MARITIME LAW ASSOCIATION

OF

AUSTRALIA AND NEW ZEALAND

TENTH ANNUAL CONFERENCE

Sydney

25th to 28th September 1983

CARGO DAMAGE AND LIABILITY PROBLEMS IN MULTI MODAL TRANSPORT

by

MR PIERS DAVIES and CAPTAIN BARRY THOMPSON

MULTI MODAL TRANSPORT

(1) CONCEPT, DEFINITION AND HISTORY

The concept of multi-modal transport is not new in itself. Goods have always been carried by varieties of transit methods, typically road or rail to port, by ship to another port and by road or rail to the final destination. However, the arrival of the container meant that multi-modal transport entered a totally new phase with new problems as well as advantages.

Containerisation has introduced new technologies and fundamentally changed the shape of ships in the 1970's decade. It has created new ports and made old ports redundant. It has also encouraged the development of multi-modal transport contracts which in one document cover the transit of goods even although the method of transport is changed during the course of the transit.

The definition of multi-modal transport adopted by the United Nations Convention on International Multi-Modal Transport of Goods (1980), Article 1, Definition 1, is as follows:

> "International Multi-Modal Transport" means the carriage of goods by at least two different modes of transport on the basis of a multi-modal transport contract from a place in one country at which the goods are taken in charge by the multi-modal transport operator to a place designated for delivery situated in a different country.

Although multi-modal transport includes pallets and similar articles of packaging, it is the use of the container in multi-modal transport which introduces important differences in cargo damages and liability problems. We have therefore given particular emphasis in this paper to the effects of containerisation on multi-modal transport.

We have also restricted this paper to issues involved in maritime multi-modal operations, but included an appendix on cargo problems in containerised air transit because of the many similarities involved.

Finally we have analysed the problems that we have been able to identify which apply particularly to conditions in New Zealand and Australia. Although we have more frequently acted for the consignor, consignee and the insurer of cargo, we have also tried to understand the problems from the point of view of freight forwarders and shipping interests.

(2) PATTERNS OF MULTI-MODAL OPERATIONS

(A) Types of Maritime Multi-Modal Operations

In New Zealand we find three basic types of multi-modal maritime operations :

(i) Local multi-modal, involving the coastal trade although this does not strictly come within the UN Convention definition of multi-modal, apart from transit between the New Zealand mainland and those semi-independent "dependencies" like the Cook Islands, Niue and Tokelau);

(ii) The Trans-Tasman trade; and

(iii) The remainder of the world wide trade transit, both importing and exporting.

The first sub-category used to be governed by Part I of the Sea Carriage of Goods Act 1940 (NZ) but now comes under the Carriage of Goods Act 1979 (NZ). The last two sub-categories are the ones that are likely to include substantial road and/or rail transit in New Zealand and/or overseas and produce legal complications if damage occurs.

(B) Cargoes

The introduction of the container has not affected all types

of cargo evenly. Some types of cargo have gone over almost completely to the new technology e.g. meat. Containers have also developed as a particularly convenient method of shipping Kiwifruit, New Zealand's most spectacular growth export of the 1970's. Specialist containers have been constructed for cargoes as diverse as livestock, bulldozers and soy sauce.

Containerisation is not always practical for some types of cargo, particularly bulk cargo. (77% of the world's fleet are bulk vessels). However, new technology is being used to make types of containers that are suitable for bulk cargo, and these have been used for wheat, rape seed etc and this trend is likely to increase in the future. Other cargoes which are basically suitable for containers may be excluded from containers because of local port conditions in the country of origin or destination. There are many ports in the world where container vessels just cannot berth and the cost of road and rail transit involved to get the goods to or from a container port is prohibitive. Such cargoes therefore use conventional vessels.

(C) Types of Vessels

These include :

(i) The purpose built cellular container ships.

(ii) The flexible purpose built cargo ship having break bulk and/or container facilities.

(iii) The modified conventional cargo ship providing some container facilities.

(iv) The Roll on / Roll off vessel.

(v) The LASH Vessel with facilities for containers and barges - no longer in use in the New Zealand trade, but still continued elsewhere.

(D) The Use of the Freight Forwarder

Although freight forwarders and consolidators have always existed, the rise of the container has increased their importance and their opportunities immensely, especially on the Trans-Tasman Trade.

(3) CARGO HANDLING

(A) Cargo Surveys

The introduction of multi-modal transport has not greatly altered the role of the surveyor, but it has undoubtedly complicated it in many ways, not least of which is the fact that it is likely to involve more surveyors representing different parties and requiring them to attend surveys some distance from the Port more frequently.

(I) Joint Surveys

Even before surveys are commenced a complication due to multi-modal transport and the complexity of the litigation associated with it arises as there is a need on many occasions for several surveyors to attend joint surveys. This is to ensure that each party will have an equal opportunity of establishing the facts and making representations as to the steps which should be undertaken in order to minimise risk of damage or loss or, after it has occurred, to mitigage it.

While with conventional shipping there is often the need for a shipowner's and a cargo underwriter's surveyor to attend, there may now also need to be the involvement of freight forwarder's and container terminal operator's surveyors. The more people who are involved, the more difficult it becomes to co-ordinate their movements in arranging the survey and this can lead to unavoidable delays.

(II) Pre-shipment Surveys

These tend to fall into two categories, one of which is little

altered by multi-modal transport and the other of which is significantly complicated thereby.

Those pre-shipment surveys which are for the purpose of determining the risk and considering the suitability of packaging are little affected as these always had to be carried out at the consignor's premises. (The considerations have changed, but not the need for the survey or the site where it takes place).

However, surveys to determine the actual pre-shipment condition of particular goods or those associated with container condition and loading can no longer take place at the Port, but instead the surveyors must attend at the consignor's or freight forwarder's premises, often well away from the Port area and thereby adding significantly to the surveyor's time involved.

(III) Damage Surveys

In the case of damage surveys, whether appointed by shipowner, charterer, underwriter or consignee, the surveyor's first requirement is to determine the facts and four words summarise this, for he has to determine the "nature, cause and extent" of the loss. This role of the surveyor is unchanged in principle although some aspects of it are altered in detail due to the involvement of containers in multi-modal transport.

"Nature"

Little has changed and the nature of cargo loss or damage has hardly altered over the years. It still falls under four principal headings.

(a) Mechanical - Breakage and deformation
(b) Organic - Decomposition
(c) Chemical - Corrosion and change of state
(d) Disappearance - Pilferage and misplacing

"Extent"

The extent of a loss is a variable in each case as it has

always been, although the extent of damage from various causes has shown a pattern of change. It has increased from some causes and diminished from others.

"Cause"

It is with the determination of cause that the surveyor is presented with the greatest challenge. The actual causes of cargo loss or damage may not have changed greatly, (impact, wetting, careless or unsuitable stowage and pilferage still predominate), and the investigation of cause has always been one of the surveyor's principal roles because of the need to establish :

(a) The party responsible for the damage
(b) Whether an insured peril has operated (in a claim against underwriters)
(c) How to prevent or attempt to prevent a recurrence of a similar loss
(d) The necessary steps to mitigate the loss

What has particularly changed where the multi-modal transport is concerned in containers is the problem of <u>when</u> and <u>where</u> the loss or damage was caused because this is essential to determining <u>who</u> was responsible for it.

The problem arises with container use in that the damage can occur out of sight, sometimes without the knowledge of the party causing it, and frequently without the receiving party being aware of it and not therefore being able to establish that it had previously occurred.

Where the damage is by wetting, particularly by fresh water, one of the surveyors most valuable weapons is mould dating. Samples of mould can be referred to a micro-biologist for an opinion on their age and if not more than about four weeks old it is usually possible to determine the date of wetting reasonably accurately. Even up to eight weeks a fairly good indication of the age may be obtained but thereafter it becomes rather uncertain and in any event some indication of

the temperatures experienced will be desirable as they affect the rate of growth to some extent.

Whilst in theory, determination of the party responsible for the damage does not affect the principle that the party contracting for the carriage on behalf of the shipper will have a liability, in practice it does alter the modus operandi of the consignee in pursuing his claim as it will affect the limit of liability and therefore the amount recoverable.

(IV) Mitigation

Having ascertained the fundamental facts concerning the nature, cause and extent of the damage which then has to be reported to the instructing party, the surveyor has to direct his attention to the mitigation of loss and this too has been complicated by multi-modal transport.

Because the goods are not tallied in and out at each stage of transit, as is generally the case with conventional transport, damage may occur and go unnoticed until final destination. This lack of detection at the time of occurrence presents a problem beyond that of determining who is responsible for it, because the damage may readily become aggravated with no party taking steps during transit to mitigate the loss, it often then being taken too late to be effective.

(B) Cargo Problems

Containerisation has reduced certain types of damage and increased others. It may here be helpful to compare them as follows :

(I) Pilferage

The casual pilferage by ships crews and waterfront labour has diminished as the opportunity has been removed but large scale organised theft, often involving the entire container and contents, has increased. Losses are probably less frequent now from pilferage except perhaps in the case of personal

effects with all their packing problems, but when they do occur they are frequently on a much larger scale.

The provision of seals to prevent unauthorised opening of container doors is partially effective, but too little care is generally exercised when containers change hands to check that seals are still intact and are, in fact, the same seals as were originally placed on the containers at the commencement of transit. Only care in checking seal numbers with those on documents at each stage of transit will effectively contain pilferage or determine the stage at which it occurred. Where original seals are intact at devanning this indicates pilferage having occurred prior to or during loading of the container and not subsequently.

There are containers in use for shipping fresh produce, for example onions, where one door is deliberately removed to improve ventilation and this tends to invite pilferage - it is not difficult for road or rail carriers to "help themselves".

(II) Water Damage

Damage to containers both before and after stuffing which permits the ingress of water is one of the principal causes of cargo damage in this mode of transport.

One of the most common types of container damage is the puncturing of the roof in the corners by twist locks on the crane or derrick spreaders which, when dropped onto the roof, have failed to locate in the corner posts. Such holes are commonly from 10 mm to 50 mm in diameter and can be responsible for considerable water damage to the container's contents whilst stowed on deck, on railway wagons or road trucks or whilst standing in the open at container terminals. Considerable water ingress can result and with no opportunity for its escape the entire floor area can become wetted and subsequently cargo which is not directly wetted may later suffer secondary damage due to the humid atmosphere created within the container.

Other damage associated with forkhoists and lifting equipment may be to the ends and sides of containers also resulting in water ingress or, in the case of refrigerated containers, in the loss of refrigeration through damaged insulation. Corrosion damage to containers is also common.

Rubber door sealing gaskets, if in bad condition, will permit water entry and heavy seas or driving rain will frequently penetrate poorly fitting doors. Another source of trouble is poorly executed repairs and it is not uncommon to find a container repair which appears adequate and stands up to the light test (door closed with person inside looking for daylight) but which leaks badly when subjected to weather conditions.

We have found instances where the freight forwarders, realising the difficulty which will later be experienced by the consignee in bringing a claim against them successfully, did not reject a defective container before loading it or, if damaged by them, failed to notify the shipowner so that the container could be repaired before water entered it. Similarly shipowner's employees and their stevedores may be reluctant to admit causing damage, which often occurs to the top, so that the damage passes undetected.

(a) Sea Water - Leaking hatches and leaking or partially swamped lighters present a much reduced problem with container use and except when damaged containers have let in salt water when carried on deck or when subject to partial hold flooding through bilge or sea water circulating system leaks the incidence of sea water damage are rare with this mode of transport.

(b) Rain Water - Significantly reduced are the incidents of wetting to cargo whilst being loaded or discharged during rain or cargo already in holds being wetted by rain whilst the hatch covers are open. Containers are frequently loaded under cover.

However, when cargo has been rained on before or during container stuffing the water retention within the unventilated container is often very much more serious than in the ship's hold where at least some ventilation is probable.

(c) Condensation - The problem of condensation is a particularly serious one due to their poor and usually negligible ventilation. Damp, often green, timber for dunnage and vegetable commodities which respire e.g. coffee, produce a very humid atmosphere in the confines of a container and condensation is almost inevitable particularly with inward cargoes to New Zealand in Winter.

(d) Ship Sweat - A very much higher proportion of cargo in a container is likely to be in contact with steel, or directly beneath the steel roof, than in a conventional ship's hold and hence is more likely to be wetted by water condensing on the inside of the container.

(e) Cargo Sweat - The lack of ventilation in most containers, as compared with many ship's holds, reduces the opportunity for cargoes to readily assume ambient temperatures and upon entering warmer climates the container contents are particularly prone to cargo sweat as the moist warm air condenses upon it.

The problems of cargo sweat and ship sweat have existed for many years and have often been linked with questions of inherent vice. There have been a number of important decisions on these issues, and one that has particular relevance so far as container transit is concerned is The "Flowergate" [1967] 1 Lloyd's Rep. 1 which is a case relating to a conventional ship carrying cocoa beans from West Africa where the problems of moisture in the cargo were not known at the time. The defence of inherent vice was therefore successful. However, the Court made it clear that The "Flowergate" case did not justify the ship's owner repeating the same transit procedure with subsequent shipments of cocoa beans from West Africa.

There has been a tendency for ship interests to quote The "Flowergate" decision in relation to problems experienced with condensation, ship sweat and/or cargo sweat in containers. However, the initial period of experimentation with containers has long passed in most types of commodity shipments and there is a substantial amount of published material on condensation in containers available to ship and cargo interests. Consequently, ship or cargo interests that ignore this information, do so at their peril.

(III) Washing Overboard

The carriage of containers on deck has increased the losses due to this cause considerably. Previously deck stowage was usually confined to hazardous cargoes and to those too bulky to stow below, but now any type of cargo is liable to be carried on deck in a container and those in the vulnerable parts i.e. a'baft the fo'c's'le, are likely to be severely damaged or washed overboard in exceptionally heavy weather. Recent losses have included a grand piano for the new Wellington Town Hall.

(IV) Impact Damage

Cargo in conventional vessels was prone to damage in loading/discharge by striking the ship's structure or by being struck by other cargo whilst in stow. Tearing of bagged cargoes was common from this cause. Container use has reduced this type of damage significantly, although there are instances of complete containers being dropped, causing severe internal damage.

(V) Odour Damage

The lack of ventilation and the confined space in containers often permits a significant increase in odour concentration when compared with that in a ship's hold. Combined with a lack of expertise in avoiding the stowage of un-neighbourly cargoes, with consequent cross tainting, this gives rise to an increasing number of claims but often the size of them is

reduced due to the reduction in exposure in each incident where the quantity of sensitive cargo in one container would be relatively small as compared with a ship's hold.

Chemical odours are sometimes retained by a container long after discharge but are not always significantly apparent to those loading the container, particularly if inexperienced and if the container has been reasonably well ventilated before loading. Once shut up again and almost hermetically sealed the odour can become very damaging to the new contents and some large claims have resulted from this cause.

This type of loss is less inclined to occur in breakbulk shipments where ship's officers are conscious of the problem and, in any event, a reduction in the concentration of odour will generally result in a ship's hold which probably has some ventilation.

(VI) Cargo Shifting in Stow

The collapse of a stow between successive discharge ports, as was common with an inadequately tommed brow in conventional ships, no longer arises. This was often responsible for substantial cargo damage.

Incidents of damage however due to inadequate securing of cargo in a container often arise and some freight forwarders have little concept of the forces involved when a ship rolls and pitches in a seaway. Unpacked motor vehicles in containers with only their brakes applied to secure them have been found at destination with imaginable consequences!

(VII) Packaging

Whilst it is often reasonable to reduce the standard of packaging required with containers shipped "door to door" this does not apply where containers are only used from "terminal to terminal" or even "depot to depot". Packaging must be adequate to withstand handling at each end by stevedore's and/or carrier's labour not under consignor/consignee control. Multi-modal handled goods often suffer due to

inadequate packaging for this reason and it is not uncommon for Agriculture Department Officers to require FCL containers to be devanned in the Port area and the contents delivered as LCL. Quite often the reduced packaging standard for container transport is less able to withstand wetting when it does arise.

(VIII) Refrigerated Cargoes

Cleanliness of the stowage space is more easily achieved with containers than in ships holds and once the produce is inside them, heating by direct exposure to sun and wind is totally eliminated. These problems were prevalent in conventional vessels where hatches were often left open for lengthy periods during loading and discharge.

The principal problems with reefer 'boxes', particularly those with integral or clip on refrigeration units, are their vulnerability to human errors in connecting to power at terminals and their incorrect setting of temperatures, their susceptibility to malfunction following shifting on/off their various modes of conveyance and often, on board ship, their lack of accessibility for servicing in the event of operational defects developing.

Responsible shipowners take care to ensure that reefer boxes have a "pre-trip inspection" of their refrigeration machinery but occasionally oversights do occur and in the Pacific Islands facilities are not always available for this. Less responsible freight forwarders and container leasing companies often omit the pre-trip inspection thereby increasing the risk of mechanical failure.

In any event, the efficiency of refrigeration equipment in containers varies considerably and from the shipper's point of view the standard of his container depends upon "the luck of the draw".

Partlow temperature recorders fitted to clip-on and integral refrigeration units generally record the temperature

of the return air in the circulation system, which is only a partial indication of the true temperature of the cargo. Whilst being reasonably satisfactory, these recorders lack the reliability of the more robust ship's equipment and when Ryan records (small self-contained recorders placed by shippers inside the container) have also been used discrepancies sometimes show up.

Due to the lack of observation by ship's staff of the actual produce being loaded in the container an opportunity is lost at this stage of transit, often a day or more after leaving the meatworks or refrigerated stores, to check the flesh temperatures and to reject if unacceptably high. In conventional refrigerated ships, ship's staff took particular care over this but reliance must now be placed solely upon the Partlow recorder temperatures and there have been occasions when surprising errors have been made in setting the needle for the Partlow recorder or reading the temperatures on the Partlow cards.

From the shipowner's point of view, the lack of knowledge on his part of the actual condition of the product does present a problem and may cause him to accept cargo which he would otherwise have rejected as not being in fit condition for carriage.

Many shippers do not understand a container's air cooling and circulation system often resulting in the restriction of the air flow by improper loading whilst others ask too much of the equipment and expect the container to act as a blast freezer.

(IX) Fresh Produce (Not Refrigerated)

Lack of inspection opportunity at ship's side for containerised fresh produce requires surveyors to attend at growers/packers premises to check upon product condition, dunnaging, stowage and container condition. This is time consuming, often difficult to co-ordinate and consequently expensive and frequently inefficient.

Ship delays prior to their arrival at the loading port significantly increase the possibility of deterioration with containerised produce which will often remain poorly ventilated standing in an open terminal stack in hot sun, whereas cargo awaiting a conventional vessel will frequently be held in a relatively cool and well ventilated open stow in a wharf shed. When the inland container loading point is remote from the port this confined period will be further extended in transit to the port.

(X) Household and Personal Effects

Pilferage and damage is commonly found to be present in these shipments and the position is aggravated by the involvement of groupage containers.

With conventional shipping, large packing cases or lift vans often contained one family's effects and short of damage to the cases the contents were protected from pilferage. The position is now that several families' possessions will go into one ISO container, often with little protection, and prior to loading or subsequent to devanning at a container depot the smaller items are very vulnerable to pilferage.

(XI) Stowage & Safety

Apart from cargo damage caused by the many factors of poor stowage, a real concern to the ship owner is that associated with stowage which constitutes a danger to the carrying vessel.

There are several well documented cases where a vessel and her crew have been endangered by improper stowage of dangerous goods which have been improperly declared as to category or not even declared at all. Another danger is the declaration of incorrect weights for container loads. This has become a source of danger during the salvage of container vessels when helicopters winching containers to safety have found some of the containers to be unexpectedly heavy.

Fundamentally, the ship owner is adversely affected by his inability to exercise his customary control over stowage.

(C) The General Problem of Standards of Container Stuffing

In effect the container has replaced the ship's hold as far as the ship owner's requirement is concerned to provide a cargo worthy stowage space. Just as the ship's cargo stowage area had to be clean and tidy, free from contaminating odours and from damage which would permit the entry of water and suitably dunnaged, so now must the container fulfil this requirement.

The ship's spaces were under the direct control of the ship's officers who could be expected, by virtue of their periods of service and study in obtaining their Certificates of Competency, to have a reasonable knowledge of the requirements. It is well recognised however that this knowledge may not always be readily apparent or properly applied, but at least the consignor / consignee could enjoy a reasonable expectation of proper handling when he was shipping his cargo with reputable shipping companies.

Containers on the other hand are frequently stuffed by consignors and freight forwarders lacking in the necessary skills of cargo stowage and, in the course of transit, the containers are constantly changing hands and tend to become "nobody's baby" with a consequent lack of care being taken.

The following are typical failures in cargo stowage with containers by freight forwarders and shippers :

(i) Liquids over solids
(ii) Heavy goods over light goods
(iii) Excessive floor loading i.e. weight concentration
(iv) Uneven weight distribution i.e. one end heavy
(v) Un-neighbourly cargoes -
  (a) Hard and soft goods adjacent
  (b) Cross tainting by odour
  (c) Moisture sensitive goods in same container as goods exuding moisture

(vi) Use of wrong type of container i.e. conventional where an open top type would facilitate loading / devanning.

(D) Container Damage by Cargo

From the ship owner's point of view an unsatisfactory aspect of multi-modal transport is the fact that his containers, representing a major asset, spend a good deal of their life in the hands of others and therefore outside of his own control. Apart from handling damage already referred to, containers are susceptible to damage from the cargo inside them due to shifting as a consequence of improper stowage or leakage of chemicals many of which are corrosive.

It is not unknown for shippers to "modify" a container when the proposed content, perhaps awkward machinery, does not fit easily and there are examples of cargo securing arrangements by shippers which damage the containers.

Recovery of costs against the shipper, often long after the event and in another country, is difficult for ship owners and sometimes they are severely restricted by purely commercial considerations and the need to preserve shipper good will.

(4) DOCUMENTATION PROBLEMS

(A) General

Surveyors acting for underwriters usually instruct consignees to lodge Pro-forma claims against carriers. Conventionally this has meant claiming against the ship owner but with the complexity of multi-modal transport it is frequently necessary to advise consignees to claim against several parties simultaneously including the ship owner, the freight forwarder's agent and the container terminal operator who is often the Port Authority.

Claims against freight forwarder's agents present difficulties in that it is not uncommon for an agent to claim that he has no authority to discuss claims on behalf of his principal and we have even known of a case where an agent has contended that he had no knowledge of the fact that he was an agent of the particular freight forwarder!

In our experience, few local agents of freight forwarders have much understanding of the legal position and it becomes extremely difficult to discuss claims intelligently with those who think that they have no liability!

Whilst ship's agents may use every argument in the first instance to decline liability on behalf of their principals they usually have a clearer understanding of their principal's liability under the contract of carriage.

Apart from the legal complexities in recovering against freight forwarders, considerable difficulties are experienced with the smaller claims, which often do not warrant recourse to litigation, simply because it is frequently impossible to discuss claims with those who are almost totally ignorant of their principal's responsibilities and we have experienced instances where freight forwarders have repudiated liability and have argued that a claim by a consignee should be directed against a shipowner and not against their principal because the principal received a clean receipt from the shipowner at the port of shipment thus relieving him of the liability!

Nor surprisingly a shipowner will sometimes argue that he will not entertain a claim from a consignee as the latter is not a party to the ocean Bill of Lading and container terminal operators frequently refuse to discuss claims with consignees contending that they act only as an agent of the shipowner and have therefore no contractual obligations with the consignee.

It is not surprising that the poor consignee is becoming utterly confused and only too ready to seek settlement of

his claim from his underwriters under Subrogation leaving them to sort out the "madhouse" for themselves.

(B) Particular Problems

(I) Combined Transit Bills of Lading

Because these bills of lading are meant to cover every kind of multi-modal transit, they are longer, more complex and more confusing than the standard ship's bill of lading. Also,with a number of the joint container shipping services it is difficult to tell from the bill of lading wording and the day to day handling of the goods who is the "carrier" and who is the "agent of the carrier" for the purposes of the bill of lading conditions.

(II) Pseudo Bills of Lading

The orthodox approach is to have bill of lading documents only where title passes and in the other circumstances to use a name and format which clearly distinguishes the position. For example, OCL will use its Common Short Form Bill of Lading where it is a bill of lading situation and in other circumstances use a Non-Negotiable Waybill. This avoids the possibility of confusion.

Any such waybill is non-negotiable and does not require presentation and is clearly unsuitable for use with documentary credits.

Unfortunately, the orthodox approach has not been followed by a number of organisations. In the USA these are referred to as NVOCC operators i.e. "non-vessel owning common carriers" or more satisfactorily as NVOC i.e. "non-vessel owning carriers".

Such organisations frequently issue what could be politely described as "look-alike" bills of lading which are in fact pseudo bills of lading. These have all the appearances of a bill of lading and in fact may be called a bill of lading, but the fine print on the back disclaims liability in

circumstances that would not be acceptable with an orthodox bill of lading. This is a most unsatisfactory practice and we support those who are pressing for the use of the term "bill of lading" to be closely controlled.

Valuable detailed comment on the background to this recent development is contained in the article by Mr James Laird presented to the New Zealand Branch of the Maritime Law Association of Australia and New Zealand in April 1983.

(III) The Role of the Freight Forwarder

Often the role of the freight forwarder is ambiguous and confusing. Sometimes the freight forwarder is the true consignor on the bill of lading and sometimes only an agent for the consignor.

(IV) Time Bar Complexities

Instead of the comparatively simple Hague Rules and Hague-Visby time bars, containerisation has introduced a whole series of variations on the time bar theme - 6 months, 9 months and 11 months as well as 12 months, sometimes from the date of contracting, sometimes from the date of receipt and sometimes from the date of unloading. Often if freight forwarders have their own different time bars they will not confirm consent to a time extension offered by the ship interests.

(V) Per-Package Limitations

The problem of what is the "package" existed long before containers, but containerisation has added further complications. Although a container is physically a package, the legal issue is whether it is a package or not for the purposes of the bill of lading and Hague Rules or Hague-Visby Rules limitation.

There are a number of different approaches :

(a) The Re-Usable Article of Transport Equipment - In

an American case The "Aegis Spirit" [1977] 1 Lloyd's Rep. 93, (United States District Court Seattle), the Judge took the view that a container is neither a package nor a unit of goods. Instead, he looked upon it as a re-usable article of transport equipment.

(b) The Intention of Parties as Shown in the Documentation - Under this test, if the bill of lading, or even the shipping note, shows one container containing 15 cartons, then it is the 15 cartons that are the per package limit, but if the bill of lading just refers to one container, then it is the container itself which is the limit.

The cases that follow this line include Leathers Best -v- SS "Mormaclynx" [1971] 2 Lloyd's Rep. 476, (United States Court of Appeals - Second Circuit) and The "Tindefjell" [1973] 2 Lloyd's Rep. 253 (Canadian Federal Court).

(c) If Only the Container is Mentioned - and no reference is made to the contents, then the container is the one package Royal Typewriter -v- MV "Kulmerland" [1973] 1 Lloyd's Rep 318 (United States District Court New York) and on appeal [1973] A.M.C. 1784.

This position may be complicated if a freight forwarder has issued a consignment note to the Consignor showing "1 container with 40 parcels" but only declared "1 container" to the shipowne

(d) Functional Package Unit - This theory is that if the goods could have been carried in the hold of the ship without a container, then their normal method of transit is the one that counts e.g. if they were palletised before being put in the container then the number of the "packages" would be the number of pallets. The "Kulmerland" case is given as authority for this but it was also a case where the intention of the parties was shown on the documentation.

Prior to adopting the Hague-Visby Rules, we understand that German Courts favoured the container as the unit whereas the French Courts favoured the number of packages noted on the bill of lading itself - The "Isee" [1965] DMF 18.

Adopting the Hague-Visby Rules resolves most of these difficulties with containers as the Rules relate it to the number of packages or units enumerated on the bill of lading. However, New Zealand has yet to adopt either the Hague-Visby Rules or the Hamburg Rules.

Many bills of lading especially on the Europe New Zealand / Australian run have a $US2.50 per kilo limit as well, which generally applies where sea damage cannot be pinpointed.

So far as New Zealand Courts are concerned, we believe that they would probably follow approaches (b), (c) and possibly (d) above in those cases where the Law involved was still the Hague Rules and not the Hague-Visby Rules, but there is yet to be a decision on this particular point.

(VI) Jurisdiction Problems

In New Zealand, the question of jurisdiction was simplified after 1968 by amendments to the Sea Carriage of Goods Act 1940. New Zealand courts received over-riding authority to consider litigation in respect of cargo imported into New Zealand in accordance with the proper law of the contract. The New Zealand Sea Carriage of Goods Act was also imposed on all exported cargo, although the New Zealand courts would only have effective jurisdiction if the defendant had a presence in New Zealand.

Multi-modal transit disrupted these simple arrangements. The New Zealand courts still have jurisdiction over litigation relating to the sea transit portion and apply the relevant Hague Rules or Hague-Visby Rules legislation, but the New Zealand courts do not have jurisdiction to consider claims over the land transit part outside New Zealand. These may be

governed by a wide variety of regimes including C.M.R., C.I.M. and the various Freight Forwarders Association Rules adopted in Europe, including the Road Haulage Conditions of Carriage (U.K.), the Dutch Forwarding Conditions, the German Forwarders Standard Terms and Conditions and the Association of Italian Forwarding Agents General Terms and Conditions.

In addition to these conventions and official rules, there are the FIATA Combined Transport Conditions embodied in the ICC Negotiable FIATA Combined Transport Bill of Lading and all the unofficial contractual terms drafted by freight forwarders throughout the world.

Sometimes, these private contractual terms produce ridiculous results e.g. jurisdiction in the city of Hamburg for claims on a transit from inland Italy to Genoa and then to New Zealand on a Belgian ship where none of the parties had an office in Hamburg and all the witnesses lived and worked outside West Germany.

This plethora of rules and contractual terms may mean that overseas courts or arbitrators are involved as well as the New Zealand courts resulting in two sets of legal proceedings in different forums, both trying to decide on the central problem of identifying where and how the damage occurred to the goods.

(VII) Harbour Boards, Wharfingers and Stevedores

The recent decision of The "New York Star" [1980] 2 Lloyd's Rep. 317 (P.C.) has marked another high tide in favour of the ship interests so far as conventional cargo is concerned. It solidifies the line of decisions from The "Eurymedon" decision [1974] 1 Lloyd's Rep. 534 (P.C.) back to Suisse Atlantique -v- Rotterdamsche Kolen Central [1966] 1 Lloyd's Rep. 529 (H.L.) and Scruttons -v- Midland Silicones [1961] 2 Lloyd's Rep. 365 (H.L.).

It confirms that the stevedore "normally and typically" does have the protection of the bill of lading conditions.

The "New York Star" decision also has considerable implications so far as container transit is concerned. Instead of a wharfinger and stevedore being involved in the receipt of the goods and the loading or unloading of the vessel, we now have a container terminal operator using straddle carriers and container cranes. This container terminal operator may be a private company as in Wellington or a statutory harbour board as in Auckland and the issue arises as to whether these container terminal operators are entitled to the protection of the combined transport bill of lading conditions or not.

Our view is that the container terminal operator, whether it is a private company or a statutory authority, is entitled to the protection of the bill of lading conditions, provided there is the standard sort of "Himalaya" clause in the bill of lading and the container terminal operator can bring itself within the four rules enunciated by Lord Reid in Midland Silicones. Since The "New York Star" decision, it should be comparatively easy for the container terminal operator to establish this as a matter of normal commercial usage. After all, if the container terminal operator is not entitled to have the protection of the "Himalaya" clause in a combined transport bill of lading, who is?

In addition, the container terminal operator may well adopt special contractual arrangements with the ship owners or pass special bylaws, if they are a statutory authority, to cover the operation of the container terminal concerned.

In 1980, the Auckland Harbour Board adopted the Container Terminal Conditions of Service which had been negotiated between the ship owners and the New Zealand Container Terminal Operators Association. These conditions specifically state that the Board is to have the benefit of the ship owner's bill of lading terms.

In addition, the C.M.I. is now promulgating the Standard Conditions for International Terminal Operators, but it is too early yet to know whether these will have any impact on Australia or New Zealand.

(VIII) Trans Tasman Freight Forwarders Liability

The position in the Trans-Tasman trade so far as freight forwarders are concerned has been dominated by the use of a total exclusion clause, commonly numbered 3 (a), the usual wording of this clause is set out in Appendix B. This clause is often supported by additional exclusionary clauses which, for example, impose time limits or relate to goods damaged which have been packed by the freight forwarder.

The first test case on Clause 3 (a) brought before the New Zealand courts was EMI -v- Holyman [1976] 2 NZLR 566, where Mr Justice Beattie was invited to rule on the validity of the 3 (a) exclusionary clause but declined to do so. Instead, he found on the facts that the freight forwarder was acting for the sea leg of the journey merely as a forwarding agent and there had been no breach of its duty of care.

Since that decision, there has been the important case in the House of Lords of Photo Production -v- Securicor [1980] 1 Lloyd's Rep. 545. In this case, the House of Lords demolished the doctrine of fundamental breach of contract promoted by Lord Denning and others for the second time. Photo Production -v- Securicor was used as an authority by the Privy Council in The "New York Star".

Almost immediately after these decisions, Mr Justice Holland held in Mogal Transportation -v- Auckland Glass [1980] Butterworths Current Law 219, that Clause 3 (a) did protect the carrier employed by the freight forwarders. Mr Justice Holland relied on The "Eurymedon" decision and The "New York Star" decision as authorities for his decision.

Although academics now believe that the doctrine of fundamental breach of contract has been finally disposed of, we would be surprised if it does not return in some other form. Most probably by the development of the two loopholes that still exist in the interpretation of exclusion clauses. These are :

(a) the strict interpretation of an exclusion clause so that

if it does not clearly cover the cause of action then it is set aside on a point of construction; and

(b) differentiating between clauses which limit liability and clauses which exclude liability. The recent House of Lords decision in Ailsa Craig Fishing Co. -v- Malvern Fishing Co. [1983] 1 All E.R. 101 (H.L.) has made it clear that the House of Lords considers that a clause which purports to limit liability should not be construed as strictly as one which excludes liability, as the former is more likely to accord with the intentions of the parties.

There are still cases pending before the New Zealand Courts on the Clause 3 (a) exclusion and it will be interesting to see how the Courts approach these problems in the light of all these recent developments.

(5) SPECIAL PROBLEMS

(A) On-Deck Carriage of Containers on Conventional or Semi-Conventional Vessels

The technology of purpose built container vessels has developed to the point where there is little distinction between on-deck and under-deck carriage of containers. The containers are slotted in and held so that the security of the top tiers is nearly as strong as the lower tiers in the hold of the vessel itself. Although the top tiers are more exposed to sea spray, if the container is maintained properly, this involves little risk to the cargo inside.

The position on the conventional vessels with break bulk cargo is also clear-cut. It is the hybrid vessels that create difficulties; sometimes the ship owner has attempted to have the best of both worlds without properly planning or re-building an older conventional vessel. It is this sort of vessel where containers are more likely to be lost overboard because they are not properly secured.

The ship owners argue that goods carried topside on such hybrid vessels are not "on-deck" while cargo interests argue in such circumstances that the containers are "on-deck" and there has been a breach of the Hague Rules if the bills of lading have not been claused as "on-deck".

(B) Leasing and/or Ownership of Containers

The ownership of most of the means of transit prior to containers was not really a great issue. Pallets and crates could be of value, but not on the scale that a container is. This has resulted in a whole new series of complications. Containers may be owned by the ship owner or leased by him from organisations or companies that are not shipping interests themselves.

As these containers can also be subject to damage, either in transit or through the inappropriate contents (see Section 3 (D) above), complex legal issues and questions of insurance can easily arise. The recent case of Bragg -v- Oceanus Mutual [1982] 2 Lloyd's Rep. 132 (C.A.) illustrates how complicated some of these matters can get.

Another case which raised interesting problems of marine insurance over leased containers is I.C.S. -v- British Traders [1981] 2 Lloyd's Rep. 460 (Q.B.) where the lessee of containers went bankrupt and the plaintiffs recovered the leased containers and claimed the recovery costs from their insurer.

(C) Fraud

Although the most spectacular instances of maritime fraud have involved tankers like The "Salem" [1983] 1 Lloyd's Rep 342 (H.L.) or "rust-bucket" conventional cargo vessels, containers have also lent themselves to fraud and deception.

The container itself may be stolen and sometimes the owner connives in the theft as a means of avoiding stringent Exchange Control Regulations.

In addition, the contents of the container can be subject to fraud and deception, for example, by forging evidence of interference with the container in transit to get insurance, when this was either an under-loading at the point of origin or an under-declaration of out-turn at the point of receipt.

Another problem is the under-declaration of the weight of a container or the failure to declare dangerous goods in order to save freight rates.

The recent book by Ellen and Campbell - International Maritime Fraud (Sweet and Maxwell, 1981) is a fascinating source of background information on these activities.

(D) Slot Chartering and Section 11 Agents

Since 1968, cargo interests in New Zealand can sue the agent of a vessel for any damage that occurs on the vessel to any goods that are being imported into New Zealand, no matter what jurisdiction or other exclusion clauses exist in the relevant bill of lading.

Enquiries are necessary with the Customs Department and the Harbour Board at the port concerned, to find out who is the agent of the vessel for cargo claims. If the vessel is chartered then there may be a charterer's agent as well as an owner's agent. The position may become more complicated when there is a multi-modal transit by container, especially if there has been slot chartering on a container vessel between members of a particular shipping service. Consequently the agent for claims for damage to cargo in a particular slot may not be the agent of the vessel for the purposes of Section 11 of the Sea Carriage of Goods Act 1940 (N.Z.).

Particular care is necessary to make sure that the correct parties are joined in any necessary litigation. The most effective approach is to write to all the possible defendants and invite them to agree amongst themselves which company is to be the agent of the vessel for the purposes of Section 11.

Failing any such agreement then the shot gun method of issuing proceedings against the lot must be followed.

(E) Multi-Modal Transit and the Gold Clause Agreement

The introduction of combined transport has brought a number of problems to light in regard to the Gold Clause Agreement. Some of the more important of these are as follows :

(i) The Gold Clause Agreement was intended to apply to sea voyages only. Consequently, it will not apply to the land portions of a combined transport bill of lading.

(ii) If it cannot be established where the loss or damage occurred, then the limit provided by the combined transport bill of lading will apply, and the Gold Clause Agreement will not be applicable.

(iii) The bill of lading may well show the name of a freight forwarder who is not a signatory to the Gold Clause Agreement although the ship owner and the insurer of the damaged goods is. If the freight forwarder was acting solely as an agent for the consignor or consignee of the goods, then we believe that the Gold Clause Agreement should apply, but if the freight forwarder is the true consignor and consignee of the bill of lading, then we believe the Gold Clause Agreement would not apply.

(iv) The practice of slot chartering on a container vessel also creates complications. The British Maritime Law Association takes the view that the Gold Clause Agreement would apply in the case of a claim for damaged goods carried under a bill of lading issued by a slot charterer who is a party to the Gold Clause Agreement, in the same way as it would apply to a claim under a bill of lading issued by a time charterer. The question in both cases is "is the person against whom the claim is made under the bill of lading, a party to the Agreement?" If the

answer is yes, then the Agreement will apply and if the answer is no, the Agreement will not apply.

(6) MARINE INSURANCE IMPLICATIONS

(A) General

The container in itself does not add any really new change of principle to marine insurance, but it does provide changes of detail in transit arrangements and in the risks involved in the transit arrangements. Sometimes for the better, sometimes for the worse.

In section 3 (B) above, we have already covered the most significant changes in risk factors of cargo damage. However, several particular problems need further elaboration.

(B) Inherent Vice

Like Mr R. J. Salter in the June 1980 MLAANZ Newsletter, Vol 2 No : 3 pages 11 and 12, we consider that it is possible for the packaging of a container to be so bad as to amount to inherent vice. Basically the same legal principles would apply as in conventional cargo and these have been particularly well summarised in SOYA G.m.b.H. -v- White [1982] 1 Lloyd's Rep. 136 (C.A.) where Donaldson L.J. gave a comprehensive and lucid statement of the law relating to inherent vice. This decision has been confirmed on appeal by the House of Lords [1983] 1 Lloyd's Rep. 122.

(C) Container Sweat

The problems of container sweat and the application of The "Flowergate" decision have already been referred to in section 3 (B) (II) above. For marine underwriters the risk of container sweat can be unexpected as there is not the same long accumulated experience of problems which exists in relation to conventional ships. Marine underwriters are therefore well advised to keep up with the technical information that

becomes available on this subject from time to time.

(D) Independent Certificates as to Condition

We believe that it is often very important for insurers to obtain independent certificates as to the condition of cargo before transit starts. All too often, because the goods are coming by container, no independent certificate is obtained prior to departure. Consequently the problems of establishing when and where the damage occurred, and whose liability is involved, are made that much more difficult.

(E) "On-Deck" / "Under-Deck"

The problem of "on-deck" / "under-deck" cargo referred to in section 5 (A) above is also of major significance so far as insurers are concerned. Usually they have less information about the vessel and how the cargo is to be carried than the consignor or consignee. "On-deck" carriage in such circumstances when the bill of lading is not claused, can seriously affect their risks and lead to issues of whether there has been proper disclosure or not.

(F) Recoveries

Because of the difficulties of establishing when and where the damage occurred and who caused it, and the various procedural complications that we have set out in the sections above, it is often difficult for an underwriter to obtain a recovery under subrogation without embarking on an exercise that can be costly, as proceedings may be necessary in several different countries. Sometimes in litigation and sometimes in arbitration.

All these factors have to be taken into consideration by the underwriter in fixing the rate for the transit concerned.

(7) FUTURE DEVELOPMENTS

(A) Practical and Technological Changes

(I) Bulk Cargo

The use of bulk containers will probably increase further but there is not in our view the same scope for them in the handling of bulk cargoes as there is with general cargoes simply because the handling of bulk cargoes in and out of a ship is so much simpler.

Many commodities shipped in bulk flow freely and can therefore be loaded and discharged through hoses, chutes, or at worst by grabs. They lend themselves to speedy handling which does not unduly delay the carrying vessel in port.

However, the bulk container is useful for small parcels of a commodity particularly where several shippers or consignees are concerned and where more than one mode of land transport is to be used either end of a voyage.

Tank containers are a good example of bulk containers and they are principally used for liquids. Other bulk containers have top loading and bottom discharging facilities relying upon gravity and grain is often carried in this manner. Even conventional containers fitted with polythene liners are being used for grain.

One development still in its infancy in New Zealand is the use of bulk bags often made of woven polypropylene and provided with four lifting straps for use with fork hoists or cranes. These bulk bags carrying one or sometimes two tonnes are taking the place of hessian or multiwall paper bags and tending to reduce damage by reduced handling.

(II) Air Freight

There is likely to be a substantial increase in the involvement of freight forwarders, just as in sea multi-modal, but because airports are more widely distributed than sea ports there is always more opportunity for direct contact between shipper and airline than between shipper and shipping company.

Speed of operation has always been an important factor with aircraft and thus the value of the unitised load was early recognised by the airlines. The development of the aircraft container following that of the pallet has not revolutionised air cargo handling to the same extent as with ship cargoes. This is largely because the cargo weight and size of air containers have not greatly exceeded the air pallets and two of Air New Zealand's containers actually have the same sized base as their standard pallets. Because of the shape of the aircrafts' holds these containers have the same width and height as the maximum loads on the pallets.

(III) Types of Ships

We believe that the Roll On / Roll Off vessel has the greatest potential for development. Being able to carry conventional cargo as well as containers and palletised loads Roll On / Roll Off ships, provided they are fitted with their own ramps and lifting gear, are much more flexible than cellular container ships. In general they call for less modification to port facilities and so can be more readily utilised in smaller ports.

It appears likely that their future growth will be much more spectacular than that of cellular container ships. It is only in matters of stability that any significant problem remains.

(B) International Conventions

(I) Hamburg Rules

The Hamburg Rules introduce a number of matters that would particularly affect multi-modal transport. In particular, the liability period is extended by Article 4 to cover the period from the receipt of the cargo to its delivery. Under the Hague and Hague-Visby Rules, it is generally from ships side to quay side only. Secondly, the liability per package is defined in the terms of IMF Special Drawing Rights and increased further over the Hague-Visby limits. Thirdly,

the carrier becomes liable for delays. Consequently if the Hamburg Rules do come into force, it will be a significant future development. At the present moment, they rest in limbo attended by persistent rumours and counter rumours.

(II) The (1980) United Nations Convention on International Multi-Modal Transport of Goods (TCM Convention)

We have already quoted from this Convention's definitions. If it comes into force it will have significant effects on liability issues, in particular the onus of proof will lie with the multi-modal transport operator, because of presumed fault or neglect. The multi-modal transport operator is also liable for the actions of his servant or agent and delay.

Moreover, the TCM Convention is designed to fit in neatly with the liability provisions of the Hamburg Rules rather than of the Hague-Visby Rules. Consequently, the adoption of this convention, will probably depend on the adoption or otherwise of the Hamburg Rules.

The points in issue in (I) and (II) above are discussed in greater detail in "Towards a New Zealand Shipping Policy", Ministry of Transport, January 1983, pages 111 - 119.

(8) CONCLUSION AND ACKNOWLEDGEMENTS

We started off in awe of the topic that had been chosen by the Association and this sense of awe has only increased as we progressed. Our greatest problem throughout has been to decide what to leave out of this paper and how to summarise the relevant information.

We have been greatly helped by Tony Seaman and Briar Wilson and to a lesser degree by others closely associated with the Shipping, Insurance and Legal professions.

We thank them for their work and enthusiasm, but take full responsibility for the errors and omissions of this paper.

APPENDIX A

Cargo Problems with Air Transit Containers

Whilst cargo damage does occur with this type of multi-modal transport the number of incidents or volume of cargo involved with damage claims is significantly less than with seaborne freight even allowing for the obvious difference in quantities carried. However, due to the fact that high freight costs generally only attract high value goods, there is probably at least as high, if not higher, claims value per value of goods carried.

Container handling by airways is without many of the problems associated with seaborne containers. Being so much smaller and lighter they are more easily handled and since all who are associated with aircraft servicing are safety conscious, containers naturally receive more careful and gentle handling. Furthermore, they are generally not subjected to the same often violent movement that may arise when a vessel is subjected to natural forces in a seaway.

The essence of air transport is speed. This requires a prompt handling of cargo resulting in less time in the open, less time in transit sheds and thus, less time in which to become damaged.

As a general rule, freight consolidation for aircraft takes place in the vicinity of the airport and goods are delivered to depots which are often within the confines of the airport boundaries. The shorter the delivery journey after stowage in the container the less the chance of damage en route.

Due to the fact that air freight charges are very largely based on weight, and excess freight costs dearly, there is a tendency to reduce packaging to a minimum. This is one of the principal causes of air cargo damage and machinery in particular, already a heavy item, is often shipped on a pallet base with only a polythene sheet covering. Damage frequently occurs, not in the aircraft hold, but in the cargo stores and in loading onto trucks by fork hoists.

Water damage by rain would, in our experience, rate high amongst the causes of airfreight damage and yet water protection is light, inexpensive and does not incur heavy freight penalties - a point for shippers to bear in mind.

Palletised cargo by air is restrained by nets and sometimes by polythene shrink wrapping. Even containers are largely open on two sides with net restraints so that their contents too are partly exposed to the weather although recently in New Zealand there has been a move by airlines to cover some cargo better in recognition of the fact that rain is a major source of damage to air cargo.

Pilferage does not present too much of a problem in most airports but delay with fresh produce associated with lack of adequate refrigerated stores before shipping or in trans-shipping is a major problem accounting for substantial losses in high value commodities.

In general, containers have not altered the pattern of air freight to anything like the same degree as with sea freight nor do they appear to have presented such severe problems.

APPENDIX B

Wording of Clause 3 (a) in two typical freight forwarders' contracts

"The Forwarder SHALL NOT BE UNDER ANY LIABILITY for any loss of or damage to or mis-delivery, delay in delivery, concealed damage, deterioration, contamination, evaporation, non-delivery of goods held in their care, custody or control, or any consequential loss arising thereform, howsoever caused".

"The Forwarder SHALL NOT BE UNDER ANY LIABILITY for any loss of or damage to or mis-delivery, delay in delivery, concealed damage, deterioration, contamination, evaporation, non-delivery of goods held in its care, custody or control, or any consequential loss arising thereform, whether caused by negligence or otherwise howsoever."