Introduction

Metals & Minerals Legal Brief is a publication in which shipping and contractual matters relevant to the international trade with mineral concentrates, semi-manufactured metals, refined metals, fero-alloys and steel are reviewed.

In this issue, the Editor reviews the following topics:

- The Shipping Regulations For Copper Concentrates

- Shippers' And Buyers' Potential Liabilities In The Sea Carriage Of Containerised Commodities

- The Basis For The Settlement Of Claims For Loss Of Containerised Goods

- The Basis For The Settlement Of Claims For Metal Cargoes Lost Overboard

- The Meaning Of Statement "Apparent Good Order And Condition" In Charter Party Bills Of Lading Issued For Hot-Rolled Steel Coils

If you have any comments about the matters reviewed in this edition, please address them to **editor@commoditylaw.eu**

The Shipping Regulations For Copper Concentrates

by Vlad Cioarec, International Trade Consultant

Copper Concentrate is listed in the IMSBC Code under four schedules:
1. Metal Sulphide Concentrates;
2. Metal Sulphide Concentrates, Corrosive UN 1759;
3. Metal Sulphide Concentrates, Self-Heating UN 3190;
4. Mineral Concentrates.

1. Metal Sulphide Concentrates

The term “Metal Sulphide Concentrates” is a general description of worldwide application for metal concentrates such as copper concentrates, zinc concentrates and lead concentrates.
These cargoes are categorised as Group A cargoes according to the criteria of the IMSBC Code because it may liquefy if shipped with a moisture content in excess of the transportable moisture limit.
These cargoes possess chemical hazards that meet the criteria for classification as Group B cargoes and as MHB (SH), MHB (TX) and MHB (CR).

MHB (SH) – Materials Hazardous Only In Bulk, Self-Heating Solids – refer to cargoes that self-heat when transported in bulk and do not meet the criteria of the IMDG Code for inclusion in Hazard Class 4.2 (Substances liable to spontaneous combustion).

MHB (TX) – Materials Hazardous Only In Bulk, Toxic Solids – refer to cargoes that have toxic hazards to humans if inhaled when loaded, transported in bulk or unloaded and do not meet the criteria of the IMDG Code for inclusion in Hazard Class 6.1 (Toxic substances).

MHB (CR) – Materials Hazardous Only In Bulk, Corrosive Solids – refer to cargoes that are corrosive to metal and do not meet the criteria of the IMDG Code for inclusion in Class 8 (Corrosive substances).

2. Metal Sulphide Concentrates, Corrosive UN 1759

This schedule was included in the IMSBC Code in 2016[1] following a proposal submitted by the Australian delegation to IMO in 2014[2] relating to a copper concentrate shipped from Australia (Mount Garnet Copper Concentrate). The test results for the respective copper concentrate showed that it could liquefy if the moisture content exceeds the TML of 9.1% so that it can be categorised as Group A cargo[3] and that it possesses chemical hazards that meet the criteria for classification as Group B cargo, according to the criteria of the IMSBC Code, as dangerous goods in Hazard Class 8 (Corrosive substances), according to the criteria of the IMDG Code and as Materials Hazardous Only In Bulk, Self-heating solids and Solids that evolve toxic gas when wet, according to the criteria of the IMSBC Code.

1 See IMO Cicular Letter No. 3678/26 September 2016
2 See IMO document CCC 1/5/11/4 July 2014 and IMO document CCC 2/5/9/12 June 2015.
3 See IMO document CCC 1/INF. 15/4 July 2014

The chemical hazards of Mount Garnet Copper Concentrate are:

(a) the corrosion risk (Class 8 in the IMDG Code). The moisture content of Mount Garnet Copper Concentrate forms sulphurous acid which is corrosive to the ship's steel structure so that the cargo holds should have adequate coating. After discharge of the cargo, the cargo residues must be washed away from the ship's holds.

(b) the self-heating risk (MHB(SH)). Mount Garnet Copper Concentrate does not meet the criteria for inclusion in Hazard Class 4.2 from the IMDG Code but presents a self-heating risk when shipped in bulk so that the carrying ship must be fitted with a fixed gas fire extinguishing system.

(c) the generation of toxic gases (MHB (WT)). Mount Garnet Copper Concentrate is extracted from copper ore with the use of flotation reagents. The residues of flotation reagents remain attached to the copper concentrate until it is loaded in the ship's holds for sea carriage. During the sea carriage, the copper concentrate will oxidize consuming the oxygen in the cargo holds. Concurrently with the cargo oxidation, the toxic gases generated by the residues of the flotation reagents will accumulate in the cargo holds[4] so that the carrying ship must be fitted with gas detectors.
The gas concentrations must be measured regularly during the voyage by the ship's crew and the results of the measurements must be recorded and kept on board.
The ship carrying this type of copper concentrate must have on board a Certificate of Fitness for the Carriage of Solid Bulk Cargoes and a Certificate of Fitness for the Carriage of Dangerous Goods listing “Metal Sulphide Concentrates, Corrosive UN 1759” as a permitted cargo and a Cargo Manifest and a Stowage Plan setting forth the location of copper concentrate on board.

3. Metal Sulphide Concentrates, Self-Heating UN 3190

This schedule was included in the IMSBC Code following a proposal submitted by the Australian delegation to IMO in 2017[5] relating to a copper concentrate shipped from Australia (Boddington Copper Concentrate). The test results for the respective copper concentrate showed that it could liquefy if the moisture content exceeds the TML range of 9.5% to 10.5%[6] so that it can be categorised as Group A cargo according to the criteria of the IMSBC Code and that it possesses chemical hazards that meet the criteria for classification as Group B cargo according to the criteria of the IMSBC Code, as dangerous goods in Hazard Class 4.2 (Substances liable to spontaneous combustion) according to the criteria of the IMDG Code and as Materials Hazardous Only In Bulk, Solids that evolve toxic gas when wet (MHB(WT)), Toxic Solids (MHB(TX)) and Corrosive Solids (MHB(CR)) according to the criteria of the IMSBC Code.

The chemical hazards of Boddington Copper Concentrate are:

(a) the self-heating risk (MHB(SH)). Boddington Copper Concentrate meets the criteria for inclusion in Hazard Class 4.2 (Substances liable to spontaneous combustion and self-heating, UN 3190). The cargo shall be accepted for loading only if the cargo temperature does not exceed 55ºC. The cargo temperature shall be measured during loading and sea carriage and the cargo holds shall not be ventilated during the carriage.

(b) the generation of toxic gases (MHB (WT) and (TX)). During the sea carriage, Boddington Copper Concentrate will oxidize consuming the oxygen in the cargo holds. Concurrently with the

4 See IMO document DSC 17/INF.8/13 July 2012
5 See IMO document CCC 4/5/2/30 June 2017
6 See IMO document CCC 4/INF.5

cargo oxidation, the toxic gases generated by the residues of the flotation reagents will accumulate in the cargo holds[7] so that the carrying ship must be fitted with gas detectors.
The gas concentrations must be measured regularly during the voyage by the ship's crew and the results of the measurements must be recorded and kept on board.
The ship carrying this type of copper concentrate must have on board a Certificate of Fitness for the Carriage of Solid Bulk Cargoes and a Certificate of Fitness for the Carriage of Dangerous Goods listing "Metal Sulphide Concentrates, Self-Heating UN 3190" as a permitted cargo and a Cargo Manifest and a Stowage Plan setting forth the location of copper concentrate on board.

(c) the corrosion risk (MHB(CR)).

4. Mineral Concentrates

Copper concentrates described as "Mineral Concentrates" are categorised as Group A cargoes according to the criteria of the IMSBC Code. It may liquefy if shipped with a moisture content in excess of the transportable moisture limit.
Section 4.3.2. of the IMSBC Code stipulates that:

"When a concentrate or other cargo which may liquefy is carried, the shipper shall provide the ship's master or his representative with a signed certificate of the TML, and a signed certificate or declaration of the moisture content, each issued by an entity recognized by the competent authority of the port of loading. The certificate of TML shall contain, or be accompanied by, the result of the test for determining the TML. The declaration of moisture content shall contain, or be accompanied by, a statement by the shipper that the moisture content is, to the best of his knowledge and belief, the average moisture content of the cargo at the time the declaration is presented to the master."

Copper concentrates described as "Mineral Concentrates" are non-combustible cargoes or cargoes with low fire risks. These copper concentrates are neither categorised as Group B cargoes nor classified as MHB.

7 See IMO document DSC 17/INF.8/13 July 2012

Shippers' and Buyers' Potential Liabilities In The Sea Carriage Of Containerised Commodities

by Vlad Cioarec, International Trade Consultant

Liability For Destination Terminal Handling Charges

The freight rates for containerised shipments are quoted in two ways: as an all-inclusive rate that incorporates all charges or as a basic rate plus ancillary charges.
In case of all-inclusive rates, the payment of freight charges and surcharges under a single Bill of Lading would all have to be on either a prepaid or collect basis and no part of an all-inclusive rate may be split between a prepaid portion and a collect portion.
In case the ancillary charges such as Terminal Handling Charges are charged separately from the basic sea freight rate, the Bills of Lading may show a portion of total freight and charges prepaid and the balance of the freight and charges collect. Such Bills of Lading are sometimes issued for containerised shipments sold on CFR or CIF terms, when the sellers do not wish to pay for the destination terminal handling charges. In such cases the Bills of Lading stipulate expressly that the Destination Terminal Handling Charges must be collected prior to the release of containers to the consignee.
For this purpose some NVOCCs and container shipping lines included in their Bill of Lading terms and conditions the following clause:

"Notice To Endorsee And/Or Holder And/Or Transferee
By taking up this Bill of Lading, whether by endorsement and/or becoming a holder and/or by transfer hereof and/or by presenting this Bill of Lading to obtain delivery of the Goods herein and/or otherwise, the endorsee/holder/transferee and the Carrier agree that the endorsee/ holder/transferee thereupon become a party to a contract of carriage with the carrier on the basis herein."

The banks paying under letters of credit accept the Bills of Lading containing references to costs which may be incurred after the containers with the goods are discharged. In this regard the ISBP[1] paragraph E27 has the following provisions:

"a. When a credit states that costs additional to freight are not acceptable, a bill of lading is not to indicate that costs additional to the freight have been or will be incurred.
…..

c. Reference in a bill of lading to costs which may be levied […] after the goods have been unloaded (demurrage costs) or costs covering the late return of containers (detention costs) is not an indication of costs additional to freight."

Liability For Container Demurrage And Detention Charges

The container demurrage charge is levied by the container liner operators in case of consignees' failure to arrange the Customs clearance or to take delivery of the laden containers from the destination port terminal within the allowable "free time".

1 International Standard Banking Practice for the Examination of Documents under UCP 600 (ICC Publication No. 745E)

The “free time” is the period of time during which the carrier holds in custody the laden containers at the destination port terminal following the date of discharging from the vessel, free of charge.
The container detention charge is levied by the container liner operators in case of consignees' failure to unpack the goods and return the containers to the carrier within the allowable “free time”.
In this case, the “free time” is the period of time allowed for unpacking the goods and return of the empty containers to the carrier.
The demurrage rate, detention rate and free time periods for collection of the laden containers, unpacking the goods and return of the empty containers are stipulated in the carrier's tariff which is incorporated in the Bill of Lading through express reference in the Bill of Lading's terms and conditions. An example of such Bill of Lading's terms and conditions are the MSC's Bill of Lading terms and conditions which include the following provisions:

“3. Carrier's Tariff
The terms and conditions of the Carrier's applicable Tariff are incorporated into this Bill of Lading. Particular attention is drawn to terms and conditions concerning additional charges including demurrage, per diem, storage expenses and legal fees etc. A copy of the applicable Tariff can be obtained from the Carrier or its agent upon request and the Merchant is deemed to know and accept such Tariff. In the case of any conflict or inconsistency between this Bill of Lading and the applicable Tariff, it is agreed that this Bill of Lading shall prevail.
[….]
14.8 The Carrier allows a period of free time for the use of the Containers and other equipment in accordance with the Tariff and as advised by the local MSC agent at the Ports of Loading and Discharge. Free time commences from the day the Container and other equipment is collected by the Merchant or is discharged from the Vessel or is delivered to the Place of Delivery, as the case may be. The Merchant is required and has the responsibility to return to a place nominated by the Carrier the Container and other equipment before or at the end of the free time allowed at the Port of Discharge or the Place of Delivery. Demurrage, per diem and detention charges will be levied and payable by the Merchant thereafter in accordance with the Tariff.”

Some carriers stipulate the free time period also on the face of the Bills of Lading.
One of the risks related to the containerised transport of commodities is that in case of a downfall of the market price below the contract price the buyers will seek to avoid the payment and collection of containers with the goods at any cost. In such case, the shippers will be left to bear the container demurrage charges. The shippers remain liable as the original party to the contracts of carriage notwithstanding the transfer of the Bills of Lading to a bank.
The buyers would become liable only after the presentation of the Bills of Lading and making a formal demand for delivery of the goods. If the buyers do not make a formal demand for delivery of the goods, they cannot be held liable under the Bills of Lading[2].
An example of such case was the English case **Fortis Bank S.A./N.V. and Stemcor UK Ltd. v. Indian Overseas Bank**[3]. The case involved a shipment of 15,500 MT of steel scrap packed in containers sold basis CFR CY Haldia to an Indian company.
The letters of credit issued for the payment of cargo required the presentation of Bills of Lading made out to order of the issuing bank and showing 10 days free time for the storage of containers at the discharge port.
The Bills of Lading issued for the cargo showed between 10 and 14 days free time for the storage of containers at the discharge port. However, by the time of shipment the market price for steel scrap had fallen below the contract price and the buyer was no longer interested to buy the cargo.

2 See Evergreen Marine Corporation v. Aldgate Warehouse (Wholesale) Ltd., [2003] EWHC 667 (Comm), [2003] 2 Lloyd's Rep. 597.
3 [2011] EWHC 538 (Comm); [2011] 2 Lloyd's Rep. 190.

On instruction of the buyers, the issuing bank rejected the shipping documents on the ground of alleged discrepancies but failed to return the shipping documents with reasonable promptness to the negotiating bank.
The shippers were unable to take control over the goods at the destination container terminal in due time because the issuing bank returned the Bills of Lading only after three months after the date of presentation by the negotiating bank.
The carrier claimed the reimbursement of container demurrage charges from the shippers. The shippers had to pay container demurrage charges in the amount of $869,048.
A more recent example is the English case **MSC Mediterranean Shipping Company SA v. Cottonex Anstalt[4].**
The case involved a shipment of raw cotton packed in 35 containers sold to a company in Bangladesh. After the conclusion of the sale contract, the market price of raw cotton collapsed. The buyer sought to cancel the contract but the seller refused the cancellation of contract.
The next move of the buyer was to obtain an injunction order from a local Court to restrain the issuing bank from paying under the letter of credit. However, the letter of credit was confirmed by a bank in the seller's country so that after the shipment of goods, the shipper obtained the payment under the letter of credit from the confirming bank.
The containers with the goods were discharged at the port of discharge on various dates between 13th May and 27th June 2011.
The Bills of Lading stipulated a free time period of 14 days starting from the dates when the containers were discharged from the vessel at the port of discharge.
The consignee refused to collect the goods. The Bills of Lading terms and conditions stipulated that if the consignee failed to collect the goods within the 14 days' free time period, the carrier was entitled to unpack the goods from containers and thereby free up the containers for use elsewhere. However, the customs authorities did not allow the removal of cotton from containers without a Court order and the containers remained at the port of discharge.
The carrier sent notices to both shipper and consignee.
On 27th September 2011, the shipper informed the carrier that it no longer had any legal title to the goods following the payment made by the confirming bank and it could do nothing about the containers. But in an email dated 2nd February 2012, the carrier offered to sell the containers to the shipper as a solution for the settlement of dispute provided also that the shippers would have settled up-to-date demurrage charges due. The shipper declined the offer because the carrier wanted for the 35 containers US$200,000 which would have meant approximately US$5,714 per container.
In June 2013 the dispute reached to the English Commercial Court.
The carrier sought to recover the sum of US$577,184 for the container demurrage charges incurred following the date of expiry of the 14 days' free time period until 30th April 2013. The carrier contended that demurrage started to accrue after the expiry of the 14 days' free time period and would have continued to accrue at the daily rate until the containers were redelivered.
The shipper contended that the notice sent on 27th September 2011 about his inability to return the containers within the foreseeable future amounted to a repudiation of the contracts of carriage which the carrier was obliged to accept, thereby bringing to an end any obligation to pay demurrage.
The English Commercial Court held that demurrage will accrue after the expiry of the free time period irrespective of whether the shipper or consignee collects the containers or not. The Court also held that the shipper remained liable as the original party to the Bills of Lading (contracts of carriage).
The English Commercial Court held that from 27th September 2011 when the shipper informed the carrier that there was no realistic prospect of being able to redeliver the containers, “the delay in collecting the goods had become so prolonged as to frustrate the commercial purpose of the

4 [2016] EWCA Civ 789, [2015] EWHC 283 (Comm).

adventure” and therefore, the shipper was in repudiatory breach of all the contracts of carriage. Therefore, the carrier was entitled to recover the demurrage charges for the period between the date of expiry of the 14 days' free time period and 27th September 2011 when it received the shipper's notice that it no longer had legal title to the goods.

In appeal, the English Court of Appeal held that the shipper was in repudiation of the contracts of carriage from 2nd February 2012 when the carrier offered to sell the containers to the shipper.

The Court held that the carrier's offer to sell the containers was the clearest indication that the “commercial purpose of the adventure” had become frustrated by 2nd February 2012.

The fact that the “commercial purpose of the adventure” had become frustrated meant that in commercial terms the containers had been lost. Due to the breach of contract, the shipper had become liable in damages for their loss. The loss to the carrier resulting from the shipper's failure to return the containers was represented by the value of containers on 2nd February 2012. The carrier had the right to recover damages for the loss of containers calculated by reference to their value on 2nd February 2012 (US$3,262 per container) and demurrage for detention of containers up to and including 1st February 2012. After 1st February 2012, demurrage was not recoverable.

The English Commercial Court held that the container demurrage charges will continue to accrue after the expiry of the free time period until:

- the shipper or consignee takes delivery of the containers and returns them to the carrier; or
- the goods are unpacked by the carrier based on the Bills of Lading terms and conditions entitling the carrier to do so; or
- the contract of carriage is terminated (by shipper's repudiation).

Therefore, if the shippers of containerised commodities are trapped in a dispute with the buyers or their banks due to the buyer's refusal to perform his contractual obligations and will not be able to redeliver the containers in a foreseeable future, they should try to reach a settlement with the carrier in due time for the cost of containers. The demurrage charges will be payable until the date of such settlement. The carrier cannot ignore the shipper's repudiation of the contract of carriage and claim demurrage indefinitely.

The Basis For The Settlement Of Claims For Loss Of Containerised Goods

by Vlad Cioarec, International Trade Consultant

In claims for loss of containerised goods, the basis for the calculation of the carrier's liability limit is the number of packages stated in the Bills of Lading to have been loaded in the container(s).
The question often arise what constitutes the “package” for the purpose of calculating the limit of the carrier's liability.
The US Courts decide the package limitation claims on the basis of section 4(5) of US COGSA 1936 which provides that in case of goods shipped in packages the carrier's maximum potential liability is limited to $500 per package, while in case of goods not shipped in packages the carrier's maximum potential liability is limited to $500 per customary freight unit.
In determining what constitutes the “package” for the purpose of calculating the limit of the carrier's liability, the Courts look to the way in which the goods were described in the Bills of Lading.
The US Courts distinguish between the Bills of Lading that state the number of packages within the container and the Bills of Lading that do not describe the goods “in terms of items that can reasonably be understood as packages[1]”.
In case of the former, the US Courts[2] calculate the carrier's liability limit by reference to the number of packages stated in the Bill of Lading to have been loaded in the container(s)[3] and thereby the

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1 See Binladen BSB Landscaping v. M/V Nedlloyd Rotterdam, 759 F.2d 1006 (2nd Cir. 1985).

2 In Hayes-Leger Associates v. M/V Oriental Knight, 765 F.2d 1076 (11th Cir. 1985) the Court adopted the following two rules: “(1) when a bill of lading discloses the number of COGSA packages in a container, the liability limitation of section 4(5) applies to those packages; but (2) when a bill of lading lists the number of containers as the number of packages, and fails to disclose the number of COGSA packages within each container, the liability limitation of section 4(5) applies to the containers themselves.” As to the meaning of the term “package”, the US jurisprudence adopted the definition given in Aluminios Pozuelo, Ltd. v. S.S. Navigator, 407 F.2d 152, 155 (2nd Cir. 1968) where the term “package” was defined as “a class of cargo, irrespective of size, shape or weight, to which some packaging preparation for transportation has been made, which facilitates handling but which does not necessarily conceal or completely enclose the goods.”

3 In Mitsui & Co., Ltd. v. American Export Lines, 636 F.2d 807 (2nd Cir. 1981) the Court held that: “[A]t least when what would ordinarily be considered packages are shipped in a container supplied by the carrier and the number of such units is disclosed in the shipping documents, each of those units and not the container constitutes the “package” referred to in §4(5) [of COGSA].” In Binladen BSB Landscaping v. M/V Nedlloyd Rotterdam, 759 F.2d 1006 (2nd Cir. 1985) the Court held that: “[W]hen the bill of lading discloses not only the number of containers but the number of cartons within each, the cartons, not the containers, will be treated as COGSA packages.” In Hayes-Leger Associates v. M/V Oriental Knight, 765 F.2d 1076 (11th Cir. 1985) the Court held that: “[I]f a shipper places its packages of goods in a container furnished by the carrier and discloses the number of packages in the container to the carrier in the bill of lading or otherwise, each package or unit within the container constitutes one package for purposes of COGSA's five hundred dollar limitation of liability.” In Leather's Best, Inc. v. SS Mormaclynx, 451 F.2d 800 (2nd Cir. 1971) the Bill of Lading described the shipment as one container said to contain 99 bales of leather. The Court held that each bale constituted a “package”. In Matsushita Electric Corporation v. SS Aegis Spirit, 414 F. Supp. 894 (Washington District Court 1976) the Bill of Lading described the shipment as “2 containers said to contain 601 cartons”. The Court held that each of the 601 cartons constituted a “package”. In Allstate Ins. Co. v. Inversiones Navieras Imparca, 646 F.2d 169 (5th Cir. 1981) the Bill of Lading described the shipment as “One 20' Ft. Container With 341 Cartons”. The Court held that each of the 341 cartons constituted a “package” for purposes of COGSA's $500 limitation of liability. In Smythgreyhound v. M/V Eurygenes, 666 F.2d 746 (2nd Cir. 1981) the Bill of Lading described the goods stuffed in containers as 1,500 cartons of stereo equipment. The Court held that each of the 1500 cartons constituted a “package”. In Monica Textile Corp. v. SS Tana, 952 F.2d 636 (2nd Cir. 1991) the Bill of Lading described the goods stuffed in containers as 76 bales of cotton cloth. The Court held that each of the 76 bales of cotton cloth constituted a “package”. In International Adjusters, Inc. v. Korean Wonis-Son, 682 F. Supp. 383 (ND Illinois 1988) the Bill of Lading described the goods stuffed in containers as 9 cases and 42 cartons. The Court held that ““package”, as it is used in §1304(5), refers to the

cargo insurers will recover the amount resulting from the multiplication of the number of packages by $500.

In case of the latter, either the container is deemed the package[4] on the basis of which the carrier's liability limit has to be determined or the goods are considered “goods not shipped in packages” in which case the calculation of carrier's liability limit must be made “per customary freight unit”[5]. Since the ocean freight for the Full Container Loads is usually charged as a flat rate per container, the “customary freight unit” is often the container itself[6]. Thus, when the container is deemed the “package” or the “customary freight unit”, the claimant's recovery is limited to $500 per container.

In cases where the Bills of Lading state that more than one unit of packing has been used, e.g. bundles stowed on pallets, the question of what constitutes the “package” for the purpose of

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individual cartons and cases contained in a large container, and not to the large container itself, when the number of individual cartons and cases is disclosed. [...] The Brussels Protocol of 1968 also adopted this approach, specifically stating that the number of packages or units shall refer to the number of packages or units held in a large container or pallet.” In Sony Magnetic Products v. Merivienti O/Y, 863 F.2d 1537 (11th Cir. 1989) the Bill of Lading described the shipment as: “1x40 foot container STC [said to contain]: 1320 Ctns. Magnetic Tapes (blank).” The Court held that each of the 1320 cartons constituted a “package”. In St. Paul Fire & Marine Ins. v. Sea-Land Service, 735 F. Supp.129 (S.D.N.Y. 1990), the Bill of Lading described the shipment as: “40 FT. CONTAINER … S.T.C. [Said To Contain] 150 PKGS.” The Court held that each of the 150 packages constituted a “package”. In Universal Leaf Tobacco v. Companhia de Navegacao Maritima Netumar, 993 F.2d 414 (4th Cir. 1993), eight Bills of Lading were issued for a shipment of 1200 cases of tobacco stuffed into 12 containers. The Bills of Lading stated that each 40 foot container held 90-99 cases of tobacco. The Court held that each of the 568 cases that were lost during the carriage constituted a “package”. In Tokio Marine and Fire Ins. Co. v. Nippon Express, 155 F. Supp. 2d 1167 (CD California 2000) the Bill of Lading described the goods stuffed into container as 33 skids containing 177 pieces. The Court held that each of the 33 skids constituted a “package”. In Fishman & Tobin v. Tropical Shipping & Const. Co., 240 F.3d 956 (11th Cir. 2001) the Bill of Lading described the goods stuffed into container as “39 Big Packs Containing 27,908 units boy's pants”. The Court held that each of the 39 big packs constituted a “package”.

4 In Sperry Rand Corp. v. Norddeutscher Lloyd (S.D.N.Y. 1973) the Bill of Lading described the goods stuffed into container as 9,500 electric shavers. The Court held that the container constituted the “package”. In Rosenbruch v. American Export Isbrandtsen Lines, Inc., 543 F.2d 967 (2nd Cir. 1976) the Bill of Lading described the goods stuffed into container as “used household goods”. The Court held that the container constituted the “package”. In Binladen BSB Landscaping v. M/V Nedlloyd Rotterdam, 759 F.2d 1006 (2nd Cir. 1985) the Bill of Lading described the goods stuffed into container as live plants. The Court held that: “when a bill of lading lists only the number of containers under “No. of Pkgs.” and does not describe the cargo in terms of items that can reasonably be understood as packages, … each container constitutes a COGSA package. […] Maximum damages in such a situation then are $500 per container, irrespective of the contents.” In DWE Corp. v. TFL Freedom, 704 F. Supp. 380 (S.D.N.Y. 1989) the Bill of Lading described the shipment as follows: “No. of Packages: One (1)”, “Description of Package and Goods: 40' Container house to house said to contain dry goods, merchandise divers”. The Court held that: “This Bill of Lading expressly refers to the container as a package – it lists “One(1)” container in the column which asks for the number of packages. It fails to specify an alternative measure of the number of “packages” shipped … The entry in the column on the Bill of Lading which asks for a description of package and goods merely states “40' Container … said to contain dry goods, merchandise divers,” without further itemization. I conclude that the container is the “package” envisioned by the contract of carriage.” In Orient Overseas Container Line v. Sea-Land Service, 122 F. Supp. 2d 481 (S.D.N.Y. 2000) the Bill of Lading described the goods stuffed in containers as automobile engines. The Court held that the container constituted the “package”. In the Australian case El Greco (Australia) Pty Ltd. v. Mediterranean Shipping Co. S.A., [2004] FCAFC 202; [2004] 2 Lloyd's Rep. 537, the Bill of Lading described the goods stuffed in container as “200,945 pieces posters and prints”. The description of goods in the Bill of Lading did not indicate how they were packaged. The Federal Court of Australia held that this was not an enumeration of packages pursuant to the liability limitation provisions of Article IV, Rule 5(c) of the Hague-Visby Rules. The Court held that: “since there was no enumeration of packages for the puposes of art.4, r.5(c), it followed that the container itself was the only package or unit for limitation purposes.[…] the bill had to use words which made clear the number of packages or units separately packed for transportation; if it was not clear from the face of the bill what numbers of packages or units were packed as such, there would only be one package or unit – the container.”

5 In Binladen BSB Landscaping v. M/V Nedlloyd Rotterdam, 759 F.2d 1006 (2nd Cir. 1985) the Court adopted the rule that “goods placed in containers and described as not separately packaged will be classified as “goods not shipped in packages” for which the $500 liability limit would be per “customary freight unit”.” The rule was upheld in Hayes-Leger Associates v. M/V Oriental Knight, 765 F.2d 1076 (11 th Cir. 1985), DWE Corp. v. TFL Freedom,

calculating the limit of the carrier's liability will depend on which of the packing units, e.g. the pallets or bundles, are counted as “packages” in the Bills of Lading.
In the US law case **Allied International American Eagle Trading Corp. v. SS Yang Ming**[7], a cargo of screws, bolts, nuts, studs and washers was packaged on two pallets, one holding nine cartons, the other holding ten drums of cargo. Each pallet was counted as one package in the Bill of Lading.
The question in dispute was whether the cartons and drums or the pallets should be considered the “packages”. The US Court of Appeals for the Second Circuit held that even though the contents of the pallets were enumerated in the Bill of Lading, the cases and drums were not individually counted in arriving at the agreed upon total number of “packages” stated in the Bill of Lading. Since each pallet was counted as one package in the Bill of Lading, the pallets should be considered the “packages” for the purpose of calculating the limit of the carrier's liability.
This case set the rule in US jurisprudence that the pallets shall be considered the “packages” if they are individually counted as “packages” in the Bill of Lading. The rule was upheld in **Groupe Chegaray/V. De Chalus v. P&O Containers**[8]. In that case 2268 cartons containing perfumes and cosmetics were bound together with plastic wrap onto 42 units that were stowed on pallets.
The description of goods in the Bill of Lading was:

1 X 40' DRY VAN S.T.C. [said to contain]
31 PACKAGES NOS. 43/73 ORDER 70187 X COSMETICS
11 PACKAGES + 2 CTNS ORDER 70188A COSMETICS
UNIT TOTALS
42 PACKAGES STC 2268 CARTONS + 2 CTNS

In fact, the shipper's description of goods stated:

31 PALLETS NOS. 43/73 ORDER 70187 X COSMETICS
11 PALLETS + 2 CTNS ORDER 70188A COSMETICS

The shippers made no objection to the carrier's description of pallets as “packages”.
The US Court of Appeals for the Eleventh Circuit held that since the 42 pallets were individually counted and described as “packages” in the Bill of Lading, the carrier's liability limitation had to be calculated by reference to the 42 pallets.
Therefore, the smallest unit of packing enumerated in the Bills of Lading will not always be deemed the appropriate package. The Court decision will depend on which of the packing units are counted as “packages” in the Bills of Lading.

704 F. Supp. 380 (S.D.N.Y. 1989) and Norwich Union Fire Ins. v. Lykes Bros. SS Co., 741 F. Supp. 1051 (S.D.N.Y. 1990). In Hayes-Leger Associates v. M/V Oriental Knight, 765 F.2d 1076 (11 th Cir. 1985) one of the Bills of Lading described the shipment as “1 CONTAINER SAID TO CONTAIN: 3,542 PCS. WOVEN BASKETS AND RATTAN FURNITURES”. The Court held that: “This description was insufficient to indicate to the carrier that the goods were “packaged”... [I]f the shipper intends to rely on the description portion of the bill of lading to disclose to the carrier the number of COGSA “packages”, that description must indicate “the number of items qualifying as packages (i.e., connoting preparation in some way for transport), such as “bundles”, “cartons”, or the like.” “Because the bill of lading listed “ONE CONTAINER ONLY” as the number of packages, and did not otherwise disclose to the carrier the number of packages within the container, the shipment must be treated as one of “goods not shipped in packages”.”

6 See DWE Corp. v. TFL Freedom, 704 F. Supp. 380 (S.D.N.Y. 1989); Norwich Union Fire Ins. v. Lykes Bros. SS Co., 741 F. Supp. 1051 (S.D.N.Y. 1990); Orient Overseas Container Line v. Sea-Land Service, 122 F. Supp. 2d 481 (S.D.N.Y. 2000). The US Courts determine what is the “customary freight unit” based on the relevant information stated in the carrier's tariff and Bill of Lading.

7 672 F.2d 1055 (2nd Cir. 1982)

8 251 F.3d 1359 (11th Cir. 2001)

One question raised by the carriers was that in case of goods stuffed in container by the shipper, the carrier cannot be bound by the shipper's description of goods in the Bill of Lading because it did not packed the container and did not have a reasonable opportunity to check its contents. Therefore, the container should be considered the "package" for the purpose of the carrier's limitation of liability. An example of such case was **Center Optical (Hong Kong) Ltd. v. Jardine Transport Services (China) Ltd.**[9]. The relevant passage of the judgment is quoted below:

"It is said by the defendant that there is a special definition of packing limit provided by cl.6(4) (D), and that if the carrier does not stuff the container itself, the container is the packing unit for the U.S. $500 COGSA limit. Clause 6(4)(D) reads, in relevant part, as follows:
(D) Definition of Package or Shipping Unit
Where a Container is used to consolidate Goods and such Container is stuffed by the Carrier, the number of packages or shipping units stated on the face of this Bill of Lading in the box provided shall be deemed the number of packages or shipping units for the purpose of any limit of liability per package or shipping unit provided in any international convention or national law relating to the carriage of Goods by sea. Except as aforesaid the Container shall be considered the packaging or shipping unit ..."

In the US case **St. Paul Fire & Marine Ins. v. Sea-Land Service**[10], the US District Court held that:

"The scope of the $500 limitation does not turn upon whether the shipper or the carrier loaded the goods into the container, but rather, as the Second Circuit has ruled, on whether the carrier has been put on notice of the contents of the container."

The English and Australian Courts decide the package limitation claims on the basis of the provisions of Article IV, Rule 5(c) of the Hague-Visby Rules which stipulate that:

"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."

In the English case **The "River Gurara"**[11], the Colman J. said that:

"[U]nder the scheme prescribed by the Hague Rules a package is no less a package for the purposes of art. IV, r.5 where the carrier has been unable to verify its existence as such at the time when he received it for shipment."

In the Australian case **El Greco (Australia) Pty Ltd. v. Mediterranean Shipping Co. S.A.**[12], the Federal Court of Australia held that:

"Article IV, r.5(c) applies both to the carrier's packed containers and shipper's packed containers... What was "enumerated" on the bill shall be considered an "enumeration" irrespective of whether the carrier or shipper packed the container.

9 [2001] 2 Lloyd's Rep. 678
10 735 F. Supp.129 (S.D.N.Y. 1990)
11 Owners of Cargo Lately Laden on Board the River Gurara v. Nigerian National Shipping Line Ltd., [1996] 2 Lloyd's Rep. 53
12 [2004] FCAFC 202; [2004] 2 Lloyd's Rep. 537

There is no requirement in the art. IV, r.5(c) that the enumeration must be contractually agreed to be binding. Article IV, r.5(c) is not a provision dealing with binding representations; it concerns the form of a bill, the identification on it … of the number of packages or units. The enumeration will not bind the carrier under art.III, r.4 if it is made clear that the carrier does not represent it. However, the enumeration will still stand for limitation purposes under art. IV, r.5(c)[13]."

The Courts rejected the Bills of Lading clauses providing that the shipper-packed containers should be considered "packages"[14] and limiting carrier's liability to $500 per container[15]. Such clauses were considered an attempt to lessen the carrier's liability below the limit established by the international convention and national law and consequently, were deemed invalid.

13 The Federal Court of Australia held that if the packages are identified in the Bill of Lading, art.IV rule 5(c) of the Hague-Visby Rules applies even if the shipper's description of goods is qualified by the statements "said to contain" and "shipper's load, stow and count".

14 In Matsushita Electric Corporation v. SS Aegis Spirit, 414 F. Supp. 894 (Washington District Court 1976) and All Pacific Trading, Inc. v. M/V Hanjin Yosu, 7 F.3d 1427 (9th Cir. 1993), the Bills of Lading contained the following clause: "where the cargo has been either packed into container(s) or unitized into similar article(s) of transport by or on behalf of the Merchant, it is expressly agreed that the number of such container(s) or similar article(s) of transport shown on the face hereof shall be considered as the number of package(s) or units for the purpose of the application of the limitation of liability provided for herein." In The River Gurara, [1998] 1 Lloyd's Rep.225, the Clause 9 (B) of the Bills of Lading had the following provisions: "Shipper-packed containers. If a container has not been packed or filled by or on behalf of the carrier … (B) notwithstanding any provision of law to the contrary the container shall be considered a package or unit even though it has been used to consolidate the goods, the number of packages or units constituting which have been enumerated on the face hereof as having been packed therein by or on behalf of the merchant and the liability of the carrier (if any) shall be calculated accordingly." In El Greco (Australia) Pty Ltd. v. Mediterranean Shipping Co. S.A. [2004] FCAFC 202 the Clause 21 of the Bill of Lading had the following provisions: "Where the goods have been packed into containers by or on behalf of the merchant, it is expressly agreed, that each container shall constitute one package for the purpose of application of limitation of the carrier's liability." In Rossetti v. Charleston Freight Station, Inc., 354 F. Supp. 2d 612 (District Court of South Carolina 2005) the Bill of Lading had on its face the following clause: "TOTAL NO. OF CONTAINERS/PACKAGES RECEIVED & ACKNOWLEDGED BY CARRIER FOR THE PURPOSE OF CALCULATION OF PACKAGE LIMITATION (IF APPLICABLE): 1 CONTAINER(S)/ PACKAGE(S)." The carrier argued that the clause is an explicit agreement to treat the container as the package for purposes of COGSA's limitation. The Court held that: "In the Court's opinion, the language Charleston Freight relies on is simply non-bargained for boilerplate that courts have repeatedly refused to consider in applying COGSA's package limitation." Another relevant commentary was made by the District Court of New York in St. Paul Fire & Marine Ins. v. Sea-Land Service, 735 F. Supp. 129 (SDNY 1990): "Allowing the carrier, in this case Sea-Land, to insert an essentially unbargained-for definition of "package" in the bill of lading would effectively eliminate the protection COGSA was meant to afford shippers. ... [T]he Second Circuit on a number of occasions has consistently held that a container is not a COGSA package when the carrier has been put on notice of the contents of the container. There is little sense in saying that carriers can sidestep this rulings by adding boilerplate language to their bills of lading to the effect that containers are always packages, regardless of what the shipper puts on the front of the bill of lading."

15 In Leather's Best, Inc. v. SS Mormaclynx, 451 F.2d 800 (2nd Cir. 1971) the Bill of Lading had on its face the following clause: "SHIPPER HEREBY AGREES THAT CARRIER'S LIABILITY IS LIMITED TO $500 WITH RESPECT TO THE ENTIRE CONTENTS OF EACH CONTAINER ..." The US Court of Appeals for the Second Circuit held that: "we cannot escape the belief that the purpose of §4(5) of COGSA was to set a reasonable figure below which the carrier should not be permitted to limit his liability and that "package" is thus more sensibly related to the unit in which the shipper packed the goods and described them than to a large metal object, functionally a part of the ship, in which the carrier caused them to be "contained". We therefore hold that, under the circumstances of this case, the legend in the lower-left hand corner of the bill of lading was an invalid limitation of liability under COGSA." See also Monica Textile Corp. v. SS Tana, 952 F.2d 636 (2nd Cir. 1991) and Universal Leaf Tobacco Co. v. Companhia de Navegacao Maritima Netumar, 993 F.2d 414 (4th Cir. 1993).

Article 6, Rule 2(a) of the Hamburg Rules[16] and Article 59, Rule 2 of the Rotterdam Rules[17] have similar provisions to Article IV, Rule 5(c) of the Hague-Visby Rules so that it can be argued that the rules adopted by the English and Australian Courts and their comments based on Article IV, Rule 5(c) of the Hague-Visby Rules would be equally applicable to package limitation cases to be decided based on Article 6, Rule 2(a) of the Hamburg Rules and Article 59, Rule 2 of the Rotterdam Rules.

16 Article 6, Rule 2(a) of Hamburg Rules has the following provisions: “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, if issued, or otherwise in any other document evidencing the contract of carriage of goods by sea, as packed in such article of transport are deemed packages or shipping units. Except as aforesaid the goods in such article of transport are deemed one shipping unit.”

17 Article 59, Rule 2 of Rotterdam Rules has the following provisions: “When goods are carried in or on a container, pallet or similar article of transport used to consolidate goods, or in or on a vehicle, the packages or shipping units enumerated in the contract particulars as packed in or on such article of transport or vehicle are deemed packages or shipping units. If not so enumerated, the goods in or on such article of transport or vehicle are deemed one shipping unit.”

The Basis For The Settlement Of Claims For Metal Cargoes Lost Overboard

by Vlad Cioarec, International Trade Consultant

The metal cargoes are carried by sea packed in containers. The container ships are designed to carry containers both under and on deck. In case of containers carried on deck there is a risk that it could be lost overboard during a storm and that the cargo insurers will not be able to recover the value of cargo from the ship's P&I Club due to the provisions of the International Conventions limiting the carrier's liability in function of the number of packages stated in the Bill of Lading to have been loaded in the container(s).

Given the high value of metal cargoes and the risk that that containers stowed on deck could be lost overboard during a storm, the shippers should request the stowage of containers loaded with metal cargoes under deck when booking the freight space.

If the stowage below deck is not possible, then in case of loss of containers stuffed with metal cargoes overboard the cargo insurers would be able to recover only the value resulting from the multiplication of packages stated in the Bill of Lading.

In case of the metal cargoes packaged in bundles, i.e. copper cathode sheets, copper ingots, tin ingots, zinc ingots, aluminium ingots, the enumeration of bundles in the Bill of Lading and their description as “packages” will make the carrier liable for each bundle stuffed in the container up to the limit stipulated in the applicable law.

Similarly, in case of the metal cargoes packaged in bags, i.e. ferronickel granules, copper concentrates, the enumeration of bags in the Bill of Lading and their description as “packages” will make the carrier liable for each bag stuffed in the container up to the limit stipulated in the applicable law.

However, the shipper's failure to enumerate the bundles in the Bill of Lading and to provide evidence that the bundles were separately strapped with bands will mean that in case of loss of cargo the cargo insurer will recover a much lower value than in case where the bundles are deemed to be the packages for the purpose of determining the limit of the carrier's liability.

In the US case **Mitsui & Co. Ltd. v. American Export Lines**[1], a cargo of 1,834 tin ingots loaded in 5 containers was lost overboard during a storm. The shipper's description of cargo in one of the Bills of Lading was in the following terms:

“Two 20' Containers Said To Contain as follows: Gross Weight

OMLU	122590	30 Bundles of 438 pcs (pieces)	33,703
NICB	4327	30 Bundles of 438 pcs (pieces)	33,540

HOUSE TO HOUSE
GRADE “A” TIN INGOTS”

The cargo was stuffed in containers by the shipper.

The buyer brought evidence that the bundles referred to in the Bills of Lading were in fact stacks of 15 ingots that had not been strapped together with metal bands. The metal ingots are normally strapped together in bundles to secure them.

The buyer claimed that the tin ingots were not shipped in packages and therefore, each tin ingot constituted a “package”. This would have allowed the buyer and ultimately, the cargo insurer to recover the full value of cargo.

1 636 F.2d 807 (2nd Cir. 1981)

The dispute was whether each container or each stack of ingots or each individual ingot constituted a “package” for the purpose of calculating the limit of the carrier's liability.
The US Court of Appeals for the Second Circuit held that:

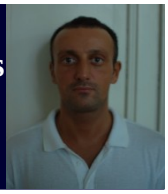
“The stacks of ingots, though described as “bundles”, did not conform to the ordinary meaning of that term. The shipper had done nothing to hold them together … We do not see how these stacks could be regarded as packages …
However, it does not at all follow, as urged by AEL [carrier] that the containers become the packages. If the ingots were not shipped in packages, and we hold they were not, then … the $500 limit would apply “per customary freight unit”. Nothing in §4(5) suggests that simply because the goods were not sufficiently wrapped, bundled or tied to be COGSA packages, the container inexorably becomes the package.”

The Court held that in that case the customary freight unit was the long ton on the basis of which the freight was calculated. The shipper was able to recover only half of the sum that would have recovered if the claim would have been made on the basis that the bundles enumerated in the Bills of Lading were the “packages”.
The question what should be the basis for the settlement of claims for the loss of metal cargoes was again addressed in the US case **Seguros Illimani SA v. M/V POPI P**[2]. In that case, two containers containing 1,005 tin ingots packaged into 67 steel-strapped bundles were stolen from the container terminal of the port of discharge.
The buyers and cargo insurers claimed that each tin ingot constituted a “package”. This would have allowed the buyers and ultimately, the cargo insurers to recover the full value of cargo.
The dispute was whether each bundle of ingots or each individual ingot constituted a “package” for the purpose of calculating the limit of the carrier's liability.
In that case the cargo was stuffed in containers by the carrier's agent at loading port and the evidence showed that the tin ingots were indeed strapped together in bundles.
The US Court of Appeals for the Second Circuit held that the bundles were the packages not only because they were enumerated in the Bills of Lading but because the evidence showed that the tin ingots were indeed strapped together in bundles and thereby packaged. The Court held that an ingot cannot be considered a “package”.
Therefore, in case of claims made in US jurisdiction for the loss of metal cargoes transported in containers, the claimants should take into consideration the following rules:
- in case where the metal ingots are strapped in bundles and the bundles are enumerated in the Bill of Lading, the bundles will be considered the packages based on which limit of the carrier's liability has to be determined;
- if the Bills of Lading fail to enumerate the bundles, then the cargo insurer's recovery will be based on the “customary freight unit” whatever that might be, the long ton or the container itself.
The point is that in the latter case the cargo insurer will recover a much lower value than in case where the metal ingots are strapped in bundles and the bundles are enumerated in the Bill of Lading.

2 735 F. Supp. 108 (S.D.N.Y. 1990); 929 F.2d 89 (2nd Cir. 1991)

The Meaning Of Statement "Apparent Good Order And Condition" In Charter Party Bills Of Lading Issued For Cargoes Of Hot-Rolled Steel Coils

by Vlad Cioarec, International Trade Consultant



For the unwrapped hot-rolled steel coils it is customary to be stored in the open area and to have the surface covered by a layer of rust[1]. This layer of rust is caused by contact with fresh water and is usually of no consequence for further processing since any remaining rust or other extraneous matter is to be removed by a "pickling" process before cold rolling[2]. Hence, the presence of a light film of rust on the surface of hot-rolled steel does not affect its quality[3].
This does not, however, mean that the Charter Party Bills of Lading should not mention about it. Nor does it mean that if the Charter Party Bills of Lading mention about the presence of rust on the surface of the steel this is necessarily an indication of a defective condition of cargo.
This matter was explained by the London Maritime Arbitrators and the English High Court in the case **Sea Success Maritime Inc. v. African Maritime Carriers Limited[4]**. In that case the question was not whether to mention or not in the Charter Party Bills of Lading about the presence of rust on the surface of steel, but whether a cargo in such condition should be loaded or not. The case was a dispute over the interpretation of a loading survey clause of a time charter party which stated that:

"Master has the right and must reject any cargo that are subject to clausing of the Bills of Lading."

The cargo was described in the Charter Party Bills of Lading based on the findings of pre-loading survey made by vessel's P&I Club surveyors. The P&I Club's surveyors report stated that the hot-rolled steel coils had been stored before shipment in open space subject to adverse weather conditions and that the cargo was rusty, with a percentage of it suffering from dents and buckles.
The charterer's statements in the draft Bills of Lading as to condition of cargo were not disputed by the Master, but, in reliance of loading survey clause of charter party, the Master refused to load the cargo. The shipowners' interpretation of charter party clause was that only "good" cargo could be loaded and that any cargo that would be "subject to remarks" in the Bill of Lading must be rejected.
On their part, the charterers claimed that provided the description of cargo made in the Bills of Lading was accurate, there was no need for Master to clause the Bills of Lading as they already contained the surveyors' remarks. Accordingly, the Master had no good reason to refuse the loading of cargo on board the vessel.
The dispute was first submitted to arbitration in London and then went to English High Court.
The arbitrators had to decide over two questions:
- In what circumstances, on the true construction of charter party clause above, is the Master entitled and obliged to reject the cargo presented for shipment/tendered for loading?
- Did those circumstances exist at the time of loading the steel cargo?
The arbitrators' interpretation of charter party clause was that this was intended to avoid disputes between the Shipper and the Master as to the appropriate description of the cargo being loaded or about to be loaded to be inserted in the Charter Party Bills of Lading. It was not intended *"to operate in circumstances where there is no disagreement between the Master and the Shipper as to*

1 See the Information about "Steel sheet in coils" in the Cargo Information section of Transport Information Service from the German Insurance Association at www.tis-gdv.de
2 See "Hot rolled steel sheeting" report in the Carefully to Carry section in the Loss Prevention area of UK P&I Club website www.ukpandi.com and the Information about "Steel sheet in coils" in the Cargo Information section of Transport Information Service from the German Insurance Association at www.tis-gdv.de.
3 See the Information about "Steel sheet in coils" in the Cargo Information section of Transport Information Service from the German Insurance Association at www.tis-gdv.de
4 [2005] EWHC 1542 (Comm); [2005] 2 Lloyd's Rep.692

the proposed description of the cargo in the Bills of Lading". Accordingly, the Master did not have the right to reject the cargo tendered for loading.

The arbitrators found that in the context of the charter party clause submitted for interpretation the term "clausing" means *"a notation on the Bill of Lading by the Master or his agent, which qualifies existing statements in the Bill of Lading as to the description and apparent condition of the goods"*. It does not refer to terms used by charterer to describe the cargo in Bill of Lading even if such terms indicate a defective condition of cargo at time of loading. The question of whether the goods are "in apparent good order and condition" depends primarily on the nature of goods and the way in which they are described in the Bills of Lading that are tendered by charterer to Master for signature. A cargo that is properly described in the Bills of Lading as damaged or imperfect in some way can still be stated to be in "good order and condition". Thus, a cargo described in a Bill of Lading as *"hot-rolled steel coils with pitting and gouging"* can be stated to be in "good order and condition".

Similar conclusions can be found in US case law. One example is the case **Thyssen, Inc. v. S/S Eurounity**[5], where the Bills of Lading included notations indicating that the cargo of hot-rolled steel was "RUST STAINED", "PARTLY RUST STAINED" and "WET BEFORE SHIPMENT". The shipowners argued that these notations indicated a defective condition of cargo at time of loading. The Court disagreed on the basis of the evidence provided by a freight forwarder and loading port surveyor. The freight forwarder testified that these notations referred to *"nondamaging, atmospheric rust that does not affect the value of steel"*. The loading port surveyor testified that the *"steel is considered to be in "prime" condition when the bills of lading include these standardized notations[6]"*.

In addition the pre-shipment survey report had a statement which confirmed that the presence of rust was not an indication of a defective condition of cargo. The statement was: *"Amount of depreciation caused by any rust condition observed: none."* Accordingly, both the District Court and the Court of Appeal concluded that the hot-rolled steel products so described were in good condition.

Another example is the case **Steel Coils Inc. v. M/V Lake Marion**[7] where the Charter Party Bills of Lading included similar notations indicating that the hot-rolled steel coils were rust stained and wet before shipment. The shipowners argued that these notations indicated a defective condition of cargo at time of loading.

Both the US District Court and the Court of Appeal found from the evidence presented that the notations in the Bills of Lading indicating rust staining and moisture on the hot-rolled steel coils did not affect their good condition prior to loading.

Captain Arthur Sparks, Steel Coils' expert on sea carriage of steel cargoes explained that the notations regarding rust in the Bills of Lading were *"non-restrictive clauses indicating that the goods were undamaged but affected by a form of atmospheric rust normal on all mild steel surfaces which are untreated against oxidation"*. This atmospheric rust, which he also termed "fresh water rust", is caused by the storage of hot-rolled steel coils in open air prior to loading onto the vessel. Mr. Arthur Sparks stated that this type of rust does not result in harmful deterioration of the material and only if the hot rolled coils come into contact with "an electrolyte more aggressive than fresh water, e.g. saltwater," does permanent damage to the plating occur. He also said that *"it is not unusual for such goods to be shipped in an apparent rusty condition and wet"* and despite the notations on the bills of lading, all of the bills of lading were signed clean and therefore *"all cargo when shipped was in apparent good order and condition"*.

5 21 F.3d 533 (2nd Cir.1994)

6 These standardized notations are part of a list of standard clauses published by The International Group of P&I Clubs to be used in Bills of Lading to describe the condition of steel cargoes.

7 331 F.3d 422 (5th Cir. 2003)