must be examined in some detail.

Furthermore, the accuracy of these statements will have to be inspected within the framework of other legal regimes, local and international, even if the Hague Rules bill of lading is the commonest in the transport world of today.

2.2. The Quantity of the Contents

When does a carrier have to mention the number of items, packages, etc. 'stuffed' in a container? When are reservations on such matters valid? What is the significance of the reserved and unreserved details?

2.2.1. The Hague Rules

The Hague Rules require that the carrier issue to the shipper a bill of lading showing '[e]ither the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper'.² However, the carrier is exempted from stating any of these details 'which he had no reasonable means of checking'.³

The two questions which present themselves if these provisions are to be applied to containers are as follows: 1) What general observations can be made about the 'reasonable means of checking' the contents of containers? 2) How exactly does the 'said to

2. Art.3(3)(a).

3. Art.3(3), last paragraph.

contain' formula, now universally applied to container bills of lading, fit into the framework of these provisions?

1) 'Reasonable means of checking' the contents of containers

As is often the case, there is no special difficulty in applying the 'reasonable means of checking' criterion to the two extreme (but by no means uncommon) variations of container operations. When a container is 'stuffed' and sealed in one place, and is delivered, still sealed, to a carrier in a different place altogether, that carrier cannot be deemed to have had any opportunity to check such details of the quantity of the contents which are not apparent outside the container. When, on the other hand, 'stuffing' is performed by the carrier or his agent after receipt of the cargo in loose form from the shipper, the bill of lading particulars must include such details of the cargo as are visible to inspection on the moment of receipt by the carrier, not, of course, after 'stuffing' is performed. Greater difficulties may arise in connection with border-line cases, where shipper and carrier enter each other's territories, creating situations and inspection opportunities, whose legal significance is not immediately clear.

Before these are discussed, however, notice must be taken of the following two matters.

Firstly, it should not be automatically assumed that a sealed container hides within its walls all possible information about its contents. Whereas the number of packages or units stowed in the container can never be positively ascertained without opening the container doors, their total weight can easily be checked by weighing the 'stuffed' container and subtracting its tare weight. Whether or not weighing the whole container on receipt is a 'reasonable means of checking' is a factual question, but one's prediction is that it will be answered positively in most cases. The weight of the 'stuffed' container is a crucial element in the

safety of any means of transport used for carrying it. Both motor vehicles, railway wagons and vessels have a maximum load usually determined by strict statutory regulations; vessels also have the problem of proper trimming and balancing. This requires authentic, verified knowledge of the weight of the containers, and at least where containers are received in stations, ports and, of course, container depots, one cannot see how a carrier can succeed in arguing that container weighing facilities are beyond the scope of 'reasonable means of checking'. As to the tare weight of the container, it is important to observe that, unlike conventional boxes, information about the container's tare weight is well regulated by internationally accepted standards.⁴ At least as far as modern ocean containers are concerned, reliable information about their tare weight is always displayed on their doors. One believes, therefore, that it may become a general rule that the weight of the cargo in a 'stuffed' and sealed container is a verifiable detail which has to be mentioned in the bill of lading without reservation. This may not be the best way of specifying the quantity of the goods received, but it is still quite valuable. To start with, much of the probative value of the bill of lading may be restored in cases of alleged loss of part of the contents of a container. In such cases a comparison of the weight on receipt and on delivery by the carrier may serve as an excellent indication of the validity of the allegation. Where the consignment is homogeneous this could be considered almost decisive proof; in other cases it may still substantiate the allegation in the general sense that things disappeared from the container while in the custody of the carrier. Furthermore, the weight of the total consignment is not wholly ineffective in conveying some idea of the quantity of the contents

4. See ISO Recommendation 790, art.2.1.

even in the absence of any accident. Even ignoring the case of goods in bulk where the weight is actually the best specification of quantity, the holder of a bill of lading can obtain some information about the number of items stowed within the container, the value of that information depending on the amount of information known about single items in the consignment and, again, its homogeneity.⁵ Now, this should not be underestimated. The future of the bill of lading as a useful document of title may well depend on its value as a receipt, but what is usually required in this connection is not necessarily a full, perfectly accurate, carrier-certified, description of the cargo. Such a description is unobtainable even where conventional methods of carriage are used, and what is usually expected is one or two carrier-certified details in the bill of lading which would support the fuller description in the shipper's invoice. Potential buyers, for instance, may justifiably hesitate to conduct the transaction on the basis of a bill of lading specifying only 'one container s.t.c. 200 T.V. sets' in transit, but an additional carrier-certified reference to the weight of the consignment, if not the best objective specification of quantity, may give the bill of lading just the extra reliability needed to make it commercially attractive.

The second matter which should be discussed here relates to carrier-'stuffed' containers. Though one feels quite confident that nothing in the Hague Rules, or indeed any other applicable statutory rules, exempts the carrier who receives the cargo in loose form from specifying the normal full details about the packages, units, etc. in the bill of lading, one is not certain that the

5. To give a simple example, if a buyer has a good idea of the weight of a single item like the ones stowed in the container, the total weight of the contents gives a good indication of the number of such items, if the consignment is homogeneous.

maritime industry always shares this view. The custom of qualifying bill of lading particulars where containers are concerned has apparently become so much a part of the container transport world that there is a danger that the original justification for formulae such as 'said to contain', 'contents unknown', etc. will be forgotten, and that such formulae will be used unwarranted by either law or logic. Whether or not such abuses will gain a firm foothold in the world of carriage of goods depends, of course, on whether or not shippers will insist on their right for fully detailed bills of lading when the goods are 'stuffed' by the carrier, but even universal acceptance of the qualified bills in such cases cannot render them sufficient unless the existing statutes and transport conventions are amended accordingly. As the law stands now, a bill of lading holder should find no difficulty in having a 'said to contain' reservation, for instance, quashed and ignored⁶ by a court in case the carrier denies responsibility for the number of packages received by him, if that number was apparent on receipt.

This brings us to the border-line cases where the manner of application of the 'reasonable means of checking' criterion is not so immediately clear. The obvious question of what means are reasonable is intermingled here with a question of timing. After the closure of the container doors, no commercially reasonable means can discover the quantity of the goods 'stuffed' therein (except by means of the weight inspection technique described earlier, which has only a limited application). More troublesome is the moment when 'stuffing' is completed, but the container doors are not yet closed. Some consignments, usually those consisting of a small number of items, reveal their quantity at that moment at a mere glance inside the container; other consignments reveal to the

6. As repugnant to Hague Rules art.3(8). Rodière, Gén.Mar., para.466,p.87.

outside only those goods which are stowed close to the doors, requiring part of the whole of the consignment to be moved or unloaded if any valuable information about the number of items 'stuffed' in the container is to be disclosed. Does 'reasonable means of checking', then, include any such moving or unloading of goods? A positive answer about unloading the whole consignment would be plainly absurd, but an analogy to other related matters, such as the duty to inspect the quality of stowage,⁷ seems to indicate that the carrier need not interfere with the already stowed goods at all. Finally, there is the time before or during 'stuffing'. The quantity of the goods is then open to inspection as in conventional methods of carriage, and any problems which may arise in that connection are not peculiar to containerisation and need not be discussed here.

What, then, is the relevant time for applying the 'reasonable means of checking'? Before 'stuffing', on the completion of 'stuffing' or after the closure of the doors?

The best solution to adopt, it is suggested, is the same as the one analysed at length in the chapter on pre-shipment operations,⁸ namely that in principle the time for inspection should be concurrent with the time of delivery; that the process of 'stuffing' a carrier-supplied container at the shipper's yard should be considered as delivery to the carrier when no special notice to the carrier is required for the container to be collected for transport, and thus, when the carrier-employee is present at the 'stuffing', his knowledge of, or his opportunity to know, the quantity of conventional units or packages stowed in the container should be imputed to the carrier, and the details included in the

7. Chapter II, sec. 6, *supra*.

8. *Ibid*.

bill of lading without any reservation; that when the arrangement is for the carrier to collect the container on a specified time, or after notice, theoretical delivery may occur on 'stuffing' or when notice is given, as the case may be, but the relevant time for inspection should be the time when the carrier's employee or agent comes to collect the container, and thus the 'reasonable means of checking' criterion should be applied according to whether or not the container doors are still open at that stage, and if they are open, according to the amount of information about the quantity of the contents which can be gathered without moving the stowed goods; that in other situations, where both delivery and the first opportunity to inspect occur after the closure of the doors, the carrier usually need not acknowledge in the bill of lading anything more than the acceptance of the container itself.⁹

Beyond pointing to the obvious analogy between the inspection dealt with here and the inspection for quality of the stowage, one cannot show direct support for this set of rules, except for the last one, either in direct court decisions, or in commentators' opinions. The latter restrict themselves to the more radical aspects of the problem, ie. to the lack of opportunity to inspect the contents of containers sealed before receipt by the carrier, and the resulting decline in the value of the bill of lading as receipt

9. See the references in the next note. Rodière's attitude, however, is not completely clear. Although he states that 'the carrier cannot accept his clients' declarations with his eyes closed' (Gén.Mar. para.513, p.148), it is difficult to ascertain whether this statement purports to describe the existing law or the desirable one. The same remark applies to Rodière's "Un Faux Problème: Celui des 'Containers'" (1968), 20 D.M.F.707, and to H. ~~Schadée~~ ^{Schadée}'s 'Le Contenu Juridique du Container' (1967), 19 D.M.F.602, 603. Both authors, so it seems, confuse the right to inspect with our present issue.

in that category of cases.¹⁰ As to court decisions, some have affirmed the rule that a 'said to contain' reservation is valid in the latter category of cases,¹¹ but none has directly touched on the subtler questions arising when delivery precedes the closure of the doors. However, the facts revealed in some cases deserve close attention as they seem to re-affirm one's impression that the revolutionary aura surrounding container transport has sometimes caused the parties involved to lose sight of some basic principles of transport law.

Cameco, Inc. v. S.S. American Legion, et al.¹² seems to be one such case. There, corrugated cartons of Danish ham were 'stuffed' in Odense into a refrigerated container and carried by land to Hamburg for shipment to America. '[T]he trucker who carted the carrier's container', states the court,¹³ 'was the carrier's agent. He was present at the shipper's tally and count and could have participated in it'. And yet, the fact that, despite this, the bill of lading referred to the consignment as '1 container said to contain', and added a 'shipper's load and count' reservation, passed unnoticed and without any sign of protest. Had this been a single case of this sort one could have dismissed it as a mere curiosity, but there is a quite distinctive pattern of such cases building up. Leather's Best v. Mormaclynx¹⁴ is one such case;

10. See, e.g., P.R. Recupero, 'The Shipper's Right to Recover Under COGSA for Damage to Containerized Cargo' (1973), 15 Boston College Ind. & Comm. L. Rev. 51, 68; S. Simon, 'Latest Developments in the Law of Shipping Containers' (1973), 4 J.M.L. 241, 445; The Law Council of Australia, 'Report on Containerization', 5 The Law Council Newsletter, No. 1, p. 13. The categoric reference in these articles to cases of pre-sealed containers only, without any warning of the existence of other cases, may create for the unwary reader the sort of danger mentioned in p. 359 infra.

11. See, e.g., The Rouen Court of Appeal, 14.2.75, 27 D.M.F. 473, 477.

12. Supra, n. 40, p. 344.

13. 514 F.2d 1291, 1299.

14. Supra, n. 10, p. 330.

Inter American v. Coordinated Caribbean Transport,¹⁵ another;¹⁶ in both the 'said to contain' formula was used despite the fact that the drivers, the carriers' agents, took a very active part in the 'stuffing' operation: their part is described not as mere presence but as 'supervision' of the loading. They even issued receipts for the inner packages. Why this did not find any expression in the bill of lading can only be explained in the same way as in the similar issue regarding carrier-'stuffed' containers, namely that there is a tendency in maritime circles to attach reservations to every container bill of lading, regardless of the position of the law on the matter. That position, without doubt, is that whenever the carrier has the opportunity to see the contents of a container he must acknowledge receipt of the contents in the bill of lading, mentioning such details as the applicable law requires, and as are visible when the opportunity to check occurs.

2) Bill of lading reservations

What is the validity and effect of reservations such as 'said to contain', 'contents unknown' and 'shipper's load and count' under the Hague Rules?

The answer is much less self-evident than may seem at first sight. A description of the number of packages, etc. pursuant to art.3(3)(b) is 'prima facie evidence of the receipt by the carrier of the goods [thus] described', according to art.3(4). It follows, of course, that in the absence of such a description the bill of lading does not serve even as prima facie evidence as to the number of packages included in the consignment. Now, we have seen that in a considerable number of container operations the carrier has the

15. Supra, n.12, p. 331.

16. See also the facts of Cassation, 12.10.64, 17 D.M.F.18 ('Pris en charge 4 containers...sans garantie du contenu en nombre...', despite the fact that the contents were tallied by the carrier's representatives), and the account of this case in Havre, 5.11.74, 27 D.M.F.352, 355.

perfect right, under the proviso of art.3(3), to refrain from mentioning the number of inner packages because that number is unverifiable on receipt. But nothing in art.3 gives the carrier the right to waive that right by mentioning the number of inner packages, and at the same time disclaim responsibility for the accuracy of that number. The number of packages mentioned in the bill of lading, it could be argued, is still within art.3(3)(b), and the disclaimer of responsibility is void as repugnant to art.3(8). The argument, in other words, is that where the number of packages is unverifiable, the carrier who wishes the bill of lading not to acknowledge this number, even *prima facie*, can achieve this as far as the Hague Rules are concerned only by refraining from mentioning that number altogether, not by mentioning it with a reservation.

That this is the only strictly correct interpretation of art.3 is beyond doubt. It also carries no little commercial commonsense. In most of the international carriage of goods operations performed in the present day, bills of lading (or at least the copies by which the document of title function of the bill is performed) are accompanied by the shipper's invoice. This, it can be argued, is where the shipper gives his own account of the details of the consignment. The bill of lading, on the other hand, functions as the carrier's receipt, his means of giving such an account of the consignment as can be guaranteed by him to be true (if only *prima facie*). To mix these two sources of information, it could be asserted, would serve no purpose except to mislead the unwary, even if words of caution are added to the bill of lading.

The argument against qualified bills of lading finds support among some writers on maritime law. The Canadians Tetley¹⁷ and

17. W.Tetley, Marine Cargo Claims (Toronto.London 1965), 61-3.

Pourcelet,¹⁸ as well as the French Fraikin and Lafage,¹⁹ all share the view that omitting any unverifiable detail is the only valid way for the carrier to avoid prima facie responsibility for the accuracy of the details.

And yet, this argument must be rejected as both futile and against the spirit of the law. It is futile because the practice of using bills of lading with qualified details has become such an integral part of transport in general, and containerisation in particular, that it is impossible to imagine a court interfering with it in any significant way. The argument is also against the spirit of the law because the Hague Rules make manifest an unmistakeable intention that carriers be exempted from even prima facie responsibility for unverifiable details, and there is little logic in declaring void words which purport to bring about exactly that effect whenever the details are indeed unverifiable. The proviso to art.3(3) gives too little attention to the technique of achieving exemption in the cases mentioned there, to warrant an outright rejection of a technique which was already in wide use before the Rules²⁰ and has never been abandoned since the enactment of the Rules.

Significantly enough, the three leading contemporary treatises on maritime law in England and France, namely Scrutton, Carver and Rodière, did not even mention this question of technique. Nor was the question raised by any of the American commentators on container transport. The former discuss the occasions on which a carrier has the right not to undertake prima facie responsibility for bill of

18. M.Pourcelet, Le Transport Maritime sous Connaissance(Montreal, 1972),30:

19. G.Fraikin and G-H.Lafage, 'Le Transport sous Connaissance en Droit Français', in Le Transport Maritime sous Connaissance a l'Heure de Marché Commun(Paris,1966),198.

20. Rodière, Gén.Mar.para.460,pp.76-7.

lading details,²¹ and the latter²² emphasize the fact that the receipt by a carrier of a pre-sealed container is one such occasion, but none raises any doubt as to whether the widespread technique of exercising that right, i.e. by qualifying the details, is valid under the Hague Rules. Whether or not this is intentional is unclear, but in either case it becomes even clearer that the issue is of academic value only.

This pattern repeats itself in court decisions. None, as far as the present writer knows, discussed the issue in any direct way.²³ Contrary to Tetley's view, the cases cited by him²⁴ in support of his argument answer the question of whether the 'said to contain' reservation, or a similar one, is justifiable in the circumstances of the case, not the question of whether reservations can ever be valid at all. Quite a number of cases can be cited in support of the validity of reservations, but, once again, that support can be inferred from the mere fact that the 'said to contain' reservation, for instance, was confirmed in the circumstances of the case, without any doubt being raised as to the general validity of reservations.²⁵

Academically, one's full sympathy is with the argument against qualified bills of lading. If, indeed, details about the quantity of the cargo which are qualified by a 'said to contain' or a similar

21. See, e.g., Rodière, Gén.Mar. p.76, et seq.

22. See note 10, ^{p.357} supra.

23. Except for two Dutch cases of the Amsterdam and Rotterdam District Courts, whose summaries in [1975] Lloyd's Mar.& Comm.L.Q. 185 indicate that the validity of a 'weight unknown' received serious attention there.

24. Tetley, *op.cit.* p.61, n.5. Fraikin and Lafage, *op.cit.*, rely on the same authorities.

25. See, especially, the Rouen Court of Appeal, 14.2.75 (n.11, p.357, *supra*) and the Havre Tribunal of Commerce 5.11.74 (*supra*, X "...c'est à juste titre qu'il [le transporteur] a exprimé, par la réserve said to contain, l'impossibilité où il était de faire la nomenclature de la marchandise logée dans ces dits conteneurs", 27 D.M.F.356).

reservation are no more than a decorative addition to the bill of lading, making the bill look like a fully effective receipt but not perform as one, then such details should not be there at all. In practical terms, however, it must be realised that qualified bills of lading are sanctioned by such a clear universal consensus (or at least agreement by silence) that only legislation can change this practice, and no sign of any legislative dissatisfaction with the practice exists at present.²⁶ Qualified details, so it seems, are here to stay and to dominate the law of container transport.

This analysis has used the Hague Rules for a model. Most of the conclusions arrived at in this connection are valid where other regimes of transport law are concerned, but the following remarks must be made about matters which have a special bearing on each of these regimes:

2.2.2. French Local Law

The provisions of the French local law about bill of lading particulars and reservations are almost identical to those of the Hague Rules, since articles 35-6 of the Decree of 31.12.66²⁷ repeat art.3(3) almost verbatim. However, unlike the latter provision, art.36 requires that when the carrier refrains from mentioning some particulars because of the impossibility of checking them, a 'special, motivated, note'²⁸ be made in the bill of lading explaining that impossibility.

How is this provision to be applied where containers are concerned? Obviously, a 'said to contain' or 'que dit être' reservation alone does not answer the requirement for a 'motivated'

26. On the contrary, UNCITRAL's Draft Convention on the Carriage of Goods by Sea, U.N.Doc. A/CN.9/105, Annex, art.16(1), seems to suggest that reservations should be the only valid way of treating unverifiable details ('If the bill of lading contains particulars ...which the carrier...had no reasonable means of checking...the carrier shall make special note of the absence of reasonable means of checking').

27. On the Contract of Carriage of Goods by Sea, etc.

28. '[M]ention spéciale et motivée'.

note; and this requirement should not be taken lightly. It represents the only significant difference between art.36 and its predecessor, namely art.2 in the statute of 2.4.36, and should be taken, therefore, as a clear expression of the French legislator's intention that the justification for any reservation be explained expressly, and according to Rodière,²⁹ in detail. The latter author goes so far as to insist that a reservation which is not sufficiently explained should be deemed void.³⁰

A note in the bill of lading reading 'colis mis en containers par le chargeur. Pris en charge 4 containers SNC plombés, sans garantie du contenu en nombre, en qualité et en poids',³¹ is undoubtedly sufficient as far as art.36 is concerned. The 'motivation' required by this article must include enough material to convey the justification for the reservation to a fairly knowledgeable user, not to a complete layman, and the abovementioned note includes all the former needs to know:- 1) That containers were used, 2) That 'stuffing' was performed by the shipper, and 3) That the container was sealed. These facts mean, of course, that the carrier could not ascertain the number of inner packages without breaking the seal, and therefore that, legally speaking, it was impossible to check that number.³²

Can a shorter formula answer the requirements of art.36 where containers are concerned? One's opinion is that even if the number of words can be cut down, the three elements appearing in the above-

29. Gén.Mar. para.465, p.82.

30. Ibid.

31. From Cassation, 12.10.64, ^{n.16, p.358} supra, SNC is the abbreviated name of the owner of the container. The present issue itself was not discussed in the decision.

32. Ironically, although an excellent example for our purposes, this specific note did not represent the reality of this case because a tally was conducted by the carrier's representative on receipt of the container.

mentioned note, ie. receipt of a pre-'stuffed', sealed container, are indispensable and should appear in every formula if it is to comply with art.36.

2.2.3. American Local Law

The American statutory provisions on the probative value of bill of lading particulars are so completely different in construction and wording from the provisions discussed earlier that they give the impression of different content. A second reading would correct that impression, because the difference is of emphasis rather than of content. Both the Federal Bill of Lading Act, U.S.C.A.,secs.100-1, and the Uniform Commercial Code sec.7-301, only slightly different from each other in wording, lay down the following system.

The issuer of a bill of lading is responsible for the accuracy of particulars in the bill unless 'the document indicates that the issuer does not know whether any part or all of the goods in fact were received or conform to the description' in the bill of lading. Examples of such an indication are expressly mentioned (such as 'said to contain', 'shipper's weight load and count', etc.) and, most importantly, it is required that 'the indication be true', ie. for our present purposes, that the carrier really does not possess any knowledge of the accuracy of the details which were furnished by the shipper.

One consequence of the latter requirement is, of course, that the carrier cannot indicate lack of knowledge when he loads the goods himself.³³ He is here required to count and weigh the goods, and both statutes rule that any reservation is of no effect in such circumstances. More significant for our present purpose

33. See Norfolk Terminal v. U.S. Lines (supra,^{n.16, p.333}) where a 'said to contain' reservation was deemed effective in relation to goods 'stuffed' by the shipper's agent, but not in relation to similar goods delivered to the carrier in loose form.

is the ruling by a New York State court,³⁴ dealing with a similar statutory provision, that a reservation is of no effect even when the shipper loads the goods and the carrier has a representative present in the weighing and loading operations: 'It can hardly be said, under such circumstances, that the [carrier] relied upon the count or weight given to it by the shipper, but rather that it secured such information from one of its own employees'.³⁵ This leaves us with one significant difference between the American provisions and those of the Hague Rules, namely that whereas the latter oblige the carrier to use reasonable means of checking the shipper's information, the former do not; they only annul reservations when the carrier actually knows the details, not when he could find them out. True enough, a ruling such as the one mentioned above by the New York court goes some way towards bridging this gap. If actual presence of a carrier's employee in the 'stuffing' operation deprives the carrier of the right to qualify the bill of lading particulars in the American system, then the area where there still remains a difference between the systems is narrowed down where containers are concerned to the marginal cases where some theoretical opportunity to inspect the contents presents itself, but is not used, as, for example, in the case of a driver who comes to collect the container between the completion of 'stuffing' and the closure of the doors, but does not make an effort to observe the contents. The Hague Rules would then charge the carrier with the opportunity to inspect, whereas the American statutes in all likelihood would not.

34. Beacon Milling Co. v. N.Y. Cent. R. Co., 244 N.Y.S.575(1930).

35. Ibid.575.

2.2.4. The CMR

3) The CMR articles 6,8, and 9 create a clearer, and better worded and constructed version of the Hague Rules and the French local statutory provisions on bill of lading particulars and reservations. Its main features are as follows: 1) The consignment note, prepared by the shipper, shall contain statements about the number of packages, etc. 2) 'On taking over the goods, the carrier shall check...[t]he accuracy of the statements'. 3) 'Where the carrier has no reasonable means of checking the accuracy of the statements...he shall enter his reservations in the consignment note together with the grounds on which they are based'.

Now, most of the characteristics of these provisions were discussed earlier in connection either with the Hague Rules or with the Decree of 31.12.66, but the explicit language of the present provisions make some of the speculative interpretations suggested in the earlier connection unnecessary. Chief among these is the positive rule here about the carrier's duty to inspect the goods 'on taking over'. It is at this moment, then, that the 'reasonable means of checking' must be exercised. The language of the present provisions also makes it even clearer that reservations alone do not suffice; they must be accompanied by an explanation of the facts which justify them.

Generally, the CMR formula is the most useful and easy to follow among its equivalents in other statutes, but many of the questions raised earlier still remain. When, exactly, are containers 'taken over' by the carrier? What are the 'reasonable means of checking' the content of containers in different stages? What explanation of the background of a reservation satisfies the requirements? In the absence of special court rulings on these questions in connection with the CMR specifically, it is suggested that the answers given to similar questions earlier apply here as well.

2.2.5. The CIM

The CIM's method of dealing with our present problems is significantly different from the methods used in any of the statutes and conventions dealt with so far. The basic difference lies in the fact that the CIM does not take great interest in the number of inner packages at all. 'The number of packages comprising the consignment is not, under the CIM regime, an essential element of the designation of the merchandise'.³⁶ Art.(6)(5)(e) only requires the number of packages to be mentioned in consignment notes which relate to consignments of less than a wagon-load.³⁷ Consequently, the number of packages or units included in a shipper-'stuffed' container need not, and in view of the exclusivity rule in art.6(8) perhaps even must not, be mentioned in the consignment note.

The CIM does not seem to allow for any reservations at all. It installs a system by which the railway has the right to verify the shipper's information, as described in the consignment note, in a formal and intricate process of inspection conducted in the presence of either the sender or 'two witnesses not connected with the railway',³⁸ the cost of which must be undertaken by the sender if his information is found to be inaccurate.

This rules out flexible criteria like 'reasonable means of checking' or non-committal formulae like 'said to contain', etc., and prescribes the following rigid set-up, as far as our present issues are concerned. The senders of containerised cargo need supply information only about the quantity of goods which are to be 'stuffed' by the carrier. When they are 'stuffed' by the

36. P.M-F Durand, Les Transports Internationaux(Sirey,1965), para.44,p.79.

37. Except for 'wagon loads which comprise one or more articles or packages forwarded by rail-sea and which require to be trans-shipped'.

38. Art.7.

sender himself, no details at all about the number of inner packages need appear in the consignment note. If such details do appear, either they are contrary to art.6(8), or the carrier has the right to conduct a full-scale inspection of the contents, at his own cost if the details are found to be accurate. The right to inspect undoubtedly deprives the carrier of the right to relieve himself of responsibility for the details³⁹ by means of a reservation; he must either accept the details, or try to have them crossed out as superfluous and contrary to art.6(8), or conduct an inspection.

2.3. The Apparent Condition of the Goods

How, if at all, can the traditional principles of proving the place of occurrence of damage with the aid of bill of lading remarks about the condition of the goods be operated where containers are concerned? In order to answer this, and to substantiate some answers given earlier on this matter,⁴⁰ those traditional principles which have a direct bearing on container transport must be sorted out and distinguished from the maze of rules and principles about the probative value of various bill of lading remarks describing the condition of the goods on receipt by the carrier.⁴¹

Of these, the two most relevant principles are the principle of apparentness and what will be called here the principle of comparison. The first implies the idea that, in the absence of special circumstances, bills of lading describe only those aspects of the condition of the goods as are apparent on receipt by the

39. Note that this responsibility is not dealt with in the CIM itself.

40. See pp.326-30,340, supra.

41. Many questions related to the bill of lading notes on the condition of the goods may, of course, arise in container cases, but the present analysis is concerned only with problems of that category, which have been aggravated or accentuated by the special features of container transport as such.

carrier.⁴² The second principle indicates that, despite the first one, if what was apparent on receipt is found to have changed its condition when observed on delivery, a bill of lading 'apparent condition' remark can still have considerable probative value regarding the condition of the invisible parts if alleged changes in the latter's condition can be shown to be causally connected with the changes in the condition of the observable exterior.

Sometimes required by written law,⁴³ but mostly by universal custom, some kind of a reference to the apparent condition of the goods has become an almost inseparable part of bills of lading. Container bills of lading show no significant outward signs of change in this custom. Most of them still acknowledge receipt 'in apparent good order and condition', or one of its equivalent formulae, the only visible difference being that some variation of the complementary 'condition of contents unknown' note, present in many of the conventional bills, has now become a feature of all container bills of lading. This, however, bears no significance in itself⁴⁴ because the 'apparent good order' note does not relate to the contents anyhow.

But what exactly is 'apparent', and at what stage? Again, the CMR supplies the only statutory answer to the latter part of the question, namely that the 'apparent condition' relates to what is apparent to the carrier 'on taking over the goods'. There is little doubt, however, that the same answer is valid under all other legal regimes, both statutory and customary. The answer to the first part of the question is more difficult. Expressions such

42. The authorities on this principle are too numerous to be mentioned. See, however, as representative references the classical analysis in Scrutton, art.60,p.115, and the list of American decisions in 33 ALR2d.872-879.

43. See the Hague Rules art.3(3)(c), and its equivalents in the English, American and French local statutes, and the CMR art.8(1)(b).

44. Scrutton, *ibid.*

as 'which could be seen',⁴⁵ 'of such a character that it must have been apparent to anyone',⁴⁶ 'external',⁴⁷ 'which [was] apparent to reasonable inspection',⁴⁷ 'so far as met the eye',⁴⁸ are only some examples of the variety of linguistic substitutes used in different cases to expand and explain the meaning of 'apparent condition'. But exactly as in the case of the similar issue concerning the apparentness of the quantity of the goods and the quality of loading and stowage, nowhere does the law lay down any positive directives as to the exact amount of effort which the carrier has to exercise in inspecting the goods on receipt. In the absence of such directives, the bulk of court decisions on the present issue must be searched to find a pattern, a common denominator which could be applied to the various situations in container operations.

And this common denominator, it is suggested, is that the inspection called for has no formal independent standing at all. It is ancillary in nature in that it requires no more than letting the senses detect signs of damage by sight, smell⁴⁹ or touch, while performing other, more positively defined, duties such as loading or stowage or, at most, while walking round the cargo on or after receiving it. The carrier, in other words, is required to refrain from closing his eyes to the obvious rather than to exert himself in search of existing signs of damage.

The rather obvious application of this to container realities is that a statement of 'apparent good order and condition' in the

45. Brandt v. Liverpool, etc. Steam Navigation Co., [1924] 1 K.B. 575, 593.

46. Compania Naviera Vasconzada v. Churchill & Sim, [1906] 1 K.B. 237, 244.

47. Silver v. Ocean Steamship Co. [1930] 1 K.B. 416, 425.

48. The Peter der Grosse (1875), 1 P.D. 414, 420.

49. See the Antwerp court decision of 19.4.67, summarised in [1968] E.T.L. 392 and The Peter der Grosse, *ibid.*

bill of lading when the container is delivered to the carrier in a sealed condition relates only to the exterior of the container.⁵⁰ But a case such as Silver v. Ocean Steamship⁵¹ carries a further lesson. There, the existence of small perforations in the tins containing the goods were considered perfectly compatible with an 'apparent good condition' note, considering the poor lighting conditions at the time of loading, etc., whereas the alleged existence of larger gashes in the tins was treated as incompatible with the same note. Both sorts of defects were external; both could have been discovered without opening the tins, and yet only such defects as must have been visible amidst the activities of loading and stowage are considered 'apparent'. Applied to container realities this means that a container must reach a certain degree of dilapidation or show some striking signs of damage before these can be expected to find expression in the bill of lading.

Quite apart from the question of visibility of a defect, there is the question of evaluating its significance. Should the carrier make a note in the bill of lading of every defect which was discovered by his employees? A positive answer may look attractive to a carrier anxious not to be responsible for old damage, but overzealousness in this matter may prove costly to the carrier. Any remark qualifying the apparent good condition of the goods would 'contaminate' the bill and render it 'unclean' and therefore quite useless commercially, and theoretically there is no reason why a shipper should not recover from the carrier any loss which an unjustified reservation about the condition of the container may have caused.

50. See Blue Bird Food Products Co. v. Baltimore & Ohio R. Co., 492 F.2d.1329,1332(3rd.Circ.1974). In an earlier stage of the proceedings the same court suggested, in an obiter dictum, that when a carrier receives a trailer sealed only by 'easily removable metal bonds', the 'apparent good order' note covers the contents. This was not repeated in the later decision, and seems to the present writer to be incorrect. 472 E2d.102,107.

51. Supra, n.47.

True enough, this problem exists theoretically in relation to conventional means of transport; but it requires greater attention where containers are concerned. Containers, the outer layers of all containerised consignments, differ from the outer layers of most conventional consignments in that they are more resilient and in that they are re-usable. A two-year-old container may bear the marks and bruises of a large number of past journeys and it is a matter of very delicate balance to evaluate whether it can still perform successfully. It is only rarely that such evaluation can be done by a mere look at the outside of an already sealed container. Again, the only perfect solution to this problem would be to involve an independent party in inspecting shipper-'stuffed' containers on, or before 'stuffing', and certifying their condition (together with the quantity of the goods, the apparent condition of the inner units and packages and the quality of stowage in the container), thus relieving the carrier from the need to evaluate the effect of ordinary wear and tear, and leaving him only with the duty to note obvious signs of new damage (i.e. damage occurring between 'stuffing' and receipt by the carrier).

Another awkward aspect of container transport is that a container, the only visible part of the consignment, is often supplied to the shipper by the carrier himself. A master who acknowledges receipt of a container in bad condition may relieve his employer of theoretical responsibility on one plane, but at the same time involve him in direct responsibility emanating either from the general bailor's warranty of fitness in common law or from the more specific statutory provisions on cargoworthiness. Legally, there is no dilemma: the master is required by statute and custom to give in the bill of lading an objective account of the condition of that part of the consignment which is visible to inspection. But it would be illusory to ignore the distorting

effect this double loyalty must have on the present issue in practice.

Finally in connection with the principle of apparentness itself, it must be pointed out that containers are not always delivered to the carrier in a sealed condition. This was discussed twice before in relation to related issues,⁵² and there is no reason why everything said there should not be applicable here. When 'stuffing' is conducted in the presence of the carrier's employee or agent, the units and packages comprising the consignment are as apparent as in any conventional mode of transport. When the container is already 'stuffed', but not yet closed, when being taken over by the carrier, the 'apparent condition' note in the bill of lading necessarily covers such features of the contents as are visible to the outside, through the open door.

The principle of comparison is only a logical extension of the principle of apparentness. In its simplest form it applies to cases where the damage itself is apparent on delivery by the carrier, by comparison with the absence of such damage on receipt, as evidenced by the issuing of a clean bill of lading. The carrier may then be estopped from claiming the existence of old damage (against holders of the bill of lading other than the shipper), ~~or~~ at least bear the burden of proof (against the shipper).⁵³ More directly relevant to the realities of containerisation is the comparison of external packages.

This can best be demonstrated by the case of The Solveig.⁵⁴ A clean bill of lading was issued there for cases containing bottles of wine wrapped in straw. On arrival both the cases and

52. At pp.353-8, and chapter II, sec.6, *supra*.

53. See Tribunal of Commerce of Dunkirk, 23.1.61, 13D.M.F.678: Roadway Express v. Naturalite, 435 S.W.2d.455 (C.C.A.Tex.1968).

54. 217 F.805(N.D.Cal.1914).

the labels on the bottles were found severely stained by the rotting straw. Was the clean bill valid evidence as to the condition of the labels on receipt by the carrier? Usually not, because the bottles were invisible on receipt, but here the cases themselves were found on arrival to have been damaged by the same factor which caused the damage to the labels. This raises the fair assumption that if the cases themselves were intact on receipt, so were the labels, and as the cases themselves were apparent on receipt by the carrier and were acknowledged by him to be 'in apparent good condition', it can be assumed that the labels were then still in good condition. In the words of the court, '[i]f the external covering of the goods is so damaged when they are delivered as to account for the injury to the contents',⁵⁵ then a clean bill of lading makes the carrier prima facie responsible for that injury.⁵⁶

The applications of this to containers are only too obvious. Where the container is delivered to the carrier already sealed, a comparison of its external features on receipt and delivery is the only way in which the bill of lading remarks can contribute towards establishing the place of occurrence of damage which was discovered on delivery and could have been caused by the same factor which brought about the change in the apparent condition of the container itself.

55. Ibid. 807.

56. See also Reider v. Thompson, 197 F.2d.158(5th.Circ.1952).
Yeckes-Eichenbaum v. Texas Mexican R. Co., 165 F.Supp.204
(S.D.Tex.1957), rev'd on other grounds, 263 F.2d.791.

3. CONCLUSION

Containerisation has brought about a general decline in the value of bills of lading as receipts for the goods they represent. This is an inevitable result of the declining role of carriers in the preparatory stages of the transport operation where containers are concerned, and of the general principle which allows carriers to refrain from taking responsibility for the accuracy of particulars of the cargo which cannot be inspected on receipt.

Ideally, a container operator who wishes to make use of the latter principle when receiving a container which was 'stuffed' by the shipper without the presence of the carrier's representative, should refrain from mentioning the details of the containerised goods in the bill of lading altogether. However, despite some doubt, it seems that ^{the} widespread custom of indicating the details of such goods, as supplied by the shipper, under a 'said to contain' reservation is equally effective to relieve the carrier even from prima facie responsibility for the accuracy of the details.

The effect of lack of details in the bill of lading, or of a 'said to contain' reservation on the legal relations between cargo-owner and carrier can be far reaching, although this does not seem to have been universally realized at the time of writing. Without the bill of lading presumptions emanating from details about the quantity and condition of the cargo on delivery to the carrier, shippers may find it difficult to establish even a prima facie case against the carrier when loss or damage is discovered during or at the end of the journey. However, this difficulty should not be considered fatal in all cases. Firstly, proof of the place of occurrence of loss or damage can sometimes be made by positive means. Secondly, the limited details which can be ascertained when a closed container is delivered to the carrier are not wholly valueless. The weight of the cargo can be verified by weighing the container, and the apparent condition of both the seal and the container itself at the various stages of the journey can sometimes serve as an indication of the place of occurrence of losses or severe mechanical damage.

It is unlikely that the general principle behind these rules, namely that an issuer of a bill of lading cannot be made responsible for details which are not apparent on receipt, will undergo any significant change. Nor would any such change be justified. The only change in the machinery of guaranteeing the details of shipper-'stuffed' goods, therefore, can emanate not from the law, but from a change in the practices of the container transport industry itself, e.g. in the form of greater participation of carrier representatives in the 'stuffing' process, or even in the form of independent, third-party, inspection at the time of 'stuffing'.

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