INTERNATIONAL MARITIME COMMITTEE

International Subcommittee

on

BILL OF LADING CLAUSES

COMMENTS ON REPORT OF INTERNATIONAL SUBCOMMITTEE

Dated 30th March 1962

1.

FINLAND	Conn. C. 1
SWEDEN	Conn. C. 2
UNITED KINGDOM	Conn. C. 3
NETHERLANDS	Conn. C. 4
ITALY	Conn. C. 5
NORWAY	Conn. C. 6
YUGOSLAVIA	Conn. C. 7

MARCH 1963

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MARCH 1963

FINNISH MARITIME LAW ASSOCIATION

BILL OF LADING CLAUSES

COMMENTS ON THE REPORT OF THE INTERNATIONAL SUBCOMMITTEE

I. INTRODUCTION

Revision of Article X.

Although we understand that the wording of this Article was approved at Rijeka, we would like, in case this Article comes up for discussion in Stockholm, to make the following comments.

According to the proposed wording the Convention shall apply to every Bill of Lading for carriage of goods — — — —if the *port of loading*, the *port of discharge* or an *optional port of discharge* is situated in a contracting state. An *optional port of discharge* becomes a *port of discharge*, if the option to discharge is exercised. If, on the other hand, such option is not exercised, then it is irrevelant what the legislation of the optional port is. In our opinion, therefore, there should be no reference to an optional port.

According to the wording of this Article the Convention applies to every *Bill of Lading* for carriage of goods from one state to another. Then that implies that the nationality of the ship is not relevant and the reference to the nationality of the ship is therefore only confusing.

The Convention contains stipulations as to the obligation of the Master to issue a Bill of Lading, to the contents of this Bill of Lading, to the obligation of the Master to bring the cargo to the port of discharge in good order. It also contains stipulations about certain facts, which relieve the Master from these obligations, but also of the damages he has to pay in case of non-fulfilment. There can therefore hardly be any other Law governing the Bill of Lading, and the words « whatever may be the Law governing such Bill of Lading » seem to be superfluous.

Chapters II and III

No comments.

IV. POSITIVE RECOMMANDATIONS

On page 11, *in fine*, it is contended that on certain occasions Courts have taken a standpoint as to who should carry out loading, stowing, discharging, etc. We have had no such cases in Finland, and we know that ever since the Convention came into existence Carriers have had loading, stowing, discharging, etc. effected by Stevedores, in most cases engaged by the Carriers themselves, but in many cases appointed by the Shippers, Charterers, etc., without the Courts interfering. A different thing is, of course, that in relation to a *bona fide* Bill of Lading holder, the Carrier is liable as if he himself had carried out the loading, stowing, etc.

If to Art. III (2) are added the words « in so far as this operation is not performed by the Shipper or Consignee », then, if the Shipper carries out loading, stowing, etc., is it the intention that this should in any way lessen the liability of the Carrier ? This could be the case only if the Bill of Lading holder were aware of the fact that the Shipper would be liable for faults in loading, etc. How should the fact that the Shipper has carried out loading, stowing, etc. be brought to the knowledge of the Bill of Lading holder ? Presumably by inserting in the Bill of Lading a Clause to the effect that the Shipper has carried out loading, stowing, etc. We would then have a new set of Marginal Clauses, which would give rise to all the same difficulties as we now have with the other such Clauses.

The difficulties which arise if the Shipper carries out loading, stowing, etc. do not exist if the Consignee carries out discharging. In our opinion, however, a corresponding stipulation in the Rules would not benefit the Carrier. As the Law is now, where the discharging is the task of the Carrier, if he delegates this to the Consignee, who is identical with the Bill or Lading holder, then, if the Consignee carelessly carries out the discharging, he would have to take the consequences, as he could not then fall back on the Carrier as regards damages for his own faults.

For these reasons we would prefer to retain *status quo* on this point.

Notice of Claim Art. III (6). First para.

If, as is the case according to the present wording, the removal shall be *prima facie* evidence of the delivery by the Carrier of the goods as described in the Bill of Lading, then the removal constitutes such *prima facie* evidence and nothing more. We are therefore of the opinion that the addition to the Rule is of no practical value and is in itself no reason for going to the trouble of having the Convention altered.

Art. III (6). Third para.

The carrier now and then delivers goods to a person who has not the relevant Bill of Lading in his possession. The Carrier often does this to accommodate a customer and in most cases the customer will be able to produce the Bill of Lading within a very short time. However, there are cases which are not so simple as this. A Bill of Lading may have gone astray while in transit from the Shipper to the Consignee, or the Shipper may have heard that the person to whom the goods originally were to be consigned has got into financial straits and has sent a Bill of Lading to a third person, e.g. « stoppage in transitu ». Finally, a person may fraudulently claim goods, stating that the goods have been consigned to him.

Whenever the Carrier delivers goods without the Bill of Lading being produced, he requires a guarantee, or should do so for his own safety. This guarantee usually constitutes a financial burden on the Consignee. He is therefore anxious to get rid of this burden, and, if he is *bona fide*, he will without loss of time make arrangements to produce the Bill of Lading. If again the goods have been delivered to a third party, who is not a *bona fide* Consignee, then there is no reason to make things easier for such third party.

Should in such cases e.g. the Shippers' claim against the Carrier have become time-barred, then it would seem unreasonable to cause an economic loss to the proper proprietor of the goods, merely for the sake of accommodating a third party who has — perhaps fraudulently — got the goods into his possession.

Notwithstanding the above we are prepared to support the recommendation made by the majority of the subcommittee, namely that in the event of delivery of goods to a person not entitled to them, the period of one year otherwise stipulated for claims against Carrier shall be extended to two years.

Gold Clause. Art. IV (5) and IX.

We have no objection to the proposals under this heading.

Liability in tort. The « Himalaya » problem.

We are in full agreement with the efforts to have the Convention so amended that cases of the « Himalaya » type will not arise again.

On the proposed draft we would make the following comments.

Para. (1) saying that action for damages against the Carrier can only be brought subject to the conditions of the Convention seems to us to be superfluous. The Convention stipulates when and what actions can be taken against the Carrier, and it does not help the Carrier to have these stipulations repeated as proposed.

A different thing is, of course, that actions over and above what is stipulated in the Convention can be taken against the Carrier who, to the detriment of the Bill of Lading holder, has caused damages with criminal intent. In such cases the ordinary Law and not the Convention will apply.

If, as is suggested above, Para. (1) is left out, then Para. (2) will have to be redrafted. In doing this guidance can be found in the wording of Art. 6 of the International Convention relating to the Limitation of Liability of Owners of Sea-going Ships (1957) or Art. 12 of the International Draft Convention for the Unification of Certain Rules relating to the Carriage of Passengers by Sea (1961) or Art. 12 of the Preliminary Draft International Convention for the Unification of Certain Rules relating to the Carriage of Passengers Luggage by Sea.

Both to Blame.

We have no comments to make under this heading.

Other Subjects Examined and Future Action.

We have no comments to make under these headings.

Helsinki/Helsingfors, November 9th, 1962.

Rudolf Beckman *Bertel Appelqvist*

SWEDISH MARITIME LAW ASSOCIATION

BILL OF LADING CLAUSES

COMMENTS ON THE REPORT OF THE INTERNATIONAL SUBCOMMITTEE

The Swedish Association of International Maritime Law appointed a subcommittee to examine the report mentioned above (Mr. K. Grönfors, chairman, B. Barth-Magnus, L. Hagberg and H. G. Mellander). The subcommittee has submitted its unanimous opinion to the Association. In the light of what has been said and after further considerations the Swedish Association would like to express the following views :

REVISION OF ARTICLE X

Our Association supports the proposed amendment.

1. Carrier's liability for negligent loading, stowage or discharge of the goods by the shipper or consignee (Art. III (2)).

It is perfectly true that in principle the carrier should not be held responsible for faults of the shipper or consignee committed at the loading or the discharge of the goods. Nevertheless the text proposed in the report presents some difficulties. It is hardly well suited for the transport of general cargo and would moreover weaken the value of the B/L as a negotiable document. The carrier should be able to cope with the problem by using a c/p as suitable base and stick to the c/p in typical f.i.o. situations.

In the circumstances the majority of our Association prefers the status quo on this point.

2. Notice of claim (Art. III (6) first para).

Our Association supports the reservation appearing pages 14/15 in which is said :

« ...that although the suggested amendment gave some clarification they would prefer a rule with a more effective sanction to a claim when notified too late. »

During the preparatory work of the International Subcommittee the Norwegian Association proposed the following formula :

« Any liability of the Carrier under these Rules shall cease unless notice of the claim has been given to the Carrier or his agents without undue delay, but no notice shall be required if it is proved that the Carrier or any one for whose acts he is responsible acted recklessly or with intent. »

This appears to us on the whole a satisfactory formula.

If it is felt, however, that the words « undue delay » convey too vague a meaning it would probably be possible to combine them with an outside time limit of say seven days, or to use a seven days' limit only which in most cases probably would be ample (Cfr. for air transport Warsaw Convention Art. 13 (3) and for road transport C.M.R. Convention 1956 Art. 30).

The time should start from the moment the goods were actually received or placed at the effective disposal of the consignee. In this respect it must be noted that goods very often are discharged and stored at the quay long before the consignees have been notified of the arrival of their goods. Further it is often difficult for the consignees to arrange survey of the goods before they are cleared through the customs. Thus the time should not commence to run before the goods are placed at the *effective* disposal of consignees.

3. Time limit in respect of claims for wrong delivery (Art. III (6) third para).

Our Association believes it important to have a rule about time limits inscribed into the Convention which would dispose of the need for consignees to put up long and costly bankguarantees. The resolution appearing in the report page 19 is, however, not an ideal one. Already the need to add a special declaration (bottom page 19) goes to show that the majority has hardly found the best possible solution.

Our Association would prefer a uniform time bar applicable to all types of claims on B/L. This would dispose also of the question of time limit in respect of claims for indirect damage through delay (Vide report point 15, page 53), which indeed would be a great advantage.

We would favour a uniform one year time limit to be introduced covering the whole field of possible claims. We submit that Art. III (6) third para of the Convention be amended to read as follows :

« In any event *all rights under the Bill of Lading shall cease* unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. »

4-7. Gold Clause, The Himalaya Problem, Nuclear Damage and Both to Blame.

Our Association supports the suggestions of the Report in respect of these questions.

8-10 (no comments)

11. Due diligence to make ship seaworthy (Art. III) (i) and IV (i)).

Our Association is not inclined at this stage to accept the status quo recommanded in the report. While the decision in the « Muncaster Castle » is an English one it might well in the long run have repercussions elsewhere. Should it constitute a different solution than would have been adopted under other jurisdictions it might have a bearing on the wish of the parties to have the British COGSA apply or not. Notwithstanding the new Article X, which is already adopted by the I.M.C., the « Muncaster Castle » decision might incite to disputes as to what COGSA should apply owing to the fact that the stern view adopted might well lead to a conflict of interests between the Carrier on the one side and the consignee on the other.

Our Association should therefore welcome that renowed efforts be made to try to find a solution to the difficulties caused by the « Muncaster Castle » decision.

Some members, however, do not share this view and should like the « Muncaster Castle » decision to prevail.

12-24. (no comments)

FUTURE ACTION

To have the amendments which will be eventually adopted embodied in a additional protocol of the type used for the Haag protocol of 1955 to the Warsaw Convention is we believe the best solution in this case.

Our Association should appreciate were the I.M.C. decision to contain a suggestion that the Belgian Government invite to the Diplomatic Conference which will deal with such protocol those Governments which ratified the 1924 Convention or afterwards have acceeded to it.

Stockholm, 14th December, 1962.

Kaj Pineus *Claës Palme*

BRITISH MARITIME LAW ASSOCIATION

BILL OF LADING CLAUSES

COMMENTS ON THE REPORT OF THE INTERNATIONAL SUBCOMMITTEE

INTRODUCTION

It is thought appropriate to commence our comments on this Report by conveying to those responsible for drafting it our appreciation of its comprehensive and clear nature. We believe that the studies of the International Subcommittee have been most useful and that the conclusions set out in the Report will serve as a really satisfactory basis for the future work of the Comité Maritime International. In commenting on the Report we have thought it desirable to go into some detail as to the reasons for the views expressed on the various points. This has necessitated reference to some decisions by the Courts in the United Kingdom which, we hope, will not unduly weary members of other Associations.

The paragraph numbers appearing against our comments refer to those contained in the Report. As will be noted, we have also followed the pattern of the Report by dividing our comments under three headings namely, (a) Positive recommendations, (b) Other subjects examined and (c) Future action.

We should add that, although the content of the Report has received detailed study by this Association and the comments have been carefully considered, the Association reserves the right to amend these comments either before the Stockholm Conference or at the Conference itself.

POSITIVE RECOMMENDATIONS

1) Carrier's liability for negligent loading, stowing or discharge of goods by shipper or consignee. (Article 3 (2)).

It is suggested in the Report that there is uncertainty about the extent of the carrier's liability in this paragraph. Is the carrier obliged

to perform the whole operation properly and carefully or is the carrier bound to do this only to the extent that he has himself undertaken to do so.

This question was considered in *Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd. 1954 2 Queen's Bench Division,* when it was decided that the carrier is only responsible for that part of the operations which he has undertaken to carry out. The reasoning upon which this decision was based was clearly expressed by the Judge (Devlin J., as he then was) in the following words :

« The object (of the Rules) is to define not the scope of the contract service but the terms on which that service is to be performed. The extent to which the carrier has to undertake the loading of the vessel may depend not only upon the different systems of law, but upon the custom and practice of the port and the nature of the cargo. It is difficult to believe that the Rules were intended to impose a universal rigidity in this respect, or to deny freedom of contract to the carrier. The carrier is practically bound to play some part in the loading and discharging so that both operations are naturally included in those covered by the contract of carriage. But I see no reason why the Rules should not leave the parties free to determine by their own contract the part which each has to play. On this view, the whole contract of carriage is subject to the Rules, but the extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to determine ».

This interpretation of the Act was subsequently approved in a decision of the House of Lords given in 1956 *(G. H. Renton & Co. Ltd. v. Palmyra Trading Corporation),* and it may, therefore, be accepted that under English law, the carrier is not *obliged* to perform the operation of loading and discharging, but that, if he does undertake so to do, his liability is regulated by the Act.

The Association has noted the recommended amendment to the sub-paragraph of this Article and appreciates that wording on the lines suggested in the Report is necessary in order to clarify the position in other countries. It has, however, been pointed out that sometimes the operations of loading, handling etc. are not performed by the shipper or consignee themselves but by persons appointed by them to act on their behalf. It is thought that this factor should be covered and, without wishing to propose a final text, the following wording illustrates what we have in mind :

« *Insofar as these operations are undertaken by the carrier,* the carrier shall properly and carefully load, handle, stow... ».

2) Notice of Claim (Article 3 (6), first paragraph).

As is indicated in the Report, the three-day period for notice of claim is of varying importance in different countries.

In England, whether notice is given or not, the onus of proving loss or damage always lies upon the claimant. But in some countries it appears that, provided notice of claim is lodged within three days, the carrier is presumed to have been af fault, i.e. the burden of disproving loss or damage is on the carrier.

In these circumstances it will be appreciated that the point is of somewhat academic interest in this country. Nevertheless, the Association takes no objection to the words recommended as an amendment to this sub-paragraph.

3) Time limit in respect of claims for wrong delivery. Article 3 (6) third paragraph).

The question raised in the Report is whether the expression « loss or damage » in this paragraph covers liability for wrong delivery and thus entitles the carrier to limit liability under the Rules. As far as the law of the United Kingdom is concerned, a distinction is drawn between the negligent performance of a contract and a fundamental breach which goes to the root of the contract. In the former case the carrier is liable, even though the goods have suffered no physical loss or damage (see *Anglo-Saxon Petroleum Co. Ltd. v. Adamastos Shipping Co. Ltd.* 1957 1 L.L.R.) but such liability is limited under the Rules and the claim against him is time barred after one year. In the latter case the carrier might well lose the protection of all the exceptions under the Rules, including the time limit and he remains liable in full within the 6 year period of our Statute of Limitations *(Spurling v. Bradshawe* 1956 1 W.L.R. 461).

Without prejudice to the provisions of the Gold Clause Agreement, the Association supports the amendment recommended in the Report which will thereby reduce the period during which it is at present necessary for Receivers to obtain Bank guarantees when they have received goods without producing the Bill of Lading.

4) Gold Clause (Article IV (5) and IX).

The effect of the proposed amendment is to clarify this question by adopting the Poincare franc as the basis for the limitation figure, as was done in the Passenger and Nuclear Conventions. The sterling equivalent is about £ 235. The Association supports the recommendation which will avoid past uncertainty in this sphere.

5) Liability in Tort.

In the recent case of *Midland Silicones Ltd. v. Scruttons Ltd.* (1961) 2 Lloyd's List Law Reports, certain stevedores, who by their admitted negligence had damaged a valuable package of goods during discharge in the Port of London, sought to limit their liability to the sum of $ 500, upon the ground that the Bill of Lading was subject to

the U.S. Carriage of Goods by Sea Act 1936 (the Act incorporating the Brussels Convention 1924). It was held that the stevedores could not rely upon this provision, because English law knows nothing of a « jus quaesitum tertio » arising by way of contract, and consequently one who is not a party to a contract can derive no benefit from it. The Court of Appeal had earlier arrived at a similar decision in the case of *Adler v. Dickson and Another* 1954 2 Lloyd's List Law Reports, in which it was decided that the Master and Boatswain of a ship who had injured a passenger by their negligence were not entitled to rely upon a clause in a passenger ticket which exempted the Shipowners from liability for negligence.

The Association fully supports the principle behind this recommendation. It must, however, be stressed that merely to amend the Hague Rules in the manner suggested would not, so far as the law in the United Kingdom is concerned achieve the object of the amendment, namely to give that protection to servants, agents and independent contractors as is at present afforded to carriers under Article 4 of the Rules. As has already been mentioned (see the Midland Silicones case quoted above) a person who is not a party to a contract cannot derive any benefit under such contract. Consequently whatever provision may be inserted in the Rules to protect servants etc. this in itself will be of no avail without a supplementary provision (possibly by way of a specific Section in an Act of Parliament) which lays down that servants, agents and independent contractors may, notwithstanding that they are not parties to the Contract of Carriage, benefit from the defences and limits of liability set out in such contract. Apart from this consideration, the Association wishes to reserve its position regarding the actual text suggested as an amendment because it is somewhat doubtful that the words employed will in fact achieve the object as set out on page 29 of the Report.

6) Nuclear damage.

The Association supports this recommendation.

7) Both to Blame.

The Association supports this recommendation.

OUTWARD BILLS OF LADING — ARTICLE X

Apart from the recommendations made in paragraphs 1 to 7 of the Report, note has been taken of the Resolution adopted at Rijeka in 1959 regarding the amendment of Article X of the Rules, as mentioned in the Report on pages 5 and 6.

As at present drafted the provisions of the Convention apply only to Bills of Lading issued in any of the Contracting States i.e. to « outward » Bills of Lading.

Under the United Kingdom Carriage of Goods by Sea Act, therefore, the provisions apply only to Bills of Lading relating to the carriage of goods from any port in the United Kingdom. The Act does not apply to the carriage of goods from any port outside the U.K. to any other port whether in or outside the U.K.

This has given rise to a conflict of judicial opinion as to the position when goods are shipped from a port outside the U.K., in a country which is a Contracting State to the Hague Rules, to a port within the U.K., but the Bill of Lading, contrary to the law of the country of origin of the contract of affreightment does not contain an express provision that it is subject to the rules of the Convention.

In the « *TORNI* » 1932 p. 78, Bills of Lading issued in Palestine for carriage of goods to England did not incorporate the Hague Rules, though Palestinian law required that they should. They did, however, contain a provision that they were to be construed according to English law. The Court of Appeal held that the Bill of Lading should be interpreted as if Palestinian law had been complied with. In *Vita Food Products v. Unus Shipping Co.* 1939 page 277 Appeai Cases, the Privy Council came to an opposite decision in a similar case. This conflict cannot be resolved until a similar case comes before the House of Lords or unless the Carriage of Goods by Sea Act is amended to apply to both inward and outward Bills of Lading in the manner recommended by the amendment to Article X.

In these circumstances, the Association confirms that, in its view, the Article should be amended as proposed.

OTHER SUBJECTS EXAMINED

8) Unseaworthiness and deck cargo (Article 1 (c) and Article III (1)).

Certain members of the Association are of the view that further consideration should be given to the desirability of covering deck cargo in terms similar to those mentioned in the Report.

9) Liability before loading and after discharge (Article 1 (e) and Article VII).

Whilst appreciating the difficulties of claryfying the point raised under subparagraph (b) of the Report, it is thought by some members that further consideration should be given to evolving a clear definition of the period of the carrier's liability.

11) Due diligence to make ship seaworthy (Article III (1) and IV (1)).

The Association is of the view that since the decision in the « Muncaster Castle », the burden of liability resting upon Shipowners is unreasonably heavy. In these circumstances it is thought that further serious efforts should be made to reach agreement on an amendment

which, while lessening the Shipowners' present liability, would constitute a fair compromise with cargo owners. With this in mind the Association tentatively suggests that Article III (1) should be amended somewhat als follows :

« Provided that if in circumstances in which it is proper to employ an independent contractor (including a Classification Society), the carrier has taken reasonable care to appoint one of repute as regards competence and has taken all other reasonable precautions, the carrier shall not be deemed to have failed to exercice due diligence solely by reason of an act or omission on the part of such an independent contractor, his servants or agents (including any independent sub-contractor and his servants or agents) ».

12) Received for Shipment Bills of Lading (Article III (3) and (7)).

The Association is inclined to accept the decision reached in this matter. Nevertheless it would ask for further time to consider the point.

17) Invoice Value Clause (Article III (8)).

There exists support within the Association that this subject should be further considered. Futhermore, it should be mentioned that certain members are of the view that the market value of the goods should be the basis for calculating liability and that no choice should be given to carriers as under the « alternative » type of clause set out in subparagraph (b) of the Report.

FUTURE ACTION

In view of the comments which have been made above, it will be understood that the Association believes that there are a number of points upon which the Hague Rules could usefully be amended and which would give justice to both cargo and Shipowners. In these circumstances the Association supports the general principle that steps should be taken to implement such amendments.

But we feel strongly that the manner in which this is done should be somewhat as follows :

1) When the amendments have been settled within the C.M.I. a Diplomatic Conference should be called and which should be restricted to delegates from those countries which have signed and ratified the Hague Rules or which have taken positive steps so to do.

2) The amendments should be incorporated into a Protocol to the Hague Rules, thus avoiding the amendment of the Rules as a whole.

1st January 1963.

NETHERLANDS MARITIME LAW ASSOCIATION

BILL OF LADING CLAUSES

COMMENTS ON THE REPORT OF THE INTERNATIONAL SUBCOMMITTEE

I.

The Conference of the Comité Maritime International which met in September 1959 at Rijeka, adopted two resolntions with respect to the Convention mentioned above.

In the first of the two resolntions a new text of article X of the Convention was adopted.

In a second resolntion the Interıational Snbcommittee was entrusted with the task to study other amendments and adaptations to the provisions of the Convention.

The nndersigned wishes to express its sincere admiration for and great appreciation of the manner in which the International Snb-Committee acquitted itself of its task. Its terms of reference being wide, the International Snbcommittee rightly nndertook to review a considerable number of the provisions of the Convention and to examine snch proposals for amendments of these provisions as were snbmitted to it by one or more of its members. The results of its discnssions and the conclusions at which it has arrived have been laid down in its final report of the 30th March 1962.

II.

Before entering in discnssion of the recommendations and conclnsions presented by the report of the International Snbcommittee, the undersigned wishes to make the following observations of a more general natnre :

a) the proposed revision of the Convention raises the problem if and to what extent snch revision will be desirable or opportune. It shonld be remembered that the Convention owes its existence to a compromise reached between shipowners and cargo interests. Moreover the

Convention, as it now reads, has been ratified or adhered to by a large number of maritime nations. In fact, it has led to an almost worldwide unification of the law on the liability of the carrier of goods under bills of lading. Although the wording of the Convention may in certain respects be open to criticism — this wording has been described as containing typical bill of lading language —, on the whole the application of the Convention has proven to be satisfactory to all parties concerned. Although the Convention applies only to carriage of goods under bills of lading, yet more and more charterparties are incorporating the principal provisions of the Convention as part of the contract of affreightment which is embodied in such charterparties. On the whole the divergences in the application of the Convention by the Courts of different countries have been so small, that it may be stated that the almost worldwide unification of the law referred to above has brought about an almost worldwide uniformity of that law.

Any attempt to bring about a revision of the Convention which would encroach on its principles, might disturb this compromise and endanger this uniformity. Even if the Diplomatic Conference should decide to incorporate such revision in a separate protocol which, for reasons which are selfexplanatory, would seem to be the most useful method to effect such revision, there would always be the danger that a number of countries now being parties to the Convention, would refrain from signing or ratifying such Protocol. It need not be stressed that the ensuing situation would be, if not chaotic, at any rate highly undesirable from the point of view of international uniformity. It might lead to a situation in which cargoclaims relating to the same ship and the same voyage, if brought in the Courts of different countries, would be decided upon either the « old » or the « new » Hague Rules, depending on whether the country of the Court, in which proceedings were instituted, did or did not ratify the Protocol.

When dealing with the amendments proposed, the Stockholm conference should bear the above considerations in mind. In other words : in respect of each of these proposals the conference should investigate whether or not the amendment proposed would be of a nature to directly or indirectly modify the principles underlying the Convention and therefore to disturb the existing compromise. In that case the amendment should only be carried, if it should appear to be absolutely indispensable. Should a particular amendment constitute a real improvement as compared with the actual text — aud certain of the amendments may be considered as such —, but should the amendment not be found to be indispensable. then for the reasons set out above it might be better policy to refrain from adopting the proposed change. Sometimes « le mieux est l'ennemi du bien ».

b) Subject to what is stated in subpar. (a) above, the undersigned believes that the Stockholm Conference should not extend its

labours beyond the « Positive recommendations » made by the International Sub-Committee. In fact, this Report shows that in respect of all the « other subjects examined », the International Subcommittee decided to refrain from making proposals for amendments. In case the Conference should decide that one or more of those subjects should be investigated more fully, then such subjects should be referred once more to the International Subcommittee.

In this connexion the undersigned would point out that the existing Convention merely contains « certain rules » « relating to bills of lading ». The authors of the Convention never intended to make a uniform law encompassing a complete set of rules governing all the aspects of the contract of carriage and this intention is fully borne out by the Convention as it now stands. As in the other fields of maritime law, the C.M.I. should be wary of endeavouring to arrive at completeness and what may be termed perfectionism. Such endeavours would probably prove not only to be impossible, but might also very likely disturb and endanger the compromise referred to above.

c) The undersigned wishes to stress that none of the above observations is intended to imply any criticism as regards the remarkable work done by the International Subcommittee and the excellent report prepared by its Chairman. On the other hand it is up to the Plenary Conference to see that the C.M.I. does not « rush where angels fear to tread ».

III.

In formulating the « positive Recommandations » the International Subcommittee followed the order in which the articles of the Convention concerned appear therein. In discussing these Recommendations, the undersigned will follow the same method.

1) Carrier's liability for negligent loading, stowage or discharge of the goods by the shipper or consignee (Art. III (2)).

With regard to Article III (2) the practice followed by the Courts of a great many countries seems to show a similar tendency which moreover seems to give satisfaction. In the opinion of the undersigned this tendency should not be disturbed and therefore endangered by the revision of this particular provision of the Convention.

It is further to be noted that article III (2), contains a reference to article IV. This illustrates how an apparently unsubstantial change of one of the provisions of the Convention may have a bearing on other provisions. On the other hand it may be asked wether the consequences thereof have in every case been fully considered.

For all these reasons the undersigned does not think the amendment proposed desirable.

2) Notice of claim (Art. III (6) first para.).

The undersigned regrets that it has not been able to discover what would be the effect of the change (or rather the addition) proposed as no need therefore seems to exist. It is therefore suggested not to accept this recommandation.

3) Time limit in respect of claims for wrong delivery (Art. III (6) third para.).

This proposal raises the highly important question whether the expression « loss or damage » within the meaning of the Convention does or does not include so called « wrong delivery ».

At present this question is generally answered in the affirmative. However, should the amendment proposed be adopted, it would necessarily follow that in future the answer would be negative.

It will not be impossible to prevent this consequence by means of a resolution such as the one which was adopted by the International Subcommittee, even although this Subcommittee stated that it did not wish to solve the problem.

Considering that the words « loss or damage » have a special meaning in other articles of the Convention, this resolution in itself provides an argument for not attempting to amend Article III (6), third para.

The proposal to fix a period of prescription (or of extinction) of the action in case of « wrong delivery » at two years not only might serve as an argument that « wrong delivery » is to be considered as a special category of loss and is therefore to be distinguished from « loss or damage », but might also encourage those who wish to strive for the adoption of a longer period of prescription (extinction) of the action than the one year's period of Article III. The one year's period, however, is one of the elements of the compromise referred to above, which compromise might thus be disturbed with all the serious consequences resulting therefrom.

Apart from the foregoing the Undersigned suggests that at any rate the words « unless suit is brought » be replaced by « unless a writ is served » as it seems that under the law of procedure of certain countries suit is brought by issuing a writ, whilst such writ may be served on the defendant at a later date.

4) Gold Clause, Rate of Exchange, Unit Limitation (Art. IV (5) and Art. IX).

The undersigned agrees in principle to the proposals submitted by the International Subcommittee. The undersigned would, however, prefer that the Convention should determine the date of conversion. As such should be taken the date of payment, as done in Art. VI of the Brussels International Convention on Passengers.

As regards the amount of the limit, the undersigned would prefer to reserve its final opinion until the views of all parties interested, especially those of Underwriters, be known.

IV.

LIABILITY IN TORT, THE « HIMALAYA »-PROBLEM

The problem raised in connection with this recommendation is one which arises from English law. On the other hand there seems to be no special international need for a provision of this nature.

V.

NUCLEAR DAMAGE

The undersigned agrees to a provision of this nature, although the wording may be open to improvement. In the opinion of the undersigned it would be better to state that the Convention does not apply to nuclear damage. The expression « nuclear damage » should then be defined in the same way as has been done in the 1962 International Convention on the Liability of Operators of Nuclear Ships, namely as « loss or damage which arises out or results from the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel (i.e. any material which is capable of producing energy by a self-sustaining process of nuclear fission) or of any material, including nuclear fuel, made radioactive by neutron irradiation. »

VI.

BOTH OF BLAME

The undersigned agrees with the conclusion arrived at by the International Subcommittee.

Amsterdam, January 1963.

ITALIAN MARITIME LAW ASSOCIATION

BILL OF LADING CLAUSES

COMMENTS ON THE REPORT OF THE INTERNATIONAL SUBCOMMITTEE

I. INTRODUCTION

Before submitting our views on the various positive recommendations contained in the report, we wish to express our sincerest congratulations for the valuable work done by the International Sub-Committee under the able chairmanship of Mr. Kaj Pineus. The report which has been prepared by the Chairman is crystal clear and has made our work comparatively easy.

We wish to add at this stage that we have considered all the recommendations of amendments to the Convention with a very open mind, since we do not think that the Convention is something which should not be touched in any case. By so thinking, we would misinterpretate the functions of the C.M.I.

Thirty eight years have elapsed since the time of signature of this Convention, many things have changed, the experience has shown that there are many points which are not clear, and particularly, that there are many rules which have received a different interpretation in the various countries, owing to the different legal systems in force, so that sometimes uniformity is only in the words, but not in their interpretation.

It is our feeling that we must take this into account, and try to achieve a substantial uniformity, namely try to use words and phrases such as to assure to the best possible extent a uniform interpretation of the rules agreed upon. None of us should consequently object to a request of amendment or of addition by stating that for him the words are clear : they may be clear to him, they may be clear to the Judges of his nation, but they may not be clear at all to other people, to the Judges of other nations.

We must therefore re-consider the Hague Rules with the experience of these thirty eight years, amend them where necessary for

assuring a uniform interpretation, delete what has appeared superfluous, add what has been left out and it is felt advisable to regulate, without, anyhow, touching upon what has proved satisfactory, only because some improvements of secondary importance can be made.

II. POSITIVE RECOMMENDATIONS

1. Carrier's liability for negligent loading, stowage or discharge of the goods by the shipper or consignee (Art. 3 (2)).

Although the question of the liability of the carrier when the goods are loaded and stowed by the shipper, has received during the past years a negative solution by our courts, we throughly agree on the advisability of amending this paragraph in order to assure a uniform interpretation of the rule.

We wish anyhow to draw the attention of the other Associations on the possible misleading effect of the wording which has been suggested. In fact, whilst the carrier may be relieved from his responsibility only in so far as the loading, stowing and discharging of the goods are concerned, if the words « in so far as these operations are not performed by the shipper or consignee » are inserted at the beginning of the sentence, it might be implied that the carrier may be relieved from liability also with respect to the carying, keeping and caring for the goods.

We therefore suggest to amend the phrase as follows :

« The carrier shall, subject to the provisions of Article IV, properly and carefully carry, keep and care for the goods carried. He shall also in so far as such operations are not performed by the shipper or consignee, properly and carefully load, handle, stow and discharge the goods carried ».

We also suggest that, in order to better coordinate this provision with Article IV, at paragraph 2 (i) reference be expressly made to the consignee.

We believe anyhow that, as regards the bona fide holder of the bill of lading, the carrier is entitled to exclude his liability for the loading, stowing and discharging of the goods, provided that the performance of these operations by the shipper (and consignee) is clearly evidenced in the bill of lading itself. Otherwise the liability of the carrier would be limited by a fact which does not appear in the bill of lading. In order to avoid this consequence, which would diminish the value of the bill of lading as document of title, we suggest to add under paragraph 4 of Article 3 that there shall be a conclusive evidence of the loading and stowing of the goods having been performed by the carrier, unless the contrary is evidenced in the bill of lading.

2. Notice of claim (Art. III (6) First paragraph).

With two exceptions, it has been agreed that, whether notice is given or not, the onus of proving loss or damage always lies upon the claimant. It may therefore be argued why this rule has been incorporated in the convention, and in fact it has sometimes been maintained, at least in Italy, that in order to give it a meaning, this clause should be interpreted in such a way as to shift into the consignee, when notice has not been given within the three days time limit, the burden of proving that the loss or damage has been caused by a negligence of the carrier.

This interpretation, which, we believe, is contrary to the intention of the people who have drafted the convention, has now been rejected by our Courts, but, in order to avoid the danger of it coming up again, we agree that it would be advisable to avoid any doubt as to the meaning of this clause.

We have anyhow some doubts as to whether the words « shall have no other effect on the relations between the parties » are clear enough. To us they look a little bit too vague and we should therefore very much welcome a more clear wording, such as, for instance, the following : « but it (the rule) shall not affect the provisions of Article IV, paragraphs 1 and 2 ».

3. Time limit in respect of claims for wrong delivery (Art. III (6) third paragraph).

We understand that the question whether the expression « loss or damage » in this paragraph covers liability for wrong delivery and thus entitles the carrier to limit liability in time and amount under the Rules has received different solutions in the various Countries. We therefore support in principle the amendment suggested in the Report, with the two following sub-amendments :

a) that the two years time limit run from the date of delivery of the goods or the date when the goods should have been delivered;

b) that the wording be changed, so that to make clear that the two years limit is applicable only in favour of the holder of the bill of lading, and not also in favour of the person who has taken delivery of the goods without being in possession of the bill of lading : in fact the present wording could also be interpreted in such a way as to cover the person not entitled to the goods;

c) that the wording be changed, in such a way as to eliminate the « proviso » and avoid any reference to an « extension », which we believe is not correct and might be misleading.

To such effect we venture to suggest the following text :

« In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within

one year after delivery of the goods or the date when the goods should have been delivered; *provided that in the event of delivery of the goods to a person not entitled to them the carrier and the ship shall be discharged from all liability in respect of loss or damage claimed by the holder of the bill of lading unless suit is brought within two years from the date when the goods should have been delivered.* »

4. Gold Clause, Rate of Exchange, Unit Limitation

a) *Gold Clause*

We support the proposal of adopting the Poincaré Franc as the basis for the limitation figure.

b) *Rate of exchange*

The system suggested, namely that the date of conversion into national currencies is to be regulated in accordance with the law of the court seized of the case, would undoubtedly create confusion and fail to create uniformity in a field where uniformity should be very much welcome. And this is far from being understandable, when in three recent International Conventions (the Warsaw Protocol of 1956, the Passengers Convention of 1961 and the Nuclear Convention of 1962), the principle of the conversion at the date of payment has been adopted.

c) *Package and unit*

The suggestion to retain the status quo overlooks entirely the difficult interpretation problems which have arisen as regards the concepts of « package » and « unit » in many national legislations. It has recently been maintained in Italy that the package limitation cannot apply when a package is of great volume and value, since the intention of the drafsmen of the convention has only been to protect the carrier for damages to small packages of great value, in cases, therefore, in which the value could not be ascertained. We understand that similar problems have arisen in the United States where a partly cased tractor has been held not to be a package and the limitation per unit has applied. In so far as this second system of limitation is concerned, many doubts have arisen as to the proper unit to be taken into account.

We wish therefore to stress the utmost importance of amending the present text and of adopting a rule, whatever it may be, which can assure a uniform interpretation in all the contracting States. A very clear and exhaustive picture of the various possible solutions has been made at page 25 of the Report of the International Subcommittee. We believe that this can be taken as the basis of a discussion and are of the view that the easier and clearer solution might be that of adopting the criterium n° 6, namely a limitation based on a weight/volume unit.

Article IV (5) could therefore read as follows :

« 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 francs per ton or per 40 cubic feet at the option of the claimant, each franc consisting of 65.5 milligrams of gold of millesimal fineness 900, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading.

This declaration ..... (no change) ..... on the carrier.
By agreement ..... (no change) ..... above named.
Neither the ..... (no change) ..... of lading.

« Conversion of this sum into national currencies other than gold shall be made according to the gold value of such currencies at the date of payment. »

5. Liability in tort.

Our Association is aware of the problems which have arisen, special in Anglo-Saxon countries, with respect to the liability in tort and therefore fully supports the recommendation made by the Subcommittee. We only wish to point out that the reference in paragraph (2) to the « carriage of goods » raises the problem of the interpretation of Article I (c) on which we shall revert later, under (9).

6. Nuclear damage.

We support this recommendation.

7. Both to blame.

We support this recommendation.

III. OTHER SUBJECTS EXAMINED

8. Unseaworthiness and deck cargo (Article 1 (c) and Article III (1)).

Our Association is in favour of retaining the status quo unless it be proved beyond any doubt that an amendment is really necessary or advisable.

9. Liability before loading and after discharge (Article 1 (e) and Article VII).

The definition given by Article I (e) is not in fact very clear, since it is not known what is exactly meant by « the time when the goods are loaded » and by « the time when they are discharged from the ship ». Is the process of loading and unloading included in such time or not ? The « tackle to tackle » rule could have solved the

problem when the loading and unloading was performed by means of the ship itself, but cannot be of any use when other means are used.

We wonder whether, whilst enabling the carrier to contract out his liability as per Article VII, the rules of the Convention could not apply to the whole period of the carrier's liabililty, namely from the time of delivery of the goods to him for transportation to the time of their re-delivery to the consignee. At present in fact it may happen that a contract of carriage be governed by three different laws, namely one for the period running from the delivery to the carrier of the loading, one (the International Rules) from the loading to the discharge and one from the discharge to the re-delivery.

The applicability of various national legislations to a single contract of carriage seems to us illogic and contrary to the ordinary rules in the matter of conflict of laws.

We believe that no doubt should arise as to the fact that the contract of carriage covers the period between the delivery of the goods to the carrier and their re-delivery to the consignee, irrespective of the possibility for the carrier to contract out his liability as regards losses and damages suffered by the goods, prior to the loading or after discharge.

10. Liability when goods are trans-shipped.

We support this recommendation.

11. Due Diligence to make the ship seaworthy (Article III (1) and Article IV (1)).

We should like, before expressing our views in this matter, to know the result of the investigation referred to in the Report. We believe in fact that it will prove very helpful in reaching a decision on this very important matter.

12. Received for shipment bills of lading (Article III (3) and (7)).

We feel that the view expressed by the Subcommittee is sound and we support it.

13. Statements in bills of lading as evidence (Article III (4) and (5)).

1) First question : what is the meaning of Art. III (4) ?

It is stated in the Report that the majority of the members of the Subcommittee found that there is no need for amending the Convention to meet the points raised. It does not appear from the Report which is the interpretation of this paragraph according to the views of such members.

But we wish to inform the other National Associations that this paragraph has raised a great deal of discussion and of conflicting judg-

ments in Italy, since it has been held sometimes that the bill of lading being a prima facie evidence only, it is open to the carrier to prove that the quantity, weight, measurement, etc. of the goods are different from those indicated in the bill of lading and such view has recently been acquiring strength.

We think that the bill of loading should, as against a bona fide holder, be a conclusive evidence of the receipt by the carrier of goods as described therein and, in order to assure a uniform interpretation of this paragraph, we support the amendment proposed by a minority of the subcommittee, namely :

« Such bill of lading when transferred to a third party who is acting in good faith, shall be conclusive evidence of the receipt of the goods as therein described in accordance with paragraph 3 (a), (b) and (c). »

2) Is there any contradiction between Article III paragraph 4 and article III paragraph 5 ?

If the above amendment be accepted, we believe that no contradiction exists between these two paragraphs.

14. Time limit for recourse action (Article III (6)).

The problem raised by the French Association exists in our Country and is of a certain importance. We therefore support the proposal made by the French Association, namely to have a new article incorporated in the Convention for the purpose of covering this problem.

15. Time limit in respect of claim for indirect damage through delay (Article III (6)).

We share the view expressed by the Subcommittee.

16. Prescription (Article III (6)).

We share the view expressed by the Subcommittee. This is a problem that should receive a uniform solution in all the Maritime Conventions.

17. Invoice value clause (Article III (8)).

We share the view expressed by the Subcommittee.

18. Pro rate clause (Article II (8)).

We share the view expressed by the Subcommittee.

19. Fire (Article IV (2) b).

We do not see why the fire should be governed by a rule which is different from those applying with respect to other excepted perils. This might have had some reason many years ago, when fire was a

danger much greater than all other dangers, but not now. We consequently suggest to delete the words « unless caused by the actual fault or privity of the carrier ».

20. Reservation appearing in the Protocol of Signature

The reservation appearing under n° 1 of the Protocol of Signature is a problem of considerable importance, and therefore recommend that this provision be incorporated in the text of the Convention.

21. Limitation as to value for indirect damage by delay (Article IV (5)).

We share the view expressed by the Subcommittee.

22. Exceptional cargo (Article VI).

23. Paramount Clause.

We support the recommendation made by the Subcommittee.

24. Jurisdiction.

We share the view expressed by the Subcommittee.

IV. FUTURE ACTION

We believe that a higher degree of uniformity would be reached if the amendments proposed by the Subcommittee and perhaps some additional ones could be made at the earliest possible date.

Action should therefore be immediately taken in order to implement such amendments and hope that this will prove possible at the next Conference of the C.M.I. at Stockholm, so that a set of amended rules might be approved by the Stockholm Conference.

We believe that then a Diplomatic Conference should be called for the purpose of having the amendments incorporated in a Protocol to the 1924 Convention, but that such Diplomatic Conference should anyhow be restricted to the countries which have ratified or adhered to the 1924 Convention.

NORWEGIAN MARITIME LAW ASSOCIATION

BILL OF LADING CLAUSES

COMMENTS ON THE REPORT OF THE INTERNATIONAL SUBCOMMITTEE

(Reporters : Mr. Per Gram and Mr. Annar Poulsson)

The Board of our Association have considered the Report and this is a summary of their views.

REVISION OF ART. X

The amendment passed at Rijeka (1959) is an improvement, but as suggested previous to that plenary Conference (our comments dated 27th February 1958, marked «Con 6.6 - 58») it does not go far enough. By this amendment the Convention will apply more generally, and the « Geographical holes » may be reduced, but we still think that this Article ought also to solve the problem of choice of applicable HR-enactment instead of leaving this to national conflict rules which are neither uniform nor easy to ascertain. Much space could also be saved in liner bills of lading, where lengthy paramount clauses must now regulate this question, if it could be uniformly solved in the enactments.

If permitted we would therefore like to revive our proposal that the Rijeka amendment be followed by this addition :

« The Rules of this Convention shall take effect as enacted in the country of the agreed port of discharge.

If no such enactment is in force, then the Rules of this Convention shall take effect as enacted in the country of the port of loading.

If no such enactments are in force, then the Rules of this Convention shall take effect as enacted in the country where the carrier has his principal place of business.

It shall not be permissible to contract out of the above provisions. »

1. Carrier's liability for negligent loading etc. (Art. III (2)).

Our Board support the recommended amendments. It is a sound idea that the carrier should not be held liable for faults committed by

the shipper or consignee when they perform the loading, stowing or discharging. The proposed text clearly covers the cases where these operations are performed by shippers' or consignees' own labour. We are uncertain, however, whether the proposed text covers the cases where the shippers or consignee use and pay for independent stevedores. We take it that this point is deliberately left open.

2. Notice of claim (Art. III (6) first paragraph).

We cannot see that the proposed amendment will bring any meaning or real effect into this rule which is devoid of any sense as it stands at present.

If nothing better can be done about it the present rule might preferably stand as it is, or better still, be taken out of the Convention.

The words now proposed added can only have the intention that no real sanction to a late claimant shall be permissible by national legislation. Also the language chosen seems too sweeping when it suggests that the removal of the goods shall have no other effect between the parties than as evidence of their state when delivered. The delivery itself has indeed some other quite distinct effects, such as putting an end to the seller's right to « stoppage in transits ».

We still find that a too late claimant should be estopped from claiming, and are glad that our Swedish colleagues have taken up our proposal to this effect in their comments dated Dec. 14, 1962. We can also agree with them that « undue delay » is a vague term, and that 7 days, to run from the effective placing at consignee's disposal, seems a reasonable time limit.

3. Time limit in respect of claims, for wrong delivery (Art. III (6) third paragraph).

We are glad that a new rule in this matter is proposed by the majority of the International Subcommittee. As we have pointed out before, the object should be to fit the rules to the normal rather than the abnormal cases. The far greater number of deliveries to persons not in the possession of an orignal B/L are of course deliveries to the right persons — these are now suffering from the burden of the bail expenditure — for too long. Therefore we can still not see the necessity to extend the period to two years. We beg with respect to disagree with our Finnish friends who suggest that it is always easy to bring the missing B/L forward within a short time.

We would also here support the Swedish proposal of one uniform rule covering all claims under a bill of lading. We agree that there is a need for covering also the claims for delay in delivery because in some countries such claims are held not covered by the expression « loss or damage ».

Further, the Swedish proposal would have the much more important advantage of covering also the liability for the correct description

as to amount and quality of the goods in the bill of lading — a liabilty not covered by the expression « loss or damage », which we assume only refers to liability arising during the actual transport.

4. Gold Clauses etc.

We support the amendments for the reasons stated by the Pineus Committee.

5. Liability in tort, the « Himalaya » problem.

We consider such an enactment important and desirable, in order to bring the HR in line with the Liability Convention and the Warsaw Convention.

As to the details, we think (1) of the amendment necessary to establish clearly that any suit in tort is also covered by the conventional limitations.

As to the present n° (4) and new n° (7) of Art. IV we consider it hardly necessary to make any exception for intentional acts — these rare cases can as suggested by our Finnish colleagues be taken care of without express words. We are in doubt as to the proviso for recklessness (faute lourde). In the cases where we would want this exception it would probably be covered by the criminal intent rule which needs no expression. As to the rest we are concerned about the dividing line towards ordinary negligence and would fear frequent litigation of cases where the negligence is actually only quite ordinary. If there is a fault, it can always be pleaded that it was reckless. Thus we fear that this exception can do more harm by defeating the object of the main rule than is warranted by the thought that a reckless servant should not be relieved of liability for his recklessness.

However, we would for the sake of unity with the other conventions be prepared to accept the principle of point (4) and the proposed n° 7 of Art. IV, however provided that exception should be made when the fault committed is in the navigation or in the management of the ship (see Reservation n° 1 at page 31 of the Report). We would need this qualification here of the rule in the Warsaw Convention, because that Convention does not know the distinction of nautical faults. Such faults should be absolutely exempt — and in this field it is particularly easy to argue that any fault is recklessly committed.

6. Nuclear damage.

We agree to the proposal.

7. Both-to-blame.

The resolution of the Subcommittee was passed because it was felt that this problem only arises because the US is out of step with all other countries.

The Chairman of the Subcommittee has brought our attention to the fact that as a result of a debate in the US Congress it must now be held unlikely that any changes of US law will be made in the field of limitation in the near future. Mr. Pineus then suggests that the question should be reopened whether the Convention should after all be amended for instance by adding the words « *directly or indirectly* » to the beginning of Article IV.

These words may seem helpful, but are of course unnecessary everywhere else in the world. The question remains whether they would be given the desired effect by the US Supreme Court — in a case based on a foreign enactment with this amendment.

As to US law it seems no more likely that the US would accept such an amendment than a revision of their limitation rules.

Reluctantly we therefore consider that this still is a problem which can best be solved nationally in the US.

OTHER SUBJECTS EXAMINED

The Norwegian Association agree to the Report.

One member of our Board representing the cargo interest (Mr. Arne Bech) feels that the Convention should be amended on two points which have been turned down in the Report (N^{os} 9 and 10).

Liability before loading and after discharge

The development particularly in the liner service has made the « tackle to tackle »-principle inadequate as the goods today frequently have to be delivered to the carrier or his agents some time prior to the actual loading. Further the consignee is often not allowed to collect his cargo on unloading but will have it delivered from the carrier or his agents some time afterwards. The convention should in the opinion of the dissenting member cover the whole period in which the goods are in the actual possession of the carrier or his agents.

Liability when the goods are transhipped

In the case of a through bill of lading which presents itself as such an amendment is not called for. If however the bill of lading does not state that the goods are going to be transhipped, the carrier should not be allowed to contract out of liability for oncarriage relying on a general transhipment clause or liberty clause. Such transhipment for the carrier's convenience should in the opinion of the dissenting member not reduce his liability until the goods are properly delivered to the receiver.

The dissenting member accordingly suggests the following amendments to Art. I and Art. VII of the convention :

Article I.

. . . . . .

e) « Carriage of goods » covers the period from the time when the goods are *received for shipment by the carrier or his agent until they are delivered at a contractual port of discharge.*

Article VII.

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, condition, reservation or exemption as to the responsability and liability of the carrier of the ship for the loss or damage to, or in connexion with, the custody and care and handling of goods *during a period when the goods are in the custody and care of another carrier provided however that it is expressly stated in the bill of lading or must be implied that the carrier should totally or for a specific part be performed by another carrier.* »

FUTURE ACTION

The Norwegian Association have so far advocated the form of amendments in the Convention.

It seems to us that the choice between an additional protocol and such amendments should better be decided when the final scope of the revision has been agreed.

Oslo, 26th February 1963.

Sjur Brækhus
Chairman

Per Gram
Hon. Secretary

YUGOSLAV MARINE LAW ASSOCIATION

COMMENTS ON THE REPORT OF THE INTERNATIONAL SUBCOMMITTEE

The Yugoslav Maritime Law Association has received the Report of the International Subcommittee on B/L Clauses. After having discussed it our Association wants to make the following remarks :

We wish, first of all, to pay our tribute to the excellent work performed by the Subcommittee and his able President in dealing with this rather complicated matter. The assembling of facts, the exposition of the problems and the presentation of different points of view have been made in a very efficient way.

Our Association accepts most of the majority proposals, that is those under Part IV, items 2, 6 and 7, and under Part V, items 8, 9, 10, 11, 12, 15, 17, 18, 19, 21, 22, 23 and 24 in the Report. There remain, nevertheless, certain matters where we could not agree with the majority opinion.

PART IV :

ad 1. **Carrier's liability for negligent loading, stowage or discharge of the goods by the shipper or consignee (Art. III (2).**

The wording of the majority decision (p. 13 of the Report) goes too far inasmuch as it mentions also « handle, stow, carry, keep, care for » as being operations which could be performed by the shipper or the consignee. Obviously the operations consisting in « carry, keep, care for » are never performed by the shipper of the consignee, being exclusively operations performed by the carrier. As for the operations of handling of the goods, they can be performed also during the carriage itself. In such case they are allways performed by the carrier. Whereas if they are performed during loading or discharging, these operations are already covered by the terms « load » and « discharge ».

As for the stowage, even in cases where operations of stowage are performed by the shipper himself, they are, in our opinion, so closely connected with the duties of the carrier relating to the maritime

security of the vessel that these operations should also remain the responsability of the master (i.e. the carrier).

On the other hand we quite agree that the modern conditions and facilities (e.g. in cases of loading or discharging of cargo — especially bulk and liquid cargo or heavy lifts — by elevators, conveyers and other technical means) of loading and discharging justify a change in the attitude taken by the 1924 Convention which does not allow in any case to shift the responsibility for loading and discharging from the carrier to the shipper or consignee (art. 3, paras 2 and 8, art. 7). We are therefore of the opinion that *if there exists an agreement* between the shipper or consignee and the carrier that loading or discharging operations of determined goods shall be performed by the shipper or consignee himself and in case they *are actually performed by them*, the carrier should not be held liable for loss or damage to the goods resulting from such operations.

Subject to possible drafting changes we suggest the following :

« Subject to the provisions of Article 4, the carrier, shall properly and carefull load, handle, stow, carry, keep, care for, and discharge the goods carried, *but he will be exempted from the duty to properly and carefully load respectively discharge the goods if these operations under the agreement between the parties have to be and actually are performed by the shipper or consignee.* »

ad 3. **Time limit in respect of claims for wrong delivery (Art. III (6) third para.).**

There should be no changes in the present wording of art. III under which the one year time limit applies also in cases of delivery to a wrong person. The position of the consignee is namely substantially the same whether there is a non-delivery, a cross-delivery or a wrong delivery. In all these cases the carrier did not fullfil his essential obligation to deliver the goods under the B/L. It is understood that, as in all other matters covered by the Convention, in case of *dolus* of the carrier or of his servants and agents acting within the scope of their employment, the carrier is not protected by the said time limit.

ad 4. **Gold Clause, Rate of Exchange, Unit Limitation (Art. IV (5) and IX).**

A. In relation to the decision concerning art. IV, we only dissent with the last para i.e. para 5 (p. 27 of the Report) relating to the *date of conversion.*

The day of payment seems to provide the most suitable solution. This criterion was also accepted by the Passengers Convention (Brussels 1961) and thus ensures uniformity of Maritime Law (the Passengers

Convention is besides a « pendant » to the B/L Convention). It has the advantage that the Poincaré francs representing a mere abstract monetary unit amount will be converted into existing national currency on the day of payment. In this way the risk of the devaluation of the currency will not be borne by the person who suffered damage.

Should the above solution prove inacceptable to the majority of the International Maritime Committee, what we would sincerely regret, the most suitable solution of the problem would be the conversion at the date of the final judgment.

B. As to the question of « *package and unit* », our Association supports the reservation made under point n° 2 on p. 27 of the Report.

The liability of the carrier according to the system of the B/L Convention can be established only by two elements : a) the sum which will as a maximum be applied, and b) the basis (the basical unit) to which this sum will be applied. If we do unify only the first element and leave the second ununified, no unification has been achieved at all, because the final amount up to which the carrier will be liable may vary according to the basis to which the sum (the first element) is applied. From the many cases where the amount to be paid depends of the mere fact whether a cargo item carried was packaged or not, we would refer to the case Middle East Agency v. The John B. Weterman, 86 F. Supp. 487, 1949 A.M.C. 1403 (S.D.N.Y. 1949) where a tractor machine, unpackaged was divided — in contemplation of law — into units of 40 cu. ft. valued at $ 500,— each. If packaged the amount would obviously been merely limited to $ 500,—. (Cf. Gilmore Black, Law of Admirality, 1957, p. 167). Therefore in order to get unification it is not enough to find a solution or replacement to the ominous obsolete gold clause, but also to the very unhappy formula of « package or unit ».

It is obvious that each solution concerning the unification of the second element has its negative sides. But the present state of affairs means complete uncertainty. The carrier cannot know in what country his ship might be arrested and suit brought against him, so he does not know what basis will be applied to the sum representing the first element mentioned above. He might be liable concerning the same goods up to 10.000 Poincaré francs or up to ten times 10.000 Poincaré francs. Even if sued in the USA he can not know it in advance, the result may depend in some cases on the fact how the court will treat the wrapping of the goods, whether it will consider that a package is in question or not.

Any solution whichever may be chosen can be critisized. Therefore we should choose the solution which has the least disadvantages. Of course, also, in that case there shall be anomalies. But the parties to the contract of carriage will be aware of them, and therefore will be able to face them and take the necessary steps in order to avoid them.

As to the question of the concept of « package and unit » it seems that the concept of « package » could be eliminated without harm. This notion is uncertain and vague, it creates difficulties, and therefore the Convention should concentrate on the notion of « unit ».

But, there are various units.

« Commercial (trade) or shipping unit » is not a suitable notion because it is too vague, and there is too great a variety of possibilities which could be subsumed.

« *Freight unit* » seems to be a more suitable notion. Such units are not very numerous, as their basis is : a) weight, b) volume, c) piece (including package), d) standard (for wood).

Taking the freight unit as a starting point, we have to differentiate two possible basis : 1) the customary freight unit and 2) the actual freight unit.

The customary freight unit has the advantage that the judge can establish it irrespective of the fact whether the actual freight is mentioned in the B/L or not. Its disadvantage is that the contracting parties have not the necessary certainty (« customary » in what place ? at the port of shipment, or discharge ?). Practice has shown that where the courts are applying this criterium they also like, whenever it is possible, to take account of the actuel freight unit.

The actual freight unit presents the great advantage to enable the contracting parties to choose for the basis of the carrier's liability the unit they want : the piece regardless of the fact whether it is wrapped, unwrapped or partly wrapped, or the weight or the volume of the goods, etc. — if the result concerning the carrier's liability could lead to abnormal results (e.g. in the case of carriage of Swiss watches) the shipper, knowing of it in advance, would have the possibility to take the necessary steps in order to avoid the results which would prove unfavourable (he will declare the value). The actual freight unit can be always easily established by the judge (whether mentioned in the B/L or not, by requiring, if necessary, the presentation of the pertaining documents).

For the above mentioned reasons the actual freight unit should be taken as the usual basis for establishing the carrier's liability whenever this should prove possible.

Such possibilities do not exist in cases where the freight is contracted on a lumpsum basis. In such cases the customary freight should be applied.

The last category of cases to be dealt with are the cases of *carriage in containers*. But it seems they do not present any special problem requiring a special treatment, because the above principles can be applied also in these cases without difficulties (of course the case where the carrier himself loads the goods of more shippers into one container is excluded, because this case does not differ from the loading

into a ship's hold, so it is not to be considered as a container carriage) : a) if the freight is calculated per container as a unit (piece weight or volume of the container itself) then the actual freight unit may be applied, b) if the goods in the container (their number, weight, volume, etc) have been taken as the basis for the calculation of the freight — the actual freight unit is also applicable, c) if a lumpsum freight is agreed for the carriage of more containers — the customary freight unit should be applied.

Our Association is aware of the fact that the suggested solution is far from being perfect, but it considers it to be the best among the various unperfect solutions.

ad 5. **Liability in tort, the « Himalaya » problem.**

We fully support the minority opinion under point n° 3 (p. 33 of the Report).

PART V

ad 13. **Statements in B/L as evidence (Art. III (4) and (5).**

Our Association fully supports the reservation of the minority as stated on pp. 47-49 of the Report.

ad 14. **Time limit for recourse action (Art. III (6).**

We agree that no action should be taken on this particular point, not for the reasons put forward in the decision (p. 51 of the Report), but for the fact that such cases are outside the scope of the B/L Convention.

ad 20. **The reservation appearing in the Protocol of Signature under nr. 1 (Art. IV) 2 (c) to (p).**

Question 1 : We support the minority reservation (p. 61 of the Report) for the following reasons :

The clause under n° 1 of the Protocol of Signature should be made mandatory. Thus when the carrier has established the causal connection between the excepted case and the loss or damage, the receiver should always be allowed to prove that the loss or damage of the goods were caused by fault of the carrier or his agents or servants in the cases of Art. 4 Para 2, Subparas c)-p) if they are not covered by Subpara a) of the Convention. This burden of proving the fault rests on the receiver (holder of the B/L). It is a very heavy burden, so the carrier is still favoured very much even if such a clause would be made mandatory. It seems only fair that the carrier should be held liable in case such a fault is proved.

Question 2 : No special rule as to the question of proof to be established by the carrier seems to us to be necessary.

PART VI

Concerning the future action, the Yugoslav Maritime Law Association maintains its position such as it is reflected in para 2 on p. 71 of the Report, namely, that all the amendments to be agreed upon (new rules and interpretative rules) should be entered in a protocol. Nevertheless a difference should be made between the rules which are considered to be absolutely essential when accepting the protocol and those which are not.

Concerning the essential rules no State should be allowed to make reservations, as for the others such reservations should be rendered possible.

Rijeka, January 27th, 1963.

Vladislav Brajkovic
President of the Yugoslav Maritime Law Association

Andrija Suc
Rapporteur