WORLD IN A BOX
WHAT LEGAL ISSUES MIGHT YET NEED TO BE RESOLVED AND BY WHAT MECHANISM?

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1. As we have seen, the container revolution commenced in the late 1950s and continued apace throughout the latter half of the 20th century. This revolution resulted in the rapid development of multimodal carriage. The lingering legal issue is the development of a proper international liability regime for multimodal carriage. There is currently no uniform legal regime governing liability for the multimodal carriage of goods – most usually within a container. Instead, we have a series of single mode regimes (variously concerned with carriage by sea, air, road or rail) and a series of multimodal 'afterthoughts' designed to have the least possible interference with the existing single mode regimes (COTIF/CMR are examples).

2. The issue lingers because neither the *Hague* nor the *Hague-Visby Rules*, which remain the primary liability regime for the carriage of goods by sea, were drafted with containerization in mind. There are only two references to containers in the HVR (one in Art 6A in relation to deck cargo, and one in Art 4 (5)(c) – the limitation provisions). The 'afterthoughts' mean there has been continuing jurisprudential conflict as to whether a container is *the* package or unit for the purposes of limitation of liability or whether it depends on the way packages and units are enumerated on the bill of lading *as packed.*

3. By the time of the promulgation of the *Hamburg Rules* in 1978, containers were an ordinary part of maritime transport yet garnered little attention in the new rules. They were included within the definition of 'goods', if supplied by the shipper, and Art 6(2)(a) attempted to clarify the 'shipping unit' which would be the basis of limitation of liability – although using the words that have proven controversial 'enumerated in the bill of lading … as packed' (*El Greco (Australian) Pty Ltd v Mediterranean Shipping Co SA* (2004) 140 FCR 296; *Kyokuyo Co Ltd v AP Moller-Maersk A/S t/a Maersk Line (The Maersk Tangier*) [2018] 2 Lloyd's Rep 590.)

4. Early in the container revolution, standard form contracts and associated trade practices were developed by industry in an attempt to solve the most common difficulties faced by multimodal transport operators. These included the FIATA Multimodal Transport Bill of Lading, the UNCTAD/ICC Rules for Multimodal Transport Documents and COMBIDOC. More recently, a suite of negotiable and non-negotiable multimodal transport documents was developed, including BIMCO's MULTIDOC95, COMBICONBILL, MULTIWAYBILL and COMBICON-WAYBILL.

5. These documents provided for a more or less complete contractual liability regime with clear rules on issues such as the basis of liability, availability of defences in different stages of the voyage, limitation, and a time bar. What each of these documents is concerned to address, each in a different way, is how to avoid interference with mandatory regimes applicable to unimodal segments of the adventure. As Professor Lorenzon observes (in Malcolm Clarke (ed) *Maritime Law Evolving* (Hart, 2013) 168), this is where the difficulty lies – whilst attempts have been made

at multimodal thinking, those attempts are all set within the framework of the various unimodal regimes, all of which are negotiated with the parties concerned, and which are designed to tackle the specific needs of specific unimodal carriage. There is no need for a 'perils of the sea' defence in relation to those driving a truck; similarly, a 'per package or unit' limitation makes no sense in relation to carriage by air.

6. In 1980, there was an attempt at an international convention with the United Nations Convention on International Multimodal Transport of Goods, which did not attract any significant support, in part, it is said, because of adverse lobbying by the maritime industry (Lorenzon 170). The convention provided for the possibility of issuing one document, the MT Document, to cover the entire transportation period and for the Multimodal Transport Operator to undertake the liability of the whole period during which it is 'in charge' of the goods, being from the time it takes the goods into its charge until the time of delivery.

7. The most recent attempt at a more comprehensive liability regime was the promulgation of the *Rotterdam Rules* in 2008. They were intended to replace the *Hague*, the *HVR* and the *Hamburg Rules* and therefore are premised on a unimodal regime. Nevertheless, they were designed as a multimodal regime, provided there is a sea-carriage leg, and are therefore referred to as a 'maritime plus' regime. This approach makes the convention applicable to the sea leg and, where the contract provides for a further leg through a different mode of transport, to that extra leg. It attempts to resolve issues of conflict of conventions through provisions aimed at creating a limited network liability system. This means that it will apply the unimodal regime applicable to a specific mode of transport in all circumstances in which the event which has caused loss or damage, or delay has been localised, provided such event is the exclusive cause of the loss, damage or delay (Art 26). Where damage is not localised, the Rules apply.

8. The *Rotterdam Rules* have not achieved international support. As at 8 May 2020, there were 25 signatories (Armenia, Cameroon, Congo, Democratic Republic of the Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, Guinea-Bisseau, Luxembourg, Madagascar, Mali, the Netherlands, Niger, Nigeria, Norway, Poland, Senegal, Spain, Sweden, Switzerland, Togo, and the United States; all together representing 25 per cent of the world's trade) and 5 State parties (Benin, Cameroon, Congo, Spain, and Togo).

9. Consequently, particular problems remain when goods are carried at sea in containers, which problems are not adequately addressed by the existing liability regimes.

10. Despite the lack of support for the adoption of the *Rotterdam Rules*, proponents of the Rules continue to advocate for their adoption, particularly by reference to the perceived benefits with respect to containerized cargo (Prof Michael Sturley, 'The Rotterdam Rules and vessel safety' (2019) 25 *JIML* 429; CMI's Submissions to IMO February 2020).

11. Uncertainty around the package limitation is unlikely to be resolved definitively by the *Rotterdam Rules* since the wording is largely unchanged from that used in the *Hague* and *HVR* (Art 59(2)).

12. The *Rotterdam Rules* attempt to address issues around deck cargo, liability for which can be excluded entirely by the carrier under the *Hague* and *HVR* regimes by creating a mini-regime regarding liability for cargo actually carried on deck and deals with three issues: (1) is carrying cargo on deck a breach of contract in itself? (2) is the carrier liable for loss of, damage to, and

delay in delivery of permitted deck cargo? And (3) is the carrier's liability for loss of, damage to, and delay in delivery of non-permitted deck cargo subject to limitation? (Art 25).

13. The *Rotterdam Rules* would also dramatically alter the obligations of the carrier in requiring it 'before, at the beginning of, *and during the voyage* by sea to exercise due diligence to: … (c) Make and keep the holds and all other parts of the ship in which the goods are carried, *and any containers supplied by the carrier*…fit and safe for their reception, carriage and preservation' (Art 14).

14. One of the issues which may be assisted by the adoption of the *Rotterdam Rules* is the increasing number of casualties caused by container fires in recent years – the *Sincerity Ace*, the *Yantian Express*, the *APL Vancouver*, the *Grande America*. The principal source of the underlying problem that led to these tragedies was the non-declaration or mis-declaration of the dangerous nature of the cargos. Unlike the *Hague* and the *HVR*, the *Rotterdam Rules* include a substantial number of provisions that encourage relevant parties to communicate and share information about goods for carriage, as well as enumerating the liabilities of parties when they fail to do so (Arts 28-32). Secondly, the *Rotterdam Rules* provide a legal underpinning for the parties' use of electronic communication, including electronic transport records (which could include the use of block chain), thereby facilitating the sharing of relevant information relating to the goods the subject of the carriage (Arts 35-36).

15. Both the IMO Sub-committee on Carriage of Cargos and Containers (IMO, CCC 7/6/1 14 February 2020) and the IMO Facilitation Committee (IMO, FAL 44/20/2 14 February 2020), meeting in February of this year, have acknowledged the role that the *Rotterdam Rules* would play in reducing the risk of container fires by requiring greater sharing of information between shippers and carriers and facilitating electronic commerce, which will better enable operational personnel to have timely access to the information needed to ensure vessel safety.

16. Important though these issues are, they are raised primarily in the context of maritime carriage, although no doubt safety issues also arise during transport by other modes, although perhaps with less catastrophic consequences.

17. So, we return to the initial observation that there is no one international liability regime for multimodal carriage of goods, rather there is a complex web of unimodal regimes. The *Rotterdam Rules* will not change this position.

18. There is of course a threshold question – whether there is in fact a need for a compulsory legal regime for multimodal transport and whether the current contractual framework for multimodal transport produces unfair results? Professor Lorenzon's studies (ibid, Ch 7) suggest that the current framework does not appear to have created particularly harsh or unfair results for cargo interests. He observes that the market for multimodal carriage is not as concentrated as it is for single mode transport operators and that competition among different players has not offered fertile soil for the development of dubious exclusion clauses. He posits that the only way to achieve a truly multimodal regime must be that of taking a firm multimodal approach by which he suggests looking at the container itself as a single mode of transport. It might then be possible to design a special regime applicable to containerised carriage.

19. Alternatively – freedom of contract might yet produce the best solutions for all those involved in a rapidly developing industry underpinned by technological advances that we are yet to imagine.

20. Containerization has also had implications for other doctrines of maritime law, such as general average. Natalie Campbell ('Book Review – General Average: Law and Practice (3rd ed)' [2018] *LMCLQ* 563) has observed that the modern reality of 'container vessels [that] carry tens of thousands of containers, with potentially more than one bill of lading attributed to a single container' and multiple holders of those bills of lading makes the adjustment of general average complex and practically difficult.

21. Although provision is made in the York-Antwerp Rules 2016 for particular cargo to be excluded from contributing to general average if 'the cost of including it in the adjustment would be likely to be disproportionate to its eventual contribution' (Art XVII(a)(ii)), she notes that, depending on the cargo, 'smaller packages may still be of sufficient value to negate … Rule XVII(a)(ii)', resulting in an 'exorbitant number of contributors' remaining.

22. Campbell's conclusion is that the YAR may not be 'an appropriate mechanism to deal with general average arising from today's container vessels'. That is for others to debate, but all of these matters show the continuing impacts of containerization on principles of maritime law formulated before the world could be carried around in a box.

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