CONTAINERISATION — ITS LEGAL IMPLICATIONS

In recent years containerisation as a revolutionary method of transportation of nearly all types of goods has been fast catching on among people in the shipping and marine insurance world.[1] In place of conventional crates, wooden boxes and packages, container units as standard equipment, specially designed to facilitate transport by sea, rail and air, operated entirely by a single company or firm, are used to provide the much-needed (i) point-to-point, (ii) port-to-port and (iii) factory-to-customer services. Containerisation is favoured on grounds of greater economy, safety to goods, convenience to the parties concerned and, *inter alia,* easy handling, but what remains a matter of some doubt is its legal implications under the Hague Rules.

Carriage on deck

It seems container ships are designed in increasing number to facilitate on-deck carriage of containers, sometimes stacked a few tiers high[2] and carriers often claim it a matter of difficulty to state in advance how many or which of the containers will actually be stowed under deck. Accordingly, rather than run the risk of deviation[3] carriers have resorted to the widespread practice of introducing into the bill an express provision giving them the option of shipping the cargo 'on or below deck at the merchant's risk etc.'

In *Armour & Co.* v. *Leopold Walford Ltd.*[4] a clause in the bill provided: "The company has the right to carry... below and/or on deck... and shall not be liable for... loss damage or injury within the exceptions ... Before the bill was issued a booking slip was sent to the plaintiff containing the following terms: "All engagements are made subject to... conditions and/or exceptions of our bills ... No cargo shipped unless Walford lines bills ... are used ..." Goods carried on deck were damaged and it was held (i) that the plaintiffs had accepted the booking slip and were bound by the clause in the bill of lading and (ii) that defendants were under no contractual obligation to notify plaintiffs of their intention to ship goods on deck.

This case was decided prior to the Hague Rules.[5] An important implication seems to be that where it is provided that a steamer has

1. By 1975 from 50 to 85% of cargo transported between Europe and U.S.A. will be containerised: hearings on S 3235 before Senate Committee on Com., 9th Congress 2nd Session 26 (1968); Container Services of North Atlantic 70-71, John R.I. p. 43.
2. *Journal of Maritime Law and Commerce* (1969), vol. 1, No. 1, p. 81, footnote.
3. Deck-carriage may entitle shipper to rescind it: Royal Exch. *Shipping Co.* v. *Dixon* (1886). 12 A.C. 11; or constitute deviation: St. *Johns Corp.* v. *S.A.C. Geral* (1923) 263 U.S. 119.
4. [1921] 3 K.B. 473; also Peter Helms (1938) A.M.C. 1220.
5. Or Carriage of Goods by Sea Act, 1924, or Carriage of Goods by Sea Ordinance in Singapore.

the liberty to carry goods on deck the bill of lading so issued may not be considered "clean".[6]

In the "Glory",[7] the bill of lading was expressed to be subject to the Carriage of Goods by Sea Act and provided *inter alia:* "Steamer has liberty to carry goods on deck and shipowners will not be responsible for any loss, damage or any claim arising therefrom." Of the 50 tractors loaded on board, 16 were stowed on deck and one was lost overboard. The learned judge held that though the second part ("and … therefore") offended against the Act, the first part did not. He considered that the shipowners had liberty to ship cargo on deck subject always to their obligations under Art. III r 2.

In view of above and the growing practice of carrying containers on deck, what would be the legal position under the Hague Rules if such a general liberty clause permitting carriage is introduced in the bill of lading?

A recent case on containerised cargo under the name of *"Hong Kong Producer"*[8] first went before the U.S. District Court which gave judgment for the defendant. The bill of lading provided:

"The shipper represents … the goods covered by this bill… need not be stowed under deck … and it is agreed … that they may be stowed on deck unless the shipper informs the carrier before the delivery of the goods that under-deck stowage is required." It was held the plaintiff could not recover as there was *inter alia* no breach of contract in stowing containers on deck as defendant had not been notified to the contrary.

On appeal to the U.S. Court of Appeals, however, the shipper was awarded the full amount of damage sustained. It appears that the use of such a clause not only did not constitute a valid agreement but also estopped the carrier, having accepted the goods for shipment, from invoking it and that the shipper did not lose his protection under the Hague Rules since deck-carriage was not stated in the bill of lading. One gathers the main grounds of the decision to be the absence of (a) an agreement regarding deck carriage, (b) an established custom to carry containers on deck and (c) of a statement of deck carriage in the bill. It is submitted that this decision must be taken subject to the qualification that (1) the "Hong Kong Producer" was not a container but general ship and so the custom relating to deck carriage would not apply; (2) no booking slip stating deck carriage was issued in advance; (3) an increasing widespread practice of deck carriage may in the near future be sufficient to warrant judicial recognition, and (4) there was insufficient time available for the shipper to notify the carrier to the contrary. What will then be the position where all these elements are present except the statement of deck carriage in the bill?

6. *Delawanna Inc.* v. *Blijdendijk* [1950] A.M.C. 1235.
7. *Svenska Traktor A.* v. *Maritime Agencies (Southampton) Ltd.* [1953] 2 Ll.L. Rep. 131.
8. *Encyclopaedia Britannica Inc.* v. *The "Hong Kong Producer" and Universal Marine Corpn.* [1969] 2 Ll.L.Rep. 536.

The decision of the "Hong Kong Producer" though not binding as a matter of precedent on courts in Commonwealth countries might probably be followed in the interest of establishing uniform bills of lading to govern rights and liabilities of carriers and shippers *inter se* in international trade.[9]

An interesting point appears where it is expressly agreed that cargo is to be shipped partly on deck and partly under deck; the U.S. Court in the above case did not once allude to the necessity of a separate bill of lading being issued apart from the statement of deck carriage. Hence where cargo is delivered for shipment in identical containers and the bill of lading states "shipped on board 6 containers, 3 on deck and 3 below deck" without more, this will still place the shipper or indorsee in difficulty in adducing evidence, as the rights and protection enjoyed differ according to whether the damaged or lost cargo is on-deck or under-deck.[10]

Even if certain marks are stamped on containers stowed on deck, it remains doubtful whether such marks would be regarded as essential for the purpose of creating an estoppel under Section 3, Bills of Lading Act 1855; obviously such must be marks conveying a meaning as to the character of the goods on the faith of which an indorsee takes up the bill of lading.[11] Also from the standpoint of commercial negotiability and value, a bill of lading with statements of shipments on deck and under deck will not be considered clean. A possible solution would be for certain marks to be expressly inserted in the bill on the containers shipped under deck on the understanding that for the purpose of Section 3 they shall be regarded as essential marks of identity.

Per package or unit liability

The special-purpose containers are generally of a size and volume capable of accomodating a number of conventional crates or packages. If the $100 per package or unit[12] is extended to cover a container, it will operate to reduce the carrier's liability to a fundamental degree. In *Standard Electrica, S.A.*[13] which came before the U.S. Court of Appeals, an action was brought against the carrier for short delivery of 7 pallets each comprising 40 cartons of tuners. The plaintiff had not expressly declared the nature and value of the goods under Section 4(5), U.S. Carriage of Goods by Sea Act, 1936. The court held that "package" included pallets and the carrier's liability was limited to $500 per package.[14]

It seems a different standard of liability for container-type of cargo must be provided, though the proviso to Article IV r.5 of the

9. *Herd & Co. Inc.* v. *Krawell Machinery Corp.,* U.S. Supreme Ct. [1959] A.M.C. 897; *The Asturias*, [1941] A.M.C. 761.
10. *Denny, Mott & Dickson Ltd. and Others* v. *Lynn Shipping Co. Ltd.* [1963] 1 Ll.L.Rep. 339.
11. Carver, *Carriage of Goods by Sea* (1963), para. 80.
12. Article IV r. 5 Hague Rules.
13. *Standard Electrica*, *S.A.* v. *Hamburg S.D.G. and Columbus Lines, Inc.* [1967] 2 Ll.L.Rep. 193.
14. Carrier's liability is limited to £100 in U.K. and $500 in U.S. under the Hague Rules. See also Tetley, W., *Marine Cargo Claims* (1965), p. 234.

Hague Rules may still serve the purpose where the shipper takes pains to comply with it subject to the guarantee imposed by Article III r.5 to indemnify the carrier.

The limitation of carrier's liability under the Hague Rules was at the Conference held at Brussels[15] raised to the equivalent of $662(U.S.) per package or unit or 90 cents (U.S.) per pound whichever is higher, to furnish a solution to this aspect of the container problem. Further the following container provision was passed by the Conference:

> Where container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.[16]

It is difficult to see how a bill could be issued enumerating the packages or units enclosed in a container which may be sealed or pressurised when delivered for shipment[17] since such statements may tend to induce purchasers to act to their prejudice, though the carrier may be covered by a letter of indemnity in the absence of fraud,[18] or by Article III r.5.

Further the proviso to Article III r.3 of the Hague Rules would seem to nullify the effect of the container provision of the protocol in that the carrier shall not be "bound to state ... in the bill of lading... any quantity or weight... which he has no reasonable means of checking".

In any case the container provision of the protocol[19] concerning such packages or units, in the absence of standard practice, can be quite arbitrary. Are such packages or units to be enumerated to be based on value, size or some distinct form of packing within the container itself? It may be anticipated that carriers will substantially raise the freight where the goods shipped are enumerated, and this will be followed by a corresponding premium-increase by marine insurers.

Again, where the cargo is delivered for shipment in containers, it is not clear under the new proposal[20] whether the liability of 90 cents per pound applies to the contents alone or both. If both, then the carrier's liability could be well increased beyond proportion where low-priced commodities are stowed in heavily refrigerated containers.

15. 12th Session, Diplomatic Conference on Maritime Law held at Brussels, February 1968.

16. Protocol to amend the International Convention for the Unification of Certain Rules relating to bills of lading adopted at Brussels on February 23, 1968.

17. E.g. Container Marine Lines, Isbrandsen — "If the container is discharged from the vessel with seats intact, the Carrier shall not be liable for any loss or damage to contents of container unless it be proven that such loss or damage was caused by Carrier's negligence".

18. *Brown, Jenkinson & Co.* v. *Percy Dalton*, [1957] 1 Ll.L.Rep. 31.

19. See *ante,* No. 16.

20. *Ibid.*

Another interesting point is how and on what basis is freight to be calculated?

> *Gulf Intalia Co.* v. *American Export Lines Inc.*[21] concerned the damage to a tractor weighing over 43,000 Ibs. partly enclosed in a wooden packing. This was held not to be a package for the purpose of limiting carrier's liability to $500.[22] The carrier's liability was held to be limited to $500 per measurement ton — the same basis on which freight was calculated.

In *Edmund Fanning*[23] ten locomotives shipped on board were lost in a fire. A bill of lading provision limited the carrier's liability to $500 per package or "freight unit". Freight was calculated on the basis of so much per locomotive and not on the ton. It was held that the carriers were only liable to the extent of $500 per locomotive.

Whose container?

This is important less because a special-purpose container may well be a self-refrigerating, cooling, warming or ventilating plant or unit for preserving the cargo during all stages of its transit than because difference in its ownership may appear to bring about sharply different duties of care and liabilities as may be seen later.

If the container is provided by the carrier, it may be considered as part of the ship's equipment,[24] and hence any defect or malfunction in the working of the container on commencement of the voyage resulting in damage to its contents would constitute uncargoworthiness[25] within Article III r. 1(c), unless caused by a latent defect not discoverable by reasonable inspection and due diligence.

If the defect or failure of the container machinery occurs in the course of transit and its contents are damaged, the carrier would also appear to be liable under Article III, r.2[26] and will probably not be protected under Article IV r.2(a) as the damage is most probably not due to the "Act, neglect or default... in navigation or... management of the ship".[27]

Generally the carrier's responsibility under the Hague Rules falls within the tackle-to-tackle period. If the container supplied by the carrier is regarded as part of the ship's equipment for the shipper to

21. [1958] A.M.C. 439.
22. U.S. Carriage of Goods by Sea Act, 1936.
23. [1953] A.M.C. 1977.
24. Hague Rules Article III r. 1(b) & (c).
25. Unseaworthiness: see *Reed* v. *Page* [1927] 1 K.B. 743, per Scrutton; *Elder, Dempster* v. *Patterson, Zochonis* [1924] A.C. 522, 539. See also *The Amstelslot* [1963] 2 Ll.L.Rep. 223; *The Muncaster Castle* [1961] Ll.L.Rep. 57.
26. "Subject... the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried": Hague Rules. Art. III r. 2.
27. *Gossee Millard* v. *Canadian Merchant Marine* [1929] A.C. 233 where H. Lords distinguished between want of care of cargo and want of care of vessel indirectly affecting the cargo; carrier is liable for damage/loss due to the former but not the latter. In *Foreman* v. *Federal S.N. Co.* [1928] 2 K.B. 424 per Wright J. — management of the ship does not include management of refrigerating machinery.

stow his cargo before the actual shipment, is this "stowage"[28] which a carrier is under duty to do properly and carefully under Article III r. 2? If so can the carrier be held liable for damage caused by bad stowage in containers though the stowing was (i) effected outside the conventional loading (ii) by the shipper himself or his agent? It is submitted that on principle a shipper will be estopped from complaining by merely assenting to a method of stowage directed by him.[29]

Professor Kurt Gronfors holds the view[30] that where the shipper stows the goods in the container and delivers it locked to the carrier, the latter can have no responsibility whatsoever for the stowage which he has neither performed nor had any opportunity to control. This appears to be sound in principle but it is nevertheless submitted that the incidence of liability for cargo-damage can be further examined with reference to the suggestions below:

(1) Tracing damage to fault;

(2) Tracing damage to control; and

(3) Letter of Indemnity.

(1) *Tracing damage to fault*

Where the container is opened up at the destination and its contents are found to be damaged, the court, it is suggested, may attempt to determine on the evidence given whether the cause thereof is due to:

(i) bad or faulty container stowage attributed to the shipper or his servant or agent, which may be termed "bad container packing or inherent vice";[31] or

(ii) bad on-board stowage falling within the tackle-to-tackle period for which the carrier is personally responsible under the Hague Rules Art. III r. 2.[32]; or

(iii) the contributory fault or neglect of both in which case the damage or loss sustained will be apportioned accord-

28. According to Tetley, *Marine Cargo Claims* (1965) at p. 163, this is a strict obligation.

29. *Hovill* v. *Stephenson* (1830) 4 C & P. 469; *Major* v. *White* (1935) 7 C & P 41; see also Stensons, *Stowage,* 5th Ed. p. 607. *Mannix, Ltd.* v. *N.M. Paterson & Sons, Ltd.* [1965] (Exch. Ct. of Canada), 2 Ll.L.Rep. 108: For shipowner to be relieved of consequences of bad stowage, it seems an express or implied agreement of stowing to be done by shipper is necessary. See *post*, No. 35.

30. Container Transport and the Hague Rules.

31. Bad container packing may be used to refer to the items being so insufficiently packed or enclosed that they cannot safely stand the ordinary wear and tear of the voyage: *The Ponce* [1946] A.M.C. 1124; also covered by Art. IV r. 2(n); inherent vice being a common law exception always protects the carrier: *The Silversandal* [1938] A.M.C. 1489; also covered by Art. IV r. 2(m), (n) and (q).

32. *Pyrene* v. *Scindia Navigation Co.* [1954] 2 Q.B. 402; see *Goodwin* v. *Lamport and Holt* (1929) 34 Ll.L.Rep. 192.

ing to their respective degrees of fault or neglect,[33] provided the carrier can separate the loss resulting from each cause, otherwise he must bear the entire loss.

Where it is not possible to trace the damage to the fault of either party or both, then it is suggested the carrier to exonerate himself has to discharge the onus of proof arising from the *prima facie* evidence of negligence on his part where the container is not sealed, its contents are readily available for inspection and a clean bill of lading has been issued. But where the container is sealed, the burden of proof of damage to its contents — it is submitted — should be on the shipper or consignee as where ordinary cargo shipped under a clean bill is delivered damaged.[34]

(2) *Tracing damage to control*

In the *Heinz Horn*[35] the U.S. Court of Appeals held *inter alia,* as regards damage to bananas on the first voyage, that since the Carriage of Goods by Sea Act 1936 was incorporated into the charter-party, the shipowner was under a duty to "properly and carefully stow" goods carried, and though clause 8 of charter-party stated that charterers were to load, final decisions as to stowage were made subject to master's discretion and were his responsibility.

If courts go so far as to hold the carrier responsible for stowage in the container, no matter where the operation occurs, it is suggested that on principle the carrier should have control and supervision over the matter. This would no doubt bring the carrier's liability for damage or loss within the ambit of the Hague Rules. Such control or supervision should not be imposed on the carrier by some illogical extension of Article III r. 2, but remain a matter where the parties can feel free to take on responsibility[36] since the Hague Rules are not intended to regulate the scope of the contract service but the terms on which such service is to be performed.

Hence it would follow that where the stowage in the container is effected by an independent agent or the shipper himself, the carrier it is submitted should not be held liable for bad container stowage provided he is not personally negligent: Article IV r. 2(i) or (q). Thus the respective areas of responsibility will appear to be well defined.

(3) *Letter of Indemnity*

The courts have on occasions upheld letters of indemnity[37] in favour of the carrier when justified by reason of the speed of the operations necessary for the normal exploitation of regular oceanlines

33. *Schnoll & Co.* v. *Vallescura* [1934] A.M.C. 1573 (U.S. Supreme Ct.).
34. *The Standale,* 61 Ll.L.Rep. 223.
35. *Heinrich C. Horn* v. *Cia De Navegacion Franco S.A. & J.R., Akins* [1970] 1 Ll.L.Rep. 191. See also *Mannix, Ltd.* v. *N.M. Paterson & Sons, Ltd.,* [1965] 2 Ll.L.Rep. 108.
36. See Tetley, W., *Marine Cargo Claims* (1965), p. 165.
37. *Ben Line* v. *Joseph Heureux* 52 Ll.L.Rep. 27; Scrutton, *Charterparties* (1964), p. 12.

and the impossibility of the master to verify with vigorous precision the information furnished.[38] It is submitted that to expedite container transport the court should, apart from actual instances of fraud and conspiracy, being contrary to public policy,[39] generously give effect to a letter of indemnity in cases of *bona fide* dispute or doubt. It is suggested that a letter of indemnity may be validly enforced in these situations:

(1) Where the carrier is expected to enumerate in the bill of lading the packages or units in a locked container as where the freight is calculated on the same basis [40]. Here is seems the quantity stated would operate as conclusive evidence against the master or person signing it.[41] The grounds of decision in *Brown Jenkinson* v. *Percy Dalton.* should probably not be extended here, unless the carrier or person signing it has actual or constructive knowledge of the mis-statement.[42]

(2) Where the shipper personally or through his agent for reasons advantageous to himself does the stowage in the container and on board, and by his negligence causes damage to the container or fails to connect it to the proper electric or pressure supply especially after the issuance of a bill of lading stating "shipped in good order and condition" an indorsee for value might possibly succeed in an action for damages against the carrier, who might not be able to bring in the shipper as third party.

(3) Where the carrier consents to the carriage of a shipper's containers on deck or underdeck but has genuine doubts whether they would leak and consequently cause damage to other cargo or are dangerous in some way involving the carrier in expenses.[43]

Properly and carefully... carry, keep, care for.. ,[44]

If the shipper supplies the container then it might be fairly treated as part of the cargo itself and not as part of the ship's equipment,[45] and damage caused by insufficient packing or inherent vice in the container would generally exonerate the carrier. What will be the position if a self-refrigerating or warming container marked "A.C. 110-120v. 60 cycles only" loaded on board is immediately plugged into the ship's electric supply marked "220-240 volts D.C. only" or vice versa and the machinery is burnt resulting in damage to the cargo?

The relevant principle is, seaworthiness includes cargo-worthiness which implies that the ship must be fit to receive the cargo when loaded. Where the Hague Rules apply, the carrier in his duty to care

38. (1958) D.M.F. 414 Translation — In Tribunal de Commerce de la Seine.
39. *Brown Jenkinson & Co.* v. *Percy Lattton (Land.) Ltd.* [1957] 2 All E.R. 844.
40. *Ante,* No. 16.
41. S. 3, Bills of Lading Act 1855.
42. Unenforceable at the suit of the party who intended the illegality — Scrutton, *Charterparties* (1964), p. 12. Also *St. John Shipping Corpn.* v. *Joseph Rank, Ltd.* [1956] 2 Ll.L.Rep. 413.
43. See also Art. IV r. 6 Hague Rules.
44. Art. III r. 2 Hague Rules.
45. Art. III r. 1 (b) then appears to be no part of carrier's responsibility as regards the container.
45. *Elder, Dempster & Co.* v. *Paterson, Zochinis & Co.* [1924] A.C. 522.

for the cargo is obliged to ensure that electric supply of the correct voltage and kind is available for connection to the container wherever necessary. Article III r. 1(b) & (c) seem to be quite clear on this point.

It appears in the above example the carrier's duty to keep the cargo properly and carefully has been breached[47] and since this duty is non-delegable and personal, the carrier remains liable though a servant or master may have actually been at fault.

Other equally probable situations include the following:

(1) The shipper's container, which could be highly pressurised or a vacuum, leaks;

(2) Owing to a power failure on board, the self-refrigerating or warming machinery in the container stops;

(3) The leakage from a container allows a gas to escape causing damage to other cargo in the same hold.

How would the court relate the standard of care required of a carrier to a situation like No. (1) ? Given that the obligation of the carrier to keep and care for the cargo is strict, how could the standard applicable to cargo carried in a general ship be of any relevance in a container ship? For the Hague Rules to cover such a situation, the court may have to attribute to them a new degree or level of responsibility on the carrier's part. It is submitted that what may be considered a latent defect or inherent vice in the cargo when carried in a general ship may not be so in a special-purpose or all-container ship.

According to Carver's definition of seaworthiness,[48]

> "the ship must also have a competent master... and sufficient crew. And if... the nature of the navigation requires one (a pilot), she is not seaworthy without a pilot. Also, the cargo taken must be a safe cargo for such a voyage.. . be stowed so as not to be a source of danger... If exceptionally bad weather is to be expected the standard of seaworthiness is correspondingly high.[49]"

It seems clear that these common law rules relating to seaworthiness also apply to container transport under the Hague Rules except that the carrier is only bound to exercise due diligence and is not liable for damage or loss due to a latent defect not discoverable by reasonable inspection. Could it not be argued that a container ship is unseaworthy within Article III r. 1 unless it carries on board special apparatus for testing and detecting leaks, spare containers to replace faulty ones, a crew of trained container-technicians to carry out repairs on board and not the least gas-masks?

47. Tetley, *Marine Cargo Claims* (1965) at p. 169, states that this is a strict obligation on carrier not limited to the exercise of due (diligence alone; also Art. IV does not exempt carrier from damage or loss due to his personal fault or negligence. Also this does not come within "management" or "navigation" in Art. IV r. 2(a).

48. Carver, *Carriage by Sea* (1963), para. 108.

49. *Texas & Gulf S.S. Co.* v. *Parker* (1920) 263 Fed. Rep. 864.

It is submitted that the degree or extent of a carrier's care required for the cargo depends on whether it is carried in (a) a conventional form in a general ship, (b) the shipper's container sealed or locked or (c) the carrier's container in a container ship. The level or degree of care required of the containerised cargo carrier has not been, and will probably not be in the near future, ascertained. This is one area where the court has to rely on the information and findings of shipping and container experts.

Loss or damage due to failure of power on board would not come under "neglect or default" in the navigation or management of the ship under carrier's failure to care for the goods,[50] thus rendering him liable. Also whether gas leakage from a container causing damage to other cargo would render it "dangerous" to entitle carrier to invoke Article IV r. 6 would depend on (i) where it is stowed, (ii) the nature of the other cargo affected and (iii) the fact that there is no improper stowage.

Time of delivery and suit

A statement in the bill of lading of goods being shipped in apparent good order and condition is on principle binding on the carrier as it is within the master's authority to make. As regards containerised cargo, it would mean no more than an admission that the external condition of the container so far as discoverable by reasonable inspection is satisfactory, and this is no *prima facie* evidence of the actual condition of its contents.[51] It would appear that the basic duty of the carrier to deliver the goods in the same apparent good order and condition has been reduced to delivering a metal or plastic container — whatever its contents — apparently in good shape, provided no complaint is received in writing before or at the time of delivery or at the latest within 3 days thereof if the loss or damage not apparent.[52]

In practice it is not possible for the shipper or consignee to give such notice in writing when goods are discharged (a) into a lighter, (b) by stevedores or (c) into a warehouse for the purpose of forwarding to the shipper. If, however, each of these methods of discharge is directed by the shipper or consignee, it follows there is valid delivery into the proper custody. It is also unlikely that notice in writing would be given where containers appear slightly buckled or mishapen due to their frequent use. Hence it is submitted that in general this provision as to the carrier's basic duty where the container is used does not appear to serve much purpose.

Another aspect of this basic duty relates to the internal condition of the goods when the container is opened and goods are found damaged. Here there is no *prima, facie* evidence that the carrier is negligent by virtue of a clean bill of lading. To succeed, the shipper has to prove that the loss or damage occurred within the ambit of the carrier's

50. *Ante* No. 27.

51. *The Tromp* [1921] Ll.L.Rep. 30.

52. Article III r. 6 Hague Rules.

responsibility — that the cargo is not delivered in the same good condition as when received.[53] Since in most cases only the shipper himself or his servant actually knew the true condition of the goods when put and perhaps sealed into the container, the onus of proof against the carrier is not easy to discharge. This is particularly so where the the suit against the carrier may be bought by an indorsee or consignee or pledgee who might never have seen what its contents really were! It appears not improbable that even where he does succeed, the damage could still be attributed to bad container stowage, insufficient packing or a break-down in the container machinery[54] for which the carrier would be protected under Article IV.

Further, the suit or action against the carrier must be brought within one year from the date of the delivery or non-delivery in a court with the proper jurisdiction otherwise the claim is time-barred,[55] though it may not prevent an equitable defence being raised against the carrier.[56] It appears that the "loss or damage" in Article III r. 6 is only in connection with goods, and does not protect the shipper against the carrier's claim for general average contribution.[57]

Negotiability of the bill of lading

It could be expected at the initial stages that containerised cargo may not be so, readily saleable by endorsement plus delivery of the bill of lading for the following reasons:

(1) The statement "shipped in apparent good order and condition" without more only binds the carrier as regards the external condition of the metal or plastic box, without giving the slightest indication of the nature and condition of its contents. Hence it appears that S. 1, Bills of Lading Act 1855, would in effect operate to subject the indorsee or consignee to liabilities without the corresponding rights contemplated. If the shipper undertakes to stow the goods in his own container, the indorsee or consignee may not be able to recover from the carrier either on the ground of his constructive knowledge or Article IV r. 2(q) or (m) or (n), unless stowage is considered the carrier's non-delegable personal obligation, which legal authorities do not seem to indicate.[58]

(2) A person advancing money on the security of such a bill of lading may not wish to run the risk of taking possession of the locked

53. *Silversandal* [1940] A.M.C. 731 — The burden of proof of unreasonableness of customary stowage is on the cargo interests; also *Silversteak* [1941] A.M.C. 647.

54. If stowage is solely done by shipper, he cannot complain; it is doubtful if the indorsee or consignee can bring an action against carrier.

55. *Compania Columbiana U.S.* v. *Pacific S.N. Co.* [1946] 2 W.L.E. 484.

Note: Two changes (Visby Rules) to Hague Rules were introduced at Stockholm Conference, 1963: (1) Art. III r. 6 para. 4 is deleted and replaced with provision that the delay for suit may be extended beyond one year by agreement; (2) recourse action by carrier could be taken within at least three months. The new Rules have not yet been adopted.

56. *Goulandris Brothers* v. *Goldman* L 1958 1 Q.B.

57. Per Lord Alverston C.J. in *Greenshields*, *Cowie* v. *Stephens* [1908] 1 K.B. 5 (C.A.).

58. Scrutton, *Charterpwties* (1964), p. 413.

container after payment of freight and other expenses[59] except where it is possible to open up and inspect some of the containers during transit or the loan is made in the form of a post-dated bill of exchange or a letter of indemnity can be furnished.

(3) The widespread practice of on-deck carriage not only increases the risk of damage but implies the issuance of a bill of lading which cannot be considered clean.[60]

(4) It seems a purchaser under a C.I.F. contract may not be able to recover; from the marine insurer for non-disclosure by the original shipper of the material fact of deck .carriage.[61] Such a defence would be available not only against the shipper but all persons claiming through him subsequent to the endorsement or sale.[62]

(5) Where cargo is carried in the container, it is contemplated that a greater number of persons may be involved in its handling both before and after delivery than actually covered, and so unless a "warehouse-to-warehouse" clause is expressly included in the policy, container cargo may not be adequately covered.[63]

(6) If stowage in the container is effected by or attributed to the shipper himself or his direction, it, appears probable that loss or damage due to defective packing or enclosing or malfunction of the machinery might not be recoverable even though the "All Risks" clause is included in the policy.[64]

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59. An implied agreement to pay freight, demurrage and damages by pledgee may result at common law: *Brandt* v. *Liverpool S.N. Co.* [1924] 1 K.B. 575.

60. *The Peter Helms* [1950] A.M.C. 1235.

61. *The "Papoose"* [1969] 1 Ll.L.Rep. 178.

62. Marine Insurance Act 1906 s. 50(2); see also *Piekersgill* v. *Lond. and Prov. Mar. Ins. Co.* [1912] 3 K.B. 614.

63. Inst. Cargo Clauses (F.P.A.); see also *Westminster. Fire Office* v. *Reliance Mar. Ins. Co.* (1903) 19 T.L.R. 668.

64. Inst. Cargo Clauses (All Risks). The 'All Risks' Clause does not cover loss or damage due to inherent vice or faulty packing unless fault of the shipper's servant or malfunction of the container machinery is within the terms of the policy. If the container belongs to shipper, its malfunction could be termed "inherent vice"; see *Berk & Co. Ltd.* v. *Style* [1952] 3 All E.R. 625 Q.B.

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