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WORLD MARITIME UNIVERSITY

Malmö, Sweden

**What Constitutes a Package or Unit For The Purpose
of Determining the Package Limitation in Carriage
of Good by sea?**

By

TIGHILT FODIL

Algeria

A dissertation submitted to the World Maritime University in partial
Fulfilment of the requirement for the award of the degree of

MASTER OF SCIENCE

In

MARITIME AFFAIRS

(SHIPPING MANAGEMENT)

2006

Declaration

I certify that all the material in this dissertation that is not my own work has been identified and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my personal views, and are not necessarily endorsed by the university.

Signature:

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Abstract

Title of Dissertation: **What Constitutes a Package or Unit For The Purpose of Determining the Package Limitation in the Carriage of Good by sea?**

Degree: **MSc**

This dissertation studies the meaning of the term “package or unit” for the purpose of determining the package limitation in the carriage of goods by sea. The basis for the concern is that there still remains uncertainty in the mind of any subsequent holder of a bill of lading as to the basis on which the carrier’s liability will be limited.

A brief review is made of the historical evolution of the different carrier liability regimes, their main features and shortcomings.

This dissertation, will review the articles of the different cargo liability regimes covering sea transport that deal with the “package or unit” concept, and make an extensive reference to the jurisprudence of different jurisdictions which have considered the concept of a “package or unit” and mainly to the US jurisprudence where the controversy had raged fiercely, in order to propose a clear interpretation of the term “package or unit” within the contemplation of the Rules. The dissertation will also suggest some proper wording to describe cargo on the face of a bill of lading.

The conclusion gives a summary of the findings and recommendations in order to avoid future dispute and confusion.

KEYWORDS: Package limitation, bill of lading, Hague Rules, Hague-Visby Rules, Hamburg Rules, COGSA.

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Abbreviations used in Cases

AMC	American Maritime Cases
A.C	Appeal Cases (English)
Asp. M.L.C	Aspinall's Reports on Maritime Law Cases
C.A	The Court of Appeal of the United Kingdom
Cir	The United States Court of Appeals which is divided into thirteen circuits.
DMF	Le Droit Maritime Français
E.R	The English Reports.
ETL	European Transport Law,
Ex. C.R	Exchequer Courts Reports, Canadian Admiralty court reports (Trial Division and in Appeal)
F	Federal Reporter
F.2d	Federal Reporter (second series)
Fed. Cas	Federal Cases
F.C	Federal Court Reports, (Canada).
F. Supp	Federal Supplement. United States District Court decisions
JMLC	Journal of Maritime Law and Commerce
Lloyd's Rep	Lloyd's List Law Reports
LI. L. Rep	Lloyd's List Law Reports
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly,
N.R	National Reporter. Canadian Supreme Court and Federal Court of Appeal reports which appear very soon after the decisions are rendered.
S.C.R	Supreme Court Reports, Ottawa, Canada
U.S	United States Supreme Court decisions

List of Abbreviations

COGSA	Carriage of Goods by Sea Act
CMI	Comité Maritime International
CSC	International Convention for Safe Containers
FCL	Full Container Load
ICS	Institute of Chartered Shipbrokers
IMF	International Monetary Fund
IMO	International Maritime Organization
LCL	Less than Full Container Load
No. of Pkgs	Number of Packages
OECD	Organisation for Economic Co-operation and Development
SDR	Special Drawing Rights
UCP 500	Uniform Customs and Practice for Documentary Credits
UNCTAD	United Nations Conference for Trade and Development
UNCITRAL	United Nations Commission on International Trade Law

Chapter One

Introduction

1.0 General Background

The term liability has its origin in the Latin word *ligare*, which means 'to bind, to tie' (Katsivela, 2004). Historically the concept of liability was developed in domestic law, mainly for maintenance of public order, and damages were offered primarily to avoid recourse to private vengeance (United Nations, 2004).

Marine carrier liabilities for cargo loss and damage have been part of the maritime business world for centuries. The function of a cargo liability regime is to set a balance of responsibility between shipper and ship owner for losses that may occur. However, losses and damages occur in spite of the best care and due diligence, as maritime carriage was a risky venture both for the ship owner and the shipper. One of the unique features of maritime law is the ship owner's right to limit his liability for loss or damage resulting from his negligence. "The rule was probably first codified at the time of Louis XIV in the seventeenth century" (Gold et al., 2003, p. 718).

A variety of regimes currently govern liability for cargo loss or damage that occurs during international ocean carriage under a bill of lading. These regimes define the rights and liabilities of the two parties concerned in an agreement to carry goods by sea, namely, the carrier and the cargo interest, including the right of the

carrier to limit his liability for cargo claims. The most prominent among those regimes are the so-called “Hague Rules” of 1924, “Hague-Visby Rules” and the “Hamburg Rules”.

There are two separate methods of limitation that may be available to the carrier of goods by sea; the so-called “tonnage” limitation and the “package” limitation. The focus in this dissertation will be on the latter one.

The rules were based on a fundamental compromise, that is giving ship owners defined obligations in return for a limitation on their maximum liability. In the case where the carrier is responsible for damage or loss to goods, then he is entitled to limit his liability by application of the widely known “package limitation”. It is restricted to claims for loss or damage incurred in connection with goods which are being carried under a bill of lading and limited to a specified amount that is calculated with reference to particulars of the cargo like weight, package, or unit of the goods carried. In other words, the basis of the limitation depends on whether the cargo is contained in “packages” or shipped as “units”.

A predictable limitation, most importantly, serves the purpose of letting the parties know beforehand, whether the shipper needs to arrange his own insurance for the excess above the limitation and at the same time being sure to receive reasonable compensation, or whether the risk is to be covered by the carrier and reflected in the carrier's freight rate. In other words, it protects the carrier from the risks associated with cargoes of high-undisclosed value and, by establishing a standard level of liability, enables him to offer uniform and cheaper freight rates.

Unfortunately the terms “package or unit” were left undefined by the rules and do not clarify the interpretation, which has led to endless arguments, disputes, conflict and even moral indignation, over what a “package or unit” is. That problem has been exacerbated by the adoption of new methods of preparing and assembling goods for shipment.

The “per-package” limitation was intended to include all the ordinary packages customarily in use at that time when they were handled individually by hand. Before the industrial revolution, the goods were packed in various kinds of boxes, barrels, baskets, bags, and bales, and were described in bills of lading without mention of weight. The quantity used was mainly from the custom of trade e.g. “a half-pipe of brandy”, “a hogshead of dried cod”, “a barrel of flour”, “a basket of wine”, “a chest of tea”, “a box of prunes” and “a half-box of raisins”. Some agreements on the description of the quantity measurements existed between the English and the Americans e.g. the wine gallon as a measure of liquids and the bushel as a measure of grain. At that time forklifts, trucks, containerships, containers and similar mechanized cargo handling equipment were not even invented.

The transition in the methods of cargo carriage from break-bulk to unitization and now to containerization has helped goods to be delivered faster and cheaper. Unfortunately, at the same time these changes in the shipping industry have created confusions to the Rules that define the duties, liabilities, and limitations of the carrier and the shipper, and contributed to the obsolescence of the description of the term “package or unit”. The variety of regimes that currently govern liability for cargo loss or damage have all failed to provide the necessary clarity for assessing liability for cargo loss or damage in an era that is now dominated by containerization, where they were not in use in 1924, and there is a growing divergence between existing international conventions.

1.1 Statement of Problem

The interpretation of the wording “per package or unit” raises several difficult questions like how to determine the content of the terms “package”, “unit”, “unit of the goods”, “freight unit”, and how to calculate the carrier’s liability since individual packages are almost always consolidated for shipment in a container or on a pallet or similar article of transport. Is it, as the carrier would argue, the container? Or is it, as cargo interests would say, the units contained inside? Some of which have not yet acquired definite solutions, others have been decided differently by the courts of the various contracting states.

However, the problem is not to decide if a container is a package or if a carton of goods are a package, the problem rather is to determine if the term “package or unit”, referred to in the Rules, is the container itself or the package inside. The answer to this question is of vital importance to the allocation of the risk of loss in ocean transportation.

1.2 Research Question

The current liability framework does not reflect developments that have taken place in terms of transport patterns, technology and markets. In addition certain ambiguities remain which still require clarification. For that the main question would be what constitutes a “package” or “unit” for the purpose of determining the package limitation in carriage of goods by sea?

1.3 The Purpose of This Dissertation

The main objective of this dissertation is to determine a clear meaning of the terms “package or unit”, which were left undefined by the Rules. The purpose of this study therefore will be achieved through the following objectives:

- To identify the main features of a cargo liability regime covering sea transport.
- To examine the main differences in existing cargo liability regimes.
- To make a comparison of limits of liability, under main cargo liability regimes.
- To find what constitutes a package or unit for limitation purposes under those Rules?
- To try to make proposals and recommendations on the appropriate wording of the “per package or unit” limitation in the bill of lading.

In this dissertation, a number of questions will be posed to which the author will try to find answers. The different questions could be summarized as follow:

- How to calculate the limitation of liability under the different cargo liability regimes.
- What monetary limits of liability should apply?
- What are the recent international developments concerning cargo liability regimes?
- Is there any attempt for international unification of mandatory carriage regimes?
- When is a package not a package?
- Is size relevant and is it essential that the article carry some form of wrapping?
- Is the term “unit” intended to refer to a shipping unit, such as a crate, package, or container, or would it equally apply to a freight unit, i.e. the unit of measurement used to calculate the freight?
- Is the limit calculated with reference to the total number of packages enumerated on the bill of lading or with reference to the number of packages actually lost or damaged?
- When is a container not a container?
- Whether the container itself, when supplied by the shipper, should be considered as a package?
- Will a clause like “said to contain x cases” be adequate?
- What happens if the container is used to carry bulk cargo?

To answer those questions will be possible through an analysis of various court interpretations under the different Rules, particularly in US legal jurisdictions under the COGSA (1936) where the controversy has raged most fiercely. On the basis of these findings, the dissertation will draw conclusions and make necessary proposals on the appropriate wording in the bill of lading, in order to avoid future disputes and conflict over what is a “package” or a “unit”.

1.4 Methods

The research proposes to focus on the above questions and trying to answer them. The author will navigate through the muddy waters of determining the

meaning of “package or unit” under the different Rules. This dissertation, most of all will review the articles of the different cargo liability regimes covering sea transport that deal with the “package or unit” concept, and make extensive reference to the jurisprudence of different jurisdictions, which have considered the concept of a package and a unit, and mainly to the US jurisprudence where dispute has raged fiercely.

1.5 Structure

This dissertation consists on five chapters:

Chapter 1, Introduction: Chapter 1 states the problem, the research question, the purpose, and the method of this dissertation. Especially this chapter tries to describe the whole problem that the author is interested in and justify the reason of this dissertation.

Chapter 2 The carrier liability regimes: Chapter 2 presents a brief review over the historical background of the existing maritime cargo liability regimes, their main features and a brief description of the unit of account used in limits of liability.

Finally, a brief analysis of the areas of dissatisfaction with many aspects of the Rules and the need for the unification of the existing Rules in a new regime allocating risks between cargo and carrier which would cure the basic failings of existing maritime cargo liability regimes.

Chapter 3, Meanings of “package or unit” in the rules: Chapter 3 describes the “Per package or unit” concept under the main rules. It reviews both the major and most recent “container as a package” cases, with reference to different court cases, and mainly in the US where it has been given considerable attention, as it has not yet ratified the Hague-Visby Rules, in order to fully appreciate the dilemma that has faced shippers, carriers, underwriters and courts. Finally, it analyzes the different approaches used in the US courts in order to provide a fair and sensible

interpretation of existing legislation to the problem that has arisen out of the “container revolution”.

Chapter 4, Suggested wording: Chapter 4 will examine different wordings in the bills of lading that have been found confusing and ambiguous in the different courts and try to identify proper wording that the parties need to use in order to have a clear bill of lading, and diminish the disputes and uncertainties.

Chapter 5, Conclusion: Chapter 5 will summarise the findings, conclude the research and give some recommendations for the parties to avoid any further costly and time consuming disputes.

Chapter Two

Cargo Liability Regimes

2.0 Historical Background

The carrier's liability for cargo loss and damage has been part of the maritime business world for centuries. Over the past three centuries there has been a fluctuation in the balance of bargaining power between shippers and carriers. For example by the late 17th century, strict liability was imposed on maritime carriers. They were absolutely liable for loss or damage to goods carried under contracts evidenced by bills of lading regardless of fault on the carriers. The only exclusions available were for loss or damage caused by act of God, acts of the Queen's (or public) enemies, inherent vice of the goods, the fault of the shipper, or a general average sacrifice. This level of strict liability imposed on the carrier was adopted in the common law nations, including the United States, as well as civil law nations like France. The reasoning behind imposing strict liability on the carrier was that:

It was believed that a cargo owner who shipped his goods by a marine carrier should be afforded special protection; he was prevented, by geographic remoteness, from closely supervising the passage of his goods and he was particularly susceptible to collusion between dishonest carriers and thieves (Myburgh, 2000).

By the end of the 19th century however, steam powered vessels had appeared and with it an expansion in international trade, the shipping industry had fundamentally changed. The financial position of the ship-owner was greatly improved by technological advancements in shipping. European ship owners, in particular British ship owners, dominated the seas and they exercised great commercial strength over cargo owners, and as the ship owner's bargaining power increased, the scope of his liability to cargo interests decreased. The English courts applied without restriction the doctrine of "freedom of contract" which was almost sacred, allowing the parties to subordinate the principle of strict liability. The English position was summarized in the report of February 1921, of the Imperial Shipping Committee:

There is nothing in English law to stop a ship-owner from contracting out of the whole or any part of his liability, and by a practice which has gradually extended since about 1880, British ship-owners do habitually in their bills of lading contract themselves out of their common law liability to a large extent (Colinvaux, 1982, p. 295-296).

As carriage by sea was based on contract, and using their commercial muscle, ship owners inserted wide exemption clauses in bills of lading excluding many of their basic obligations. In other words ship owners eventually achieved almost complete immunity for cargo loss even from all liability for unseaworthiness and crew negligence.

Basically the original intention of this freedom of contract was to encourage carriers to face the uncertainties of international shipping without undue risk, encourage shippers to purchase cargo insurance, and to spread the risks of international shipping through a large group of insurance underwriters and shippers. It was thought that by limiting the liability of the ship-owners, investment in shipping would be encouraged, and this would help increase the wealth and influence of the maritime nations.

In contrast to the British and other European courts, in the United States, “since the 1870s, the courts resolutely refused to enforce unreasonable conditions in bills of lading” (Colinvaux, 1982, p.295). United States shipper and cargo interests, increasingly dissatisfied with carriers’ use of oppressive exemption clauses, rebelled and lobbied the government for regulation against the abuse of the carriers’ strong bargaining position. They were powerful enough to obtain legislation to adjust the balance in their favor, and in 1893 they persuaded Congress to pass the Harter Act, which was an Act limiting the ship owner’s freedom of contract and designed to prevent the abuses brought about by the English concept of absolute freedom of contract, by invalidating bill of lading clauses which gave carriers wider exemptions than those in the Act.

The opinion of the United States Supreme Court in *The Delaware* case, *said* with regard to British owners:

The exigencies which led to the passage of the Act are graphically set forth in a petition addressed in 1890 by the Glasgow Corn Trade Association to the Marquis of Salisbury . . . That, taking advantage of their practical monopoly, the owners of the steam ship lines combined to adopt clauses in their bills of lading, very seriously and unduly limiting their obligations as carriers of the goods, and refuse to accept consignments for carriage on any other terms than those dictated by themselves . . . That this policy has been gradually extended by the steamship owners until at the present time their bills of lading are so unreasonable and unjust in their terms as to exempt them from almost every conceivable risk and responsibility as carriers of goods. . . . In particular it was complained that wide general liens in bills of lading’ render the bill of lading, which has been of such essential service on account of its negotiable character in promoting the commercial

prosperity of Great Britain, a document unfit for negotiation (Colinvaux, 1982, P. 296).

It was the first attempt to redress the balance between the interests of ships and cargo. However, great uncertainty prevailed because liability might well depend on where a case was litigated, whether U.S or U.K law applied. Because of the various interpretations of the rules, organizations representing shippers, carriers, banks, and insurance companies began discussions, and it soon became clear that a single Convention binding all contracting parties was preferable to achieve uniformity in the rules of liability to be applied in international shipping.

2.1 Background of the Existing Maritime Cargo Liability Regimes

A variety of regimes currently govern liability for cargo loss or damage that occurs during international ocean carriage. The most prominent among those regimes are the so-called “Hague Rules” of 1924, the “Hague-Visby Rules” and the “Hamburg Rules”.

2.1.1 The Hague Rules

In order to consider the question of introducing uniformity into the vexed question of ship-owners’ legal obligations towards cargo-owners, the representatives of leading ship-owners, underwriters, shippers and bankers of the big maritime nations met, after considerable discussion, at a conference at The Hague in Holland held under the auspices of the Comité Maritime International (CMI), the informal successor to the International Law Association in maritime matters, where a set of rules based on the Harter Act was finally drafted in 1921. After further revision at conferences in Brussels in 1922 and 1923, it was signed in Brussels on 25 August 1924, and entered into force as of June 2, 1931. Its official designation is the International Convention for the Unification of Certain Rules Relating to Bills of Lading 1924, commonly called the Hague Rules.

The Hague Rules represented the first attempt by the international community to find a workable and uniform means of dealing with the problem of ship-owners regularly excluding themselves from all liability for loss or damage of cargo. The Hague Rules govern liability for loss/damage to goods carried by sea under a Bill of Lading, and were based on the fundamental compromise that the carriers accepted a due diligence obligation to make the ship seaworthy at the commencement of the voyage in exchange for limitation of liability and the possibility of relying on the famous list of exceptions, mainly the “nautical fault” immunity. In other words, the shipper bears the cost of lost/damaged goods if they cannot prove that the vessel was unseaworthy, improperly manned or unable to safely transport and preserve the cargo.

Many countries passed legislation adopting The Hague Rules soon afterwards like, the Carriage of Goods by Sea Act 1924 (UK) which came into force on 1 January 1925, The Sea-carriage of Goods Act 1924 (Australia), Water Carriage of Goods Act 1936 (Canada), the Sea-Carriage of Goods Act 1940 (New Zealand) and the USA adopted the Hague Rules in its Carriage of Goods by Sea Act 1936.

The Hague Rules form the basis of national legislation in almost all of the world's major trading nations, and probably cover more than 90 per cent of world trade.

2.1.2 The Carriage of Goods by Sea Act (COGSA) 1936

The Hague Rules were approved by a two-thirds vote of the United States Senate, by its resolutions of April 1, 1935, and in May 6, 1937, signed by President Franklin Roosevelt, and ratified by the United States Senate on June 29, 1937.

In the United States, carriage of goods by sea is governed primarily by three statutory regimes, namely, the Harter Act, the Carriage of Goods by Sea Act (COGSA), and the Federal Bills of Lading Act, commonly referred to as the Pomerene Act. On April 16, 1936 The Hague Rules or the “1924 International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading”

were incorporated into domestic law, with the Congress adoption of the Carriage of Goods by Sea Act (COGSA) to govern the rights and responsibilities of carriers and shippers in carriage of goods by sea, which implemented almost all provisions of the Hague Rules.

2.1.3 The Hague-Visby Rules

The Hague Rules were functioning without modification until the mid-1950, when new technological revolutions took place. Containerisation was clearly a fact of life and the old Rules were not adequate to cope with this form of transport. Remedies were needed for difficulties that had surfaced in respect of, amongst other things, the package limitation, Himalaya clauses, the scope of application of the Rules, the evidential effect of bills of lading, and the effect of the time bar. At the time when The Hague Rules were drafted, maritime carriage was a risky venture both for the ship-owner and the shipper, and shipping was not nearly as sophisticated as it is today.

In 1959, the CMI began work on limited technical amendments to the Hague Rules. The purpose of the amended Rules was to amend certain provisions of the Hague Rules recognized as causing particular problems. A draft Protocol was drawn up and approved by the Comité Maritime International (CMI) at its Stockholm conference in 1963 and signed at Visby. The Visby recommendations were amended and formally adopted at the 12th Maritime Diplomatic Conference in Brussels on February 23, 1968. The Protocol entered into force on June 23, 1977, and became known as the Hague-Visby Rules 1968.

The Hague-Visby Rules were primarily adopted to deal with two main problems, which had emerged with the 1924 rules, the need to deal with containers, and the monetary value of the package limitation. The Rules were amended by a further Protocol on 21st December 1979 known as the SDR Protocol. This had the effect of expressing the monetary limits in terms of special drawing rights as opposed to the rather complicated gold francs formula in the original Hague-Visby

Rules. The initiative behind Hague and Hague-Visby came mainly from maritime nations that tend to be the more industrially developed countries.

2.1.4 The Hamburg Rules

Many, especially developing countries, took the view that The Hague Rules had been developed by “colonial maritime nations” in 1924, largely for the benefit of their maritime interests, and by that, the imbalance between ship-owners and shipper interests needed to be redressed.

During the 1970's pressure mounted from developing countries and major shipper nations for a full re-examination of cargo liability regimes, where it was channeled through the United Nations Conference for Trade and Development (UNCTAD), which perceived its principal task was to look after the affairs of less developed nations. The pressure succeeded and the UN Commission on International Trade Law held a diplomatic conference in Hamburg in 1978 to consider a draft convention on carriage of goods by sea, a rival to the Hague-Visby Rules, known as the “Hamburg Rules 1978”.

The convention was signed at Hamburg on March 31, 1978 and came into force on November 1, 1992 under the sponsorship of UNCTAD and UNCITRAL. The aim of the Hamburg Rules was to replace the Hague-Visby Rules, which in the view of UNCTAD, were heavily biased in favor of the carrier to the disadvantage of the shipper/receiver. The arguments were that The Hague Rules were outdated in several respects, and the 1968 Visby amendments left many important problems unresolved and legally defective. The Hamburg Rules provide a uniform modern commercial code in the field of sea-carriage of goods.

In conclusion one can say that each international convention in turn attempted to broaden its application in order to avoid lacunae, to encompass all contracts of carriage as well as bills of lading, and to permit incorporation by reference.

2.2 The Main Features of the Mandatory Regimes

2.2.1 The Hague Rules

The Hague Rules were the first attempt to create a uniform set of international cargo claim rules in 1924, which could be incorporated into a contract of carriage on a voluntary basis. They apply only to contracts of carriage by sea that are evidenced by a bill of lading or similar document of title, and to the carrier who is a party to the contract of carriage. They were designed to apply to goods loaded in a signatory state, with no reference to containers as they are treated as other cargo. They exclude goods carried under a sea waybill or other non-negotiable document, carriage of live animals, cargo that is carried on deck in accordance with the contract of carriage, and take no account of transport by other modes.

The Hague Rules essentially create a system of liability for negligence with a reversed burden of proof. They impose upon the carrier the duty of carrying the goods with care and of providing a seaworthy vessel at the commencement of the voyage. The carrier can escape liability by proving the loss was due to fault or even neglect of his navigational personnel, and the carrier owes non-excludable duties of “due diligence” in furnishing a seaworthy and cargo worthy ship. Furthermore, the carrier must prove that he did exercise such due diligence.

The monetary value of the unit limitation was expressed in pounds sterling that needed to be taken into gold value. If the sea carrier is found to be liable for loss, his liability is limited to £100 gold value per package or unit unless a higher value is stated.

Finally, the rules cover carriage of goods only from the time they are loaded onto a ship to the time when they are discharged from it, which is known as tackle to tackle. Provision for loss or damage from delay is absent from the present rules, and the time limit within which suit has to be brought against carrier is one year.

2.2.2 The Carriage of Goods by Sea Act (COGSA) 1936

This Act applies to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade, and only from the time goods are loaded on board the vessel to the time when they are discharged from it, known as tackle to tackle. COGSA does not apply in coastal trades or inland waters, charter parties, live animals and goods carried on deck. The US COGSA imposes an express duty on the carrier, before and at the commencement of the voyage, to exercise due diligence,

To provide a seaworthy ship; to properly equip, man, and supply the ship;
and to make the holds, refrigeration and cooling chambers, and all other
areas of the vessel where goods are carried, fit and safe for their
reception, preservation, and carriage.

Moreover, the Act requires that the carrier “properly and carefully load, handle, stow, care for, and discharge the goods carried”. After receiving the goods, and upon demand of the shipper, the carrier is required to issue a bill of lading. The COGSA expressly states “that neither the carrier nor the vessel owner shall be liable for loss or damage arising from unseaworthiness unless it is caused by a lack of due diligence to make the ship seaworthy”. If it is proven that loss or damage to cargo was the result of unseaworthiness, the carrier has the burden of proving due diligence. In addition, COGSA exonerates a ship owner from liability for cargo losses if the ship owner proves that the loss was caused by the negligent navigation or error in management of the ship.

There is no liability for delay in delivery, and the Act provides that a suit for damages must be brought within twelve months of the date of delivery of the goods or when they should have arrived.

Finally, once the carrier is liable under the contract of carriage, he is entitled to limit his liability for cargo loss or damage to \$500 “per package”, or “per customary freight unit”, in the event that they are not shipped in packages.

2.2.3 The Hague-Visby Rules

The Hague-Visby Rules were adopted primarily to deal with two problems, which had emerged with the 1924 rules, the need to deal with containers, and the monetary value of the package limitation.

The Rules only regulate international carriage of goods by sea under bills of lading having appropriate connection with a contracting State (Art X). In other words, the application of the rules is mandatory only where the goods are loaded in a port or the bill of lading is issued in one contracting state. They apply regardless of the nationality of ship, carrier, shipper, consignee or any other interested person. However, the carrier needs to be a party to the contract of carriage.

They exclude goods carried under a sea waybill, consignment note or other non-negotiable document. There is no reference to electronic media, and they do not apply to charter parties and similar agreements unless specifically incorporated into it. They exclude the carriage of live animals, and cargo that is carried on deck unless special agreement is made to incorporate them.

They extend the scope of application to coastal traffic (ICS, 2002, p. 25), and incorporated the equivalent of a “Himalaya” clause to give the carrier’s servants the same rights and immunities as the carriers themselves (Art IV bis Clauses 2 to 4). The rules deprive the carrier of the benefit of limiting his liability whenever he has acted “with intent to cause damage, or recklessly and with knowledge that damage would probably result”. The Rules address the problem of containers by inserting the “container clause”. Furthermore, The Rules cover carriage of goods only from the time the goods are loaded onto a ship to the time when they are discharged from it, tackle to tackle.

The Hague-Visby Rules increased the liability of the carrier, particularly in regard to the package limitation, and gave two alternative methods for calculating the maximum amount of the sea carriers' liability, one based on weight, the other on the number of packages and whichever is the higher applies. Thus the carriers' liability limit is either 666.67 SDR's per package or 2 SDR's per kg, whichever is higher. The limit can, however, be broken by the insertion of a declaration of the nature and value of the goods on the bill of lading. Finally there is no provision for loss due to delay, and the time bar is one year.

2.2.4 The Hamburg Rules

The Hamburg Rules were intended as a modern regime to replace The Hague and Visby Rules. The rules apply to almost all contracts of carriage by sea, not just bills of lading (Article 1.6), but charter parties are still excluded from the rules. They make provision for electronic signatures on bills of lading, contain broader provision for electronic bills of lading, electronic communications and additionally they apply where goods are discharged (even though not loaded) in a contracting state.

The liability of the carrier is based on the principle of presumed fault and as a rule the burden of proof rests on the carrier. The list of exceptions available to the carrier set out in the Hague and Hague/Visby Rules is no longer available and he can only escape liability if he can prove he and his employees or agents took all reasonable measures to avoid the occurrence and its consequences, and he could be liable for loss resulting from delay in delivery (Article 5.1). The Hamburg Rules introduced the concept of an "actual carrier" which included any of the carrier's employees, agents and subcontractors.

One of the principal changes made by the Hamburg Rules was to repeal the nautical fault defense. The period of the carrier's responsibility is extended beyond the ship rail to cover the period when the carrier has the goods in its charge (Article 4). Live animals and deck cargo are included (Article 1.5). Also, there are increased limits of liability where they were raised to 835 SDR's per package or 2.5

SDR's/kilo, (Article 6) and the time bar is lengthened to two years (Article 20). The countries that have so far adopted the Hamburg Rules amount to only twenty-nine nations, which represent a small proportion of world trade, only a few of them are major shipping nations.

2.3 Unit of Account for the Limits of Liability, Under Main Cargo Liability Regimes

As a basic rule, the sea carrier's liability for damage to the goods during transit is limited to a fixed amount per unit or per kilogram of cargo. Originally, this amount was limited to £100 pounds sterling per "package or unit". However, a question has been asked on whether limitation will be £100 sterling or the value of 100 gold sovereigns per "package or unit". In *The Rosa S* case, the court decided that the carrier is entitled to limit his liability not to £100 sterling per package or unit but to the current market value of "the gold content of 100 sovereigns of the weight and fineness specified under the Coinage Act 1870". Moreover, article 9 of the Hague Rules provides that the monetary units are to be taken to mean gold value, which allows countries that are not using the sterling currency, to translate the amount into their own national currency.

Under COGSA 1936, a carrier's liability is limited to \$500 per "package" or per "customary freight unit" in the event that there are no packages, "unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading". The customary freight unit came from the method used in calculating the freight in the contract of carriage, such as weight, size, or cost per unit. Nevertheless, a shipper is never entitled to recover more than its actual damages.

With the advent of containerization, and after more than four decades of use, the Hague Rules needed changes or amending and the Hague-Visby Rules of 1968 are significantly more generous to the claimant than the Hague Rules. The limit of liability was raised to a more reasonable level, from £100 gold per "package or unit" to 10,000 Poincare francs [65 milligrams of gold, fineness 900] per package, which

represents an increase of more than 350% against the original Hague Rules, and also introduced a per kilo limitation, at 30 Poincare francs per kilo of gross weight of goods lost or damaged, whichever is the higher.

A further, minor, revision took place in 1979, when it was agreed that expressing the limitation of liabilities will change the basic unit of account of the Hague-Visby Rules 1968 from Poincare gold francs to Special Drawing Rights ("S.D.R.'s") of the International Monetary Fund (I.M.F.). The SDR is tied to a basket of the world's dominating currencies, quoted daily in the financial press of most leading newspapers and shipping journals, e.g. *Lloyd's List* and revised every five years, (on June 6, 2006, 1 SDR = 1.49241 USD). That was more easily translated into national currencies than the Poincare gold franc in the original 1968 version of the Rules. For this reason, the 1979 Protocol is sometimes called the "Visby S.D.R. Protocol".

The reference to SDR is due to the fact that in 1971, gold itself had lost its original value as well as its monetary functions. "An SDR is a fictitious currency which was based upon the weighted average of the currencies of the United States, Britain, Japan, Germany and France" (IMF, 2006). Since January 1, 2006 the basket is composed as follows: US \$ 44%, Euro 34%, Yen 11% and U.K. £ 11 %. However, the value of this unit of account fluctuates daily. On the other hand, the disadvantage is that the SDR itself slowly declines in value with world inflation. Under Hague-Visby, the liability of an ocean carrier is 666.67 Special Drawing Rights ("SDR's") per package or 2 SDR's per kilogram whichever is the higher or more favourable to shippers. This limit can be broken if there was an act or omission by the sea carrier, done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

In 1978, rather than just amending the Hague Rules, the Hamburg Rules produced a rival to the Hague-Visby Rules and adopted a new approach to cargo liability. The Hamburg Rules have a 25% higher limit of liability compared to the Visby and SDR Amendments; from 666.67 to 835 SDR per package, or other shipping unit, and from 2 to 2.5 SDR per kilogram of gross weight, whichever is the

higher (Articles 6 and 26). These limits can, similar to the Hague-Visby Rules, be broken if there was an act or omission by the sea carrier, done with intent to cause damage, or recklessly and with knowledge that damage would probably result (Article 8, section 1).

2.4 The Need for the Unification of International Conventions

As has been said, the three major legal regimes, which apply to the carriage of goods by sea are; the Hague Rules, the Hague-Visby Rules and the Hamburg Rules. Historically, the Rules and their predecessors were a response to the contractual exclusion of liability imposed by ship owners on cargo owners, in that they focused and were based on compromises that are to try to create an equitable risk allocation between carrier and cargo interests. However, one of the problems with the international carriage conventions is their lack of uniformity.

Since 1968 various ocean carriers have, urged ratification of the Hague-Visby Rules. On the other hand, certain cargo interests have, since 1978, urged ratification of the Hamburg Rules. As a result of this disagreement, different maritime liability regimes co-exist internationally. Roughly we can see that:

Slightly over two-fifths of countries, including the United States, are signatories to the Hague Rules or apply domestic legislation mirroring the Hague Rules, slightly under two-fifths, including New Zealand, Australia, the United Kingdom, Canada and South Africa are signatories to The Hague-Visby Rules (with or without the SDR Protocol, so package limitation levels can vary dramatically) or apply analogous domestic legislation, and roughly one-fifth, including Austria, Egypt, Hungary and the Czech Republic, are signatories to The Hamburg Rules. Some countries are not parties to any of the Conventions, but have enacted uniform rules in domestic legislation (Myburgh, 2002).

Over the years, various courts of various countries have interpreted the Hague Rules and Hague-Visby Rules somewhat differently because of the growing disagreements between nations over the interpretation and substance of those conventions. The current liability framework does not reflect the developments that have taken place in terms of transport patterns, technology and markets. As a result, the law governing the carriage of goods by sea is now confused and the liability rules vary greatly from case to case. There is considerable dissatisfaction with many aspects of each of these regimes.

- The Hague and Hague-Visby Rules are often characterized as favoring carrier interests and the Hamburg Rules as favoring cargo interests.
- The Rules are outdated and not adapted to new realities of the shipping industry in several respects, such as multimodal transport and containerization.
- They have a limited scope of application (tackle to tackle).
- The limitation of liability is out of date, too low and hard to apply.
- The catalogue of exceptions to liability does not reflect the realities of modern shipping, like sophisticated navigational technology, satellite navigation, sonar, radar and the improved stability of vessels.
- There is no provision for the use of waybills and electronic transmission of data.

Furthermore, The Hamburg Rules are presently the most modern and most complete convention on carriage of goods by sea. The Rules are quite controversial and have not been accepted by any important maritime states, and their shortcomings have provoked much criticism.

The current legal framework is unquestionably fragmented and complex, and has failed to provide the necessary guidelines for assessing liability for cargo loss or damage in an era that is now dominated by containerization. Thus, the greatest shortcomings are: The different grounds of liability, different limitations of liability, different documents with a different legal value, and different time bars.

Many countries like the Nordic countries, Japan, China, the US and Australia recognizing the deficiencies, are moving through local legislation to address its drawbacks by incorporating the best features of both the Hague-Visby and Hamburg Rules.

A uniform and international approach may indeed be the best solution to the situation, and the need to harmonise the liability rules is now stronger than ever, in order to accommodate, the technological and logistical developments in the marine transport industry, make the law clearer, easier to apply and to avoid a conflict of conventions. Otherwise, international carriage of goods by sea will increasingly be governed by divergent national regimes and other uncertainties generating complication and expenses.

Some international organizations like the Comité Maritime International (CMI) and the United Nations Commission on International Trade and Law (UNCITRAL) have been working on reviewing these regimes to develop a new uniform cargo liability regime in a joint project (on an important initiative of the Draft Instrument on Transport Law), commenced in 1996. A preliminary draft was published by CMI on December 10, 2001 called "Final Draft Instrument on Issues of Transport Law". On January 8, 2002 it was delivered to UNCITRAL and is known as the UNCITRAL Draft. There is also the OECD Maritime Transport Committee that has done some conclusions and recommendations in December 2000 on these issues.

In conclusion, a uniform system ensures reliability and tends to avoid conflicts between parties and no one wants a further multiplication of international cargo liability regimes that will proliferate conflict of laws. Hopefully, the marine transport industry will agree and help to update and expand the provisions of the existing regimes to take account of modern transport practices and meet the challenges of this new millennium.

Chapter Three

Package or Unit in the Rules

3.0 Introduction

Today, in most countries the limitation of liability of a maritime carrier is restricted to claims for loss or damage incurred in connection with the goods which are being carried under a bill of lading and limited to a specified amount that is calculated with reference to particulars of the cargo like per weight, package, or unit of the goods carried. The “package” limitation was described by Simon (1977, p. 489) “as an early consumer protection law”, because it was designed to stop the ship owners’ practice of limiting their liability to a ridiculous amount by inserting clauses in the bill of lading.

Article IV, Rule 5, of the Hague and the Hague-Visby Rules and, Article 6 of the Hamburg Rules, address how to compensate and limit cargo damages, depending on the way in which that cargo was packaged and shipped. However, it can be observed that there is still uncertainty with the above articles about the meaning in practice of the term “package or unit”, which is not sufficiently precise to fit various shipping practices.

3.1 The “Per Package or Unit” Concept

The per package limitation was intended to include all the ordinary packages customarily in use at that time where they were handled individually by hand in the

form of barrels, sacks, cartons, boxes, crates... etc, as forklift trucks, containerships, containers and similar mechanized cargo handling equipment were not even invented. The advent of containerization gave rise to a number of legal problems, and determining how the loss should be allocated in a liability situation created a challenge to courts, scholars, insurers and legislators. Many shippers of goods have learnt from their cost that there is a problem, which really needs to be addressed.

Moreover, disputes over the package limitation often generate heated conflict and even moral indignation. Before the increase of the liability limitation under COGSA to \$500 in 1936 (in the United State), it was described a handsome sum, like in 1898 in the *Calderan v. Atlas S.S. Co.* case, but relatively after in 1958 it was described as a pittance, as it was stated in the *Gulf Italia v. S.S. Exiria* case. Nevertheless, a shipper is never entitled to recover more than its actual damages.

3.1.1 The “Per Package or Unit” Concept of The Hague Rules

The Hague Rules 1924 have had the merit to set the first international step for the development of a liability regime in the Carriage of Goods by Sea. Article IV Rule 5 provides liability for the carrier: “...in an amount not exceeding £100 per package or unit, or the equivalent of that sum in other currency...”

The only limit of liability available in the Hague Rules is per package or unit and there is no weight-based limit. However the Rules did not define the concepts of “package or unit”, and are so outdated today that the Rules do not consider containerized and palletized goods because these packages were not concerned in 1924, and did not give sufficient assistance in the bulk cargo trade.

3.1.2 The “Per Package or Unit” Concept of the COGSA 1936

The Carriage of Goods by Sea Act adopted a slightly modified form of the “per package limitation” provisions of the Hague Rules. Section 4(5) of the US COGSA 1936 contains the words “... in an amount not exceeding \$500 per package lawful money of the US or in the case of goods not shipped in packages, per

customary freight unit . . . “, which is another expression of the “per package or unit” concept of the Hague Rules. The Rules contemplate two kinds of cargoes:

- Goods in a package, and
- Goods not in a package.

If the goods are shipped in packages the carriers’ liability shall not be more than \$500 per package. If the goods are not shipped in packages, the carriers’ liability shall not be more than \$500 per customary freight unit, e.g., \$500 per cubic feet, lbs, or other such measure.

In the *Pannell v. United States Lines, Inc* case, the court stated: “The purpose of the Act’s limitation section is to prevent excessive claims for small packages of great value and yet not permit carriers to escape liability for just claims”.

Moreover, a carrier who fails to provide the shipper with the opportunity to declare a higher value will be denied the right to limit its liability under COGSA 1936.

3.1.3 The “Per Package or Unit” Concept of The Hague-Visby Rules

In 1968 the Visby amendments reflected an international reaction to the advent of containerization. Article IV, Paragraph 5, of The Hague Rules has been amended by Article 2 of the Brussels Protocol of 1968, and in substitution of Article IV, Paragraph 5, there is a new Paragraph 5 with a number of sub paragraphs.

So far as the “Package Limitation” is concerned, it did not change the wording of the “per package or unit” limitation. However the Rules adopted a way of solving the question of containers by relying on the description of the goods in the bill of lading, as it is shown in Article 4 rule 5 (c) the “container clause”, which basically means that if packages or units are enumerated in the bill of lading as being packed in the container, then the package or unit basis will be adopted. If the packages or units stowed in the container are not enumerated in the bill of lading, then the container will be regarded as the package or unit. This provision seemed to

cure the container problems, but a question arose immediately as to its interpretation.

Moreover, the Rules also introduced an alternative formula based on the weight of the cargo in Article IV rule 5 (a) which gives the shipper the right to opt either for compensation on a per kilo basis or on a per package or unit basis.

This alternative is particularly relevant in the case of bulk cargo, where the weight is actually the best specification of quantity and in the case of “heavy” cargoes. On the contrary in the case of “light” cargoes it is more likely that the limitation based on the number of packages will result in a higher limit.

Example “light” cargo

100 packages weighing 1 kilo each

- Number of packages limit = $100 \times 666.67 = \text{SDR } 66667$
- Weight limit = $100 \times 1 \text{ kilo} \times 2 = \text{SDR } 200$

Example “heavy” cargo

3 packages weighing 1000 kilos each

- Number of packages limit = $3 \times 666.67 = \text{SDR } 2000.01$
- Weight limit = $3 \times 1000 \text{ kilos} \times 2 = \text{SDR } 6000$

Article III Rule 5 (g) provides that the parties may agree a higher limit of liability by inserting the value of the goods in the bill of lading. Unfortunately, again the amendment does not clarify the interpretation of the phrase “per package or unit”.

3.1.4 The “Per Package or Unit” Concept of the Hamburg Rules

Article 6 (1) (a) of the Hamburg Rules limits the liability of the carrier to an “... amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogram of gross weight of the goods lost or damaged...”. In Art 6.1(a) a clear statement has resolved the conflict between “shipping” and

“freight” units that will be discussed later in this chapter “that the unit is a package or other shipping unit”.

For the containerization purpose the Hamburg Rules adopted the same “container clause” solution of the Hague Visby Rules in Article 6 (2). Moreover, in Article 6 (2) (Rule b) it had also introduced a new element in the application of the liability limitation to containers, pallets or similar articles of transport. In cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the carrier, is considered one separate shipping unit.

3.2 Analysis of the Terms “Package” and “Unit”

In order to clarify the confused meaning concerning the “per-package” limitation, the following questions will be discussed:

- When is a package not a package?
- Is size relevant and is it essential that the article carry some form of wrapping?
- What does the word “unit” mean? Is it the physical unit received for shipment or does it mean the weight or the volume unit by which the freight is calculated that is to say “freight unit” in cases when goods are shipped in distinct unpacked or uncovered units?
- Is the limit calculated with reference to the total number of packages enumerated on the bill of lading or with reference to the number of packages actually lost or damaged?
- When is a container not a container?
- Is the container a “Package” or “Unit”?
- What happens if that container or pallet is used to contain other smaller “packages” or “units”?

First of all, since the basis of the limitation of the carrier’s liability depends on whether the cargo is contained in “packages”, or shipped as “units”, it is necessary

to know the difference between and the definitions of “package” and “unit”, terms left undefined by the rules.

3.2.1 What Is A Package?

The package limitation is easy to apply so long as it is clear that the goods have been packaged. However, the meaning of the phrase “package” is not clear.

One could say that packing is the major contribution to safe arrival of merchandise at the consignee’s address. The Webster’s Third New International Dictionary defines a packages as “a small or moderate sized packed: Bundle, parcel...a commodity in its container.... a covering wrapper or container...a protective unit for storing or shipping commodity” (Merriam-Webster Inc, 1993, p. 1617). Mean while a CMI definition states that: “a package is a wrapper, case, bag, envelope or platform, etc. in which or on which cargo has been placed for carriage” (M’Baye, 1990, p. 90). For example, cartons have been one of the most common functional types of packaging, which are constructed for a single voyage and destroyed on opening.

Generally, the manufacturer of the goods or exporter supplies a package, and since the importer pays for the packaging then it belongs to him. In other words, a package holds and protects the goods for a single voyage, and generally it is used by the shipper and accepted by the carrier. Moreover, packaging might just as easily be intended to help identify goods.

The term “package” is not defined in any of the Rules. In the *Hartford Fire Insurance Co. v. Pacific Far East Line* case, the court stated, “Since no specialized or technical meaning was ascribed to the word ‘package’ we must assume that Congress had none in mind and intended that this word be given its plain, ordinary meaning”. So far the courts have not been able to come up with a clear, simple answer to the question. However, they continued to develop its meaning on a case-by-case basis.

One of the oldest cases, where a package limitation in respect of “packages”, appeared, was in 1874 in the *Whaite v. Lancashire & Yorkshire Ry Co* case, where it was held to apply to a “four-wheeled wagon with wooden sides but no top” containing painting pictures, which was placed on a railway truck. In these times the Carriers Act 1830 used the words “contained in any parcel or package”. However, it appears that the *Bekol B.V. v. Terracina Shipping Corp*, (unreported) July 13, 1988, (cited in *The River Gurara* case), was the only English case on the meaning of the word package in the Hague Rules (Treitel & Reynolds, 2001, p. 527).

On the other hand, there are many cases on the meaning of the word “package” in the United States jurisdiction, where some of them will be reviewed as follows:

One could take the example of the *Middle East Agency, Inc., v. S.S. John B. Waterman* case, in which the court held that a machine shipped on skids was a “package” for limitation purposes. Another decision in *Gulf Italia Co., v. S.S. Exiria*, held that a semi-boxed tractor partially covered with wooden planking to protect it, was not a “package” because the covering was not intended to facilitate transportation. Moreover, in the *Mitsubishi Int’l Corp. v. Palmetto State* case, the court ruled that where cargo is shipped in an enclosed box, the box is a package, regardless of size or weight.

In the *Aluminios Pozuelo Ltd. v. S.S. Navigator* case, the court had given a more detailed definition “If the cargo, irrespective of its size, weight, or shape, is fitted into or on some packaging preparation that facilitates handling or stowage, it will be considered to be shipped in a package”. Furthermore, it was decided in the same case that a toggle press had been shipped as a package as long as it was on some form of rack, skid, or cradle.

However, many questions rose, like how much packing or covering is required to establish that the goods constitute a “package”. United States decisions support the view that a “package” under the Rules does not need to be completely covered, wrapped or packed (Selvig, 1967, p. 116). Finally, in the *Tamini v. Salen*

Dry Cargo AB case, the court stated: "Only cargo that is shipped unenclosed and fully exposed is not in a 'package' under COGSA".

Another problem also arises in applying this rule to pallets or containers, which were unknown when the Hague Rules were drafted. The question is whether a container or a pallet constitutes a "package", regardless of the number of smaller packages stowed inside the container or on the pallet.

To answer the above question the author found that in the *Eagle Trading Corp. v. S.S. Yang Ming* case, the court held that "containers and pallets are quite different as the container cases involve factors not found in pallet cases like their size and their function in the shipping industry".

For example, in the case of a pallet, in the *Standard Electrica, S.A. v. Hamburg Sudamerikanische and Columbus Lines* case, the court held, after divining the parties' intent that, "because each pallet constituted an integrated unit, capable of, and intended for, handling then the pallet is a package. However, it required distinct analyses for containers". Moreover, as far as a container is concerned, in the *Stolt Tank Containers, Inc. v. Evergreen Marine Corp* case, the court stated "A container can also be a package where the cargo is not capable of being stored in smaller sub-units".

Finally one can summarize this part by answering the following questions: When is a package not a package? Is size relevant? And is it essential that the article carry some form of wrapping?

The term package has a distinct content. It only includes goods irrespective of their size, weight, or shape, which are packed into or on some packaging preparation that facilitates handling or stowage, and it is not necessary that the goods be completely covered as long as they are on some form of rack, skid, or cradle. They must, however, be packaged or wrapped, otherwise the limitation will be based on the "unit". Moreover, a container can also be a package in the case where the cargo is not capable of being stored in smaller sub-units.

3.2.2 What Is A Unit?

In the case where no packaging is used, the limitation will be calculated on the number of “units” as provided under the Hague Rules in art 4(5) and Hague Visby Rules in art 4(5) (a), “customary freight unit” under COGSA Art. 4(5), or the number of “other shipping units” under the Hamburg Rules art 6(1) (a)

The word “unit”, especially, has been called “flagrantly ambiguous” (Unctad, 1971, p. 45). The unit could be the customary freight unit (as used in the United States COGSA, Art. 4(5) and Swiss Maritime Code Art 105), on which the freight for the carriage of the goods is calculated. It could be the physical shipping unit or a unit of cargo (as used in the Italian Naval Code, Art. 423, S.M.C. 122), e.g. an unboxed car, a bale, a barrel, a sack or an item of machinery, or it could be the expression “commercial unit” as it is stated in the Hague Rules Art. 3 (4); “...normally, the quantity of goods is stated in the shipping unit or the commercial unit....” as used in commercial practice like the standard measurement for wood.

First of all, it can be said that a unit is an identifiable item, which cannot be called a package, for example a car or even a log (Treitel & Reynolds, 2001, p. 527). Moreover, under the English interpretation, every package would be a unit, but not every unit would be a package as it was discussed in the *Studebaker Distribs, Ltd. v. Charlton Steam Shipping Company Ltd* case. The court held that the word “unit” in article IV (5) of the British Carriage of Goods by Sea Act, “is a part of a cargo, similar to a ‘package’ but not strictly includable in the definition of a package”.

Secondly, if the goods are shipped in distinct unpacked or uncovered units, it is necessary to know which interpretation of unit is to be used, e.g. shipping unit or freight unit, in order to apply the limitation of liability.

3.2.2.1 What is a Shipping Unit?

In the *Studebaker Distribs, Ltd. v. Charlton Steam Shipping Co* case, the court held that the word “unit” refers to the shipping unit. In another decision in the

Canadian case *Falconbridge Nickel Mines Ltd v. Chimo Shipping Co*, the Supreme Court of Canada said: “the word ‘unit’ would . . . normally apply only to a shipping unit that is a unit of goods, in a case of damage to an unboxed truck”.

Moreover, Danish, German, and Norwegian courts have stated that an unboxed car is a shipping unit, which was the same in a case of a barrel of Vaseline and a cask of wine in a Danish and a French decision (Selvig, 1967).

3.2.2.2 What is a Customary Freight Unit?

One of the first American cases that tried to find a workable definition to the commercial meaning of the phrase “per customary freight unit” was in the *Brazil Oiticica, Ltd. v. The Bill* case, where the term customary freight unit “referred” to the unit of quantity, weight, volume unit or measure of the cargo customarily used e.g. tons and cubic feet, as the basis for the calculation of the freight rate to be charged.

Generally, in marine contracts the word “freight” was defined in the *Asfar v. Blundell* case, as used to denote remuneration or “reward payable to the carrier for the carriage and arrival of the goods in a merchantable condition”. For example, in the *Barth v. Atlantic Container Line* case, where a flat rate of freight was charged for each car shipped, the limit of liability was \$500 per car. However, in the case where freight is computed on a lump sum basis for the entire shipment, rather than by weight or measurement, the \$500 limitation figure applies to the entire shipment as stated in the *Ulrich Ammann Bldg. Equip. Ltd. v. MN Monsun* case. Furthermore, in the *Brazil Oiticica, Ltd. v. The Bill* case, the courts have interpreted the terms per package or per customary freight unit as “mutually exclusive rather than similar and overlapping”.

The evidence to prove the basis of the freight rate for the determination of the “customary freight unit” would be found in the bill of lading, as explained in the *Indian Supply Mission v. S.S. Overseas Joyce* case, “.... to prove the basis of the freight ratein the determination of the ‘customary freight unit’, have been overcome by requiring the parties and the courts to look only to the bill of lading for

guidance". For the qualification that to be "customary", the court stated in the *Freedman & Slater, Inc. v. M.V. Tofevo* case, that " the unit on which freight was computed should be one well known in the shipping industry or at least to the immediate parties".

Finally, to answer the questions like: What does the word "unit" mean in cases when goods are shipped in distinct unpacked or uncovered units? And is the term "unit" intended to refer to a shipping unit, or would it equally apply to a freight unit? The following conclusions can be driven.

First of all, a unit is an identifiable item that cannot be called a package. From the review of the above different cases it was found that, "unit" refers to the shipping unit or a unit of goods, like an unboxed car, a barrel of Vaseline, a cask of wine, a bale, a barrel, a log of wood, a yacht, a sack, or an item of machinery. One could say that the words "shipping unit" mean each physical unit or piece of cargo not shipped in a package.

On the other hand, freight unit could be applied to bulk cargo as well as machinery and equipment shipped uncrated or unpackaged. It refers to the unit of quantity, weight or measure of the cargo used as the basis for the calculation of the freight rate to be charged. In conclusion, one can find that in practice usually calculations based upon freight units will be higher than those based upon shipping units (Unctad, 1971, p. 45).

3.2.3 Bulk Cargo

In *The Pioneer Moon* case, bulk cargo was defined as a cargo that is trimmed and not stowed. It includes such cargo as coal, grain or oil in bulk, but not planks, bagged grain or cargo in cases. More details are in the Brazil *Oiticica, Ltd. v. The Bill* case, which described the bulk cargo as "...unpackaged, identified, and subject to carrier's inspections."

Firstly, one can say that the word “package” must indicate something packed. Secondly, the word “unit” refers to the shipping unit that is a unit of goods, which could be described as a physical unit. So in the case of a shipment of grain in sacks the limitation per “package or unit” can be applied as stated in the Rules,

However, in the case of a shipment in bulk, one cannot rely on any “package limitation”, as it is neither a package nor a physical shipping unit. In the English case of *Studebaker Distributors Ltd. v. Charlton Steam Shipping Company Ltd* case, the court stated “bulk cargo cannot rely on any ‘package’ limitation as the cargo is not a physical package or unit”.

On the other hand, one can rely on the weight limit alternative as stated in the Hague Visby Rules, but not in the Hague Rules. Moreover, in the case of COGSA 1936 the “freight unit” can be applied to bulk cargo as stated in *The Pioneer Moon* case, a “freight unit would be particularly appropriate when dealing with bulk cargo such as grain or oil”. Furthermore, Schoenbaum (2004, p. 375) explained, “The freight unit limit applies to bulk cargo as well as machinery and equipment shipped uncrated or unpackaged”.

In conclusion, for the question what happens if that container is used to carry bulk cargo? The answer would be:

Bulk cargo is cargo, which is trimmed and not stowed, and includes such cargo as coal, grain or oil in bulk, but not bagged grain or cargo in cases. The limit of liability amount has to be based on the weight or volume unit used in calculating the freight in the case of the COGSA 1936, or on the weight or volume unit in which goods are described in the Bill of Lading in the case of the Hague Visby Rules, but the Hague Rules do not provide the weight limit alternative.

3.2.4 What Is a Container?

In the *Northeast Marine Term, Co. v. Caputo* case, the Court has declared, “The container is a modern substitute for the hold of the vessel”. Conversely, Boyd,

Burrows, and Foxton (1996, p. 376) have described the container as “... no more than a sophisticated form of package....” However, the United States Coast Guard proposes a more detailed definition of “container”.

An article of transport equipment (lift van, portable tank, or other similar structure including normal accessories and equipment when imported with the equipment), other than a vehicle or conventional packaging [which is] ... strong enough to be suitable for repeated use; . . . specially designed to facilitate the carriage of goods by one or more modes of transport, without intermediate reloading... fitted with devices permitting its ready handling, particularly its transfer from one mode of transport to another; [and] ... so designed as to be easy to fill and empty.
(Schmeltzer & Peavy, 1970, p. 203)

3.3 Legal Implications of the Container Revolution

The problem of determining how the loss should be allocated in a liability situation has created many problems. Of all the legal problems that have arisen out of the “container revolution”, none has been more confusing for shippers, carriers, underwriters and courts alike than the question of the meaning of the word “package” as used in the Rules.

For instance, containers is sometimes treated as “a package” like in the *El Greco* case, sometimes as a “part of the ship” like in the *PS Chellaram & Co, v China Ocean Shipping Co (The Zhi Jiang Kou)* case, and at other times as “a means of transport” as described in Art II of the IMO International Container Safe Convention (Admiralty and Maritime Law Guide, 2006).

However, the problem is not to decide if a container is a package or if a carton of goods are a package, the problem rather is to determine if the term “package”, referred to in the Rules, is the container itself or the package inside.

Countries that have adopted the Visby amendments to the Hague Rules like the UK, should have no problem with goods in a container as it was solved in Article IV (5) (c) and it should be clear. However, the United States has not adopted the Visby amendments, and it is particularly in US legal jurisdictions that the controversy has raged most fiercely over whether the container, or the goods within it, constitutes a package or customary freight unit, but there is also case law in other jurisdictions.

3.3.1 Judicial Interpretation under COGSA 1936

The US courts developed three separate and distinct methods of dealing with the problem in order to provide a fair and sensible interpretation of existing legislation. In the *Bin Laden BSB Landscaping v. M/V. Nedlloyd Rotterdam* case, the court indicated that, “the technology of containerization has led to the formulation of specific rules regarding the package limitation to containers”.

3.3.1.1 The First Approach

Courts have formulated two questions to throw new light on the package question, which is called the “simple” test or the choice and description tests to containers.

1. Did the bill of lading describe the container as a “package”?
2. Who had chosen the use of the container?

First, in the case where the bill of lading acknowledges that the contents of a container are listed as separate items, then each item should be treated as an individual package for limitation purposes, like in the *Leathers Best v. The Mormaclynx* case, which was the cornerstone of American jurisprudence on

container package limitation, where the judge was influenced by the fact that the contents had been enumerated in the bill of lading.

For this first test it can be seen that it is the same way as that required by the Hague-Visby Rules in the “container clause”. There are some European cases also that support this test like in the *Societe Navale Caennaise v. Gastin* case, the French Court of Cassation held that the container was not a package because the bill of lading listed the number of bales in the container.

Conversely, in the *Standard Electrica S/A v Hamburg Sudamerikanische* case, the container itself was treated as the package because the bill of lading merely referred to the container without listing its contents.

In the same latter case, another question arose which was whether the word “package” included palletized cargo. The court held that since the parties themselves had described the pallet as a “package” in the bill of lading, “the application of the \$500 ‘package’ limitation to each pallet was fair”.

The *Hayes-Leger Assocs, Inc. v. M/V Oriental Knight* case summarized this approach as follows:

When a bill of lading discloses the number of COGSA packages in a container, the liability limitation of section 4(5) applies to those packages; but when a bill of lading lists the number of containers as the number of packages, and fails to disclose the number of COGSA packages within each container, the liability limitation of section 4(5) applies to the containers themselves.

The same way was used in the *Monica Textile Corp. v. S.S. Tana* case, where the court stated, “containers generally should not be treated as packages”. Under this doctrine, containers are only treated as COGSA packages if their

contents are not listed in the bill of lading, or the parties explicitly agree that the container is the package.

Therefore, if the bill of lading states “One container containing boxes”, there is no enumeration, thus the container is the package. If the statement is “One container containing 500 personal computers”, the packages or units so enumerated are the packages or units for limitation purposes.

Secondly, who had requested to use the container?

In the *Societe Navale Caennaise v. Gastin* case, and the German Bundesgerichtshof, March 18, 1971, it was held that when the ship owner puts at the disposal of the shipper a container in which goods are delivered to the ship owner, the container should be considered as the packing for the goods. Therefore, the container itself is presumably an extra package or unit, if the shipper provides it.

In conclusion, if the shipper chooses the use of a container and the bill of lading counts each container as one package, the limitation should apply to the container. Conversely, in the case where the carrier packs the goods in the container and the carrier tallies the number of cartons and receipt of their number is acknowledged in the bill of lading, the package limitation should be applied to the number of cartons, placed in the container.

However, the carrier can reject the shipper's description if he has no means of checking the content of the container unless the value is declared and extra freight paid.

3.3.1.2 The Second Approach (the Functional Packing Test)

In this approach the Courts have based their decisions on the so-called “functional packing” test. The question has been about whether the contents of the container could have feasibly been shipped overseas in the individual packages or cartons in which they were packed by the shipper. If the individual packing were

adequate to withstand the hazards of transport as a conventional break-bulk cargo, then each one would count as a separate package for limitation purposes.

In other words, when the shipper's own packing units are functional for overseas shipment, which means that the packages are not packed in the container, they are just stowed there, and then the container should not be treated as the "package". On the other hand, if the presence of the container were essential for the goods preservation, then the container would count as a package for limitation. The leading case in which this approach was advanced was the *Royal Typewriter vs. MV Kulmerland*.

However, this test could be rebutted by evidence that the parties intended to treat the cartons as "packages". This could not be shown in the *Royal Typewriter* case, as the bill of lading did not describe the number of cartons. The functional packing test was supposed to be used in a case where the shipper has chosen the container.

Later on many scholars and experts criticized this second approach as it was commercially impracticable and did not reflect the realities of the maritime industry. As it is well known, one of the greatest cost savings of containerization results from elimination of the normal cost of export packing that is why this approach was described as unwise.

In the *Matsushita Electric Corporation of America v SS Aegis Spirit* case, the functional test was rejected and described as impractical. The court stated that

It was unfair for the shipper to be penalized for availing himself of more economical packaging made possible through containerization while the so-called 'functional test' took no account of the corresponding economic benefits from containerization enjoyed by the carrier.

The aim of the court was to find an approach that reflected the realities of the maritime industry of today, which has led to the rejection of the functional packing test. Clearly, in the opinion of the author “the functional packing” approach may cause confusion and economic waste and encourage even more litigation.

3.3.1.3 The Third Approach (Intention Test)

In this approach the court bases its decision on the so-called intention test. The approach here is to find the party responsible for stuffing the container. If the shipper packs and seals the container without any supervision by the carrier, it is more likely that the courts will treat the container as a package, especially when the shipper fails to enumerate the contents in the bill of lading, as it was in the *Lucchese v Malabe Shipping Co* case.

So in the case where the shipper accepts the “said to contain” description in the bill of lading, it will be understood as an agreement that the parties recognize the container to be the package, as under COGSA, (3) (c), the bill of lading does not need to show a quantity which the carrier “has had no reasonable means of checking”.

Conversely in a case where the shipper packs the container without any supervision by the carrier, and the bill of lading indicates the number of cartons in each container, the container will not be considered as a package, because by disclosing the number of cartons in each container, the carrier has accepted that each carton should be considered a package. This was described in the leading Canadian case the *J A Johnston Co Ltd v The TindenfJell*, where the Carriage of Goods by Water Act is similar in nature to the US Carriage of Goods by Sea Act. The court stated, “The carrier could have refused to issue a bill of lading describing the cartons and could have insisted on a count, but did not”.

It can be concluded from the above approaches that in reaching its decision for each case, the court has to consider different facts, not just the words used in the

bill of lading, to determine whether the container is or is not to be treated as the COGSA package.

Obviously, the best solution is the first approach which was used in *Standard Electrica*, and of the trial court in *Kulmerland*, since it can be easily determined whether the shipper chooses to use the container and whether the description in the bill of lading treats the container as a package. This approach is similar to the “container clause” in the Visby amendments.

On the other hand, the question has been asked whether the limit is calculated with reference to the total number of packages enumerated on the bill of lading or with reference to the number of packages actually lost or damaged.

Under article IV rule 5 (a) the package limit is to be calculated with reference to the goods “lost or damaged”. Therefore, it is the quantity actually lost or damaged which is relevant not the quantity described on the bill of lading. In the case of a total loss it would be obvious that the whole quantity described is relevant. If for example, the bill of lading described 300 packages and 100 have been found damaged the Rules limitation will be calculated with reference to the number of packages, which have in fact been lost or damaged. Conversely in the case where the container is described as a package then the limitation in case of damage is calculated to one package lost or damaged instead of the 100 packages damaged inside the container.

Finally, in the case where the carrier consolidates goods that belong to different persons in one container and issues separate bills of lading for the individual shipments, in this situation, the container clearly cannot constitute a single package (Unctad, 1971, p. 46).

3.3.2 Judicial Interpretation under the Hague-Visby Rules 1968

It was understood that Article IV (5) (c) in the Hague-Visby Rules, the “container clause” had solved the package limitation problem when the goods are in

a container. However, in order to have a clear idea on how to apply it in practice, the author believes that the best example would be the court decision in the *El Greco (Australia) Pty Limited & Anor v. Mediterranean Shipping Co. SA* case, which is from the point of view of the author, very clear, easy to apply and straightforward. The analysis review of the case will be as follows:

The plaintiffs: *El Greco (Australia) Pty Limited & Anor*

v.

The defendant: *Shipping line, Mediterranean Shipping Co. SA*

3.3.2.1 Facts

- A quantity of posters and prints shipped in a 20ft container was damaged by sea water,
- The posters and prints were placed in approximately 2000 packages, which in turn were placed within a single container.
- The cargo was covered by a non-negotiable received for shipment through bill of lading,
- The bill issued by the defendant described the goods as:
“1 x 20 ft FCL/FCL GENERAL PURPOSE CONTAINER SAID TO CONTAIN 200945 PIECES POSTERS AND PRINTS.”
- Under the column in the bill headed “No. Of Pkgs.” was inserted the number “1”,
- At the bottom of that column, as the “Total Number of Packages” was also inserted the number “1”.
- Clause 21 of the bill stated that “Where the goods have been packed into containers by or on behalf of the Merchant, it is expressly agreed, that each container shall constitute “1” package for the purpose of application of limitation of the Carrier’s liability”.
- The defendant argued that it was entitled to limit its liability to the container as a package, because it said that there was only one package for the purposes of the Hague-Visby Rules, Article IV Rule 5 (a).

3.3.2.2 Issues

One of the most important issue in this case concerned limitation under the Hague-Visby Rules, Article IV Rule 5. The precise number of pieces shipped was disputed. The question was whether, for limitation purposes, the cargo were to be treated as constituting “1” or “200, 945” units.

3.3.2.3 Analysis

The starting point will be the clause 21 in the bill of lading which needs to be considered as void, because it was an attempt by the carrier to reduce its liability, as provided under Article III Rule 7 of the Hague-Visby Rules.

The second point in this analysis would be to focus on the descriptions in the bill of lading under the two columns so-called “No. of Pkgs.”, and “Description of Goods”

a) “No. Of Pkgs” Column

The bill of lading did say under “No. Of Pkgs.” the number “1” that could be best understood as a statement that the container was the package, not what was contained in the container.

b) “Description of Goods” Column

The second point in this case would be the controversy about the word “piece”. Article IV deals with the rights and immunities of the carrier, however, for limitation purpose in Article IV rule 5 (c) does not refer to the word “pieces” contained within the container but it refer to packages or units as packed. As regards the limitation point, Article IV rule 5(c) provides:

Where a container, pallet or similar article of transport is used to consolidate the goods, the number of packages or units enumerated in

the Bill of Lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.

However, the word “pieces” is found within Article III rule 3 (b), which is concerned with the responsibilities and liabilities of the carrier. It imposes a duty on the carrier to issue a bill of lading, which the shipper may require. It can be read in Article III rule 3 (b) that “Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper”.

The most important point for the limitation purpose, in Art IV rule 5 (c) is that it provides a rule for the description of what is to be enumerated in the bill of lading. The article specifically referred to the enumeration of “package or unit as packed”. From this hypothesis one could understand that the descriptions in the bill of lading “SAID TO CONTAIN 200945 PIECES POSTERS AND PRINTS” are not the description as required by the rules, as they do not refer to the word “pieces” contained within the container.

On the other hand, as was highlighted above, Art. IV rule 5(c) specifically referred to packages or units enumerated “as packed” in such article of transport, the word “as packed” is very important in the analysis of this case.

Under the heading “Description of Goods” on the face of the bill of lading in this case, one could not understand how the cargo was made up for transport. In other words, there was no description on which way the cargo was packaged into packages or units. The description in the bill of lading was an enumeration of the number of “pieces” of cargo, but it did not show the packages or units as packaged, that is, how they were packed and how many there were packaged. The term package was defined earlier in this chapter as goods irrespective of their size, weight, or shape, which are packed into or on some packaging preparation that

facilitates handling or stowage. In contrast, a unit is an identifiable item that cannot be called a package. Moreover it could be described as goods that are shipped in distinct unpacked or uncovered units.

3.3.2.4 Decision

From the above review one could say that the statement “200945 PIECES POSTERS AND PRINTS” was not an enumeration of packages or units as packaged. Accordingly, there was no enumeration in the document for the purpose of Article IV Rule 5(c) of the Hague-Visby Rules.

Finally the Australian Full Federal Court concluded that it was not the intention of the parties in *El Greco* case to enumerate 200,945 pieces for the purposes of limiting the carrier's liability to 666.67 SDR's per poster or print. Therefore, the carrier's liability was limited to one container.

Chapter Four

Suggested Wording in the Bill Of Lading

4.0 Introduction

In determining whether a container is a package, the intent of the parties, as evidenced in the bill of lading, is crucial. A container will not be treated, for example in COGSA 1936 as a package unless it is clearly apparent that the parties so intended. Moreover, a third-party endorsee of a bill of lading may, in a cargo claim, rely exclusively on the description of the goods in a bill of lading. In this respect, the wording of the bill of lading is particularly important. The bill of lading is accepted in every day business transactions and, unfortunately, seldom read until some dispute arises.

4.1 Bill Of Lading

For centuries goods have been carried at sea under two basic contracts: The charter party, which is a contract in respect to the ship and the bill of lading or “bills of lading”, which is a contract in respect to the goods. (In French “*contrat de transport*”, or “*connaissance*”, in Spanish: “*conocimiento de embarque*”, in Italian: “*polizza di carico*”, and in German: “*Konnossement*”).

In the old days, it was customary for a merchant to accompany his goods to the port of discharge where the goods might be sold and the expenses and profits divided between the merchant and the ship-owner. But as trade developed this practice was gradually abandoned. The goods were entrusted to the Master of the vessel, and the necessity then arose for a document that was at first a receipt for the goods but later became as a substitute for the cargo owners' personal attendance. So the bill of lading was born.

A bill of lading is a document of great commercial importance both locally and internationally, it is the focal point of the transaction, because of its special attributes (being a negotiable document, a receipt, and evidence of the contract of carriage all in one), and most importantly it forms the basis for all claims arising from the transportation of goods by sea. It is the document, which specifies the carrier, shipper, receiver, the cargo, the ports of loading and discharge, the vessel name and other important details.

There are some items worth mentioning at this point:

- It should be remembered that in the case of dispute, courts interpret contracts according to the common intention of the parties to it. "The common intention is determined first and foremost by the words used by the parties", as it was stated in *the Peonia* case.
- Most importantly in case of doubt, a contract is construed against the interest of the author of the contract, as it was stated in the *Leather's Best v. S.S. Mormaclynx* case, "A bill of lading, as a contract of adhesion is construed strictly against the carrier."

It is, therefore, important to be aware of the effect of the wording used to describe cargo on the face of a bill of lading when it is drawn up, and how to construe the wording in the event of a claim for loss or damage.

4.1.1 Description in the Bill Of Lading

The letters of credit requirements stipulate that certain descriptions of the cargo have to be shown on the bill of lading. Moreover, the Uniform Customs and Practice for Documentary Credits (UCP 500, 1993 Revision), issued by the International Chamber of Commerce, does not require the full wording of the letter of credit together with a full description of the cargo shipped to appear in the body of the bill of lading, as stated in article 37 (c):

The description of the goods in the commercial invoice must correspond with the description in the credit. In all other documents, the goods may be described in general terms not inconsistent with the description of the goods in the Credit.

Moreover, banks are bound to accept transport documents that bear clauses like “shipper’s load and count” or “said by the shipper to contain”, as stated in (U.C.P. 500, 1993 Revision) Article 31 (ii):

Unless otherwise stipulated in the credit, banks will accept a transport document which: bears a clause on the face thereof such as “shipper’s load and count” or “said by shipper to contain” or words of similar effect.

Bills of lading as “other documents” need only to state the general terms and no further details. The main details shown in the bill of lading are commercial details provided and required by the shipper for commercial or letter of credit purposes, the accuracy of which the shipper guarantees and for which the carrier accepts no responsibility.

4.1.2 What Must Be Stated On The Bill Of Lading?

Space is provided in the bill of lading to identify the goods by marks, state the quantity or number of pieces or packages, describe the nature of the goods, and state the gross weight (pounds) or measurement (cubic feet).

Art. III (3) of the Hague, the Hague-Visby Rules and COGSA (1936) oblige the carrier, at the demand of the shipper, to issue a bill of lading stating:

- a) How the goods are marked for the purposes of identification;
- b) The apparent order and condition; and
- c) Either the number of packages or pieces or the quantity or the weight of the goods as furnished in writing by the shipper.

Furthermore, other pieces of information need to be stated, namely, the names of carrier, shipper, and consignee, ports of loading and discharge, freight payable, date of delivery of cargo, and any increased limit of liability. The shipper is deemed to guarantee to the carrier the accuracy of any of the particulars about the goods packaged, or contained for shipping, and the shipper will be liable for any losses resulting from inaccuracies.

4.2 Suggested Wording

The parties need to be able to identify on the bill of lading the enumeration of packages or units “as packed”. They need to enumerate on the face of the bill of lading how the goods were packed and how many there were.

The bill must make that clear. On the face of the bill of lading under the heading “Description of Goods”, one could tell how the cargo was made up for transport into packages or units or packing. Whilst, under the heading “No. of Pkgs.”, one could tell how many there were.

However, dealing with the realities of containerization, there could be two different situations. If the carrier receives the container already packed and sealed by the shipper, which could mean that the carrier was not involved at all in packing the container, e.g. FCL container, or the situation where the container has been filled, packed, stowed, stuffed, or loaded by the carrier, e.g. LCL container.

4.2.1 If the Container is Stuffed by the Carrier

When, “stuffing” is performed by the carrier or his agent, the bill of lading particulars must include such details of the cargo as are visible to inspection at the moment of receipt by the carrier.

4.2.1.1 The Number of Packages or Units

The margin “number of packages” contains the tally that the carrier acknowledges and for which he accepts responsibility. A valid enumeration is one that clearly identifies the number of packages or units as packed. If the bill of lading states under the heading “No. of Pkgs.”, “One container containing general merchandise” there is no enumeration, then the container and its contents are themselves the package. If the statement is “One container containing 400 personal computers”, the packages or units so enumerated are the packages or units for limitation purposes. If it is “One container containing 200 personal computers and general merchandise”, the computers are packages or units and the general merchandise is either one package or is assessed by weight. In other words, the number of packages that are declared must be indicated in the number/quantity (“No. of Pkgs”) column on the bill of lading.

The number of packages should always be fully and accurately disclosed and easily discernable by the carrier. If the enumeration is wrong, the liability must be calculated up to the maximum enumerated only; though if less goods are shipped than are enumerated, the enumeration will only apply to what was actually shipped.

4.2.1.2 The Way of How the Goods Were Packaged or Packed

The bill of lading must use words to state clearly the description on how the cargo was packaged, packed or prepared for handling. There is a need to have a word that shows whether the cargo is “packed” in the container, and how the cargo was made up or the preparation of the goods for transport, for example by the use of words such as “packages”, “cases”, “boxes”, “bundles”, “bales”, “crates”, “cartons”, “pallets”, or the like. If the contents of the container are described by words, which leave it unclear whether they are separately packed items for transportation, the container will be the package and not the individual items.

If a bill enumerates the contents of a container “ten crates of computer equipment”, the container will not be considered a COGSA or the Hague Rules package, but each crate inside the container will be regarded as a package for limitation purposes. On the other hand, if the bill of lading describes the cargo as “one container of computer equipment,” the container will be considered as one package. The words in the rules “as packed” are important, and even if the number “1” designating that the goods are carried in one container is inserted in the “Number of Packages” box in the bill of lading, that provision will be overridden by other provisions in the bill of lading, e.g. “five crates of computer equipment” inserted in the “Description of Cargo” box.

4.2.2 If the Container is Stuffed by the Shipper

When “stuffing” is performed by the shipper, the bill of lading is usually marked “shipper’s load and count”, “said to contain” (in French: *Declare contenir*) or “container sealed by shipper”

The carrier can confirm only details of which he has personal knowledge and certainty. If he receives a shipper’s loaded and sealed container, and if no tally was carried out by the carrier or his agent, it is impossible for him to confirm the exact number of cartons the shipper said he loaded into the container and the carrier should avoid confirming this. Under Art III rule 3(b) the carrier is not required to

acknowledge the quantity of cargo shipped unless he has a reasonable opportunity to check it. The carrier will often refuse to enumerate the number of packages unless the enumeration is qualified by the phrase “said to contain” or “shipper’s load stowage and count”.

If the bill of lading says the cargo is “one container said to contain 200 packages” then the number of packages to use in the limitation calculation would be 200. However, if the individual packages are not enumerated in the bill of lading, the number of containers should be used.

In the *Du Pont de Nemours International SA v SS Mormacvega* case, the bill of lading referred to “1 container said to contain 38 pallets synthetic resin liquid”. With this description, the court decided that each of the pallets was held to be a “package”. Conversely, in the *Royal Typewriter Co Division of Litton Business Systems Inc v MV Kulmerland and Hamburg Amerika Line* case, the bill of lading had disclosed on its face “shipper’s load stowage and count”, and “container said to contain machinery”. The court decided that the container was the package.

Because of the bill of lading is marked “shipper’s load and count” the shipper needs to prove that each package listed on the bill of lading was actually stowed in the container in case of litigation, e.g. the carrier’s truck driver’s oral evidence, if he is present at the “stuffing” operation, with his receipt for the inner packages and the consignment note, would be sufficient as good evidence of the contents of the container.

On the other hand, it could be a sufficiently clear indication as to what constitutes a package if the packages are listed on some document other than the bill of lading, as it was stated in *Allstate Ins. Co. v. Inversiones Navieras Imparca*, case, “if a shipper... discloses the number of packages in the container to the carrier in the bill of lading or otherwise, each package or unit within the container constitutes one package for purposes of COGSA”. For example, the court could use the shipping note as a sufficiently clear indication to the number and weight of each package, as the *Tribunal de Commerce de Marseille*, used it. Other documents,

including shipping documents, invoices and packing lists also assist in revealing the intention of the parties.

Moreover, in order to be on the safe side, there must be other evidence to indicate that the contents of the container are “packages”, e.g. testimony, custom and usage in the trade, and photographs, should be sufficient.

4.2.3 Ad Valorem Declared Value of Packages or Unit

In order to avoid further disputes in the package limitation, an option needs to be left open for the shipper. The carrier should give the shipper a fair opportunity to choose a higher limit of liability by paying a higher ad valorem rate. However, evidence has shown that this option is rarely used since an ad valorem increase in freight rates is normally more expensive than the cost to the cargo owner of obtaining his own insurance cover (Selvig, 1960, p. 200).

It means that the carrier's liability may be increased to a higher value by a declaration in writing of the value of the goods by the shipper upon delivery to the carrier of the goods for shipment. As stated under COGSA (1936), a carrier shall not be liable for more than \$500 per package or customary freight unit,”.... unless the nature and value of such goods has been declared by the shipper before the shipment and inserted into the bill of lading.”

Under US legislation especially, it is required of the carrier to give the shipper a fair opportunity to declare a higher value for its goods. It is said “no limitation of liability is valid unless the shipper had sufficient notice of and fair opportunity to avoid the limitation of liability” (Helman, 2000, p. 324).

Such higher value needs to be inserted on the front of the bill of lading in the space provided for it and, if required by the carrier, an extra freight will be paid. It has been stated that “the bill of lading must also afford the shipper an opportunity to declare a higher value, either by an empty space on the bill of lading, or by some other means detailed in the contract of carriage” (Helman, 2000, p. 307).

In order to satisfy the requirement that the shipper should have the opportunity to choose between a lower freight rate and a higher ad valorem rate, the bill of lading should:

- Provide the shipper with a space to declare the value of the goods
- Contain a clause or notice that detailed the limitation of liability (the recitation of the limitation of liability) and the means by which to avoid it.

In the *Pan American World Airways v. California Stevedore & Ballast Co* case, the court stated that “... a bill of lading limitation which does not provide any opportunity for the shipper to declare a higher value is so inconsistent with Art IV (5) as to render the bill of lading provision null and void...”

Furthermore, the court in the *Petition of Isbrandtsen Co* case explained that a bill of lading that contains a clause or notice that detailed the limitation of liability, which shows that the shipper had a choice, “is prima facie proof of its truth”. A bill of lading including these particulars is called an “ad valorem” bill.

Most importantly, one could summarize by saying that “...in a majority of jurisdictions, notice of the limitation must be found solely on the inspection of the bill of lading” (Helman, 2000, p. 324). For example, in the *Leather’s Best, Inc. v. S.S. Mormaclynx* case, the bill of lading stated in capital letters:

SHIPPER AGREES THAT CARRIER’S LIABILITY IS \$500 WITH
RESPECT TO THE ENTIRE CONTENTS OF EACH CONTAINER
EXCEPT WHEN SHIPPER DECLARES A HIGHER VALUATION AND
SHALL HAVE PAID ADDITIONAL FREIGHT ON SUCH DECLARED
VALUATION PURSUANT TO APPROPRIATE RULE IN THE
CONTINENTAL NORTH ATLANTIC WESTBOUND FREIGHT
CONFERENCE TARIFF.

Moreover, it is good to know that when the bill of lading on its face or in a clause states that the container is to be considered the package for liability issues, it is null and void and there can be no binding agreement between the parties, as was discussed in the *Cia. Panamena de Seguros, S.A. v. Prudential Lines* case. Even when the shipper packs the container, such a clause is invalid.

In conclusion, a valid enumeration in the bill of lading in the case where the carrier stuffs a container is one that clearly identifies the number of packages or units as packed. On the other hand, in the case where the shipper stuffs the container and no tally was carried out by the carrier, the solution will be to use such wording as "Said to contain X cases". This shows the intention of the parties to have the individual packages used for limitation purposes. In other words, the "Said to contain" clause will be a sufficient enumeration on the bill of lading to allow the limitation provision to apply to individual packages.

Furthermore, carriers and cargo owners wishing to avoid unnecessary disputes as to limitation amounts would be well advised to enumerate the goods clearly in the bill of lading, indicating the way in which the cargo is packed in the container, whether this is in pieces, packages, boxes, cartons or units. By doing so, costs and risks could be calculated more accurately and easily, and the number of disputes will be reduced to a minimum.

Finally, and most importantly the bill of lading is the contract, the parties must be sure they understand all parts of the bill of lading, including the section detailing the carrier's liability. Contracting parties must pay attention to contractual terms, and be aware of the terms and their meanings expressed in the bill of lading. THEY SHOULD NOT sign the contract until they understand and agree with it.

Chapter Five

Conclusions and Recommendations

5.0 Summary of Findings

The objective of this dissertation was to answer the question of what constitutes a “package or unit” for the purpose of determining the package limitation in carriage of goods by sea?

The answer to this question is of vital importance. Only if “package or unit” is given a more predictable meaning, then the parties concerned will know when there is a need to place the risk of additional loss on one or the other and accordingly, to insure against it.

The relevant and controversial provisions of the Rules for purposes of this dissertation are to be found in Article IV, Rule 5, of the Hague Rules, COGSA 1936, and the Hague-Visby Rules and, Article 6 of the Hamburg Rules, which address cargo liability limitations depending on the way in which that cargo was packaged and shipped.

Two issues are presented under the different rules with regard to the “per package” limit of liability:

- 1) Are the goods shipped in “packages”?
- 2) If so, how to apply the “package” to the Rules?

The interpretation of the expression “package or unit” raises several difficult questions. Neither the Rules nor their legislative history defines the term. Lacking a legislative definition of “package or unit” the courts continued to develop its meaning on a case-by-case basis.

For the first issue, one could say that packing is the major contribution to safe arrival of merchandise at the consignee’s address. It might just as easily be intended to protect or help to identify goods. However, the dissertation has looked at the most leading cases, mainly in the US under COGSA 1936 that had dealt with this issue to find a judicial interpretation within the contemplation of the Rules.

The word “package” is to be interpreted as goods packed into some packaging preparation that facilitates handling or stowage and it could include goods that are not completely covered as long as they are on some form of rack, skid, or cradle.

In other words, in the case where the goods are not completely covered but attached to a structure such as a pallet or skid, and if the attachment is primarily designed to facilitate handling and transportation of the item, the goods so attached would constitute a single package. Moreover, their size, weight, or shapes are not controlling criteria. Finally, a container can also be a package in the case where the cargo is not capable of being stored in smaller sub-units.

When it is concluded that the goods were not packages within the meaning of the rules, the limitation will be calculated on the number of “units” as provided under the Hague Rules in art 4(5) and Hague Visby Rules in art 4(5) (a), “freight unit” under COGSA art 4(5) or the number of “other shipping units” under the Hamburg Rules art 6(1) (a).

It could be said that a unit is an identifiable item that cannot be called a package. Under the Hague Rules and the Hague Visby Rules the term “unit” refers to the shipping unit or a unit of goods, like an unboxed car, a barrel of vaseline, a cask of wine, a bale, a barrel, a sack, or an item of machinery. Under COGSA 1936 the term “freight unit” refers to the unit of quantity, weight or measure of the cargo used as the basis for the calculation of the freight rate to be charged. Moreover, “freight unit” would be particularly appropriate when dealing with bulk cargo such as grain or oil.

The second problem is determining how to apply the “package” limitation to the Rules. The difficulty arises from the fact that at the time when the rules were passed, there was little problem identifying a “package” because most cargo was shipped in break-bulk cartons or packages. The advent of containerized shipping has created additional uncertainty with respect to the “package” issue, as in deciding what is the relevant “package or units” when cargo packages are containerized or otherwise palletised since the container or pallet itself could be considered to be the relevant “package or unit”.

There has been a difference of opinion around the world as to how this problem is to be resolved. The Hague-Visby Rules have largely removed this problem since they provide a test, which is the adoption of the description of the goods in the bill of lading for determining when the container or its contents are to be considered as packages (“container clause” Art. IV (5) (c)).

However, the United States has not adopted the Visby amendments, and it is particularly in US legal jurisdictions that the controversy has raged most fiercely over whether the container, or the goods within it, constitutes a “package” or “customary freight unit”. Because COGSA remains unamended, courts have been stimulated to take a new look at the package limitation in containerized transport.

The US courts developed three separate and distinct methods of dealing with the problem in order to provide a fair and sensible interpretation of existing

legislation, namely the simple test, the functional test, and the intentional test. Later on the functional test was abandoned and described as commercially impracticable.

5.1 Conclusion

In the opinion of the author, the rational way to deal with the container situation would be to focus on three main points:

- Who prepared the bills of lading,
- Whether these documents described the containers' contents, and
- Whether the shippers really packaged their products.

By that it is for the shipper and the carrier to decide whether they want the particular container to be treated as the package or whether they want the smaller packages or units in it to be so treated. The task in determining liability is, then, to see what the bill of lading enumerated by way of packages and units as packed in the container.

5.2 Recommendations

In determining whether a container is a package, the intent of the parties, as evidenced in the bill of lading, is crucial. In this respect, the wording used to describe cargo on the face of a bill of lading when it is drawn up, and how to construe the wording in the event of a claim for loss or damage is particularly important.

Based on the findings in the dissertation, the following recommendations are made. The author believes that if applied faithfully and consistently, they should assist carriers, and shippers to minimize disputes.

If the Container is stuffed by the Carrier

- They need to enumerate on the face of the bill of lading how the goods were packed and how many there were. Under the heading “Description of Goods”, one could tell how the cargo was made up for transport into packages or units or packing. Whilst, under the heading “No. Of Pkgs.”, one could tell how many there were. There is a need to have a word that shows whether the cargo is “packed” in the container, and how the cargo was made up or the preparation of the goods for transport.

If the Container is stuffed by the Shipper

- In this case usually the bill of lading should be marked “shipper’s load and count”, “said to contain” (in French: *Declare contenir*) or “container sealed by shipper”
- If the bill of lading says the cargo is “one container said to contain 200 packages” then the number of packages to use in the limitation calculation would be 200.
- If the individual packages are not enumerated in the bill of lading, the number of containers should be used.
- Most importantly, the number of packages should always be fully and accurately disclosed and easily discernable by the carrier.

Moreover, in order for the shipper to prove that each package listed on the bill of lading was actually stowed in the container in case of litigation, he can rely on:

- The carrier truck driver’s oral evidence, if he is present at the “stuffing” operation,
- The carrier truck driver’s receipt for the inner packages, or
- The consignment note would be sufficient as good evidence of the contents of the container.

In addition, there are other pieces of evidence to indicate that the contents of the container are “packages”, like:

- Invoices
- Testimony
- Custom and usage in the trade, and
- Photographs

5.3 Concluding remarks

It is the author's hope that by providing some suggested wording, such conflicts may be avoided in the future and shippers and carriers alike will be on notice as to how to proceed.

On the other hand, the opinion of the author is that it is unlikely that the last word in the package controversy has been heard, and as long as detailed analysis is required in each case involving container losses. The desire for certainty and predictability can never be satisfied. Expensive litigation will increase until a solution acceptable to shippers, carriers, and insurers is developed.

The author believes that there is an urgent need for a clear legislative, rather than judicial rule regarding containers, which could be done either by:

a) Short term solution

- The ratification of the Visby amendments or pressure for the adoption of the Hamburg Rules.

b) Long term solution

- A drastic revision of the entire maritime regime by calling for international bodies to look again at the unification of the law of international carriage of goods by sea.

Then the controversy should be finally laid to rest.

In conclusion, one can say that “Whoever drafted the Hague or Hague-Visby Rules on package limitation deserves a hearty vote of thanks from maritime lawyers around the world for single handedly keeping them in gainful employment for the last 40 years” (Thomson, 2004).

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