Per Package Limitation and Containers under the Hague Rules, Visby & UNCITRAL

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I. Introduction

Transport of cargo by sea is subject in almost every shipping nation of the world to the Brussels Convention on the Carriage of Goods by Sea — 1924, better known as the Hague Rules. Great Britain adopted the Rules in 1924, Canada and the United States in 1936, and France in 1937. Over sixty other nations, states, and principalities have adopted the Rules as well, so that it is an international private law of almost universal acceptance.

The Rules strike a balance between the responsibilities of the carrier and the rights of cargo owners, both of which are limited in what has been an extremely successful compromise. Central to the bargain between the parties is the right of the carrier to limit its responsibility to no more than £100 sterling per package or unit which is $500.00 per package or freight unit under Cogsa, the American version of the Hague Rules.

In recent years, the balance has been upset by inflation and the container revolution. This article first discusses the per package limitation in the light of American, British, French and Canadian law and then deals with particular problems arising from containers.

Finally, there is a discussion of the per package limitation in the light of the Visby Rules and the proposed Uncitral Rules.

II. Per Package Limitation

The carrier is not liable for more than £100 sterling per package under the Hague Rules. The sum is $500.00 Canadian under the Canadian Act and $500.00 funds under Cogsa. Under the local French law of June 18, 1966, the limitation is 2,000 francs. Under the Hague/Visby Rules the limitation is 10,000 gold Poincaré francs.

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1. The Official text of the Brussels Convention at art. 4 (5) refers to “100 pounds sterling” and art. 9 states that the monetary units “are to be taken to be gold value”. 
per package or 30 such francs per kilo, whichever is higher. Art. 4(5) of the Hague Rules reads:

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pounds sterling per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before a shipment and inserted in the bill of lading.

"This declaration if embodied in the bill of lading shall be prima facie evidence, but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

"Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

It is noteworthy that the United States Act at art. 4(5), first paragraph, adds after "... per package lawful money of the United States" the words "in case of goods not shipped in packages, per customary freight unit . . .".

The Purpose of the Per Package Limitation

The purpose of the per package limitation is the same as that of the Rules generally, *i.e.* to retain a proper balance between the rights and responsibilities of the carrier on the one hand, and the rights and responsibilities of the claimant on the other. The per package limitation is part of the bargain between carriers and shippers. Non-responsibility clauses are no longer valid and a certain standard of care is imposed on carriers. In return carriers benefit from a maximum per package limitation. In *Pannell v. SS. American Flyer* 2 the purpose of the limitation was given as follows:

the purpose of the Act's limitation section is to prevent 'excessive claims in respect of small packages of great value,' but not to permit carriers to escape liability for just claims . . .

Package or Unit

The carrier is responsible for £100 sterling per package under the

2. 1958 A.M.C. 1428 at 1433 (N.Y. Dist. Ct.)
Brussels Convention of 1924 or the equivalent under the national law which is applicable. Unfortunately, two important sources of dispute and litigation arise — the first over the definition of a “package” and its application, and the second over the definition and application of a “unit”.

The Basic Principle — The Text of the Rules

Numerous formulae or definitions of a package and of a unit have been put forward. However, it is preferable to look at the Rules for the definition. The formulae have arisen because of changes in modern transport; in particular the advent of containers and the fact that inflation has reduced £100 sterling to a fraction of its value. Formulae based on anything other than the text of the Rules themselves are dangerous as they do not provide uniformity under international law nor do they seem to provide consistent national jurisprudence. Very often, too, such formulae will not provide the equity for which they were intended; for, in truth, the greatest equity is the strict observance of the law. It is submitted that it is preferable to look at the Rules themselves in order to discover what is meant by a “package” or a “unit”.

Intention of Parties — The Key

The face of the bill of lading is the prime test in determining if there is a package or unit, because under art. 3(3) (b) of the Rules the carrier shall issue a bill of lading showing either the number of packages or pieces or the quantity or weight as the case may be, as furnished in writing by the shipper. The bill of lading is thus a type sort of written proof made by both the carrier and the shipper. While it is not binding on them, it is at least *prima facie* evidence or a “commencement of proof in writing”. The face of the bill of lading is thus the major evidence of the intention of the parties and the first factor to be taken account of when determining what the package is for purposes of limitation. Other documents, including shipping documents, invoices and packing lists aid one to determine the intention of the parties as well.

3. Cour de Cassation, October 12, 1964; D.M.F. 1965, 18; see also Cour d’Appel de Rouen, October 22, 1976; D.M.F. 1977, 234.
4. Intl. Factory Sales v. Alexandr Serafimovich (1976), 1 F.C. 35 at 49; [1975] 2 Lloyd’s Rep. 346 at 354; 1975 A.M.C. 1453 at 1468 (T.D.). In order to decide what is package, Smith, D.J. said: “In particular it depends upon the intention of the parties as indicated by what is stated in the shipping documents, things said by the parties and the course of dealing between them”.
To repeat:

_The key to determining what is a package or unit for purposes of limitation is the intention of the parties, particularly as declared on the bill of lading as prescribed by the Rules._

**What is a Package?**

A package is a wrapper, carton, case or other container in which cargo has been placed for carriage. There must be packaging; otherwise the limitation will be based on the unit.

**Examples of a Package**

*Berkshire Knitting v. Moore-McCormack*[^5] — a large wooden case was held to be a package.

*Fiat Co. v. American Export Lines*[^6] — The Italian Court of Appeal held that a $49,000 machine shipped in a large crate was a package.

*(The Francesco C) L. Serra, Inc. v. SS. Francesco C.*[^7] — Two wooden cases, approximately 12 feet by 4 feet 6 inches by 13 feet, each containing a turbine wheel and weighing about 10 tons were considered to be packages.

*Mitsubishi Corp. v. SS. Palmetto State*[^8] — the U.S. Court of Appeals held that a roll of steel weighing 32½ tons in a wooden case was a package and $500 only was awarded.

*(The Mormacstar) Rupp v. International Term. Operating Co.*[^9] Nine Cases carried on trailers (the ship being a roll/on roll/off ship) were each considered to be a package by the U.S. Court of Appeals.

*Nichimen Co. v. M/V Farland*[^10] — the U.S. Court of Appeals held that steel sheets not on skids which were rolled and strapped in unwrapped coils in order to facilitate handling during transportation were packages under Cogsa, art. 4(5), reversing the trial court.

**Partial Package**

Goods partially packed have been held to constitute a package. This

is nevertheless a borderline situation. In *Companhia Hidro Electric v. SS. Loide Honduras*\(^{11}\) it was held that "... packaging for protection, whether complete or partial, should be considered as constituting a package within section 4(5) of Cogsa." Thus, each of five unwrapped circuit breakers was a package because the instrument panel at one end was covered by wooden crating.

*A Container is Package*

A container is a package because it is especially used to hold goods for transport. Whether the per package limitation applies to the whole container or to the individual packages inside, depends on the intention of the parties and, in particular, on what is declared on the face of the bill of lading. The subject is discussed in detail in the text below.

*What is Not a Package*

1) Sometimes it is easier to decide what is not a package.

A package is not goods attached to a skid. *(The Pacific Bear)* *Hartford Fire Ins. Co. v. Pacific Far East Line*,\(^{12}\) The U.S. Court of Appeals held that a "package" for purposes of Cogsa's $500 limitation did not result from the mere attachment of a machine to a wooden skid. In consequence, a large electrical transformer bolted to a wooden skid was not a "package". *Gerling-Konzern v. Hapag-Lloyd AG*,\(^{13}\) A German Appeal Court held that a large compressor bolted to a skid was not a package under Cogsa and the carrier could not limit its liability to $500 per package.

2) A Package is not Goods Attached to a Pallet

*International Factory Sales v. S.S. Alexandr Serafimovich*\(^{14}\)

From all the cases referred to *supra* it is clear that the decision whether a large container, a pallet, or a smaller, wrapped parcel

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in or on a container or pallet is a package within the meaning of Rule 5 of Art. IV depends on the facts and circumstances of each case. In particular it depends upon the intention of the parties as indicated by what is stated in the shipping documents, things said by the parties and the course of dealing between them.

Thus each carton, of which there were 150, stacked on 3 pallets, was held to be a package.

**Standard Electrica v. Hamburg Sud**

The U.S. Court of Appeals held (2 to 1) that nine pallets each holding six cartons strapped to them were nine packages.

Lumbard, Ch.J. and Hay, Ct. J. relied on the following:

a) the pallet was made up by the shipper.
b) the shipper should have declared the nature and value of the goods.
c) the $500.00 "per package" limitation was fair in the present case. If the five hundred dollars per package limitation was inadequate, then it would have to be changed by Congress, not the Courts.

It is submitted that the judgment is correct, but that the pallet was the package or unit in this case because the invoice, the dock receipt and the bill of lading all referred to what was on the bill of lading, "Quantity: 9" or "No. of packages" as "9 pallets", etc.

3) **A Boat on a Cradle is Not a Package**

**Breems v. Int. Term. Operating Co. Inc. (The Prinses Margriet)**

A sailing yacht shipped on a cradle and described as "one unpackaged sailing yacht" was held not to be a package.

In **Pannell v. U.S. Lines**, it was held by the U.S. Court of Appeals that an uncrated yacht under normal circumstances would not be a package.

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4) An Unboxed Automobile is Not a Package

In *Studebaker Distributors v. Charlton SS. Co.* 18 it was held by a British Court that an unboxed automobile was not a package under the Harter Act.

The *Tribunal de Commerce du Havre* 19 held that an unboxed automobile was not a package under the Brussels Convention, 1924, and therefore, looked to the freight unit.

In *Middle East Agency v. J. B. Waterman* 20 an unboxed tractor was not a package. Also shipped was a large rock crusher in 21 parts (11 parts in crates, five parts unboxed and mounted on skids, four parts in cases, and one part an unboxed piece). All the items were held to be packages subject to the limit of $500 per package, except the unboxed piece, liability for which was measured by the weight-ton, namely 16 and 11/200 tons multiplied by $500.00, and having a resulting limitation of $8,027.50.

**Definition of a Unit**

The definition of a unit under the Hague Rules is the source of considerable controversy. Is it a freight unit or is it an unpacked object? The question is admittedly a difficult one. Nevertheless, when one looks at the Rules themselves and sets aside all preconceived ideas, the only logical definition of a "unit" which emerges is the freight unit as declared on the face of the bill of lading. Only the "freight unit" meaning satisfies all the exigencies that the Rules impose on the term "unit".

A freight unit is very close to, and usually is, the shipping unit which is set out on the face of the bill of lading.

It is submitted that a "unit" in the Rules means a "freight unit" and not an unpacked object for the following reasons:-

1) The American Cogsa reads: "per package lawful money of the United States, or in case of goods not shipped in packages per customary freight unit . . .". This is very much clearer than the Brussels Convention of 1924. It is noteworthy that the addition by the United States Congress was intended to clarify rather

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See also *Parfait v. SS. Kittiwake* [1973] A.M.C. 1777 (N.Y. Dist. Ct.) where a motorboat was held to be package.
18. [1937], 59 LL. L. Rep. 23 (K.B.).
See also *Cour d'Appel de Paris*, March 5, 1973; D.M.F. 1974, 16
than to change the sense of the Brussels Convention.21

2) If the meaning of a unit was to be unpacked object, then only the word "unit" would have been used in art. 4 (5) because unit is a generic term and covers a package as well as an unpacked object. There would have been no need to use the term "package" as well as "unit", as "unit" would have been sufficient. In other words, "unit" is not merely an unpacked object but a packed one as well.

3) The unpacked object in the Rules is described as a "piece" in article 3(3) (b) "the number of packages of pieces" ("le nombre de colis ou de pièces" in the official French text). If an unpacked object were intended in art. 4(5) then "piece" would have been the word used rather than "unit". Unit is not a "piece" in consequence.

4) Unit as a "freight unit" makes sense for bulk cargo. Unit as an unpacked object makes no sense for bulk cargo, tallow, wheat, oil, liquid chemicals, etc. It is in fact difficult to argue that unit in respect to bulk cargo is anything other than a freight unit or shipping unit.

**Freight Unit under Cogsa**

In *Brazil Oiticica v. M/S Bill*22 it was held that "Generally in

21. The "First Understanding" to the Ratification of the Convention by the United States refers to $500. "per package or unit" and there is no mention of customary freight unit and thus it might be concluded that there is no difference intended between the terms "unit" and "customary freight unit", and that the latter is merely meant to clarify the former. The U.S. Department of State memorandum of June 5, 1937, described the various differences in wording between Cogsa and the Brussels Convention of 1924 (The Hague Rules). Then it stated:

The foregoing differences from the Convention, made in the Carriage of Goods by Sea Act, are intended primarily (1) to clarify provisions in the Convention which may be of uncertain meaning thereby avoiding expensive litigation in the United States for purposes of interpretation and (2) to coordinate the Carriage of Goods by Sea Act with other legislation of the United States.

The U.S. State Department also clarified its position in a note of March 20, 1938, to the Italian Ambassador in Washington.

The conclusion was:

The ratification of the Convention by the United States with its accompanying Carriage of Goods by Sea Act is an important step towards international uniformity, with reference to the Carriage of Goods by Sea. It is believed that neither the understandings to which that ratification was made subject nor the provisions of either the Carriage of Goods by Sea Act or the Pomerene Bills of Lading Act are out of harmony with the provisions of the Convention.

22. [1944] A.M.C. 883 at 887 (M. Dist. Ct.)
marine contracts, the word ‘freight’ is used to denote remuneration or reward for carriage of goods by ship rather than the goods themselves.” The limitation in this case was, therefore, $500.00 per 1,000 kgs. of oil shipped in bulk, because 1,000 kgs. was the customary freight unit.

_in Freedman & Slater v. M.V. Tofevo_23 it was held that

“The use of the word ‘customary’ in the phrase ‘customary freight unit’ which appears in the limitation of liability statute suggests that freight unit should be one that is well-known in the shipping industry or at least one known to the immediate parties.”

In _The Edmund Fanning_24 an uncrated locomotive was held not to be a package, but it was a “freight unit”; it having been agreed between the carrier and the shipper to carry locomotives at $10,000 freight per locomotive.

_Hartford Fire Insurance Co. v. Pacific Far East Line (_The Pacific Bear)_25 a large electrical transformer was attached by bolts to a wooden skid. The U.S. Ct. of Appeals held that responsibility must be calculated as per customary freight units.

_Shinko Boeki Co. Ltd. v. S.S. Pioneer Moon_26 the U.S. Ct. of Appeals held that the bill of lading provision purporting to define a portable tank as a “package” did not apply when liquid latex bulk cargo was shipped in portable tanks owned by the carrier, filled under its supervision, and which tanks were excepted from freight charges. The portable tanks “were functionally a part of the ship” as much as built-in deep tanks. The correct limitation sum was $500 per long ton of the cargo shipped, the unit used in computing the freight.

_General Motors Corp. v. SS. Mormacoak_27 where the carrier established a special lump sum freight rate for a “power plant” consisting of two unpacked generators and one control unit, it was entitled to limit to $500 its liability for loss of one of the generators, since the entire power plant constituted a “customary freight unit” under sec. 4(5) of Cogsa.

23. [1963] A.M.C. 1525 at 1538 (N.Y. Dist. Ct.)
India Supply Mission v. SS. Overseas Joyce\textsuperscript{28} where the ocean freight rate was fixed at $7,000 per locomotive, the "customary freight unit" was the unpackaged locomotive itself and the vessel's liability for loss or damage was limited to $500.00.

In Stirnimann v. San Diego,\textsuperscript{29} a giant crate consisting of 20 boxed and 106 unboxed parts was shipped from France to San Francisco. The bill of lading referred to "126 colis" (126 packages) and the U.S. Court of Appeals applied Cogsa. If the Convention had applied, however, one gathers that the outcome would have been the same. It was held that the single crane was not the unit, but that each of the 126 pieces was a separate package or freight unit, each with a $500.00 limitation.

**Unit in Other Jurisdictions**

If the law and the jurisprudence is clear as to the meaning of a "unit" in the United States, the definition elsewhere is less consistent. No doubt this is because the provision "customary freight unit" is only to be found in the American Cogsa. Nevertheless, despite the various reasons given and theories propounded, most courts directly or indirectly arrive at the freight unit which they sometimes call a shipping unit.

In Anticosti Shipping co. v. Viateur St. Amand\textsuperscript{30} and unboxed truck was held by the Supreme Court of Canada to be the "shipping unit" because there was a single freight fee for the truck. There was considerable discussion of "the freight unit", the court seemingly being unable to find one because the truck was shipped at a "flat charge of $48.00 plus $3.00 wharfage "fee" and not on "a rate based on tonnage." In effect, the court really defined the freight unit as the shipping unit and vice versa.

In Arrondissementsrechtbank Te Rotterdam\textsuperscript{31} an unpacked engine was held not to be a package, the Court looking to the freight unit or ton. In Gerechtshof Te's Gravenhage\textsuperscript{32} Cogsa was applied and under that law an unpacked engine was held not to be a package. Therefore the court ordered the limitation to be determined by the "customary freight unit".

\textsuperscript{28} [1966] A.M.C. 66; 246 F. Supp. 536 (N.Y. Dist. Ct.)
\textsuperscript{29} [1945] A.M.C. 436.
\textsuperscript{32} February 6, 1970; [1970] E.T.L. 410
Falconbridge Nickel Mines v. Chimo Shipping\textsuperscript{33} the Supreme Court of Canada held that an unpacked tractor and a generator were each a unit and the limitation was $500.00 per unit. The Court refused the principle of a freight unit for unpacked goods. It is interesting that the goods were described on the bill of lading under the heading “No. of Packages and Contents” as a tractor and a generator. Thus the Court applied the principle of the unit being what is set out on the bill of lading. This was the view drawn of the \textit{Falconbridge} decision in the Tindefjell.\textsuperscript{34}

“When cargo cannot be “packaged” as in the \textit{Falconbridge} case, then “unit” seems to me to be an appropriate term to characterize one complete, integrated piece of equipment of machinery.”

\textit{Sept Isle Express Inc. v. Clément Tremblay}\textsuperscript{35} an unpacked truck valued at $19,788 was washed over board. Because the bill of lading did not contain a declaration by the shipper of the value of the truck, it was held that the truck was a unit and the plaintiff could only recover $500.00. The bill of lading described the object as one truck.

\textit{The French Local Law of June 18, 1966}.

The law of June 18, 1966 of France does not solve the per package problem any better than the Hague Rules.\textsuperscript{36} Art. 28 refers to “par colis ou par unité” (per package or per unit). Art. 35(b) of the Decree of December 31, 1966 refers not to “pièces” (pieces) as in the Hague Rules where the contents of the bill of lading are described, but to “colis et objets” (packages and objects). Thus again “unité” is not likely to be an unpacked object, otherwise “objet” would have been used in art. 28 of the Law. One gathers here again that unité means a freight unit or shipping unit.

The French law of June 18, 1966 has an advantage over the Hague Rules or the Canadian or American statutes. It is that the limitation is fixed not by the law but by decree (administrative regulation), so that an amendment to the law is not required to change the per package limitation because of inflation or for any

\textsuperscript{34} [1973] 2 Lloyd’s Rep. 253 at 260.
\textsuperscript{36} Rodière, tome II, paras. 668, 669, 670.
other reason. The present limitation is 2,000 francs by Decree No. 67-268 of March 23, 1967, art. 1.

**Whether the Bill of Lading May Define Package**

To allow a carrier absolute freedom to define the term "package" in the bill of lading would, in effect, allow the carrier to limit his liability in any shipment, of no matter how many packages, to $500.00 or its equivalent for the whole shipment. Such a clause would therefore be invalid under art. 3(8).

In *Gulf Italia Co. v. American Export Lines (SS. Exiria)*[^37] To allow the parties themselves to define what a 'package' is would allow a lessening of liability other than by terms of the Act since a carrier could always limit its liability to $500.00 by merely extracting a stipulation from the shipper that everything shipped, in no matter what form, would be deemed for the purposes of limitation of liability a 'package'.

In *Pannell v. U.S. Lines*[^38] the bill of lading defined package to include "any shipping unit". The Court noted that, had Cogsa applied not by agreement, but ex proprio vigore, (i.e. by its own terms and authority), the definition of package would be invalid, as was held in *Gulf Italia Co. v. American Export Lines (SS. Exiria)*[^39].

**A Clause Reducing the Per Package Limitation**

A clause reducing the per package limitation to less than L100 sterling or $500.00 or 2,000 francs, etc. would be null as being contrary to art. 3(8).

*Crystal v. Cunard SS. Co.*[^40] the U.S. Court of Appeals held that a clause limiting liability to L20 per package being void at sea, was also void on land. "It would be unfair to permit the void clause to spring to life once the goods reached land . . .".

*Firestone International Co. v. Isthmian Lines*[^41] a clause limiting the value to $500 per package was held valid.

**Who May Benefit by the Limitation?**

Clearly the carrier may benefit by the per package limitation. Whether third parties and independent carriers may benefit is a difficult question.[^42]

[^39]: Supra, note 37.
[^40]: [1965] A.M.C. 39 at 44
[^41]: [1964] A.M.C. 1284 (N.Y. Dist. Ct.)
[^42]: Who else may benefit is discussed in Ch. 33, "The Himalaya Clause". W. Tetley Marine Cargo Claims (2nd ed. Toronto: Butterworths, 1978)
When the Limitation Applies

The limitation applies only when the Rules are in force. Nevertheless, a bill of lading need not be issued if one is intended.\(^4\)

*Berkshire Knitting v. Moore-McCormack Lines*\(^4\) a large wooden case was damaged before the bill of lading was signed, but after the issuance of a dock receipt which clearly incorporated the terms of the bill of lading. It was held that the per package limitation was $500.00 for the case. Moreover, if a dock receipt had not been issued the limitation would still be $500 because the form of the bill of lading was known and the parties clearly intended to be bound by it.

In *John Deere & Co. v. Mississippi Shipping Co.*,\(^4\) a boxed tractor was delivered to a carrier's wharf, where it was dropped in the hold and damaged due to defective ship's tackle. A dock receipt was issued, but no bill of lading was ever issued. It was held that there was nothing in the record to show that the shipper could not have required the carrier to issue a "Received-for-shipment" bill of lading declaring the full value of the tractor at the time of delivery to the carrier's wharf. The carrier's liability was thus limited to $500.00, as it was governed by the terms of the dock receipt which incorporated Cogsa with its $500 limitation.

In Any Event

When the contract is so breached (e.g. in the case of fraud) that the defaulting party is unable to benefit by the terms of the contract, it is submitted that the Rules and the limitation per package will not benefit that party.\(^4\)

100 Sterling in Gold

By art. 9 of the Brussels Convention of 1924, the monetary units used in the Convention are said to be gold. Art. 9 reads in part:

> "The monetary units mentioned in this Convention are to be taken to be gold value. "Those contracting States in which the pound sterling is not a monetary unit reserve to themselves the right of translating the..."

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44. [1966] A.M.C. 2651
45. [1959] A.M.C. 480
sums indicated in this Convention in terms of pound sterling into terms of their own monetary system in round figures.

Because signatories may stipulate that their own currency applies, the first U.S. understanding to Cogsa stipulated that the per package limitation would be $500.00 "lawful money of the United States of America." The Canadian Act, art. IX, also makes it clear that the per package limitation of $500.00 is "lawful money of Canada".

a problem arises when a Court is applying the Brussels Convention. Is the limitation 100 sterling in banknotes, or about $160.00 U.S., or 100 sterling in gold, or about $925.00 U.S.? This does not seem to have been settled and is of importance in France, in some of the Scandinavian countries and wherever the Courts are likely to apply the Convention. Thus, an Italian Court in Fiat Company v. American Export Lines Inc., which dealt with a shipment from the United States to Genoa, applied the Convention, and the limitation was fixed at $824.00 U.S. per package, being the equivalent of 100 gold sterling pounds.

Declaration of Value

The one exception to the per package limitation under the Rules is where the shipper declares the value before shipment and it is inserted on the bill of lading (Art. 4(5), first paragraph).

A declaration on the bill of lading by the shipper that he wanted to insure his goods for a certain amount was held to be a sufficient declaration.48

Where the carrier knew of the value of the goods and the carriage was really part of a large contract of construction between shipper and carrier it was held that the $500.00 per package limitation did not apply and the value was as though declared on the bill of lading.49

III. Containers

The container revolution has radically changed the physical aspects
of transport by sea. At the same time it has strained the law, especially in respect to the per package limitation.

**Facing Responsibility — Container Bills of Lading**

Shippers have responsibilities and rights. They may declare the number of packages being shipped on the bill of lading according to art. 3(3) (b). Or they may declare the value of the goods shipped if such value is more than $500.00 per package (art. 4(5)). Carriers, for their part, are permitted to verify and agree or disagree with the declaration made by the shipper on the bill of lading. Carriers are not bound to state that which they suspect is inaccurate or that which they cannot check, by virtue of art. 3(3), last paragraph. Carriers may also charge freight accordingly.

Both shippers and carriers have unfortunately hoped to obtain terms favourable to themselves without taking the positive, although sometimes unpleasant steps provided for by the Rules, i.e. the proper description on the bill of lading, the declaration of value, the charging of appropriate freight. In effect, shippers and carriers hope to enjoy a commercial advantage over their competitors without having to act as fully as the law required or without accepting their responsibilities under the law.

The Courts, for their part, face a dilemma. They are neither authorized to change the law nor to rewrite it. Yet the applying of a single $500.00 limitation to all the contents of a container often seems ridiculous. The solution is to interpret each case according to its facts in the light of the law as it now reads.

A number of theories have sprung up concerning responsibility for containers. It is submitted that although these theories are useful they can lead one astray from the law as it exists. This is especially true when a court analyses a theory and its precedents, as well as binding decisions of upper courts which, in turn, have referred to or applied the theory. It is preferable to study each container case in the light of the Rules themselves.

**Containers and the Per Package Limitation**

A container is a package, in fact, it is one of the clearest examples of a package. It envelopes all its contents (some packagings do not do this) and it is especially made to protect its contents during carriage either against pilferage or physical damage.
Similarly, a carton of typewriters or a carton of shoes or a carton of encyclopedias is a package, whether it is inside or outside a container.

The problem is, therefore, not to discover if a container is a package or if a carton of goods is a package, because both are packages. The problem is rather to discover if a "package" as referred to in art. 4(5) for purposes of limitation, is the container itself or whether it is the package inside the container.

1. If Listed on the Bill of Lading

The Rules help one to decide this question because the carrier and shipper are both obliged by art. 3(3) (b) to list "... the number of packages or pieces" on the bill of lading.

It is submitted, therefore, that in deciding what is the package or unit one must look to the intention of the parties. The prime test is what is stated on the bill of lading. Despite the various existing theories, it is advisable to look to the bill of lading in order to discover the intentions of the parties.

This is particularly so because the shipper is free to declare what he pleases and the carrier, at art. 3(3), last para., is not obliged to accept any declaration he either suspects or cannot check.

One of the earliest judgments to this effect was rendered by the Supreme Court of France\textsuperscript{50} when it ruled that the packages inside the container were the basis for the limitation if they were listed on the bill of lading or on an attached sheet.

The U.S. Court of Appeals has advanced a number of theories, but its judgments for the most part look to the declaration on the bill of lading or that made by the parties, no matter what theory is put forward.

Thus in \textit{Leather's Best v. SS. Mormaclynx}\textsuperscript{51} the bill of lading read "sealed container said to contain 99 bales of leather". Each bale was held to be a package.

In \textit{Cameco v. SS. American Legion}\textsuperscript{52} the U.S. Ct. of Appeals

\textsuperscript{50} Cour de Cassation, October 12, 1964; D.M.F. 1965, 18; see also Cour d'Appel de Rouen, February 14, 1975; D.M.F. 1975, 473 and March 16, 1973; D.M.F. 1973, 594; Tribunal de Commerce de Marseille, April 27, 1976; D.M.F. 1976, 610, to the same effect.


held that where the bill of lading read "one container said to contain" and then spelled out the number of cartons, the individual cartons were packages and not the container.

A Canadian judgment is to the same effect. In *J.A. Johnston Co. v. The Tindefjell* the bill of lading described the shipment as two containers containing 143 cartons and 174 cartons respectively. It was held that in accepting the description of the cargo which declared the number of cartons the carrier agreed to the limitation of liability on the basis that each carton was a package.

2. *If Listed on the Shipping Note, etc.*

If the packages are listed on some document other than the bill of lading, such as the shipping note, the courts have held that this is a sufficiently clear indication as to what is to constitute a package.

The *Tribunal de Commerce de Marseille* held that the limit applied to each package in the container because the shipping note referred to the number and weight of the packages.

3. *Only Container Mentioned*

If the bill of lading only mentions the container, then the container is the package for limitation purposes.

Thus in *Royal Typewriter Co. v. M/V Kulmerland* it was held that the ocean carrier was entitled to limit its liability to $500. for the theft of 350 packages of adding machines from a container because the container was loaded and sealed by the shipper who described the shipment in the bill of lading as "1 container said to contain Machinery".

The U.S. Court of Appeals took the same position in *Rosenbruch v. Amer. Export Isbrandtsen Lines* where the ocean carrier was entitled to limit its liability to $500. for the loss overboard of a
40-foot sealed container owned by the carrier, packed by the forwarded with the household goods of a single shipper and described as "1 container" in the bill of lading.

The Cour d'Appel de Rouen\textsuperscript{57} held that a container was a package and that the shipper, to avoid a single per package limitation, had to list all the packages on the bill of lading. If, however, the packages placed in the container were described on the bill of lading, then though the shipper packed the container and the bill of lading bore the notation "said to contain", the limitation applied to the packages so described and not to the container.\textsuperscript{58}

\textit{Theories}

Certain theories have evolved in respect to the per package limitation applicable to containers. Perhaps the most famous is the "functional package test". The U.S. Court of Appeals in \textit{Royal Typewriter Co. v. M/V Kulmerland}\textsuperscript{59} held that a "functional package test" should be used to determine whether the Cogsa $500 package limitation applied to containerized goods. If the shipper's own packaging was suitable for ocean transportation, then there arose a rebuttable presumption that the container itself was not a package. In the present case the carrier was entitled to limit its liability to $500 for the loss of adding machines, as they had been packed into 350 small, individual cardboard cartons which could not feasibly have been shipped without a container.

But it is noteworthy that the bill of lading in the \textit{Royal Typewriter} case read "1 Container said to contain Machinery". One gathers that if the bill of lading had read "350 individual cardboard cartons" the single container would not have been considered the package, despite the functional package test.

The U.S. Court of Appeals in \textit{Cameco v. SS. American Legion}\textsuperscript{60} held that in determining 'when a package is not a package', the

\textsuperscript{57} March 16, D.M.F. 1973, 594. (There is a laconic footnote at p. 597 to the effect that the Ministry of Education of France had decreed that the proper word for container in French is "conteneur". France was thus not only able to settle the container problem early on with relative finality, but is also able to settle the terminology problem). See also Tribunal de Commerce du Havre May 9, 1972; D.M.F. 1972, 497.

\textsuperscript{58} Cour d'Appel de Rouen, October 22, 1976; D.M.F. 1977, 234.


Second Circuit will adhere to its ‘functional package unit test’ as enunciated in *The Kulmerland*. The fact that the tinned hams were containerized in export type cartons put the burden, according to the Court, on the carrier to establish that the parties intended the container to be treated as a package.

Wilfred Feinberg, Ct. J. concurring, noted:

"There are many problems arising out of the 'package test' announced in *Royal Typewriter Co. v. M/V Kulmerland* . . . However, we are bound by it for the present, and in this case the result reached is clearly equitable." \(^{61}\)

Feinberg, Ct. J. was no doubt referring to the weakness of the functional package test. Fortunately, in *Royal Typewriter Co.* and *Standard Electrica* and *Cameco v. American Legion*, the package turned out in each case to be what was described on the bill of lading. It is submitted that the description on the bill of lading was subconsciously the real test, and that all three judgments would have reached other conclusions if the face of the bill of lading had been otherwise. \(^{62}\)

### IV. Conclusions as to Hague Rules, Visby and Uncitral

When the law is changed, carriers and shippers should obey the prescriptions of the law as it exists. They should list on the bill of lading the number of packages in the container and should charge the appropriate freight.

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61. Id. at 2581
62. *Baby Togs Inc. v. SS. American Ming*, [1975] A.M.C. 2012 (N.Y. Dist. Ct.), is to the same effect. The functional package theory is espoused but it is noteworthy that the carrier owned the container, the freight was based on the measurement of the goods and the bill of lading listed the number of cartons, the nature of cargo and the gross weight. As a result, the packages were the packages inside. See also *Eastman Kodak Co. v. SS. Transmariner* [1975] A.M.C. 123.

*Ins. Co. of N.A. v. SS. Brooklyn Maru*, [1974] A.M.C. 2443 (N.Y. Dist. Ct.) seems to be wrong, because not only is the functional package test espoused, but the number of packages listed on the bill of lading is ignored. Instead the Court applied only the functional package test citing *Royal Typewriter Co. v. M/V Kulmerland*, supra, note 59. "The first question is any container case is whether the contents of the container could have feasibly been shipped overseas in the individual packages or cartons in which they were packed by the shipper" (at 2445). Having decided that the boxes placed in the container did not qualify as packages under that test, the Court then held that:

"The burden, therefore, shifts to plaintiff to show that the container should not constitute the sec. 4(5) package. Here other factors must be considered: who owned and packed the container, whether goods of more than one shipper or goods to be sent to more than one destination were placed in the container, and what was indicated on the bill of lading." (at 2446).
The legal problems arising from container carriage do not arise from the law but from the failure of carriers and shippers to comply with the law in the hope that they will obtain an advantage for themselves or their clients. Until the law is amended, it is submitted that the Courts should apply the law as it reads.

**The Visby Rules**

The Visby Rules (The Brussels Protocol of 1968 amending the Hague Rules) came into force on June 23rd 1977 for ten nations—Great Britain, France, Denmark, Norway, Sweden, Ecuador, Lebanon, Singapore, Switzerland and Syria—while many East bloc countries already have them in force including the German Democratic Republic, Poland and Yugoslavia, as do other nations such as Argentina.

The Visby Rules, at amended art. 4(5) — (see the text in Appendix "A"), solve a number of problems in respect to the per package limitation.

1) The limit is increased at art. 4(5) (a) and fixed in Gold Poincaré Francs, which in 1968, at least had a stable value. The limitation, thus, has the advantage of being universal and a hedge against inflation.

2) The limitation at art. 4(5) (a) is an alternative being 10,000 Gold Poincaré Francs per package or unit or 30 such francs per kilo whichever is the greater. The alternative is very useful; especially the reference to kilos for heavy single packages or for bulk cargo.

3) Art. 4(5) (c) clarifies the case of goods shipped in a container or on a pallet or presumably on a skid.

If the packages are enumerated on the bill of lading, each object so enumerated is a package.

4) Unfortunately the term "package or unit" is again used in the Visby Rules in art. 4(5) (a) so that what is a unit or package is still not clear.

One gathers nevertheless, that a unit is an unpacked object and not a freight unit because "unit" seems to mean "object" in art. 4(5) (c).

5) In any event, the per kilo alternative in art. 4(5) (a) provides considerable protection as does the reference to containers and pallets in art. 4(5) (c).

**Uncitral**

In May 1976 the United Nations Commission on International Trade
Law (Uncitral) adopted a "final draft text" modifying the Brussels Convention of 1924 (the Hague Rules). The text will be submitted to a diplomatic conference in the spring of 1978.

Uncitral in respect to the per package limitation is more complicated than Visby. It offers two drafts for art. 6 (see Appendix "B") only one of which will be adopted at the diplomatic conference.

The First Alternative of Uncitral at art. 6

A) A per package or per kilo limitation which is much like Visby but for an unstated sum (to be decided at the diplomatic conference).

b) There is a limit for delay not to exceed the freight.

c) There is a stipulation as to containers and pallets in fairly similar terms to Visby.

d) There is a reference to the container, when owned by the shipper, being itself an additional package.

e) The carrier and shipper may agree to a higher limit.

The Second Alternative of Uncitral at art. 6

The second alternative is so much per kilo. There is a stipulation as well that the carrier and shipper may agree to a higher figure. (The unit is left for the diplomatic conference).

Observations on Uncitral

It is submitted that the first alternative is the better except for the reference to delay which is a needless complication.

Damages for delay under art. 5(2) still depend on "reasonable" time which is the old law and thus loss due to delay is still left to settlement out of court or to litigation. Uncitral therefore adds nothing in this respect.

V. Conclusion

The main problems arising from the per package or unit limitation of the Hague Rules, particularly in respect to containers are solved by the Visby Rules. This is a very great step forward.

Uncitral really adds little to the Visby Rules in respect to the per package limitation and the reference to delay creates a further problem without solving it.
Appendix A

Visby Rules

Article 4, paragraph 5, shall be deleted and replaced by the following:

"(a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 10,000 francs per package or unit or 30 francs per kilo of gross weight of the goods or damages, whichever is the higher.

(b) the total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged.

The value of the goods shall be fixed according to the commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

(c) Where a 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.

(d) A franc means a unit consisting of 65.5 milligrammes gold of millesimal fineness 900'. The date of conversion of the sum awarded into national currencies shall be governed by the law of the Court seized of the case."

Appendix "B"

Uncitral Rules

Article 6. Limits of Liability

1. (a) The liability of the carrier for loss of or damage to goods according to the provisions of article 5 shall be limited to an amount equivalent to ( . . .)* units of account per package or other shipping unit or ( . . .)* units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher.

(b) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed ( . . .) the freight (payable for the goods delayed) (payable under the contract of carriage).

(c) In no case shall the aggregate liability of the carrier, under both sub-paragraphs (a) and (b) of this paragraph, exceed the limitation which would be established under sub-paragraph (a) of this paragraph
for total loss of the goods with respect to which such liability was incurred.

2. For the purpose of calculating which amount is the higher in accordance with paragraph 1 of this article, the following rules shall apply:
   (a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading as packed in such article of transport shall be deemed packages or shipping units. Except as aforesaid the goods in such article of transport shall be deemed one shipping unit.
   (b) In cases where the article of transport itself has been lost or damaged, that article of transport shall, when not owned or otherwise supplied by the carrier, be considered one separate shipping unit.

3. Unit of account means . . .* 

4. By agreement between the carrier and the shipper, limits of liability exceeding those provided for in paragraph 1 may be fixed.

   B. Alternative article 6: Limits of Liability 3 /

1. The liability of the carrier according to the provisions of article 5 shall be limited to an amount equivalent to ( . . ) units of account per kilogram of gross weight of the goods lost, damaged or delayed.

2. Unit of account means . . .* 

3. By agreement between the carrier and the shipper, a limit of liability exceeding that provided for in paragraph 1 may be fixed.
   The following alternative texts were also deleted but, for technical reasons, are not crossed through to indicate their status."
*To be decided at the Diplomatic Conference.