World in a Box:
Impact of Containerisation on Shipping Transactions[1]

Introduction

The presentations thus far have considered the revolution in maritime transport that containerisation brought about, and the international legal developments spawned by that revolution. This final presentation will consider the effects that containerisation has had on a typical shipping transaction.

The sale of goods and their shipping by sea to their destination comprises a multiplicity of legal relationships, each governed by its own unique contractual arrangements. I will consider the container revolution's impact on four of these relationships: *first*, on the contract of sale itself; *second*, on the contract of carriage evidenced by a bill of lading; *third*, on the chartering of the ship; and, *finally,* on the insurance contracts for the carriage of the goods.

The contract of sale

I turn now to the relationship between the seller and the buyer, governed by the contract of sale.

Sale contracts in a shipping context are commonly made on "Incoterms",[2] standard rules published by the International Chamber of Commerce. These were first promulgated in 1936 and have been amended nine times since then. Some of the most significant changes to Incoterms have resulted from containerisation.

The most common sale terms in an international trade context include FOB (free on board) and C&F (cost and freight) or CIF (cost, insurance, freight). Although under FOB terms the buyer arranges and pays for the sea carriage and under C&F and CIF terms the seller has that responsibility, under all those terms the risk passes from the seller to the buyer when the goods pass over the ship's rail.[3]

The obvious implication of containerisation is that the shipper loses practical control over the cargo when it is placed inside a container which is then sealed and handed over to a carrier for loading. Typically, the container may be stacked for some time in the possession of the carrier, or even an intermediate freight forwarder, before being loaded and passed over the ship's rail. Under FOB and C&F terms, during this period the seller remains at risk.

[1] By Angus Stewart, Judge of the Federal Court of Australia. Paper presented at the Australian Academy of Law "World in a Box" online seminar, 23 September 2020. The author gratefully acknowledges the assistance of Samuel Walpole in the preparation of this paper.

[2] "Incoterms" is short for "International Commercial Terms".

[3] See *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145 at [129]-[134] per Allsop CJ for a general discussion of these Incoterms.

In *NSW Leather Co Pty Ltd v Vanguard Insurance Co Ltd*[4] in 1991, the New South Wales Court of Appeal was required to deal with some of these issues, including with whether the use of containers changes when risk would pass in a sale on FOB terms. The Brazilian shipper had loaded a cargo of leather into containers and caused the containers to be delivered to the carrier. However, at some stage before loading in Brazil, the goods were stolen from the container.

The buyer invited the Court to find that, as a result of what it described as "the container revolution", the time at which risk passed had changed, and that goods intended for shipment should be regarded as shipped when they are loaded into a container and the container is sealed.

A majority of the Court (Handley and Clarke JJA) rejected the argument, and affirmed that an FOB contract clearly defines risk as passing when the goods pass over the ship's rail.[5] The "container revolution" had not revolutionised FOB terms. Kirby P preferred not to answer that question because the case could be decided on a different issue. However, with reference to US Supreme Court authority his Honour suggested that the container might be regarded as a modern substitute for the hold of a vessel with the result that risk would pass on the goods being stowed into the container.[6]

Changes have been made in later iterations of the Incoterms to address issues with FOB terms arising from the use of containers. These include the introduction of FCA (free carrier) – which makes the seller responsible for delivery of the goods to the custody of the carrier at a named place whereafter risk passes to the buyer – and FAS (free alongside ship) – where the seller is responsible for delivering the goods within reach of the ship's tackle whereafter risk passes to the buyer.[7] These terms are intended for use where the parties seek the risk to pass from the seller on delivery of the container to the carrier or to a place, rather than on loading onto the vessel.

Notably, Incoterms 2000 contains a "strong warning" that FOB terms "*should not be used* when the parties do not intend delivery across the ship's rail" such as where the seller delivers a container for subsequent loading onto the vessel.[8]

The contract of carriage

Next, let us consider the contract of carriage that is evidenced by the bill of lading.

4 (1991) 25 NSWLR 699.

5 Ibid 704-5.

6 Ibid 701, referring to *Northeast F Marine Terminal Co Inc v Caputo* 432 US 249 (1977) 270.

7 See also Andrea Lista *International Commercial Sales: The Sale of Goods on Shipment Terms* (informa law, 2017) at 8-9, 150-151.

8 UNCITAL, 'ICC INCOTERMS 2000: Report of the Secretary-General' (2000) XXXI *Yearbook of the United Nations Commission on International Trade Law*, Annex II – ICC INCOTERMS 2000, 608. See also Reannon Hemmings, 'Is the Ship's Rail Really Significant', 2005 NJCL 1.

The goods for carriage may be sufficient to warrant their own container so the seller may contract with the ocean carrier on an FCL – full container load – basis,[9] and the bill may be a multimodal bill utilised where one or more legs of carriage are on land.

But, the goods may not require their own container, so the seller may contract with a freight forwarder, or NVOCC – non-vessel owning/operating common carrier – on an LCL basis, i.e. less than a full container load. The NVOCC will consolidate the goods with the goods of other shippers and issue a "house" bill of lading to each. It will then contract as shipper with the ocean carrier to carry the container, and the ocean carrier will issue to it a bill of lading in which it, and not the seller, will be reflected as shipper.

A container bill of lading will generally be a "received for shipment" bill, rather than a "shipped on board" bill.[10] The difference is important. For example, a CIF buyer need not accept a "received for shipment" bill of lading.[11] Also, if the carrier does not pack the container then it will be unable to issue a bill of lading recording the apparent good order and condition of the goods, which gives a purchaser, and in particular an on-purchaser, less assurance that what is loaded in the container is what was bought or that it is apparently in good condition. This may also have implications for any financing arrangement including whether the terms of a letter of credit have been met such as to trigger payment.

A key impact of containerisation on bills of lading has been in respect of package limitation.[12]

The Hague Visby Rules limit the liability of a carrier based on "the number of packages or units enumerated in the Bill of Lading as packed" in the container.[13] Where goods are shipped in a container, whether the container itself – as opposed to each package stowed in the container – is the "package or unit" can significantly impact the limit of a carrier's monetary liability.[14] The law in Australia and England on this point has now diverged. In *El Greco* in 2004,[15] the Full Court of the Federal Court held that unless the number of units or packages "as packed" was enumerated on the bill of lading, the

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9 See *Ace Imports Pty Ltd v Companhia De Navegacao Lloyd Brasileiro* (1987) 10 NSWLR 32 at 34-35 per Yeldham J for a discussion of the implications of an FCL/FCL endorsement on a bill of lading.

10 Carole Murray, David Holloway and Daren Timson-Hunt *Schmitthoff: The Law and Practice of International Trade* (12th ed, Sweet & Maxwell, 2012) [15-027], [16-007].

11 The importance to the buyer of shipped on board bills of lading is also discussed in *NSW Leather Co Pty Ltd v Vanguard Insurance Co Ltd* (1991) 25 NSWLR 699 at 709.

12 DA Yeldham, 'Law in a Changing Maritime and Commercial World – The Frank Stewart Dethridge Memorial Address' (1984) *MLAANZ Journal* 3, 5-7.

13 In Australia, the Australian Hague-Visby Rules contained in Sch 1A to the *Carriage of Goods by Sea Act 1991* (Cth). See Article 4 Rule 5(c).

14 See Sarah Derrington and Michael White, *Australian Maritime Law* (4th ed, Federation Press, forthcoming).

15 *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* [2004] FCAFC 202; 140 FCR 296.

container would be the package. In *Kyokuyo Co Ltd v AP Møller-Maersk* in 2018,[16] the English Court of Appeal held that if the number of units in the container was enumerated even if that was not described on the bill of lading "as packed", each unit would be a package for the purposes of limitation.

The chartering arrangements

Turning now to the chartering arrangements, the contractual carrier under a bill of lading is often not the owner of a vessel. It could be any one of a number of charterers.[17] The chartering relationships have become somewhat more complicated with containerisation.

Containerisation has led to the widespread use of slot charterparties.[18] A slot charter "is an agreement to make available a part of a vessel's cargo-carrying capacity".[19] The characterisation of slot charters as charterparties properly so-called has sparked controversy,[20] but the better view is that they are charterparties.[21] There is a debate as to whether a slot charter is merely an example of a voyage charter for part of a ship[22] or a *sui generis* type of charter which bears features of both time and voyage charters.[23]

Containerisation, and the use of slot charterparties, has also led to "liner conferences", consortia and pools whereby shipping companies coordinate their liner shipping services.[24] By these means a particular line can offer frequent and regular sailings on an advertised route even though only its share of those sailings will be undertaken by ships operated by it, the others being undertaken by the other members of the arrangement. Special provision is made for liner conference agreements in Pt X of the *Competition and Consumer Act 2010* (Cth).

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16 *AP Møller Maersk A/S t/a Maersk Line* [2018] 2 Lloyd's Rep 590

17 See *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145 at [114]-[128] per Allsop CJ for a general discussion of these relationships.

18 See *The Tychy* [1999] 2 Lloyd's Rep 11 at 21; *The Halla Liberty* [2000] 1 HKC 659 at [36]-[44]; *The NYK Isabel* [2016] ZASCA 89; 2017 (1) SA 25 (SCA) at [22].

19 David Foxton et al, *Scrutton on Charterparties and Bills of Lading* (24th ed, Sweet & Maxwell, 2020) [1-018], citing *The Tychy* [1999] 2 Lloyd's Rep 11; *The MSC Napoli* [2009] 1 Lloyd's Rep 246. See also Evi Plomaritou and Anthony Papadopoulos, *Shipbroking and Chartering Practice* (8th ed, informa law, 2018) 220.

20 See, e.g. Damien Cremean, 'Slot Charters and Surrogate Ship Arrest' (2017) 91 *Australian Law Journal* 632; Angus Stewart and Damien Cremean, 'Letter to the Editor and Response' (2019) 93 *Australian Law Journal* 258, 260-1.

21 Stewart and Cremean (n 20) 258-60; Angus Stewart, 'Is a slot charterer really a 'charterer'?' (Conference Presentation, MLAANZ Annual Conference, 2018).

22 *The Tychy* [1999] 2 Lloyd's Rep 11.

23 *The NYK Isabel* [2016] ZASCA 89; 2017 (1) SA 25 (SCA).

24 See Plomaritou and Papadopoulos (n 19) 35.

The contract of insurance

Turning now to the insurance arrangements, containerisation has also had implications for insurance to protect against damage to goods during carriage.

The *Marine Insurance Act 1909* (Cth) requires the insured to have an "insurable interest",[25] as defined in s 11 of the Act.

Referring back to the *NSW Leather* case, it turned on whether the buyer had an "insurable interest" in the goods. As the leather was loaded in the containers but not shipped with risk not having passed under the FOB sale, the buyer did not have an insurable interest in the goods at the relevant time and would have been unable to claim under the policy were it not for a "lost or not lost" clause.[26]

The case has been described as an illustration of "[t]he continuing difficulty in modern times in relation to the requirement of an insurable interest".[27] It was discussed by the Australian Law Reform Commission (ALRC) in its *Review of the Marine Insurance Act 1909* (Cth) in 2001.[28] The ALRC identified that containerisation made it more difficult to establish where damage or loss to goods took place, which affected the inquiry whether an insured had an insurable interest at the time of the loss.

The ALRC observed that "[b]roadly, it may be argued that, in view of cargo containerisation, the law should deem containers to be functionally part of the ship, so that loading into the container should generally be considered as the point of delivery at which risk in the goods passes".[29] Nonetheless, the ALRC did not recommend any relevant amendment to the Act, preferring the issue to be resolved contractually and noting that "[o]ne view is that FOB terms should not be so commonly used 35 years after the widespread introduction of containerisation".[30] The additions to Incoterms discussed above seek to address this.

Conclusion

In conclusion, it can be observed that containerisation has had a significant impact on the legal relationships involved in the carriage of goods by sea. As with the international legal framework, the domestic legal ramifications of the "container revolution" continue to arise for resolution.

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25 *Marine Insurance Act 1909* (Cth) s 10.

26 *NSW Leather* at 710-711; Sarah Derrington, 'Does the Marine Insurance Act 1909 (Cth) Still Serve the Needs of the Business Community?' (1995) 7 *Insurance Law Journal* 31, 37. See also *Reinhart Co v Joshua Hoyle & Sons Ltd* [1961] 1 Lloyd's Rep 346 at 358 per Willmer LJ.

27 Derrington (n 26) 37.

28 Australian Law Reform Commission, *Review of the Marine Insurance Act 1909* (Cth) (Report No 91, 2001) [11.60]. Cf Michelle Taylor, 'Is the Requirement of an Insurable Interest in the Marine Insurance Act Still Valid?' (2000) 11 *Insurance Law Journal* 1.

29 Australian Law Reform Commission (n 28) [11.58].

30 Ibid [11.61].