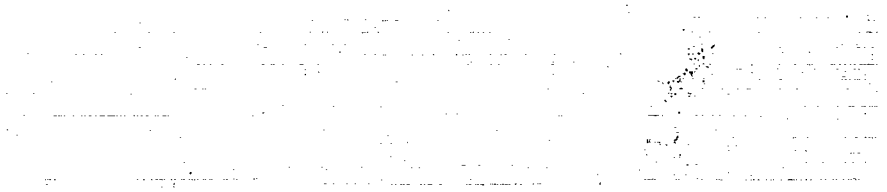
COMITE MARITIME INTERNATIONAL

DOCUMENTATION

1973

II

INTERNATIONAL MARITIME COMMITTEE



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1

REVISION OF THE HAGUE/VISBY RULES ON BILLS OF LADING

LA REVISION DES REGLES DE LA HAYE ET DE VISBY SUR LES CONNAISSEMENTS

REVISION OF THE HAGUE/VISBY RULES ON BILLS OF LADING

Questionnaire drawn up by the Chief Legal Officer relating to UNCITRAL proposal of changes in The Hague/Visby Rules on Bills of Lading. (United Nations Conference on Trade and Development, U.N.C.T.A.D.).

The Working Group on International Shipping Legislation of UNCTAD has suggested some basic amendments of the Hague Rules relating to :

(i) period of responsibility;

(ii) basis for liability (in particular the excuses for loss or damage caused by error in the management of the vessel and by fire);

(iii) deck cargo;

(iv) jurisdiction and arbitration.

GENERAL OBSERVATIONS

The UNCTAD initiative is explained by the fact that the Hague/Visby amendments were considered far too modest. C.M.I. has been criticized for its desire to retain *status quo* instead of taking into consideration the need for changes caused by modern transportation techniques and, in particular, required by the developing countries. In addition, C.M.I. is generally considered to take care of shipowner's interests by resisting any changes in favour of the shipper.

The power of UNCTAD/UNCITRAL to influence governments to agree on changes along the lines now suggested *should not be underestimated.* And if such changes be eventually agreed upon without any suggestions from C.M.I., or perhaps even contrary to the official standpoint of C.M.I., the future role of C.M.I. in suggesting and preparing international shipping legislation would be seriously endangered. You are called upon to consider this aspect thoroughly in answering this questionnaire.

Although, in principle, the burden of proving the merits of a change should rest with the person suggesting it, the present situation seems

LA REVISION DES REGLES DE LA HAYE ET DE VISBY SUR LES CONNAISSEMENTS

Questionnaire rédigé par le Conseiller Juridique Principal concernant la proposition de réforme des Règles de La Haye et de Visby sur les Connaissements. (Conférence des Nations-Unies sur le Commerce et le Développement, C.N.U.C.E.D.).

Le groupe de travail « Législation Maritime Internationale » de la C.N.U.D.E.D. a proposé plusieurs amendements fondamentaux aux Règles de La Haye, lesquels concernent :

(i) la durée de la responsabilité du transporteur,
(ii) le fondement de cette responsabilité (en particulier les exonérations pour avaries ou manquants résultant d'une faute nautique ou d'un incendie),
(iii) la marchandise chargée en pontée,
(iv) les questions de compétence et d'arbitrage.

OBSERVATIONS GENERALES

L'initiative de la C.N.U.C.E.D. s'explique par le fait que les amendements La Haye/Visby étaient estimés beaucoup trop modérés. On a critiqué le C.M.I. comme désireux de maintenir *le statu quo* au lieu de prendre en considération le besoin de changements né de nouvelles techniques de transport, changements réclamés en particulier par les pays en voie de développement. De plus, en général, le C.M.I. a la réputation de se soucier surtout des intérêts des armateurs et de s'opposer aux changements favorables aux chargeurs.

On ne doit pas sous-estimer la possibilité qu'ont la C.N.U.C.E.D. et la C.N.U.D.C.I. d'influencer les gouvernements pour qu'ils consentent à des modifications dans le sens proposé. Et, si de telles modifications étaient acceptées sans aucune suggestion du C.M.I., voire peut-être contrairement à sa position officielle, son futur rôle serait fort compromis dans la proposition et la préparation de conventions maritimes internationales. Vous-êtes invité à bien garder cela en vue quand vous répondrez au présent questionnaire.

En principe, c'est à celui qui propose un amendement qu'il appartient d'en démontrer le bien-fondé, mais la situation actuelle semble réclamer de la part du C.M.I. autre chose que cette remarque. *Il est donc*

to require another attitude on behalf of C.M.I. *It is therefore suggested that any recommendation to retain status quo on the relevant issues should be supported by as strong arguments as possible.*

QUESTIONS

A. THE AIM TOWARDS « HARMONIZATION OF TRANSPORTATION LAW »

In commenting the suggested changes of the Hague Rules before the General Assembly of C.M.I. in Antwerp, 7 November 1972, Professor Erling Selvig stressed the aim to harmonize the different branches of transport law. In this respect it was pointed out that the restricted period of liability and the defences of errors in navigation and management of the vessel and fire were peculiar to the Hague Rules and not adopted in the international conventions relating to carriage by air (after the 1955 Hague Protocol to the 1929 Warsaw Convention), rail and road. And it is generally known that the present « disharmony » between the rules from the different branches of transportation law has seriously impeded the suggested international convention relating to the contract of *combined transport.* In fact, if the rules relating to the different branches of transportation law were more consistent we could, perhaps, do without a convention relating to *combined* transport and aim at the elaboration of a convention relating to transport as such *regardless of the means of conveyance used.*

Question 1 :

Do you think there are any merits in the aim towards a harmonization of transportation law ?

Question 2 :

Do you think that a harmonization of transport law is at all possible ?

Question 3 :

Do you think that the factual circumstances following from the use of ships justify *special rules* different from rules relating to other means of conveyance (for carriage by air, rail and road) ? If so, kindly state as exhaustively as possible such special rules and the reasons supporting them...

Question 4 :

The suggested extension of the period of responsibility is intended to bring the maritime rules in harmony with the rules relating to the other branches of transport law. But it raises some questions, in particular relating to through shipments and to cases where the

suggéré que toute recommandation de maintien du statu quo sur les questions dont il s'agit s'appuie sur des arguments aussi solides que possible.

QUESTIONS

A. A QUOI TEND « L'HARMONISATION DE LA LEGISLATION SUR LES TRANSPORTS »

En commentant devant l'assemblée générale du C.M.I. à Anvers, le 7 novembre 1972, les modifications proposées des Règles de La Haye, le Professeur Erling Selvig souligna le but d'harmoniser les différentes branches de la législation sur les transports. A ce sujet, on a fait remarquer que la période restreinte de responsabilité, ainsi que les exonérations pour faute nautique et dans le cas d'incendie, étaient spéciales aux Règles de La Haye et ne figuraient pas dans les conventions internationales sur le transport aérien (depuis le protocole de La Haye qui a modifié, en 1955, la Convention de Varsovie de 1929), ferroviaire et routier. Et l'on sait, en général, que l'actuel manque d'harmonie entre les règles des différentes branches de la législation sur les transports a beaucoup nui à la convention proposée pour un contrat de *transports combinés*. En fait, si les règles relatives aux différentes branches du droit des transports étaient plus uniformes, nous pourrions peut-être nous passer d'une convention sur les transports *combinés* et viser à l'élaboration d'une convention relative *au transport en tant que tels, quelque soit le mode de transport utilisé.*

Question 1 :

Croyez-vous que vouloir une harmonisation de la législation sur les transports ait une justification quelconque ?

Question 2 :

Croyez-vous qu'une telle harmonisation soit seulement possible ?

Question 3 :

Croyez-vous que les particularités techniques de l'utilisation d'un navire justifient des *règles spéciales*, différentes de celles concernant les autres moyens de transport ? (Transport par air, par chemin de fer et par route) ? Si oui, exposez aussi complètement que possible ces règles spéciales et les raisons qui les justifient.

Question 4 :

L'extension proposée de la durée de la responsabilité est destinée à mettre les règles maritimes en harmonie avec celles des autres branches de la législation sur les transports, mais elle soulève un certain nombre de questions concernant les expéditions sous connaissement direct et les cas où le transporteur *n'est pas* chargé du soin des marchandises après leur débarquement, ou même peut-être ne peut rien sur leur sort. Il est cependant évident que *l'intention* est de tenir le transporteur pour responsable aussi des avaries et manquants posté-

carrier is *not* in charge of — or perhaps cannot even influence — the handling of the cargo subsequent to the discharge.

However, the *intention* is clearly to hold the carrier liable also when loss or damage occurs after the time when the goods are no longer in his actual charge — or even « constructive » charge. And this is achieved by stipulating that in certain instances « the carrier shall be deemed to be in charge of the goods » even when, in fact, he is not. Furthermore, it should be noted that the handing over of the goods to independent third parties does not constitute delivery unless there exists a monopoly situation (« ... the goods must be handed over »). However, it is also suggested that a placing of the goods « at the disposal of the consignee in accordance with the contract or with law or usage applicable at the port of discharge » would suffice to relieve the carrier from further liability for the goods. Hence, the carrier can avoid further liability by (express ?) provisions in the contract as to what constitutes an effective « placing at the disposal of the consignee » or, alternatively, by referring to « law or usage applicable at the port of discharge ». It therefore seems that the « monopoly » requirement is of limited importance.

It is not clear whether « the port of discharge » refers to the port agreed to in the bill of lading as the *final destination* or to the port where the cargo is discharged *from the vessel* belonging to the carrier who has issued the bill of lading. But, presumably, the *agreed* port of discharge is intended, at least in case of on-carriage not foreseen at the time of the conclusion of the contract but permitted by a standard transhipment, scope of voyage, liberty or deviation clause.

(i) Do you agree to the basic suggestion that the period of the carrier's liability should cover the whole period the goods are in charge of the carrier and not only the period until the discharge from the ship ? If not, kindly state as fully as possible the reasons for your opposition to such a change.

(ii) Do you agree to the suggested definition of the relevant period and, in particular, to the requirement that the handing over of the goods to third parties constitutes « delivery » only when there exists a monopoly situation ?

(iii) Do you think that the liability of the carrier issuing the bill of lading should continue until delivery at the *final destination* agreed in the bill of lading ? Or should the liability in case of *through transports* cease when the cargo is delivered to the oncarrying vessel at the agreed intermediate port ? Should there be any difference in case of ordinary port-to-port shipments, where the cargo is delivered to another vessel — or another means of conveyance — at an intermediate port not foreseen at the time of the conclusion of the contract (it is understood that this is permitted according to a transhipment, scope of voyage, liberty or deviation clause) ?

rieurs au moment où la marchandise n'est plus ou n'est même pas censée être sous sa garde.

Et l'on arrive à ce résultat en stipulant que dans certains cas « le transporteur sera réputé avoir la marchandise en charge » même quand ce n'est pas le cas en fait. Bien plus, il convient de noter que le fait de remettre la marchandise à un tiers qui ne dépend pas du transporteur ne constitue pas livraison, à moins qu'il n'y ait un consignataire général de la cargaison jouissant d'un monopole (« la marchandise doit être remise... »). Cependant, on propose aussi que la mise « à la disposition du réceptionnaire en conformité, soit du contrat, soit de la loi ou des us et coutumes en usage au port de décharge » suffirait à dégager le transporteur de toute responsabilité ultérieure pour les marchandises. Donc, le transporteur peut éviter une telle responsabilité par des dispositions (expresses ?) dans le contrat quant à ce qui constitue « mise à disposition du réceptionnaire » ou, alternativement, par une référence aux « lois et us et coutumes applicables dans le port de décharge ». Il semble donc que l'exigence d'un « monopole » soit d'une importance réduite.

On ne sait pas bien si « port de décharge » signifie le port désigné dans le connaissement comme celui de *destination finale* ou celui où la marchandise est débarquée *du navire* appartenant au transporteur émetteur du connaissement, mais il est à présumer que c'est le port de décharge *convenu* que l'on a voulu dire, du moins dans le cas de transbordement et nouveau transport non prévus lors de la conclusion du contrat mais autorisé par une clause imprimée du connaissement permettant de transborder, ou par une clause indiquant les limites du voyage, ou par une autre énumérant les facultés que se réserve le transporteur, ou par une clause de déroutement.

(i) Etes-vous d'accord sur la proposition fondamentale que la durée de la responsabilité du transporteur couvre tout le temps qu'il aura les marchandises en charge, et non pas seulement jusqu'à leur débarquement ? Si vous n'êtes pas d'accord, veuillez exposer aussi complètement que possible les raisons de votre objection à cette modification.

(ii) Etes-vous d'accord sur la définition proposée de la période dont il s'agit, en particulier sur l'exigence que la remise de la marchandise à des tiers ne constitue « livraison » que s'il existe un monopole de consignataire général de la cargaison ?

(iii) Croyez-vous que la responsabilité du transporteur émetteur du connaissement doive subsister jusqu'à la livraison à la *destination finale* y désignée ? Ou bien, sa responsabilité devrait-elle, en cas de *transbordement sous connaissement direct*, cesser lors de la livraison à un autre navire au port intermédiaire désigné dans le connaissement ?

En irait-il autrement dans le cas d'une expédition ordinaire de port à port et de rechargement sur un autre navire — ou sur tout autre véhicule — dans un port intermédiaire non prévu lors de la conclusion du contrat (étant entendu que cela serait permis en vertu d'une clause de transbordement, de limitation de voyage, de facultés réservées par l'armateur, ou de déroutement) ?

Question 5 :

The suggested basis of liability does not completely conform with the rules usually governing transports by air, rail or road where the liability is strict in principle but modified by defences, ordinarily, of shipper's fault, inherent vice of the goods and events amounting to force majeure or similar contingencies. Compare the expressions « circumstances which the carrier could not avoid and the consequences of which he was unable to prevent » from the CIM, and CMR conventions which, by the way, have no global application and « The carrier is not liable if he proves that he and his agents have taken all *ncessary* (nb. not « reasonable ») measures to avoid the damage or that it was *impossible* for him or them to take such measures ». (Warsaw Convention). The « long list » technique from the Hague Rules has been abandoned but it is doubtful whether the replacement of the « long list » by a general formula means any difference in substance apart from the fact that the traditional defences for *error « in the navigation and management of the ship »* and « fire » have been deleted. However, there is a reminiscence of the latter defence in so far as the burden of proving « that the fire arose due to fault or negligence on the part of the carrier, his servants or agents » is placed upon the claimant. Finally, a special rule on contributory negligence has been introduced which in principle gives the carrier a partial relief provided, however, that he can prove the amount of loss or damage not attributable to fault on his part or that of his servants or agents.

(i) Do you think that a long list of excuses — as a method of expressing the liability principle — is preferable to a general formula ? If so, state the reasons which in your view support the « long list » technique.

(ii) Do you think that the present risk allocation between the carrier and the shipper should be maintained and, as a consequence, the present defences of error in the navigation or management of the vessel and fire retained ? If so, state why. In particular, what effect would a change have on the present system of insurance ? Do you think that a change of the present risk allocation will result into a higher *total* insurance cost, e.g. by a rise of the P. & I. insurance premium without a corresponding reduction of the cargo insurance premium ? Or do you think that there will be an adjustment of the insurance market, e.g. by recourse agreements between insurance companies involved, changed recourse policies, co-insurance systems or similar arrangements ?

Question 5 :

Le fondement de la responsabilité qu'on propose n'est pas tout à fait conforme aux règles qui d'ordinaire régissent les transports aériens, ferroviaires et routiers, dans lesquelles la responsabilité est en principe stricte mais est modifiée par des exonérations, notamment en cas de faute du chargeur ou de vice propre de la marchandise ou d'événements assimilables à la force majeure ou de cas similaires. Comparez le texte : « Circonstances que le transporteur ne pouvait éviter et dont il était incapable d'empêcher les conséquences » qui est celui des conventions CIM et CMR (lesquelles, soit dit en passant, ne sont pas d'une application générale), avec celui de la Convention de Varsovie : « Le transporteur n'est pas responsable s'il prouve que lui et ses préposés ont pris toutes les mesures *nécessaires*... (N.B. : il n'est pas dit « raisonnables »)... pour éviter le dommage ou qu'il leur était *impossible de les prendre* ». La « longue liste » technique des Règles de La Haye a été abandonnée mais il est douteux que son remplacement par une formule générale signifie en fait une différence quelconque, sauf que les exonérations traditionnelles pour « *erreurs dans la navigation et l'administration du navire* » et pour « *incendie* » ont été supprimées. Il y a toutefois une survivance de cette dernière exonération en ce sens que c'est au demandeur qu'incombe le fardeau de prouver « que l'incendie s'est produit par la faute du transporteur ou de ses employés ou de ses agents ». Enfin, il a été inséré une clause relative à la contribution de la faute du chargeur à la réalisation du dommage (« Contributory negligence »), qui en principe décharge pour partie le transporteur, mais à condition qu'il puisse prouver la part de l'avarie ou du manquant qui n'est pas imputable à sa faute ou négligence ou à celles de ses employés ou agents.

(i) Croyez-vous qu'une longue liste d'exonérations (en tant que mode d'expression du principe de responsabilité) soit préférable à une formule générale ? Si oui, exposez les raisons qui à votre avis rendent la longue liste préférable.

(ii) Croyez-vous que l'actuelle répartition des risques entre transporteur et chargeur doive être maintenue et que, par conséquent, les exonérations pour négligence dans la navigation ou l'administration du navire et pour incendie doivent être maintenues ? Si oui, dites pourquoi. En particulier, quel effet un changement aurait-il sur l'actuel système d'assurances ?

Croyez-vous qu'une modification de l'actuelle répartition des risques entraînerait une augmentation du montant *total* des frais d'assurance, par exemple des primes à payer aux associations de protection et d'indemnisation mutuelles (Clubs P & I), sans réduction correspondante des primes à payer aux assureurs sur facultés ? Ou croyez-vous qu'il se produirait des ajustements sur le marché des assurances, par exemple par des accords de recours entre les compagnies d'assurance

(iii) What is your opinion about the « fire excuse compromise » ? Would it be better to go for « all or nothing », i.e. either retain the excuse or drop it altogether ? Would the placing of the burden of proof on the claimant mean a *significant* change under the law in your country ? Or would the procedural rules of evidence ease the burden of the claimant to an extent where the outcome of most cases would be practically the same as it would have been if there had been no special rule on burden of proof ?

(iv) If you favour a changed basis of liability, would you prefer the expressions used in any of the Warsaw, CIM and CMR Conventions or would you favour something along the lines suggested by UNCITRAL ?

(v) Do you think that a provision on contributory negligence is desirable. What, in particular, is you opinion of a special rule placing the burden of proof on the carrier ?

Question 6 :

The suggested new definition of « goods » means in practice that the carrier must assume the same liability for deck cargo as for cargo stowed in the holds. (« Live animals » have so far been put within brackets.) Do you think that such a change is required by changed transportation techniques (in particular container traffic) or by generally improved security measures for the carrying of goods on deck ? Or, in your view, would the suggested change place too heavy a burden on the carrier ? If so, state why. Do you consider the present rules relating to deck cargo satisfactory ? Or do you think that they create difficult problems, particularly in container traffic where, ordinarily, the shipper cannot know beforehand whether his cargo will be stowed on or below deck ? Do you think that, in such cases, the carrier's increased liability for deck cargo is preferable to his risk of being held responsible for breach of contract by carrying cargo on deck (it is perhaps doubtful whether the carrier can reserve himself the right to carry even containerized cargo on deck by a general standard clause or provision in his tariff or terms) ? On the other hand, would the abandonment of the distinction between ordinary cargo and deck cargo cause difficulties for the shipper ? Would any complications arise in the present system of insurance (cf. Question 5, ii, above) ?

intéressées, des changements dans les polices de recours, (1), des systèmes de co-assurance ou des arrangements de ce genre ?

(iii) Que pensez-vous du compromis relatif à l'exonération pour incendie ? Serait-il préférable de vouloir tout ou rien, c'est-à-dire conserver l'exonération ou la rejeter absolument ? Le fait d'imposer au demandeur le fardeau de la preuve signifierait-il un changement *important* d'après le droit de votre pays ? Ou bien, les règles de procédure en matière de preuve allègeraient-elles le fardeau de la preuve pour le demandeur au point que l'issue de la plupart des procès serait probablement la même qu'elle eût été en l'absence de règle spéciale sur le fardeau de la preuve ?

(iv) Si vous êtes en faveur d'un changement de la base de la responsabilité, préféreriez-vous les expressions employées dans l'une quelconque des conventions de Varsovie, CIM et CMR à d'autres inspirées de celles proposées par C.N.U.D.C.I. ?

(v) Jugez-vous désirable une règle relative à la contribution de la faute du chargeur à la réalisation du dommage (Contributory negligence) ? En particulier, que pensez-vous d'une disposition spéciale chargeant le transporteur du fardeau de la preuve ?

Question 6 :

La nouvelle définition que l'on propose du mot « marchandises » signifie en fait que le transporteur doit assumer la même responsabilité pour les pontées que pour les marchandises sous le pont (jusqu'à présent les mots « animaux vivants » ont été mis entre parenthèses).

Croyez-vous qu'une telle nouveauté s'impose du fait de changements dans la technique des transports (notamment de l'emploi de conteneurs) ou du fait d'une amélioration générale des moyens de sécurité pour les pontées ?

Ou croyez-vous que le changement proposé entraînerait pour le transporteur un trop lourd fardeau ? Si oui, dites pourquoi.

Trouvez-vous satisfaisantes les règles actuelles concernant les pontées ? Ou croyez-vous qu'elles donnent lieu à de difficiles problèmes, en particulier dans le trafic de conteneurs où, d'ordinaire, le chargeur ne peut savoir d'avance si la marchandise sera mise sur ou sous le pont ?

Croyez-vous que dans de tels cas une responsabilité accrue pour le transporteur soit préférable au risque d'être tenu pour coupable d'une violation du contrat pour avoir chargé sur le pont ? (A ce propos, il est permis de se demander si le transporteur peut se réserver, par une clause générale de ses tarifs ou conditions, le droit de mettre sur le pont même des marchandises en conteneur).

D'autre part, l'abandon de la distinction entre pontée et marchandises sous le pont serait-il une source de difficultés pour les chargeurs ? En résulterait-il des complications dans l'actuel système d'assurances (voir question 5, ii, ci-dessus) ?

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(1) *Note du traducteur*
Le contexte ne permet pas de savoir si l'auteur a voulu parler de polices de recours ou de politiques de recours.

Question 7 :

Even if a harmonization of the rules relating to the different branches of transport law is desirable (see Questions 1-2 above), there are different possibilities to achieve this aim. One possibility would be to follow the path suggested by the UNCTAD/UNCITRAL Working Group, i.e. to bring the rules of the respective international conventions in harmony by inherent changes in any one of them. Another method would be to elaborate an « overriding » convention covering international transport of goods irrespective of the means of conveyance used. The latter method would, if successful, replace the present international conventions altogether. Kindly indicate which method you prefer and present your general views on this problem.

B. JURISDICTION AND ARBITRATION

Question 8 :

Any insertion of provisions relating to jurisdiction would tend to reduce « forum shopping ». Do you think there is any need for such provisions in the Hague Rules ? If so, do the suggested provisions accord the claimant too many or too few options ? Or do you think the suggested five options (a) — (e) appropriate ?

Question 9 :

It is suggested that the claimant should have the right to arrest *the carrying vessel* (nb. not *any* vessel belonging to the same shipowner) in any port in a contracting State but that an action in such a State must be removed, at the petition of the defendant, to one of the stipulated jurisdictions (a - e), provided he puts up sufficient security. Do you think such a provision satisfactory ? Or does it give the claimant unwarranted protection ? Or should his protection be further improved by giving him the right to arrest « sister ships » of the carrying vessel as well ? Do you have any further comments to the suggested jurisdiction provisions ?

Question 10 :

It is suggested to expressly allow Arbitration clauses provided arbitration can be instituted at the same places as stipulated in the suggested jurisdiction provisions and that the arbitrators apply the rules of the Convention (cf. article 33 of the CMR Convention). Do you consider such a rule desirable ? If so, do you think that the suggested rule is appropriate or is it unnecessarily restricted ?

December 1972. Jan Ramberg.

Question 7 :

En admettant que soit à désirer une harmonisation des règles relatives aux différentes branches de la législation sur les transports, il y a diverses façons d'y parvenir. Une de ces façons serait de suivre la voie tracée par le groupe de travail de la C.N.U.C.E.D. et de la C.N.U.D.C.I., c'est-à-dire de mettre d'accord les règles des diverses conventions internationales par des modifications internes dans chacune. Une autre méthode serait d'élaborer une convention générale de remplacement couvrant les expéditions internationales de marchandises sans égard au mode de transport. Cette seconde façon, si elle était adoptée, signifierait le complet remplacement des conventions actuelles. Veuillez dire laquelle des deux méthodes vous préférez et exposer vos idées générales sur la question.

B. COMPETENCE ET ARBITRAGE

Question 8 :

Insérer des dispositions relatives à la compétence tendrait à réduire la pratique de la recherche systématique du tribunal le plus favorable (« Forum shopping »). Croyez-vous qu'il soit besoin de telles dispositions dans les règles de La Haye ? Si oui, celles qui sont proposées offrent-elles au choix des demandeurs trop de partis ou trop peu ? Ou pensez-vous que les cinq qui sont proposées (a-e) fassent l'affaire ?

Question 9 :

Il est proposé que le demandeur ait le droit de saisir *le navire transporteur* (N.B. : non pas *n'importe quel* navire appartenant au même armateur) en tout port de n'importe quel Etat contractant, mais qu'une action intentée dans un tel pays soit transférée, à la requête du défendeur, à l'un des tribunaux (a-e) prévus, à condition que ce défendeur fournisse une caution suffisante. Jugez-vous satisfaisante une telle disposition ? Ou bien, à votre avis, donne-t-elle au demandeur une protection injustifiée ? Ou bien, sa protection devrait-elle être encore accrue par l'octroi du droit de saisir aussi d'autres navires du même armateur que le navire transporteur ? Avez-vous d'autres commentaires à faire sur ce projet de dispositions relatives à la compétence ?

Question 10 :

Il est proposé d'autoriser expressément les clauses d'arbitrage pourvu que l'arbitrage puisse se dérouler dans les lieux indiqués dans la règle de compétence proposée et pourvu que les arbitres appliquent les règles de la Convention (voir article 33 de la Convention CMR). Estimez-vous qu'une telle règle soit à désirer ? Si oui, croyez-vous que la règle proposée convienne ou que les restrictions qu'elle comporte soient inutiles ?

Décembre 1972. Jan Ramberg.

REVISION OF THE HAGUE/VISBY RULES ON BILLS OF LADING

INTERNATIONAL LEGISLATION ON SHIPPING

Draft Report of the fifth Session of the UNCITRAL Working Group on International Legislation on Shipping, New York, 5-16 February 1973

A. Procedure

The work progressed in plenary sessions with Professor José Domingo Ray (Argentine) as president and in a Drafting Group with Professor Erling Selvig (Norway) as president.

The following countries were represented by their respective national delegations :

Argentine, Australia, Belgium, Brazil, France, Hungary, India, Japan, Nigeria, Norway, Poland, Singapore, USSR, United Kingdom, United States.

The following bodies were present as observers :

United Nations Conference on Trade and Development (UNCTAD), International Chamber of Commerce, International Chamber of Shipping, International Maritime Committee (CMI), International Union of Marine Insurance, Inter-Governmental Maritime Consultative Organization.

CMI was represented by the Chief Legal Officer, Professor Jan Ramberg, and Mr. John C. Moore, Chairman of the Bill of Lading Commitee of the Maritime Law Association of the U.S.

B. Subjects discussed

The following subjects were discussed :

1. Unit limitation;
2. Transshipment;
3. Deviation;
4. Period of limitation (time-bar).

1. UNIT LIMITATION

Here, the discussion concerned the question whether, instead of the combined unit and per kilo limitation of the 1968 Hague/Visby Proto-

LA REVISION DES REGLES DE LA HAYE ET DE VISBY SUR LES CONNAISSEMENTS

LA LEGISLATION INTERNATIONALE EN MATIERE DE NAVIGATION

Projet de rapport de la cinquième session du Groupe de travail de CNUDCI sur la Législation Internationale en matière de Navigation, New York, 5-16 février 1973.

A. Organisation

Le travail s'effectua en des sessions plénières avec le professeur José Domingo Ray (Argentine) comme président et dans un Groupe de Projet avec le Professeur Erling Selvig (Norvège) comme président.

Les pays suivants étaient représentés par leurs délégations nationales respectives : Argentine, Australie, Belgique, Brésil, France, Hongrie, Inde, Japon, Nigéria, Norvège, Pologne, Singapour, URSS, Royaume-Uni, Etats-Unis.

Les organismes suivants étaient présents en tant qu'observateurs : La Conférence des Nations Unies pour le Commerce et le Développement (CNUCED), La Chambre de Commerce Internationale, La Chambre Maritime Internationale, le Comité Maritime International (CMI), l'Union Internationale d'Assurance Maritime, l'Organisation Consultative Maritime Inter-Gouvernementale.

Le CMI était représenté par son Conseiller Juridique Principal, le Professeur Jan Ramberg, et par Mr. John C. Moore, Président du Comité du Connaissement de l'Association du Droit Maritime des Etats-Unis.

B. Sujets discutés

Les sujets suivants furent discutés :

1. Unité de limitation;
2. Transbordement;
3. Déviation;
4. Période de limitation (délai).

1. UNITE DE LIMITATION

Ici, la discussion porta sur la question de savoir si, au lieu de la double limitation à l'unité ou au kilo des Règles de La Haye et de Visby de 1968, une simple limitation par kilo devait être choisie. Ceci

col, a pure per kilo limitation should be chosen. This was strongly promoted by Norway and Nigeria, while a majority of countries favoured the combined unit and per kilo limitation. In discussing this, Japan suggested a deletion or, alternatively, an amendment of the so-called « container formula ». The possibility to apply the limitation amount to the units *within* the containers should not apply to « shipper packed » containers, since the carrier had no opportunity of checking the contents. Norway wanted an amendment to make sure that the *container itself* should be considered one separate unit. This met with general approval.

There were *indications* by some delegations that the *amounts* were too low, but it was considered necessary to leave this matter to be decided by a forthcoming diplomatic conference.

The effect of the shipper's *misstatement of value* was discussed and, in particular, if the sanction for such misstatement, if knowingly made, should be that he lost *any* right of recourse against the carrier for loss of or damage to the goods. Most delegations seemed to favour the more modest rule that only such damage or loss which *had been caused* by the misstatement should be taken into account. Furthermore, suggestions were made to introduce a provision protecting the bona fide transferee of the bill of lading, who should be able to rely upon the correctness of the declared value. However, no agreement could be reached on the regulation of these matters.

Another important matter was extensively discussed, namely what circumstances should be permitted to *break the limitation* (it was pointed out that this problem was connected with the size of the limitation amount — the higher amount, the more justifiable to make the limit « unbreakable »). A majority of delegations favoured a solution *other* than the traditional one embodied in the 1968 Hague/Visby Protocol. Reference was made to i.a. CIM (the European railway convention) and CMR (the road convention), where *the carrier* loses his right to limit on account of acts or omissions of a certain qualified nature by his *servants*. This makes a great difference in practice compared with the 1968 Hague/Visby Protocol, where only acts or omissions *by the carrier himself* break the limit (cf. the similar principle of the 1957 Brussels convention on the limitation of the liability of owners of sea-going ships). Norway and, in particular, CMI stressed the importance to get a limit which *one could rely upon* and pointed out that the insecurity brought about by permitting the limitation to be broken by acts or omissions by the carrier's *servants* was clearly unsatisfactory. Furthermore, the modern trend seemed to go in the direction of « unbreakable » limits (cf. the 1971 Guatemala Protocol to the 1929 Warsaw convention which, however, only regards damage to *passengers*).

fut fortement mis en avant par la Norvège et le Nigéria, cependant qu'une majorité de pays était favorable à la double limitation à l'unité ou au kilo. En discutant cela, le Japon suggéra une suppression ou bien une modification de la formule dite « formule du conteneur ». La possibilité d'appliquer la limitation aux colis *à l'intérieur* du conteneur ne peut pas l'être pour « les conteneurs chargés par les expéditeurs », puisque le transporteur n'a pas la possibilité de contrôler leur contenu. La Norvège voulait un amendement apportant la certitude que *le conteneur lui-même* serait considéré comme une unité séparée. Ceci rencontrera l'approbation générale.

Certaines délégations *firent valoir* que les *montants* étaient trop bas, mais il fut jugé nécessaire de laisser décider de ce point par une prochaine conférence diplomatique.

L'effet de la *déclaration inexacte de valeur* par l'expéditeur fut discuté et, en particulier, si la sanction pour une telle fausse déclaration délibérément faite, devrait être qu'il perde *tout* droit de recours contre le transporteur pour perte ou avarie aux marchandises. La plupart des délégations paraissaient préférer la règle la plus modeste : que seuls soient prises en compte une avarie ou une perte *causées* par la fausse déclaration. De plus, des suggestions furent faites pour introduire une disposition protégeant le porteur de bonne foi du connaissement qui devrait être à même de compter sur l'exactitude de la valeur déclarée. Cependant, un accord pourrait être atteint sur la réglementation de ces points.

Un autre sujet important fut longuement discuté, à savoir en quelles circonstances il pouvait être permis de *faire échec à la limitation.* (Il fut fait remarquer que ce problème était lié à l'importance du montant de la limitation puisque, plus le montant est important, plus il est justifié de faire une limite « intransgressable »). Une majorité de délégations préférait une autre solution à la solution traditionnelle telle que celle-ci est incorporée au Protocole de La Haye et de Visby de 1968. On fit référence, entre autre, à la CIM (La Convention des Chemins-de-Fer Européens) et à la CMR (La Convention de la Route) où *le transporteur* perd son droit de limiter du fait d'actes ou d'omissions d'une certaine nature venant de ses préposés. Ceci fait une grande différence en pratique comparativement au Protocole de La Haye et de Visby de 1968 où seuls les actes ou omissions *du transporteur lui-même* annulent la limitation. (Voir le principe similaire de la Convention de Bruxelles de 1957 sur la limitation de la responsabilité des armateurs de navires de mer). La Norvège et le Comité Maritime International particulièrement, insistèrent sur l'importance d'avoir une limitation *sur laquelle on puisse compter* et firent remarquer que l'insécurité apportée en permettant que la limitation soit transgressée par des actes ou omissions des *préposés* du transporteur n'était évidemment pas satisfaisante. De plus, la tendance moderne paraît aller en direction de limitations « intransgressables » (Voir le Protocole du Guatemala de 1971 à la Convention de Varsovie de 1929 qui, cependant, ne concerne que les dommages aux *passagers*).

The qualification of the *nature* of such acts or omissions which should be permitted to break the limit was extensively discussed (this matter, in my view, has much less practical importance than the distinction between acts or omissions by the carrier himself on the one hand and acts or omissions by the carrier's *servants* on the other hand).

The majority of delegations, however, favoured the more stringent words « wilful misconduct » and did not want to refer to « gross negligence » or similar expressions.

The meaning of « within the scope of their employment » was discussed and, in particular, the question whether *intentional* acts, such as theft, could at all be covered by this expression. Servants were not employed to steal or to intentionally damage the goods ! However, the employment could give them the *opportunity* to do malicious things, which « outsiders », having no access to the goods, could not do. The most practical situation would be theft in cargo terminals in the initial or terminal stages of the transport. It appeared from the discussion that this problem was solved differently in the different countries.

CMI, ICC, ICS and IUMI submitted the following statement, which was officially received by the Working Group :

« The organizations (above mentioned) respectfully submit that the wording of the 1968 Protocol to the Hague Rules be retained. We urge that the following three major reasons be considered :

1. The words, « within the scope of their employment » will, as pointed out by the United Stated delegation, give rise to serious difficulties of interpretation in individual cases, thus giving rise to much litigation.

2. Disputes will arise as to what has actually happened in cases of non-delivery of goods. The goods might have been shortshipped, discharged at the wrong port, become mixed up with other goods, mislaid or stolen. If the goods were stolen, there would be disputes as to where they were stolen and by whom. It might be determinative of the limitation of the carrier's liability whether the goods were stolen on board or ashore by, for instance, crew members, stevedore employees, outsiders, etc.

3. The wording suggested by the Working Group goes against the general modern trend to make limits unbreakable. Compare in particular, the 1971 Guatemala Protocol to the Warsaw convention. Breakable limits cause uncertainty as to the insurance cover needed by the carrier. Insurance of large cargoes (e.g. 2,000-container ships) with high values may involve such concentrations of risks as to require very high insu-

La détermination de la *nature* de tels actes ou omissions qui devraient être permis pour supprimer la limitation fut longuement discutée. (Cette question, à mon avis, a beaucoup moins d'importance pratique que la distinction entre les actes ou omissions du transporteur lui-même, d'une part, et les actes ou omissions *des préposés* ou transporteur, d'autre part).

La majorité des délégations, cependant, préférait les mots plus forts de « faute intentionnelle » et ne voulait pas employer ceux de « grande négligence » ou expressions similaires.

La signification de « dans le cadre de leurs activités » fut discutée et, en particulier, la question de savoir si des actes *intentionnels,* tels que le vol, pouvaient tous être couverts par cette expression, les préposés n'étant évidemment pas employés pour voler ou pour endommager intentionnellement les marchandises ! Cependant, leur activité professionnelle pouvait leur donner *l'opportunité* de faire des choses malveillantes que « les gens de l'extérieur » qui n'ont pas accès aux marchandises ne pourraient pas faire. Le cas le plus fréquent serait le vol dans les gares de marchandises, à la phase initiale ou terminale du transport. La discussion fît apparaître que ce problème était résolu différemment dans les différents pays.

Le CMI, la CCI, l'ICS et l'IUMI déposèrent la communication suivante qui fut officiellement reçue par le Groupe de Travail :

«Les organismes (ci-dessus mentionnés) émettent respectueusement l'avis que la rédaction du Protocole de 1968 aux Règles de La Haye doit être tenue en attente. Nous insistons pour que les trois sujets majeurs suivants soient examinés :

1. Les mots « dans le cadre de leurs fonctions » feront naître, comme l'a signalé la délégation des Etats-Unis, de sérieuses difficultés d'interprétation dans des cas individuels, engendrant ainsi beaucoup de procès.

2. Des contestations naîtront pour ce qui est vraiment arrivé dans les cas de non-livraison des marchandises. Il pourrait y avoir des cas de manquants, déchargement à un mauvais port, marchandises mélangées, égarées ou volées. Si les marchandises étaient volées, il y aurait des controverses pour savoir où elles ont été volées et par qui elles l'ont été. Il serait capital, pour déterminer la limitation de responsabilité du transporteur, de savoir si les marchandises ont été volées à bord ou à quai par des membres de l'équipage, par des proposés des entrepreneurs de manutention, par des gens du dehors, etc.

3. La rédaction suggérée par le Groupe de Travail va à l'encontre de la tendance générale moderne de faire des limitations intransgressables. Comparer, entre autres, le Protocole du Guatemala de 1971 et la Convention de Varsovie. Des limitations transgressables engendrent de l'incertitude pour la couverture d'assurance nécessaire au transporteur. L'assurance de grosses cargaisons, par exemple celle d'un porte-

rance premiums, which, through the freight, must necessarily be borne in the last analysis by the consignee.

Even though in practice the limits might not be broken often, the risk that the limitation might be broken would force carriers to insure themselves against such risks, at high premium levels. »

However, the majority of delegations approved the following drafting of the provision relating to limitation :

Article A

1. The liability of the carrier for loss of or damage to the goods shall be limited to an amount equivalent to ( ) francs per package or other shipping unit or ( ) francs per kilo of gross weight of the goods lost or damaged, whichever is the higher.

2. For the purpose of calculating which amount is the higher in accordance with paragraph 1, the following rules shall apply :

« Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading as packed in such article of transport shall be deemed packages or shipping units.

Except as aforesaid the goods in such article of transport shall be deemed one shipping unit.

In cases where the article of transport itself has been lost or damaged, that article of transport shall, when not owned or otherwise supplied by the carrier, be considered one separate shipping unit.

3. A franc means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900.

4. The amount referred to in paragraph 1 of this article shall be converted into the national currency of the State of the court or arbitration tribunal seized of the case on the basis of the official value of that currency by reference to the unit defined in paragraph 3 of this article on the date of the judgement or arbitration award. If there is no such official value, the competent authority of the State concerned shall determine what shall be considered as the official value for the purpose of this Convention.

(5. By agreement between the carrier and the shipper a limit of liability exceeding that provided for in paragraph 1 may be fixed.)

Article B

1. The defences and limits of liability provided for in this Convention shall apply in any action against the carrier in respect of loss

conteneurs de 2.000 unités, avec de grandes valeurs, peut comporter de telles concentrations de risques qu'elle nécessite de très fortes primes d'assurance qui, au travers du fret, doivent nécessairement, en dernière analyse, être supportées par le destinataire. Même si, en pratique,les limitations ne peuvent pas être souvent dépassées, le risque que la limitation puisse être dépassée, forcerait les transporteurs à s'assurer contre de tels risques à de hauts niveaux de prime ».

Cependant, la majorité des délégations a approuvé le projet suivant de rédaction des dispositions concernant la limitation :

Article A

1. La responsabilité du transporteur pour perte ou avarie aux marchandises sera limitée à une somme équivalent à ( ), par colis ou autre unité de chargement ou à ( ) francs par kilo de poids brut des marchandises perdues ou avariées, la limitation la plus élevée étant applicable.

2. Pour calculer quel est le montant le plus haut d'après le paragraphe 1, on appliquera les règles suivantes :

« Quand un conteneur, une palette ou un engin similaire est utilisé pour grouper les marchandises, le colis ou autres unités énumérés dans le connaissement comme étant inclus dans un tel engin, seront considérés comme étant des colis ou des unités.

En dehors du cas prévu ci-dessus, les marchandises à l'intérieur de cet engin seront considérées comme une unité.

Dans le cas où l'engin lui-même a été perdu ou endommagé, cet engin sera, quand il n'est pas la propriété du transporteur ou qu'il n'a pas été fourni par celui-ci, considéré comme une unité distincte.

3. Un franc signifie une unité consistant en 65,5 milligrammes d'or au titre de 900 millièmes.

4. Le montant auquel il est fait référence au paragraphe 1. de cet article sera converti dans la monnaie nationale du pays de la cour ou du tribunal arbitral saisi du cas, sur la base de la valeur officielle de cette monnaie en se référant à l'unité définie au paragraphe 3. du présent article, à la date du jugement ou de la sentence arbitrale. S'il n'y a pas de telle valeur officielle, l'autorité compétente du pays concerné déterminera ce qui sera considéré comme valeur officielle au regard de la Convention.

(5. Par accord entre le transporteur et l'expéditeur, il peut être fixé une limitation de responsabilité dépassant celle dont dispose le paragraphe 1.)

Article B

1. Les exonérations et limitations de responsabilité stipulées dans cette Convention n'appliqueront à toute action contre le transporteur pour perte, avarie ou retard subis par les marchandises couvertes par

of, damage (or delay) to the goods covered by a contract of carriage whether the action be founded in contract or in tort.

2. If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

3. The aggregate of the amounts recoverable from the carrier and any persons referred to in the preceding paragraph, shall not exceed the limits of liability provided for in this Convention.

Article C

The carrier shall not be entitled to the benefit of the limitation of liability provided for in paragraph 1 of this article if it is provided that the damage was caused by wilful misconduct of the carrier, or of any of his servants or agents acting within the scope of their employment. Nor shall any of the servants or agents of the carrier be entitled to the benefit of such limitation of liability with respect to damage caused by wilful misconduct on his part. »

(Note : Passages within brackets have not been generally agreed upon.)

2. TRANSSHIPMENT

There seemed to be a general desire that the carrier, even in cases of transshipment, should remain responsible as carrier during the entire transit. This was energetically emphasized by Australia, France and Nigeria. However, there was much disagreement how such a result could be reached by mandatory legislation. CMI pointed out that any such rule could easily be circumvented by simply avoiding *one* contract covered by *one through bill of lading* and, instead, by making *separate* contracts covered by *separate* bills of lading, possibly linked together by a « forwarder type » document covering the whole transit. Hence, a mandatory rule as envisaged would not only fail to produce the desired result but might as well give rise to commercially unwarranted procedures and excessive documentation. On the other hand, one might very well try to solve the adverse effects for the cargo-owner following from the carrier's *option* to transship on the basis of *standard clauses* in the printed text of the bill of lading. In such cases, one could stipulate that the carrier, having exercised such an option to transship, should remain responsible.

un contrat de transport, que l'action soit fondée sur le contrat ou qu'elle le soit sur le préjudice.

2. Si une telle action est ouverte à l'encontre d'un préposé ou d'un agent du transporteur et si ce préposé ou cet agent prouve qu'il a agi dans le cadre de ses activités professionnelles, il aura le droit de se prévaloir des exonérations et limitations de responsabilité que le transporteur a le droit d'invoquer de par la présente Convention.

3. Le total des montants recouvrables du transporteur et de toutes les personnes auxquelles il est fait référence dans le paragraphe précédent, ne dépassera pas les limitations de responsabilité stipulées à cette Convention.

Article C

Le transporteur n'aura pas le droit de bénéficier de la limitation de responsabilité stipulée au paragraphe 1 de cet article s'il est prouvé que le dommage a été causé par faute intentionnelle du transporteur ou de ses préposés agissant dans le cadre de leurs activités professionnelles. De même, aucun préposé ou agent du transporteur ne sera admis à bénéficier d'une telle limitation de responsabilité en ce qui concerne les dommages causés par une faute intentionnelle de sa part. »

(Note : les passages entre paranthèses n'ont généralement pas été agréés.)

2. TRANSBORDEMENT

Il semblait y avoir un désir général que le transporteur, même en cas de transbordement, demeurât responsable comme transporteur pendant tout le voyage. Ceci fut énergiquement souligné par l'Australie, la France et le Nigéria. Cependant, il y avait beaucoup de désaccord sur le point de savoir comment un tel résultat pourrait être obtenu par une législation impérative. Le Comité Maritime International fit remarquer que toute règle de cette sorte pourrait être facilement tournée en évitant simplement de faire *un* contrat couvert par *un connaissement direct* mais, au lieu de cela de faire des contrats *séparés* couverts par des connaissements *séparés* qu'il serait possible de lier ensemble par un document analogue à celui émis par le commissionnaire de transport et couvrant le voyage en entier. De là, une règle impérative comme il est envisagé, non seulement manquerait de produire le résultat désiré mais pourrait aussi bien donner naissance à des procédés commerciaux sans garantie et à une émission excessive de documents.

D'un autre côté, on pourrait très bien essayer de résoudre pour le propriétaire des marchandises, les difficultés provenant de *l'option* qu'a le transporteur de transborder sur la base des *clauses standard* du texte imprimé du connaissement. Dans de tels cas, on pourrait stipuler que le transporteur ayant exercé une telle option de transborder demeure responsable.

Another matter extensively discussed concerned the position of the non-contracting, so-called « actual », carrier. This carrier — ordinarily a sub-contractor to the contracting carrier — did not stand in a direct contractual relationship to the cargo-owner. Nevertheless, it was felt that he should be responsible for the carriage performed by him according to the provisions of the convention, which might differ from his own bill of lading condition. (This solution has been inspired by the rules relating to successive carriage in air, road- and railway law.)

Agreement was, in principle, reached on the following text :

« *Article D*

1. Where the carrier has exercised an option provided for in the contract of carriage to entrust the performance of the carriage or a part thereof to an actual carrier, the carrier shall nevertheless remain responsible for the entire carriage according to the provisions of this Convention.

2. The actual carrier also shall be responsible for the carriage performed by him according to the provisions of the Convention.

3. The aggregate of the amounts recoverable from the carrier and the actual carrier shall not exceed the limits provided for in this Convention.

4. Nothing in this article shall prejudice any right of recourse as between the carrier and the actual carrier. »

However, the following text, intended to allow a traditional through bill of lading whereby the carrier only accepts liability as carrier for the transport performed by him, was *not approved* but referred to further debate in the next Session :

« *Article E*

1. Where the contract of carriage provides that a designated part of the carriage covered by the contract shall be performed by a person other than the carrier (through bill of lading), the responsibility of the carrier and of the actual carrier shall be determined in accordance with the provisions of article C. (D).

2. However, the carrier may exonerate himself from liability for loss of, damage (or delay) to the goods caused by events occurring while the goods are in the charge of the actual carrier provided that the burden of proving that any such loss, damage (or delay) which was so caused, shall rest upon the carrier ».

3. DEVIATION

The concept of « deviation » was discussed and difficulties emerged to draft a satisfactory provision covering not only « geographical » but all kinds of « contractual » deviation as well. Some delegations

Un autre point largement discuté concernait la position du nouveau non-contractant, appelé transporteur « de fait ». Ce transporteur — ordinairement un sous-contractant du transporteur contractant — ne se trouvait pas dans une relation contractuelle directe avec le propriétaire des marchandises. Néanmoins, il fut considéré qu'il devrait être responsable pour le transport fait par lui suivant les dispositions de la convention qui pourraient être différentes de la condition de son propre connaissement. (Cette solution a été inspirée par les règles relatives à un transport successif par air - route - rail.)

L'accord fut, en principe, obtenu sur le texte suivant :

« *Article D*

1. Quand le transporteur a exercé l'option stipulée dans le contrat de transport de confier l'accomplissement du transport ou d'une partie de celui-ci à un transporteur de fait, le transporteur demeurera néanmoins responsable de tout le transport suivant les dispositions de la présente Convention.

2. Le transporteur de fait sera aussi responsable du transport accompli par lui suivant les dispositions de cette Convention.

3. Le total des montants recouvrables du transporteur et du transporteur de fait ne dépassera pas les limitations stipulées dans cette Convention.

4. Rien dans cet article ne portera préjudice à tout droit de recours existant entre le transporteur et le transporteur de fait. »

Cependant, le texte suivant, fait avec l'intention d'accorder un connaissement direct usuel, par lequel le transporteur accepte seulement la responsabilité en tant que transporteur pour le transport fait par lui, *n'a pas été approuvé* mais renvoyé à un débat ultérieur, lors de la prochaine Session :

« *Article E*

1. Quand le contrat de transport dispose qu'une partie désignée du transport couvert par le contrat sera faite par une personne autre que le transporteur (connaissement direct), la responsabilité du transporteur et du transporteur de fait sera déterminée suivant les dispositions de l'article C. (D).

2. Cependant, le transporteur peut s'exonérer de la responsabilité pour pertes, avaries ou retard causés par des événements se produisant pendant que les marchandises sont à la charge du transporteur de fait, à condition que l'obligation de prouver que de telles pertes, avaries ou retard qui sont ainsi advenus, repose sur le transporteur. »

3. DEROUTEMENT

Le concept de « déroutement » fut discuté et des difficultés surgirent pour esquisser une disposition satisfaisante couvrant non seulement un déroutement « géographique » mais aussi bien toutes les sortes de

felt that this problem should be studied in connection with the problem of responsibility for *delay* (Australia, France, Nigeria), while some delegations thought a provision dealing with deviation unnecessary if the new convention should contain a provision expressing the carrier's liability by a *general formula* instead of a « long list » of defences (Norway, Tanzania, U.S.A., U.K., Hungary, Japan). (In this context it should be noted that the international conventions relating to carriage by air, road and rail do not contain any provisions relating to deviation). Some delegations stressed that, in any event, the carrier should have the burden of proving that the deviation was reasonable under the circumstances (Nigeria, Belgium). The following text was agreed :

« The carrier shall not be liable for loss or damage resulting from measures to save life and from reasonable measures to save property at sea. »

4. PERIOD OF LIMITATION (TIME-BAR)

The following views were expressed with regard to the different issues :

1. *The length of the period*

Although one year might be too short in individual cases, in view of difficulties to gather all necessary evidence, a longer period might be unwarranted for other reasons. CMI pointed out that, in cases of through transports involving transshipment by other means of conveyance (e.g. road transport), a longer period of limitation in the convention relating to carriage by sea might effectively bar recourse actions from the sea carrier against his sub-contractors. This, in turn, might reduce the number of cases where the sea-carrier accepts responsibility for the whole transit (cf. 2 above !). UIMI and ICC feared that a longer period might cause settlement negotiations to drag out and submitted a paper proposing that the one year period be retained.

No decision was taken on this specific point by the Working Group.

2. *The time when the period starts to run*

The traditional rule that, in case of non-delivery, the period starts to run from « the date when the goods should have been delivered » (art. 3, para. 6, of the 1924 Brussels Convention) was considered diffuse and unsatisfactory. Furthermore, it was felt that one should distinguish between *partial loss or damage and delay* on the one hand

déroutement « contractuel ». Certaines délégations pensèrent que ce problème devait être étudié en liaison avec le problème de la responsabilité pour *retard* (Australie, France, Nigéria), pendant que certaines délégations pensaient qu'une clause traitant du déroutement n'était pas nécessaire si la nouvelle convention devait contenir une disposition exprimant la responsabilité du transporteur par une *formule générale* au lieu « d'une liste » d'exonérations (Norvège, Tanzanie, E.U., R.U., Hongrie, Japon). Dans ce contexte, on doit noter que les conventions internationales relatives au transport par air, route et chemin-de-fer ne contiennent pas de clauses concernant le déroutement. Des délégations firent valoir que, de toute façon, le transporteur devait avoir la charge de prouver que le déroutement était raisonnable, étant donné les circonstances (Nigéria, Belgique). Le texte suivant fut adopté :

« Le transporteur ne sera pas responsable des pertes ou avaries résultant de mesures prises pour sauver des vies ni de mesures raisonnables prises pour sauver des biens en mer. »

4. PERIODE DE LIMITATION (PRESCRIPTION)

Les points de vue suivants furent exprimés en ce qui concerne les différents dénouements :

1. *Délai de prescription*

Bien qu'une année puisse être trop courte pour des cas particuliers, par suite de difficultés pour réunir toutes les preuves nécessaires, une plus longue période ne pourrait pas être garantie pour d'autres raisons. Le CMI fit remarquer que, dans les cas de transports de bout en bout, incluant un transbordement par d'autres moyens de transport (par exemple, le transport routier), une plus longue période de prescription dans la convention de transport par mer pouvait effectivement empêcher les actions de recours du transporteur maritime contre ses sous-contractants. Ceci, en retour, pourrait réduire le nombre des cas où le transporteur par mer accepte la responsabilité de tout le transport (voir 2, ci-dessus). L'Union Internationale d'Assurance Maritime et la Chambre de Commerce Internationale craignirent qu'une plus longue période puisse faire traîner les négociations de règlement et soumirent une note proposant qu'une période d'un an soit retenue.

Aucune décision ne fut prise par le Groupe de Travail sur ce point.

2. *Moment où la période commence à courir*

La règle traditionnelle qu'en cas de non-livraison, la période commence à courir à partir de « la date où les marchandises « auraient dû être livrées » (article 3, paragraphe 6 de la Convention de Bruxelles de 1924) fut jugée confuse et qu'elle n'était pas satisfaisante. De plus, on eut le sentiment que l'on devrait distinguer entre *perte partielle ou avarie et retard,* d'un côté, *et les autres cas,* d'un autre côté. Le

and *other cases* on the other hand. The text agreed to has been inspired by the text of CIM and CMR (arts. 46 and 32 respectively).

3. *The prolongation of the period*

The principles of the 1968 Hague/Visby Protocol to the effect that the period of limitation may be *extended* by an agreement between the parties after the cause of action has arisen and that *actions for indemnity against third persons* may be brought even after the expiry of the period of the convention (minimum a further ninety days) were accepted. However, a majority of delegations considered that an agreement to extend the period should be *in writing*.

Special provisions to prolong the period in cases of « wilful misconduct » on the part of the carrier were felt unnecessary. (Such provisions exist in CIM and CMR, arts. 46.1 (c) and 32.1 respectively !)

The question whether a written claim should *suspend* the running of the period — which is the principle of CIM and CMR (arts. 46.3 and 32.2 respectively) — was extensively discussed. CMI pointed out that such suspension rules brought about considerable uncertainty in a field of law where certainty was particularly needed in order to prevent that a party by mistake loses his right of action. Discussions might arise as to whether a written claim has been filed in due course, or when it has been filed, whether it has been clearly rejected or not and when etc. A majority of delegations shared this view.

Norway suggested that the period of limitation should also *protect the shipper* for actions from the carrier but this was not approved by the Working Group.

The French delegation desired a provision to make sure that actions instituted before all competent tribunals should interrupt the period of limitation, while some delegations doubted that such a provision was necessary. It was decided to mention the suggestion in the official report and to refer it for further consideration in a forthcoming session.

Subjects to be discussed in forthcoming sessions :

The questions relating to definitions of terms under article 1 of the 1924 Brussels Convention (« carrier », « contract of carriage », « ship ») and the elimination of invalid clauses in bills of lading should have been discussed in the fifth session but had to be referred to the next session. Further, it was felt that questions regarding delay, deck cargo and live animals, reservations in bills of lading and « back-letters » and, finally, the scope of the convention, required in depth studies.

texte convenu a été inspiré par le texte de la CIM et de la CMR (articles 46 et 32 respectivement).

3. *La prolongation de la période*

Les principes du Protocole de La Haye et de Visby de 1968 portant que la période de limitation peut être *étendue* par un accord entre les parties après que la cause de l'action se soit produite et que des *actions pour indemnité à l'encontre de tierces personnes* soient ouvertes même après l'expiration de la période de la convention (minimum quatre-vingt-dix jours en plus), furent acceptés. Cependant, une majorité de délégations considéra qu'un accord pour étendre la période devrait être mis *par écrit*.

Des dispositions spéciales pour prolonger la période dans des cas de faute intentionnelle de la part du transporteur ne furent pas jugées nécessaires. (De telles clauses existent dans la CIM et la CMR, arts. 46 I (c) et 32 I respectivement !)

La question de savoir si une réclamation par écrit *suspendrait* le cours de la période — ce qui est le principe de la CIM et de la CMR (Arts. 46.3 et 32.2 respectivement) — fut longuement discutée. Le CMI fit remarquer que de telles règles suspensives apportaient une incertitude considérable dans un domaine du droit où la certitude était particulièrement nécessaire pour empêcher qu'une partie perde par faute son droit d'action. Des discussions s'élèveraient sur le point de savoir si une revendication par écrit a été faite en temps, ou quand elle a été faite, si elle a été clairement rejetée ou pas et quand, etc... Une majorité de délégations partagea ce point de vue.

La Norvège suggéra que la période de limitation devrait aussi *protéger l'expéditeur* contre les actions intentées par le transporteur mais cela ne fut pas approuvé par le Groupe de Travail.

La délégation française désirait une clause qui aurait assuré que les actions intentées devant tous tribunaux compétents interrompraient la période de limitation, cependant que certaines délégations doutaient qu'une telle clause fut nécessaire. Il fut décidé de faire mention de la suggestion dans le rapport officiel et de la renvoyer, pour plus ample considération, à une prochaine session.

Sujets à discuter aux prochaines sessions

Les questions relatives aux définitions de termes de l'article 1 de la Convention de Bruxelles de 1924 (« transporteur », « contrat de transport », « navire ») et l'élimination de clauses sans validité dans les connaissements auraient dues être discutées à la cinquième session mais devaient être renvoyées à la prochaine. De plus, il fut considéré que les questions concernant le retard, la cargaison en pontée et les animaux vivants, les réserves sur les connaissements et « les lettres de garantie » et finalement la portée de la convention, demandaient des études approfondies.

The agenda for the sixth session will be as follows.

1. definitions under article 1;
2. elimination of invalid clauses;
3. deck cargo and live animals;
4. liability of the carrier for delay;
5. scope of application of the Convention.

Further, it is foreseen that the seventh session will deal with « the required contents of and legal effects of the contract of carriage » and, in this connection, « reserve clauses and guarantees » in bills of lading.

Date and place for the next session:

The next (sixth) session will be held in Geneva from August 27 to September 7, 1973 and the seventh session in New York in February 1974 (subject to the approval of UNCITRAL).

Stockholm, March 6, 1973 Jan Ramberg

Le programme de la sixième session sera le suivant :

1. définitions de l'article 1;
2. élimination des clauses nulles;
3. cargaison en pontée et animaux vivants;
4. responsabilité du transporteur en cas de retard;
5. étendue d'application de la Convention.

De plus, il est prévu que la septième session traitera du « contenu et effets juridiques du contrat de transport » et, dans cet esprit, « des réserves au connaissement et lettres de garantie ».

Lieu et date de la prochaine session :

La prochaine (sixième) session sera tenue à Genève du 27 août au 7 septembre 1973 et la septième session à New York en février 1974, si la CNUDCI est d'accord.

Stockholm, le 6 mars 1973 Jan Ramberg

REVISION OF THE HAGUE/VISBY RULES ON BILLS OF LADING

Summary of replies received from the Chief Legal Officer to Questionnaire HR-2bis/12-72 relating to the UNCITRAL proposal of changes in The Hague/Visby Rules on Bills of Lading.

The above questionnaire related mainly to the following questions :
(i) period of responsibility,
(ii) basis of liability,
(iii) deck cargo and live animals,
(iv) jurisdiction and arbitration.

But the questionnaire also involved important questions of principle, namely if a *harmonization of the law of carriage of goods* was desirable and, if desirable, possible, And, if desirable and possible, which method of work should be preferred. One alternative would be to make haphazard changes in the various international conventions whenever they were brought up for revision or to study the possibility to establish a new convention covering all branches of transport law.

REPLIES

Replies have been received from the British Maritime Law Association, the French Maritime Law Association, the Association of the Federal Republic of Germany, the Association of the German Democratic Republic, the Italian Maritime Law Association, the Maritime Law Association of the United States, the Canadian Maritime Law Association and the Swedish Maritime Law Association. (*).

(*) *The replies of the National Associations are referred to as « Documents » : HR-3/III-73 - United States, HR-4/III-73 - France, HR-5/III-73 - Belgium, HR-6/III-73 - DDR, HR-7/III-73 - Italy, HR-9/III-73 - DBR, HR-10/III-73 - Great Britain, HR-11/V-73 - Canada. Copies of these documents may be obtained on application to the C.A.O./C.M.I., c/o Messrs. Henry Voet-Génicot, 17, Borzestraat, B-2000 Antwerpen (Belgium).*

REVISION DES REGLES DE LA HAYE ET DE VISBY SUR LES CONNAISSEMENTS

Sommaire des réponses reçues par le Conseiller Juridique Principal au questionnaire HR-2bis/12-72 se rapportant à la proposition de CNUDCI de changements aux Règles de La Haye et de Visby sur les Connaissements.

Ce questionnaire se rapportait principalement aux questions suivantes :

(i) durée de la responsabilité;
(ii) base de la responsabilité;
(iii) cargaison en pontée et animaux vivants;
(iv) juridiction et arbitrage.

Mais le questionnaire comprenait aussi d'importantes questions de principe, à savoir si *une harmonisation du droit du transport des marchandises* était désirable et, si elle l'était, s'il était possible de la faire. Si cette harmonisation était désirable et possible il s'agissait de savoir aussi quelle serait la méthode de travail qu'il serait préférable d'employer pour y parvenir. On est là dans une alternative. Une possibilité serait de faire des changements assez hasardeux dans les diverses conventions internationales quand elles sont mises sur le tapis, l'autre serait d'étudier la possibilité d'établir une nouvelle convention couvrant toutes les branches du droit des transports.

REPONSES

Des réponses ont été reçues de l'Association Britannique du Droit Maritime, de l'Association Française du Droit Maritime, de l'Association d'Allemagne Fédérale, de l'Association de la République Démocratique Allemande, de l'Association Italienne du Droit Maritime, de l'Association du Droit Maritime des Etats-Unis, de l'Association Canadienne du Droit Maritime et de l'Association Suédoise du Droit Maritime (*).

(*) Les réponses des Associations Nationales ont été numérotées comme suit : « Documents » HR-3/III-73 - Etats-Unis, HR-4/III-73 - France, HR-5/III-73 - Belgique, HR-6/III-73 - DDR, HR-7/III-73 - Italie, HR-9/III-73 - DBR, HR-10/III-73 - Grande-Bretagne, HR-11/V-73 - Canada. On peut se procurer des exemplaires de ces documents sur simple demande au C.A.P./C.M.I. c/o Henry Voet-Génicot, 17, Borzestraat, B-2000 Antwerpen (Belgique.)

1. With respect to the *period of responsibility,* several associations favour a change so as to *extend* the coverage of the Hague Rules to cover the period from the taking in charge of the goods by the carrier until delivery (U.K., Canada, France, Italy, U.S., Sweden). However, the draft provisions of the UNCITRAL Working Group are criticized. The Maritime Law Association of the United States points out that one should not regulate functions other than the functions adopted by the carrier in his capacity as ocean carrier and the British Maritime Law Association wants to restrict the coverage to the port area. The definition of delivery is questioned by some associations and in particular the idea of « constructive delivery », that is that the carrier is deemed to be in charge of the goods when, in fact, he is not. The alternative to create a new international convention relating to liability of harbour companies is mentioned by the Association of the Federal Republic of Germany and by the Association of the German Democratic Republic.

Generally, one thinks that the carrier in case of *through transports* should remain under the mandatory liability for the whole transit, but, at the same time, it is pointed out that he should not be restricted from promising a transport to a certain, defined destination and to undertake subsequent on-carriage as a forwarder without accepting liability as carrier.

The Canadian Maritime Law Association (some of the members of the appointed Working Group) suggests that the contracting party's responsibility should end when he hands over the goods to a *specified* and *named* on-carrier.

2. With regard to the *technique* used in expressing the *basis of liability,* the Maritime Law Association of the United States, the British Maritime Law Association, the Association of the Federal Republic of Germany and the Association of the German Democratic Republic favour a « long list » of defences, the reason being that this has been established in case law and that there would be no gain in abandoning it. Some organizations favour a general formula (Italy and Sweden). The Association of the German Democratic Republic mentions the fact that the international conventions relating to transport by air, rail and road use a general formula but that this is sometimes *combined* with an enumeration (in CIM and CMR some contingencies cause a reversal of the burden of proof). The Canadian Maritime Law Association also indicates the possibility to *shorten* the list. The Italian Assocation thinks that a general formula must not make it unnecessary to spell out, as in the present Hague Rules, the obligations of the

1. En ce qui concerne *la durée de la responsabilité* diverses associations sont favorables à un changement de façon *à étendre* le champ d'application des Règles de La Haye pour couvrir la période allant de la prise en charge des marchandises par le transporteur jusqu'à leur livraison (Royaume-Uni, Canada, France, Italie, Etats-Unis, Suède). Cependant les dispositions projetées par le Groupe de Travail de la CNUDCI sont critiquées. L'Association du Droit Maritime des Etats-Unis fait remarquer que l'on ne doit pas réglementer d'autres fonctions que celles assumées par le transporteur en sa capacité de transporteur maritime et l'Association Britannique du Droit Maritime veut restreindre la couverture à la zone portuaire. La question de la définition de la livraison est posée par quelques associations et, en particulier, l'idée de « livraison constructive » qui est que le transporteur est considéré comme ayant la charge des marchandises quand, en fait, il ne l'a pas. L'alternative de créer une nouvelle convention internationale concernant la responsabilité des compagnies portuaires est mentionnée par l'Association d'Allemagne Fédérale et par l'Association de la République Démocratique Allemande.

On pense généralement que le transporteur, en cas de *transports de bout en bout,* devrait demeurer sous le régime de la responsabilité impérative pendant tout le transport mais au même moment il est fait remarquer qu'il ne devrait pas être empêché de promettre un transport pour une certaine destination définie et d'entreprendre le transport subséquent comme expéditeur sans accepter de responsabilité comme transporteur.

L'Association Canadienne du Droit Maritime (certains des membres du Groupe de Travail) suggère que la responsabilité de la partie contractante devrait finir quand elle remet les marchandises à un continuateur du transport *spécifié* et *nommé.*

2. En ce qui concerne la *technique* employée pour définir *la base de la responsabilité,* l'Association du Droit Maritime des Etats-Unis, l'Association Britannique du Droit Maritime, l'Association d'Allemagne Fédérale et celle de la R.D.A. préfèrent « une longue liste » d'exonérations, la raison étant que celle-ci a été établie pour des affaires contentieuses et qu'il n'y aurait rien à gagner en l'abandonnant. Certaines organisations penchent pour une formule générale (Italie) et Suède). L'Association de la République Démocratique Allemande mentionne le fait que les conventions internationales relatives au transport par air, rail et route emploient une formule générale mais que celle-ci est quelque fois *combinée* avec une énumération (dans la Convention Internationale de Transport de Marchandises par Route et dans celle de Transport par Chemin-de-fer, certaines contingences entraînent un renversement de la charge de la preuve). L'Association Canadienne du Droit Maritime mentionne également la possibilité de *raccourcir* la liste. L'Association Italienne pense qu'une formule générale ne doit pas faire qu'il ne soit pas nécessaire d'exprimer nettement, comme dans les présentes Règles de La Haye, les obligations du

carrier to make the vessel seaworthy etc. (art. 3 of the Hague Rules), since one must distinguish between the definition of an obligation on the one hand and the liability for non-performance and misperformance of the said obligation on the other hand.

The general and important question, if the *present risk allocation of The Hague Rules* between the carrier and the shipper should be retained, is answered differently. The Maritime Law Association of the United States, the British Maritime Law Association and the French Maritime Law Association favour, in principle, no change. The Maritime Law Association of the United States could, for the purpose of preserving the present balance, even conceive an abolishment of the defences for error in the navigation and the management of the ship but counterbalanced by reduced limitation amounts.

The opinion as to the basic question whether the present risk allocation should be preserved automatically gives the answer to the questions with regard to error in navigation.

The Maritime Law Association of the United States, the British Maritime Law Association and the French Maritime Law Association want no change, while the Canadian Maritime Law Association, the Association of the Federal Republic of Germany, the Association of the German Democratic Republic and the Italian Maritime Law Association favour the suggestion by the UNCITRAL Working Group *to delete the defence*. The same opinion is expressed by the Swedish Maritime Law Association. The French Maritime Law Association mentions the possibility to *distinguish* between *error in the navigation* on the one hand and *error in the management of the ship* on the other hand.

With respect to the *fire defence* the answer seems, in principle, to be the same as for error in the navigation and management of the ship. But the Association of the Federal Republic of Germany, while suggesting that the defence of error in the navigation and the management of the ship be deleted, at the same time suggests that the defence of fire be maintained. A « compromise » manipulating with the burden of proof is not generally favoured, since this would interfere with the general rules relating to burden of proof. However, the British Maritime Law Association points out that in many cases (estimated at 45 %) fire at sea is caused by some defect in the cargo. This being so, and taking into account the difficulties for the shipowner to disprove negligence when the cargo has been destroyed, it may be equitable that the burden of proof be reversed and placed upon the claimant.

transporteur qui sont de faire que le navire soit navigable, etc... (art. 3 des Règles de La Haye), puisque l'on doit distinguer entre la définition d'une obligation d'une part, et la responsabilité pour non-accomplissement ou mauvais accomplissement de la dite obligation d'autre part.

A la question générale et importante de savoir si *la présente répartition des risques des Règles de La Haye* entre le transporteur et le chargeur doit être retenue, il est différemment répondu. L'Association du Droit Maritime des Etats-Unis, l'Association Britannique du Droit Maritime et l'Association Française du Droit Maritime ne sont pas en principe, favorables à un changement. L'Association du Droit Maritime des Etats-Unis pourrait, dans le but de préserver le présent équilibre, concevoir même une abolition des exonérations pour erreur dans la navigation et l'exploitation du navire mais cette abolition serait contre-balancée par une réduction des montants de la limitation.

L'opinion en ce qui concerne la question de base de savoir si la présente répartition des risques devrait être automatiquement préservée donne la réponse aux questions en ce qui concerne l'erreur de navigation.

L'Association du Droit Maritime des Etats-Unis, l'Association Britannique du Droit Maritime et l'Association Française du Droit Maritime ne veulent pas de changement, cependant que l'Association Canadienne du Droit Maritime, l'Association de la République d'Allemagne Fédérale, l'Association de la République Démocratique Allemande et l'Association Italienne du Droit Maritime sont en faveur de la suggestion du Groupe de Travail de la CNUDCI qui est de *supprimer l'exonération.* La même opinion est exprimée par l'Association Suédoise du Droit Maritime. L'Association Française du Droit Maritime fait mention de la possibilité *de distinguer* entre *erreur de navigation* d'une part et *erreur dans l'exploitation du navire,* d'autre part.

En ce qui concerne *l'exonération pour incendie,* la réponse paraît, en principe, être la même que l'erreur de navigation et d'exploitation du navire. Mais l'Association de la République Fédérale d'Allemagne, alors qu'elle suggère que l'exonération pour erreur de navigation et d'exploitation du navire soit supprimée, suggère en même temps que l'exonération pour incendie soit maintenue. Un « compromis » jouant sur la charge de la preuve n'est généralement pas apprécié, puisque ceci interférerait avec les règles générales concernant la charge de la preuve. Cependant, l'Association Britannique du Droit Maritime fait remarquer que dans bien des cas (estimés à 45 %) le feu en mer est dû à quelque défaut de la cargaison. Ceci étant et, si l'on considère les difficultés rencontrées par l'armateur pour réfuter la négligence quand la cargaison a été détruite, il peut être équitable que la charge de la preuve soit renversée et repose sur le demandeur.

The rule relating to the burden of proof with respect to she shipper's *contributory negligence* — which in the UNCITRAL Working Group proposal is placed upon the carrier — is not considered to make much difference compared with the situation existing already in most countries.

3. With respect to the problem of *deck cargo* most replies favour the idea to have the liability for such cargo covered by the Hague Rules. This does not solve the problem of liability for breach of contract which may arise when the carrier stows the cargo on deck in spite of contrary instructions, but it may be that the mere fact that he is responsible for deck cargo in the same manner as for cargo stowed under deck will increase his liberty to stow on deck.

4. Some replies question whether it is necessary, or even wise, to include provisions relating to *jurisdiction, arrest* and *arbitration*. While the Maritime Law Association of the United States stresses « that the first and major consideration must be protection of the right of cargo interests to get jurisdiction and security », the Association of the Federal Republic of Germany, the Association of the German Democratic Republic and the Italian Maritime Law Association want to reduce the options available for the claimant. The Canadian Maritime Law Association is opposed to arbitration provisions in The Hague Rules.

With regard to arrest of only the carrying vessel — which is suggested by the UNCITRAL Working Group — this should be understood as a counter-balance to the many options accorded to the claimant. However, most associations think that this may be difficult to accept, since it means a deviation from the general principle that all assets, wherever found, could be arrested.

5. With regard to the *method of work*, which is presently the dominating issue and of great concern for CMI, all associations acknowledge the need for a harmonization of the various branches of the law of carriage. However, the difficulties are underlined and it is generally thought that the elaboration of a new convention covering transport of goods generally will take considerable time. Some associations (the Association of the Federal Republic of Germany, Sweden) favour the method to establish *an entirely new convention replacing the present international conventions*, while others prefer the method to make « harmonizing » changes within the different conventions (the Association of the German Democratic Republic). The Maritime Law Association of the United States thinks that « the TCM convention method » is the best route at the present time.

La règle relative à la charge de la preuve en ce qui concerne *l'imprudence du chargeur* — qui, dans la proposition du Groupe de Travail de la CNUDCI repose sur le transporteur — n'est pas considérée faire beaucoup de différence comparativement à la situation existant déjà dans la plupart des pays.

3. En ce qui concerne le problème de la *cargaison en pontée,* la plupart des réponses sont favorables à l'idée d'avoir la responsabilité d'une telle cargaison couverte par les Règles de La Haye. Ceci ne résoud pas le problème de la responsabilité pour rupture de contrat qui peut surgir quand le transporteur place la cargaison en pontée, en dépit d'instructions contraires, mais il peut se faire que le simple fait qu'il soit responsable de la cargaison en pontée de la même façon que de la cargaison en cale augmente sa liberté d'arrimer en pontée.

4. Quelques réponses posent la question de savoir s'il est nécessaire et même sage d'incorporer des dispositions relatives à la *juridiction* à la *saisie* et à l'*arbitrage*. Alors que l'Association du Droit Maritime des Etats-Unis fait valoir que « la première et primordiale considération doit être la protection du droit des intérêts de la cargaison d'obtenir justice et sécurité », l'Association de la République Fédérale d'Allemagne, l'Association de la République Démocratique Allemande et l'Association Italienne du Droit Maritime veulent réduire les options qui sont à la disposition du demandeur.

En ce qui concerne la saisie du navire transporteur exclusivement — et qui est suggérée par le Groupe de Travail de la CNUDCI — cela devrait être compris comme un moyen de contre-balancer les nombreuses options accordées au réclamant. Cependant la plupart des associations pensent que cela peut être difficile à accepter puisque cela constitue une dérogation au principe général que tous les biens, où qu'ils se trouvent, peuvent être saisis.

5. Pour ce qui concerne *la méthode de travail* qui est actuellement la question dominante et de grande importance pour le CMI, toutes les associations reconnaissent qu'il est nécessaire d'harmoniser les diverses branches du droit des transports. Cependant les difficultés sont notoires et l'on pense généralement que l'élaboration d'une nouvelle convention couvrant le transport des marchandises sous toutes ses formes prendra un temps considérable. Certaines associations (l'Association de la République d'Allemagne Fédérale, celle de Suède) sont pour l'établissement *d'une convention entièrement nouvelle à la place des conventions internationales actuelles,* pendant que d'autres préfèrent faire des changements qui harmoniseraient les différentes conventions (l'Association de la République Démocratique Allemande). L'Association du Droit Maritime des Etats-Unis pense que l'esprit dans lequel est fait la Convention de Transport Combiné de Marchandises est la meilleure route à suivre pour le moment.

OTHER ISSUES REGARDING THE REVISION OF THE HAGUE RULES

The UNCITRAL Working Group on International Shipping Legislation discussed at its New York meeting 5 - 16 February, 1973, the following subjects :

— unit and/or per kilo limitation;
— transhipment;
— deviation;
— period of prescription (time bar).

1. UNIT LIMITATION

Here, the discussion concerned the question whether, instead of the combined unit per kilo limitation of the 1968 Hague/Visby Protocol, a pure per kilo limitation should be chosen. This was strongly promoted by Norway and Nigeria, while a majority of countries favoured the *combined* unit and per kilo limitation. In discussing this, Japan suggested a deletion or, alternatively, an amendment of the so-called « container formula ». The possibility to apply the limitation amount to the units *within* the container should not apply to « shipper packed » containers, since the carrier had no opportunity of checking the contents. Norway wanted an amendment to make sure that the *container itself* should be considered one separate unit. This met with general approval.

There were *indications* by some delegations that the *amounts* were too low, but it was considered necessary to leave this matter to be decided by a forthcoming diplomatic conference.

Another important matter was extensively discussed, namely what circumstances should be permitted to *break the limitation* (it was pointed out that this problem was connected with the size of the limitation amount — the higher amount, the more justifiable to make the limit « unbreakable »). A majority of delegations favoured *another* solution than the traditional as embodied in the 1968 Hague/Visby Protocol. Reference was made to i.a. CIM (the European railway convention) and CMR (the road convention), where *the carrier* loses his right to limit on account of acts or omissions of a certain qualified nature by his *servants*. This makes a great difference in practice compared with the 1968 Hague/Visby Protocol, where only acts or omissions *by the carrier himself* break the limit (cf. the similar principle of the 1957 Brussels convention on the limitation of the liability of seagoing ships). Norway and, in particular, CMI stressed the importance to get a limit which *one could rely upon* and pointed out that the

AUTRES QUESTIONS CONCERNANT LA REVISION DES REGLES DE LA HAYE

Le Groupe de Travail de la CNUDCI sur la Législation Maritime Internationale a, lors de sa réunion tenue à New York du 5 au 16 février 1973, discuté des sujets suivants :

— limitation à l'unité et/ou par kilo
— transbordement
— déroutement
— délai de prescription (time bar).

1. UNITE DE LIMITATION

Ici, la discussion porta sur la question de savoir si au lieu de la double limitation à l'unité ou au kilo du Protocole de La Haye et de Visby de 1968, une simple limitation par kilo devait être choisie. Ceci fut fortement prôné par la Norvège et le Nigéria pendant qu'une majorité de pays était favorable à la *double* limitation à l'unité ou au kilo. En discutant cela, le Japon suggéra la suppression ou bien un amendement à ce qui est appelé « la formule du conteneur ». La possibilité d'appliquer la limitation aux colis *à l'intérieur* du conteneur ne peut pas l'être pour « les conteneurs chargés par les expéditeurs », puisque le transporteur n'a pas la possibilité de contrôler leur contenu. La Norvège voulait un amendement apportant la certitude que *le conteneur lui-même* serait considéré comme une unité séparée. Cela recueillit une approbation générale.

Certaines délégations *indiquèrent* que les *montants* étaient trop bas, mais il fut jugé nécessaire de laisser décider de ce point par une prochaine conférence diplomatique.

Un autre sujet important fut longuement discuté, celui de savoir en quelles circonstances il pourrait être permis de *faire échec à la limitation.* (Il fut fait remarquer que ce problème était lié à l'importance du montant de la limitation : plus le montant est élevé, plus il est justifié de faire que la limitation soit « intransgressable »). Une majorité de délégations préférait à la solution traditionnelle incorporée au Protocle de La Haye et de Visby de 1968, *une autre* solution. on fit référence entre autres à la CIM (La Convention des Chemins de fer Européens) et à la CMR (La Convention de la Route) où *le transporteur* perd son droit à la limitation du fait d'actes ou d'omissions d'une certaine nature déterminée venant de ses *préposés.* Ceci fait une grande différence en pratique comparativement au Protocole de La Haye et de Visby de 1968 où, seuls les actes ou omissions *du transporteur lui-même* annulent la limitation. (Voir le principe similaire de la Convention de Bruxelles de 1957 sur la limitation de responsabilité des navires de mer). La Norvège et le CMI en particulier insistèrent sur l'importance d'avoir une limitation *sur laquelle on puisse compter* et firent remarquer que l'insécurité engendrée, en permettant que la limitation soit transgressée du fait d'actes ou

insecurity brought about by permitting the limitation to be broken by acts or omissions by the carrier's *servants* was clearly unsatisfactory. Furthermore, the modern trend seemed to go in the direction of « unbreakable » limits (cf. the 1971 Guatemala Protocol to the 1929 Warsaw convention which, however, only regards damage to *passengers*).

The qualification of the *nature* of such acts or omissions which should be permitted to break the limit was extensively discussed. (This matter, in my view, has much less practical importance then the distinction between acts or omissions by the carrier himself on the one hand and acts or omissions by the carrier's *servants* on the other hand.)

The majority of delegations, however, favoured the more stringent words « wilful misconduct » and did not want to refer to « gross negligence » or similar expressions.

The meaning of « within the scope of their employment » was discussed and, in particular, the question whether *intentional* acts, such as theft, could at all be covered by this expression. Servants were not employed to steal or to intentionally damage the goods ! However, the employment could give them the opportunity to do *malicious* things, which « outsiders », having no access to the goods, could not do. The most practical situation would be theft in cargo terminals in the initial or terminal stages of the transport. It appeared from the discussion that this problem was solved differently in the different countries.

CMI, ICC, ICS and IUMI submitted the following statement : « The organizations (above mentioned) respectfully submit that the wording of the 1968 Protocol to The Hague Rules be retained. We urge that the following three major reasons be considered :

1. The words « within the scope of their employment » will, as pointed out by the United States delegation, give rise to serious difficulties of interpretation in individual cases, thus giving rise to much litigation.

2. Disputes will arise as to what has actually happened in cases of non-delivery of goods. The goods might have been shortshipped, discharged at the wrong port, become mixed up with other goods, mislaid or stolen. If the goods were stolen, there would be disputes as to where they were stolen and by whom. It might be determinative of the limitation of the carrier's liability whether the goods were stolen on board or ashore by, for instance, crew members, stevedore employees, outsiders, etc.

d'omissions *des préposés* du transporteur, n'était nettement pas satisfaisante. De plus, la tendance moderne paraît aller en direction de limitations « intransgressables ». (Voir le Protocole de Guatemala de 1971 à la Convention de Varsovie de 1929 qui, cependant, ne concerne que les dommages aux *passagers)*.

La détermination de *la nature* des actes ou des omissions qui seraient permis pour supprimer la limitation fut longuement discutée. (Cette question, à mon sens, a beaucoup moins d'importance pratique que la distinction entre les actes ou les omissions du transporteur lui-même d'une part et les actes ou les omissions des *préposés* du transporteur d'autre part).

La majorité des délégations, cependant, préférait les mots plus rigoureux de « faute intentionnelle » et ne voulait pas employer ceux de « grande négligence » ou expressions similaires.

La signification de « dans le cadre de leurs activités » fut discutée et, en particulier, la question de savoir si des actes *intentionnels* tels que le vol, pourraient être tous couverts par cette expression; les préposés n'étant évidemment pas employés pour voler ou pour endommager intentionnellement les marchandises ! Cependant, leur activité professionnelle peut leur procurer *l'opportunité* de faire des choses *malveillantes* que les « gens de l'extérieur » qui n'ont pas accès aux marchandises ne pourraient pas faire. Le cas le plus fréquent serait celui du vol dans les gares de marchandises, à la phase initiale ou à celle terminale du transport. La discussion fit apparaître que ce problème était résolu différemment suivant les pays.

Le Comité Maritime International, la Chambre de Commerce Internationale, l'International Chamber of Shipping et l'Institut International des Assureurs Maritimes déposèrent la communication suivante :

« Les organismes (ci-dessus mentionnés) émettent respectueusement l'avis que la rédaction du Protocole de 1968 aux Règles de La Haye soit tenue en attente. Nous pressons pour que les trois sujets suivants, d'importance majeure, soient examinés :

1. Les mots « dans le cadre de leurs fonctions » feront naître, comme l'a fait remarquer la délégation des Etats-Unis, de sérieuses difficultés d'interprétation dans des cas individuels, engendrant ainsi beaucoup de litiges.

2. Des contestations naîtront pour savoir ce qui est vraiment arrivé dans les cas de non-livraison de marchandises. Il pourrait y avoir des manquants, elles pourraient avoir été déchargées à un mauvais port, avoir été mélangées à d'autres, égarées ou volées. Si les marchandises étaient volées, il y aurait des controverses pour savoir où elles ont été volées et par qui. Il serait capital, pour déterminer la limitation de responsabilité du transporteur, de savoir si les marchandises furent volées à bord ou à quai par des membres de l'équipage, par des préposés des entrepreneurs de manutention ou par des gens de l'extérieur, par exemple.

3. The wording suggested by the Working Group goes against the general modern trend to make limits unbreakable. Compare in particular the 1971 Guatemala Protocol to the Warsaw convention. Breakable limits cause uncertainty as to the insurance cover needed by the carrier. Insurance of large cargoes (e.g. 2,000-container ships) with high values may involve such concentrations of risks as to require very high insurance premiums, which, through the freight, must necessarily be borne in the last analysis by the consignee. Even though in practice the limits might not be broken often, the risk that the limitation might be broken would force carriers to insure themselves against such risks, at high premium levels. »

However, the majority of delegations approved of the following drafting of the provision relating to *limitation :*

« *Article C*

1. The liability of the carrier for loss of or damage to the goods shall be limited to an amount equivalent to ( ) francs per package or other shipping unit or ( ) francs per kilo of gross weight of the goods lost or damaged, whichever is the higher.

For the purpose of calculating which amount is the higher in accordance with paragraph 1, the following rules shall apply :

Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading as packed in such article of transport shall be deemed packages or shipping units.

Except as aforesaid the goods in such article of transport shall be deemed one shipping unit.

In cases where the article of transport itself has been lost or damaged, that article of transport shall, when not owned or otherwise supplied by the carrier, be considered one separate shipping unit.

3. A franc means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900.

4. The amount referred to in paragraph 1 of this article shall be converted into the national currency of the State of the court or arbitration tribunal seized of the case on the basis of the official value of that currency by reference to the unit defined in paragraph 3 of this article on the date of the judgment or arbitration award. If there is no such official value, the competent authority of the State concerned shall determine what shall be considered as the official value for the purpose of this Convention.

(5. By agreement between the carrier and the shipper a limit of liability exceeding that provided for in paragraph 1 may be fixed).

3. La rédaction suggérée par le Groupe de Travail va à l'encontre de la tendance générale moderne qui est de faire des limitations intransgressables. Voir en particulier le Protocole de Guatemala de 1971 à la Convention de Varsovie. Des limitations transgressables engendrent de l'incertitude pour la couverture d'assurance nécessaire au transporteur. L'assurance de grosses cargaisons (par exemple d'un porte-conteneurs de 2.000 unités) avec de grandes valeurs peut comporter de telles concentrations de risques qu'elle nécessite de très fortes primes d'assurance qui, au travers du fret, doivent nécessairement, en dernière analyse, être supportées par le destinataire.

Même si, en pratique, les limitations ne peuvent pas être souvent dépassées, le risque que la limitation puisse être transgressée forcerait les transporteurs à s'assurer contre de tels risques, à de hauts niveaux de prime. »

Cependant, la majorité des délégations a approuvé le projet suivant de rédaction de la clause concernant la *limitation :*

« *Article C*

1. La responsabilité du transporteur pour perte ou avarie aux marchandises sera limitée à une somme équivalente à ( ) francs par colis ou autre unité de chargement ou à ( ) francs par kilo de poids brut des marchandises perdues ou avariées, la limitation la plus élevée étant applicable.

2. Pour calculer quel est le montant le plus élevé d'après le paragraphe 1, on appliquera les règles suivantes :

Quand un conteneur, une palette ou un engin similaire est utilisé pour grouper les marchandises, le colis ou les autres unités énumérées dans le connaissement comme étant inclus dans un tel engin seront considérés comme étant des colis ou des unités.

En dehors du cas prévu ci-dessus, les marchandises à l'intérieur de cet engin seront considérées comme une unité.

Dans les cas où l'engin lui-même a été perdu ou endommagé, cet engin sera, quand il n'est pas la propriété du transporteur ou qu'il n'a pas été fourni par lui, considéré comme une unité distincte.

3. Un franc signifie une unité consistant en 65,5 milligrammes d'or au titre de 900 millièmes.

4. Le montant auquel il est fait référence au paragraphe 1 de cet article sera converti dans la monnaie nationale du Pays de la cour ou du tribunal arbitral saisi du cas, sur la base de la valeur officielle de cette monnaie en se référant à l'unité définie au paragraphe 3 du présent article, à la date du jugement ou à celle de la sentence arbitrale. S'il n'y a pas de telle valeur officielle, l'autorité compétente du Pays concerné déterminera ce qui sera considéré comme valeur officielle au regard de la présente Convention.

(5. Une limitation de responsabilité dépassant celle stipulée au paragraphe 1 peut être fixée par accord entre le transporteur et l'expéditeur).

Article D

1. The defences and limits of liability provided for in this Convention shall apply in any action against the carrier in respect of loss of, damage (or delay) to the goods covered by a contract of carriage whether the action be founded in contract or in tort.

2. If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

3. The aggregate of the amounts recoverable from the carrier and any persons referred to in the preceding paragraph, shall not exceed the limits of liability provided for in this Convention.

Article E

The carrier shall not be entitled to the benefit of the limitation of liability provided for in paragraph 1 of this article if it is proved that the damage was caused by wilful misconduct of the carrier, or of any of his servants or agents acting within the scope of their employment. Nor shall any of the servants or agents of the carrier be entitled to the benefit of such limitation of liability with respect to damage caused by wilful misconduct on his part. »

(Note : Passages within brackets have not been generally agreed upon.)

2. TRANSHIPMENT

There seemed to be a general desire that the carrier, even in cases of transhipment, should remain responsible as carrier during the entire transit. This was energetically emphasized by Australia, France and Nigeria. However, there was much disagreement how such a result could be reached by mandatory legislation. CMI pointed out that any such rule could easily be circumvented by simply avoiding *one* contract covered by one *through bill of lading* and, instead, by making *separate* contracts covered by *separate* bills of lading, possibly linked together by a « forwarder type » document covering the whole transit. Hence, a mandatory rule as envisaged would not only fail to produce the desired result but might as well give rise to commercially unwarranted procedures and excessive documentation. On the other hand, one might very well try to solve the adverse effects for the cargo-owner

Article D

1. Les exonérations et limitations de responsabilité stipulées dans cette Convention s'appliqueront à toute action contre le transporteur pour perte, avarie (ou retard) subis par les marchandises couvertes par un contrat de transport, que l'action soit fondée sur le contrat ou qu'elle le soit sur le préjudice.

2. Si une telle action est couverte à l'encontre d'un préposé ou d'un agent du transporteur et si ce préposé ou cet agent prouve qu'il a agi dans le cadre de ses activités professionnelles, il aura le droit de se prévaloir des exonérations et limitations de responsabilité que le transporteur a le droit d'invoquer sous la présente Convention.

3. Le total des montants recouvrables du transporteur et de toutes les personnes auxquelles il est fait référence dans le paragraphe précédent, ne dépassera pas les limitations de responsabilité stipulées à cette Convention.

Article E

Le transporteur n'aura pas le droit de bénéficier de la limitation de responsabilité stipulée au paragraphe 1 de cet article s'il est prouvé que le dommage a été causé par faute intentionnelle du transporteur ou de ses préposés ou agents agissant dans le cadre de leurs activités professionnelles. De même, aucun préposé ou agent du transporteur ne sera admis au bénéfice d'une telle limitation de responsabilité en ce qui concerne les dommages causés par faute intentionnelle de sa part ».

(Note : Les passages entre parenthèses n'ont généralement pas été agréés).

2. TRANSBORDEMENT

Il semblait y avoir un désir général que le transporteur, même en cas de transbordement, demeure responsable comme transporteur pendant tout le voyage. Ceci fut énergiquement souligné par l'Australie, la France et le Nigéria. Cependant, il y avait beaucoup de désaccord sur le point de savoir comment un tel résultat pourrait être obtenu par une législation impérative. Le CMI fit remarquer qu'une telle règle pourrait être facilement tournée en évitant simplement de faire *un seul* contrat couvert par *un connaissement direct* mais de faire, au lieu de cela, des contrats séparés couverts par des connaissements *séparés* qu'il serait possible de lier ensemble par un document analogue à celui émis par le commissionnaire de transport « forwarder type » et couvrant le voyage en entier. De là, une règle impérative, comme il est envisagé, non seulement manquerait de produire le résultat désiré mais pourrait aussi bien donner naissance à des procédures commerciales sans garantie et à une émission excessive de documents. D'un autre côté, on pourrait très bien essayer de résoudre, pour le propriétaire des marchandises, les difficultés provenant

following from the carrier's *option* to tranship on the basis of *standard clauses* in the printed text of the bill of lading. In such cases, one could stipulate that the carrier, having exercised such an option to tranship, should remain responsible.

Another matter extensively discussed concerned the position of the non-contracting, so-called « actual », carrier. This carrier — ordinarily a sub-contractor to the contracting carrier — did not stand in a direct contractual relationship to the cargo-owner. Nevertheless, it was felt that he should be responsible for the carriage performed by him according to the provisions of the convention, which might differ from his own bill of lading condition. (This solution has been inspired by the rules relating to successive carriage in air, road and railway law.)

Agreement was, in principle, reached on the following text :

« *Article F*

Where the carrier has exercised an option provided for in the contract of carriage to entrust the performance of the carriage or a part thereof to an actual carrier, the carrier shall nevertheless remain responsible for the entire carriage according to the provisions of this Convention.

2. The actual carrier also shall be responsible for the carriage performed by him according to the provisions of this Convention.

3. The aggregate of the amounts recoverable from the carrier and the actual carrier shall not exceed the limits provided for in this Convention.

4. Nothing in this article shall prejudice any right of recourse as between the carrier and the actual carrier. »

However, the following text, intended to allow a traditional through bill of lading whereby the carrier only accepts liability as carrier for the transport performed by him, was *not approved* but referred to further debate in the next Session :

(« *Article G*

1. Where the contract of carriage provides that a *designated part* of the carriage covered by the contract shall be performed by a person other than the carrier (through bill of lading), the responsibility of the carrier and of the actual carrier shall be determined in accordance with the provisions of article F.

2. However, the carrier may exonerate himself from liability for loss of, damage (or delay) to the goods caused by events occurring while the goods are in charge of the actual carrier provided that the burden of proving that any such loss, damage (or delay) was so caused, shall rest upon the carrier. »)

de *l'option* qu'a le transporteur de transborder sur la base des *clauses standard* du texte imprimé du connaissement. Dans de tels cas, on pourrait stipuler que le transporteur qui a exercé une telle option de transborder doit rester responsable.

Une autre question largement discutée concernait la position du non-contractant, appelé « transporteur de fait ». Ce transporteur — ordinairement un sous-contractant du transporteur contractant — ne se trouvait pas dans une relation contractuelle directe avec le propriétaire des marchandises. Néanmoins, il fut considéré qu'il devrait être responsable pour le transport fait par lui suivant les clauses de la convention qui pourraient être différentes de celles de son propre connaissement. (Cette solution a été inspirée par les règles de droit relatives à un transport successivement fait par air, route et chemin de fer).

L'accord fut, en principe, obtenu sur le texte suivant :

« *Article F*

1. Quand le transporteur a exercé l'option stipulée dans le contrat de transport de confier l'accomplissement du transport ou d'une partie de celui-ci à un transporteur de fait, le transporteur demeurera néanmoins responsable de tout le transport suivant les dispositions de la présente Convention.

2. Le transporteur de fait sera aussi responsable du transport accompli par lui suivant les dispositions de la présente Convention.

3. Le total des montants recouvrables du transporteur et du transporteur de fait ne dépassera pas les limitations stipulées dans la présente Convention.

4. Rien dans cet article ne portera préjudice à tout droit de recours existant entre le transporteur et le transporteur de fait ».

Cependant, le texte suivant, fait avec l'intention d'accorder un connaissement direct usuel par lequel le transporteur accepte seulement la responsabilité en tant que transporteur pour le transport fait par lui, *n'a pas été approuvé* mais renvoyé à un débat ultérieur lors de la prochaine Session :

(« *Article G*

1. Quand le contrat de transport dispose *qu'une partie désignée* du transport couvert par le contrat sera faite par une personne autre que le transporteur (connaissement direct) la responsabilité du transporteur et du transporteur de fait sera déterminée suivant les dispositions de l'article F.

2. Cependant, le transporteur peut s'exonérer lui-même de la responsabilité pour perte, avarie ou retard causés par des événements se produisant pendant que les marchandises sont à la charge du transporteur de fait à condition qu'il prouve qu'une telle perte, dommage (ou retard) sont ainsi advenus »).

3. DEVIATION

The concept of « deviation » was discussed and difficulties emerged to draft a satisfactory provision covering not only « geographical » but all kinds of « contractual » deviation as well. Some delegations felt that this problem should be studied in connection with the problem of responsibility for *delay* (Australia, France, Nigeria), while some delegations thought a provision dealing with deviation unnecessary if the new convention should contain a provision expressing the carrier's liability by a *general formula* instead of a « long list » of defences (Norway, Tanzania, U.S.A., U.K., Hungary, Japan). (In this context it should be noted that the international conventions relating to carriage by air, road and rail do *not* contain any provisions relating to deviation.) Some delegations stressed that, in any event, the carrier should have the burden of proving that the deviation was reasonable under the circumstances (Nigeria, Belgium). The following text was agreed :

« The carrier shall not be liable for loss or damage resulting from measures to save life and from reasonable measures to save property at sea. »

4. PERIOD OF PRESCRIPTION (TIME BAR)

The following views were expressed with regard to the different issues :

1. *The length of the period*

Although one year might be too short in individual cases, in view of difficulties to gather all necessary evidence, a longer period might be unwarranted for other reasons. CMI pointed out that, in cases of through transports involving transhipment by other means of conveyance (e.g. road transport), a longer period of limitation in the convention relating to carriage by sea might effectively bar recourse actions from the sea carrier against his sub-contractors. This, in turn, might reduce the number of cases where the sea-carrier accepts responsibility for the whole transit (cf. 2 above !). IUMI and ICC feared that a longer period might cause settlement negotiations to drag out and submitted a paper proposing that the one year period be retained.

No decision was taken on this specific point by the Working Group.

3. DEROUTEMENT

Le concept de « déroutement » fut discuté et des difficultés surgirent pour esquisser une disposition satisfaisante couvrant non seulement un déroutement « géographique » mais aussi bien toute espèce de déroutement « contractuel ». Certaines délégations pensèrent que ce problème devrait être étudié en liaison avec le problème de la responsabilité pour *retard* (Australie, France, Nigéria), pendant que certaines délégations pensaient qu'une clause traitant du déroutement n'était pas nécessaire si la nouvelle convention contenait une clause exprimant la responsabilité du transporteur par une *formule générale*, au lieu « d'une longue liste » d'exonérations (Norvège, Tanzanie, E.U., R.U., Hongrie, Japon). (Dans ce contexte, il conviendrait de remarquer que les conventions internationales relatives au transport par air, route et chemin de fer ne contiennent pas de clauses concernant le déroutement). Des délégations firent valoir que, de toute façon, le transporteur devrait avoir la charge de prouver que le déroutement était raisonnable étant donné les circonstances (Nigéria, Belgique). Le texte suivant fut adopté :

« Le transporteur ne sera pas responsable de pertes ou avaries résultant de mesures prises pour sauver des vies ni des mesures raisonnables prises pour sauver des biens en mer ».

4. PERIODE DE LIMITATION - PRESCRIPTION

Les points de vue suivants furent exprimés en ce qui concerne les différents dénouements :

1. *Délai de prescription*

Bien qu'une année puisse être courte dans les cas particuliers, par suite de difficultés pour réunir toutes les preuves nécessaires, une plus longue période ne pourrait pas être garantie pour d'autres raisons. Le CMI fit remarquer que, dans les cas de transports de bout en bout, incluant un transbordement par d'autres moyens de transport (par exemple, le transport routier) une plus longue période de prescription dans la convention de transport par mer pouvait effectivement empêcher les actions de recours du transporteur maritime contre ses sous-contractants. Ceci, en retour, pourrait réduire le nombre des cas où le transporteur par mer accepte la responsabilité de tout le transport. (Voir 2, ci-dessus). L'Union Internationale d'Assurance Maritime et la Chambre de Commerce Internationale craignirent qu'une plus longue période puisse faire traîner les négociations de règlement et déposèrent une note proposant qu'une période d'un an soit retenue.

Aucune décision ne fut prise par le Groupe de Travail sur ce point spécifique.

2. *The time when the period starts to run*

The traditional rule that, in case of non-delivery, the period starts to run from « the date when the goods should have been delivered » (art. 3, rule 6, of the 1924 Brussels convention) was considered diffuse and unsatisfactory. Furthermore, it was felt that one should distinguish between *partial loss or damage and delay* on the one hand and *other cases* on the other hand. The text agreed to is similar to the text of CIM and CMR (arts. 46 and 32 respectively).

3. *The prolongation of the period*

The principles of the 1968 Hague/Visby Protocol to the effect that the period of limitation may be *extended* by an agreement between the parties after the cause of action has arisen and that *actions for indemnity against third persons* may be brought even after the expiry of the period of the convention (minimum a further ninety days) were accepted. However, a majority of delegations considered that an agreement to extend the period should be *in writing*.

Special provisions to prolong the period in cases of « wilful misconduct » on the part of the carrier were felt unnecessary. (Such provisions exist in CIM and CMR, arts. 46.1 (c) and 32.1 respectively !).

The question whether a written claim should *suspend* the running of the period — which is the principle of CIM and CMR (arts. 46.3 and 32.2 respectively) — was extensively discussed. CMI pointed out that such suspension rules brought about considerable uncertainty in a field of law where certainty was particularly needed in order to prevent that a party by mistake lose his right of action. Discussions might arise as to whether a written claim has been filed in due course, or when it has been filed, whether it has been clearly rejected or not and when, etc. A majority of delegations shared this view.

Norway suggested that the period of limitation should also *protect the shipper* against actions from the carrier but this was not approved by the Working Group.

The French delegation desired a provision to make sure that actions instituted before all competent tribunals should interrupt the period of limitation, while some delegations doubted that such a provision was necessary. It was decided to mention the suggestion in the official report and to refer it for further consideration in a forthcoming session.

The following text was agreed :

2. *Moment où la période commence à courir*

La règle traditionnelle qui est qu'en cas de non-livraison, la période commence à courir à partir de « la date où les marchandises auraient dû être livrées » (art. 3, règle 6, de la Convention de Bruxelles de 1924) fut jugée confuse et ne pas être satisfaisante. De plus, on eut le sentiment que l'on devrait faire la distinction entre *perte partielle ou avarie et retard* d'un côté, et les *autres cas* d'un autre côté. Le texte convenu est similaire au texte de la CIM et à celui de la CMR (articles 46 et 32 respectivement).

3. *La prolongation de la période*

Les principes du Protocole de La Haye et de Visby de 1968 portant que la période de limitation peut être *étendue* par un accord entre les parties après que la cause de l'action se soit produite et que des *actions pour indemnité à l'encontre de tierces personnes* aient été ouvertes, même après expiration de la période de la convention (minimum quatre-vingt-dix jours en plus), furent acceptés. Cependant une majorité de délégations considéra qu'un accord pour étendre la période devrait être mis *par écrit*.

Des dispositions spéciales pour prolonger la période dans les cas de faute intentionnelle de la part du transporteur ne furent pas jugées nécessaires. (De telles clauses existent dans la CIM et la CMR, arts. 46 I (c) et 32. I, respectivement).

La question de savoir si une réclamation par écrit *suspendrait* le cours de la période — ce qui est le principe de la CIM et de la CMR (Arts. 46.3 et 32.2, respectivement) — fut longuement discutée. Le CMI fit remarquer que de telles règles suspensives apportaient une incertitude considérable dans un domaine du droit où la certitude était particulièrement nécessaire pour empêcher qu'une partie perde par faute son droit d'intenter une action. Des discussions s'élèveraient sur le point de savoir si une revendication par écrit a été faite en temps, ou quand elle a été faite, si elle a été clairement rejetée ou non et quand, etc... Une majorité de délégations partagea ce point de vue.

La Norvège suggéra que la période de limitation devrait aussi *protéger l'expéditeur* contre les actions intentées par le transporteur mais cela ne fut pas approuvé par le Groupe de Travail.

La délégation française désirait une clause qui aurait assuré que les actions intentées devant tous tribunaux compétents interrompraient la période de limitation, pendant que certaines délégations doutaient qu'une telle clause soit nécessaire. Il fut décidé de faire mention de la suggestion dans le rapport officiel et de la renvoyer, pour plus ample considération, à une prochaine session.

Le texte suivant fut adopté :

« *Limitation of action*

1. The carrier shall be discharged from all liability whatsoever relating to carriage under this Convention unless legal or arbitral proceedings are initiated within (one year) (two years).

(a) in the case of partial loss of or damage to the goods, or delay, from the last day on which the carrier has delivered any of the goods covered by the contract;

(b) in all other cases, from the (ninetieth) day after the time the carrier has taken over the goods or, if he has not done so, the time the contract was made.

2. The day on which the period of limitation begins to run shall not be included in the period.

3. The period of limitation may be extended by a declaration of the carrier or by agreement of the parties after the cause of action has arisen. The declaration or agreement shall be in writing.

4. An action for indemnity against third person may be brought even after the expiration of the period of limitation provided for in the preceding paragraph if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall not be less than (ninety days) commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself. »

SUBJECTS TO BE DISCUSSED AT THE FORTHCOMING MEETING OF THE UNCITRAL WORKING GROUP (FEB. 1974)

The questions relating to definitions of terms under article 1 of the 1924 Brussels convention (« carrier », « contract of carriage », « ship ») and the elimination of invalid clauses in bills of lading should have been discussed at the fifth session but had to be referred to the next session. Further, it was felt that questions regarding delay, deck cargo and live animals, reservations in bills of lading and « back-letters » and, finally, the scope of the convention, required studies in depth.

The agenda for the sixth session will be as follows.

1. definitions under article 1;
2. elimination of invalid clauses;
3. deck cargo and live animals;
4. liability of the carrier for delay;
5. scope of application of the Convention.

« *Limitation de l'action*

1. Le transporteur sera déchargé de toute responsabilité quelle qu'elle soit pour un transport fait sous le couvert de cette Convention, à moins que des procédures légales ou arbitrales aient été intentées dans un délai (d'un an) (de deux ans).

(a) Dans le cas de perte partielle ou d'avarie aux marchandises, ou de retard, ce délai est compté à partir du dernier jour où le transporteur a livré une quelconque des marchandises couvertes par le contrat;

(b) Dans tous les autres cas, à partir du (quatre-vingt-dixième) jour après celui où le transporteur a pris les marchandises, ou s'il ne l'a pas fait, à partir du jour où le contrat a été conclu.

2. Le jour où commence à courir la période de limitation ne sera pas compris dans la période.

3. La période de limitation peut être allongée par une déclaration du transporteur ou par un accord des parties après que la cause de l'action se soit produite. La déclaration ou l'accord seront faits par écrit.

4. Une action en indemnité peut être intentée à l'encontre d'une tierce personne, même après l'expiration de la période de limitation dont disposent les paragraphes précédents, si elle est intentée dans le délai accordé par la loi de la Cour saisie du cas. Cependant le temps imparti ne sera pas inférieur à (quatre-vingt-dix jours), à compter du jour où la personne intentant une telle action en indemnité a réglé la réclamation ou a été assignée dans l'action intentée contre elle ».

SUJETS A DISCUTER A LA PROCHAINE REUNION DU GROUPE DE TRAVAIL DE LA CNUDCI (février 1974)

Les questions relatives aux définitions de termes de l'article 1 de la Convention de Bruxelles de 1924 (« transporteur », « contrat de transport », « navire) et l'élimination des clauses sans validité dans les connaissements auraient dû être discutées à la cinquième session mais ont été renvoyées à la prochaine. De plus, il fut jugé que les questions concernant le retard, la cargaison en pontée et les animaux vivants, les réserves sur les connaissements, les « lettres de garantie » et, finalement, la portée de la convention, demandaient des études approfondies.

L'agenda de la sixième session sera le suivant :

1. définitions à l'article 1;
2. élimination des clauses nulles;
3. cargaison en pontée et animaux vivants;
4. responsabilité du transporteur pour retard;
5. étendue d'application de la Convention.

Further, it is foreseen that the seventh session will deal with « the required contents of and legal effects of the contract of carriage » and, in this connection, « reserve clauses and guarantees » in bills of lading.

The question of *liability for delay* is controversial, since it is not clear whether this is encompassed in the present Hague Rules (cf. art. 3.8 « liability for loss of or damage to or *in connection with* goods », and « *The Saxonstar* (1958) 1 Lloyd's Rep. 73). The inclusion of provisions relating to delay in The Hague Rules, thus clarifying the matter, works two ways. It may be considered a draw-back for the shipowner, since the cargo-owner is being made aware of the possibility to raise claims for delay. But, on the other hand, the Rules would have to set *limits* for the amount of damages on account of delay and thus remove the risk for the shipowner of being held liable in an *unlimited* amount. If provisions relating to delay are included, one has to determine whether — as in the Warsaw Convention — delay should be covered by the same limit as applies to physical loss or damage *or* if some other limit is better (e.g. related to the freight which is the solution of the European conventions relating to carriage by rail and by road, CIM and CMR respectively). If the latter method is chosen, it is necessary to draw a borderline between physical loss and delay. This is technically possible by so-called « conversion » rules — the goods *are treated* as lost when a certain period of time has elapsed (CIM and CMR contain such rules).

The *scope of application of the Convention* is, perhaps, the most essential question of all. First, one has to consider art. 10 of the present Hague Rules stipulating that the Rules only apply to bills of lading issued in a contracting State, or, as added by the 1968 Hague/Visby Protocol, also when the carriage is from a port in a contracting State or the contract contained in or evidenced by the bill of lading provides that the Rules of the convention or legislation of any State giving effect to them are to govern the contract. Second, it is clear that the distinction between carriage covered by *bills of lading* and other carriage is out-moded. Use of bills of lading in near-traffic has diminished considerably and even in transocean traffic bills of lading are on the decrease (cf. the so-called « Data freight receipt » used by Atlantic Container Line). On the other hand it is equally clear that the *mandatory* system of the Hague Rules should not be extended to charter parties, where it is difficult to find a reason for introducing a kind of « consumers' protection ». But where should the borderline be drawn ? And how ?

De plus, il est prévu que la septième session traitera « de ce que doit contenir le contrat de transport et de ses effets juridiques » et, dans cet ordre d'idées, « des clauses de réserve et des garanties » dans les connaissements.

La question de la *responsabilité pour retard* est controversable puisqu'il n'est pas clair que cela soit dans le champ des Règles de La Haye actuelles (cf. art. 3.8 « responsabilité pour perte ou avarie aux marchandises ou *relativement à* elles et *The Saxonstar* (1958) I Lloyd's Rep. 73). L'inclusion de dispositions relatives au retard dans les Règles de La Haye, en clarifiant la question, agit de deux façons. Elle peut être considérée comme un repli pour la position de l'armateur puisque le propriétaire de la cargaison est mis au courant de la possibilité de faire des réclamations pour retard. Mais, d'une part, les Règles auraient à fixer des *limitations* pour le montant des dommages par suite de retard et ainsi d'éliminer le risque couru par l'armateur d'être tenu pour responsable jusqu'à un montant *illimité*. Si des dispositions relatives au retard sont incluses, on a à déterminer si, — comme dans la Convention de Varsovie — le retard sera couvert par la même limitation que celle appliquée à la perte ou aux avaries physiques *ou* si quelque autre limitation est meilleure (par exemple, une limitation relativement au fret, ce qui est la solution des conventions européennes concernant le transport par chemin de fer et par route, la CIM et CMR respectivement). Si cette dernière méthode est choisie, il sera nécessaire de tracer une frontière entre la perte physique et le retard. Ceci est techniquement possible par application de ce que l'on appelle des règles « de conversion ». Les marchandises *sont traitées* comme si elles étaient perdues quand un certain lapse de temps s'est écoulé (la CIM et la CMR contiennent de telles règles).

L'étendue d'application de la Convention est peut-être la question la plus essentielle de toutes. D'abord on a à prendre en considération l'article 10 des Règles de La Haye actuelles, lequel stipule que les Règles s'appliquent seulement aux connaissements émis dans un Etat contractant ou, comme il est ajouté par le Protocole de LaHaye et de Visby de 1968, qu'elles s'appliquent aussi quand le transport est fait à partir d'un port situé dans un Etat contractant ou que le contrat contenu ou mis en évidence par le connaissement dispose que les Règles de la convention, ou la législation d'un Etat leur donnant effet, gouvernent le contrat. Secondement, il est clair que la distinction entre un transport couvert par des *connaissements* et un autre transport n'est plus de mode. L'usage des connaissements pour le petit cabotage a considérablement diminué et même pour le cabotage transocéanique, l'usage en décroît (cf. ce qui est appelé « reçu de fret Data » utilisé par l'Atlantic Container Line). D'un autre côté, il est également clair que le système *impératif* des Règles de La Haye ne pourrait pas être étendu aux chartes-parties, où il est difficile de trouver une raison pour introduire une espèce de « protection des consommateurs ». Mais où sera tracée la frontière ? Et comment ?

A further extremely important question is the present trend towards the *harmonization of the different branches of the law of carriage of goods.* In the sessions of the UNCITRAL Working Group, reference is frequently made to the rules of conventions regulating carriage by air, rail and road. But is this the preferable method of harmonization ? Why should these other rules be treated as « sacrosanct » ? Would it not be better to discuss harmonization *without prejudice* and consider *all* the different branches simultaneously ? The more so, since the conventions relating to carriage by rail and road have no global application. The matter of harmonization necessitates in any event a *proper delimitation* of the maritime transports that should be covered. Only such transports, where no, or only insignificant, different circumstances prevail compared with other branches of carriage of goods, should be subjected to harmonization. It may be mentioned in this context that UNIDROIT, upon the initiative of OCTI (the European Railway Bureau in Berne), has now initiated studies of this problem and that CMI has been invited to contribute by studying, together with ICC, the following matters :

— the delimitation of the maritime transports that could be covered by harmonization;

— the interrelation between carrier's liability, liability insurance and cargo insurance.

Such a study may provide valuable guidance on the two basic questions; the risk allocation between the carrier and the cargo-owner and the scope of the mandatory regulation of the contract of carriage of goods.

June 1973. Jan Ramberg.

Une autre question extrêmement importante est celle de la tendance actuelle à *l'harmonisation des différentes branches du droit des transports de marchandises.* Au cours des sessions du Groupe de Travail de la CNUDCI, il est fréquemment fait référence aux règles des conventions règlementant le transport par air, rail et route. Mais cela est-il la méthode d'harmonisation préférable ? Pourquoi ces autres règles seraient elles considérées comme « sacrosaintes ? » Ne serait-il pas mieux de discuter de l'harmonisation *sous toutes réserves* et de prendre simultanément en considération *toutes* les différentes branches ? D'autant plus que les conventions relatives au transport par rail et route n'ont pas d'application globale. La question de l'harmonisation nécessite, de toute façon, une *délimitation propre* aux transports maritimes qui doivent être couverts. Dans de tels transports où prévalent des circonstances différentes, seules des différences insignifiantes, comparativement à d'autres branches du transport des marchandises, devraient être soumises à l'harmonisation. On peut mentionner dans ce contexte que l'UNIDROIT, sur l'initiative de l'OCTI (Le Bureau des Chemins de fer Européens à Berne), a maintenant lancé des études sur ce problème et que le CMI a été invité à y contribuer en étudiant, avec la Chambre de Commerce Internationale, les sujets suivants :

— la délimitation des transports maritimes qui pourraient être couverts par l'harmonisation;
— l'interrelation entre la responsabilité du transporteur, la responsabilité de l'assurance et l'assurance de la cargaison.

Une telle étude peut apporter de précieuses indications sur les deux questions fondamentales : la répartition du risque entre le transporteur et le propriétaire de la cargaison et l'étendue de la réglementation impérative du contrat de transport de marchandises.

Juin 1973 Jan Ramberg

2

SHIPBUILDING CONTRACTS

CONTRATS DE CONSTRUCTION NAVALE

SHIPBUILDING CONTRACTS

INTRODUCTORY NOTE PREPARED BY MR. FRANCESCO BERLINGIERI

Shipbuilding contracts are being increasingly concluded between parties of different nationalities, and this fact may create considerable misunderstandings as to the true interpretation of the contract and as to its effects in particular circumstances, such as that of bankruptcy of the builder. The provisions of the contract, in fact, may not cover all problems which may arise, in which case they are supplemented by the relevant rules of the domestic law governing the contract.

Moreover, the provisions of the contract may be differently interpreted against the background of different legal systems and may also, to a greater or lesser extent, be in conflict with rules of a compulsory nature and thus be declared null and void by a court.

The knowledge of the domestic laws governing shipbuilding contracts is therefore of great importance for the correct interpretation of such contracts and may also enable the shipowner to better assess the convenience of having his ship built in a particular country, for it may very well happen that apparent economic advantages (such as lower cost or better financial terms) are counterbalanced by unknown legal provisions which favour the builder. Suffice it to mention the clause relating to the price; if the parties agree on a certain price, without saying whether it is a fixed price or it is subject to escalation, in certain countries the shipbuilder would be entitled to an increase in the purchase price following an increase in the cost of labour and materials.

The need of research in this field has already been recognized by the International Bar Association, since International Shipbuilding Contracts was the topic selected for its sixth Conference held in July 1956 in Oslo. A questionnaire was prepared at that time by Prof. Sjur Braekhus who was also the author of a very comprehensive and clear report.

More than fifteen years have elapsed since then, and it is believed that a new effort should be made in the same direction; with a view also to covering problems which have not been considered at that time and to extend the research to other legal systems.

CONTRATS DE CONSTRUCTION NAVALE

NOTE INTRODUCTIVE REDIGEE PAR M. FRANCESCO BERLINGIERI

De plus en plus fréquemment les contrats de construction navale se concluent entre parties de nationalités différentes, ce qui peut causer de graves malentendus quant à la véritable interprétation de leurs clauses et quant à leurs effets en certains cas tels que la faillite du constructeur. Les dispositions du contrat ne sauraient couvrir tous les problèmes qui peuvent se poser. Lorsqu'il se présente une question non prévue, il faut suppléer au contrat par les règles ad hoc de la loi nationale qui le régit. En outre, en présence de législations différentes, les dispositions du contrat peuvent être interprêtées de diverses façons. Elles peuvent aussi se trouver en contradiction avec des règles d'un caractère obligatoire et, par suite, être déclarées par un tribunal nulles et non avenues.

La connaissance des lois nationales qui régissent les contrats de construction navale importe donc grandement pour une interprétation exacte de ces contrats et peut aussi permettre aux armateurs de mieux juger s'il convient de faire construire un navire dans tel ou tel pays, attendu qu'il se peut fort bien que des conditions économiques en apparence avantageuses (telles qu'un bas prix ou des conditions financières meilleures) soient contrebalancées par des dispositions légales inconnues qui favorisent les constructeurs. Qu'il suffise ici de faire mention du cas que voici : si les parties se sont mises d'accord sur un certain prix sans préciser s'il est ferme ou variera suivant une échelle mobile, il y a des pays où le constructeur aura droit à un prix plus élevé en cas d'augmentation de ses frais de main-d'œuvre ou de fournitures.

La nécessité d'études dans cet ordre d'idées a déjà été reconnue par l'International Bar Association puisque le thème choisi pour sa sixième conférence, tenue à Oslo en juillet 1956, était le problème des contrats internationaux de construction navale. Un questionnaire fut rédigé à l'époque par le Professeur Sjur Braekhus, auteur aussi d'un rapport aussi clair que complet.

Comme il y a plus de quinze ans de cela, il semble qu'il conviendrait de faire un nouvel effort dans la même direction, dans celle aussi de problèmes non examinés à l'époque, et d'étendre nos études à d'autres législations nationales.

It would be greatly appreciated if papers could be prepared on this topic by qualified members of all National Associations. All these papers, preceded by an Introduction, will be published in the new Journal of the CMI. On that basis a comparison between the various legal systems will prove possible and thereafter it may be decided whether it is worth while to attempt to draw up one or more contract forms which might be adopted voluntarily by the parties concerned.

Although it is not felt advisable to draw up a questionnaire, for all contributors should feel free to deal with all the problems they think are interesting, an indication of some of these problems may prove useful.

1. LEGAL NATURE OF THE SHIPBUILDING CONTRACT

In many legal systems the shipbuilding contract is qualified as a contract of sale (of future goods). In others its nature depends on the terms of the contract but is prevailingly a sale.

Then there are legal systems which qualify this contract as a contract for works and materials (contrat d'entreprise). The nature of the shipbuilding contract is not only a theoretical problem but also a practical one, for the provisions of the law for these two and possibly other types of contract may differ substantially and they influence the actual obligations of the parties both by supplementing or by nullifying the contractual regulation.

2. PASSING OF PROPERTY

It is certainly unnecessary to underline the importance of this problem both as regards the relationship between the owner and the builder and as regards the financing aspect. In some legal systems (e.g. England) the property passes to the owner at the time of delivery; in others it passes, although perhaps the solution of the problem may not be altogether clear, during the construction of the vessel, contemporaneously with the delivery of the materials to the vessel. According to a great many domestic legislations the parties are however free to provide otherwise.

But it is interesting to ascertain whether the agreement of the parties must be formulated in a particular manner and if and when it may also cover the passing of property on materials not yet physically united to the ship : a problem of particular importance to-day, considering the modern technique of shipbuilding.

Moreover, it is necessary to ascertain whether the agreement as to the passing of property is valid as against third parties. In some countries that is apparently so, whilst in others the owner cannot acquire a good title if he does not acquire possession or if the transfer is not registered in the register of ships under construction.

Nous serions très heureux que des notes sur ce sujet soient envoyées par des membres qualifiés des diverses associations nationales. Toute seront publiées, précédées d'une introduction, dans le nouveau journal du C.M.I. Ainsi sera possible une comparaison des diverses législations, après quoi l'on pourra décider s'il vaut la peine de rédiger un ou plusieurs types de contrat que les parties intéressées puissent adopter de leur plein gré.

Un questionnaire ne parait pas désirable, car il faut que tout collaborateur se sente libre de traiter de tout sujet qui lui semble intéressant, mais il est peut-être utile d'indiquer certaines des questions qui se posent.

1. NATURE JURIDIQUE DU CONTRAT DE CONSTRUCTION NAVALE

Dans beaucoup de législations le contrat de construction navale est considéré comme une vente (de bien futur). Dans d'autres sa nature dépend des termes du contrat mais c'est le plus souvent une vente. Il y a aussi des législations pour qui c'est un contrat d'entreprise. Cette question de la nature du contrat n'est pas seulement théorique. Elle a aussi un intérêt pratique car les dispositions légales pour ces deux, ou plus de deux, types de contrat peuvent différer beaucoup et elles ont leur influence sur les obligations réelles des parties en suppléant aux dispositions contractuelles ou en les annulant.

2. TRANSFERT DE PROPRIETE

Il n'est certes pas besoin de souligner l'importance de cette question quant aux rapports entre armateur et constructeur, et aussi du point de vue financier. Dans certains pays (en Angleterre par exemple), c'est lors de la livraison du navire que l'armateur en devient propriétaire; dans d'autres (encore que la réponse à la question ne soit peut-être pas parfaitement certaine) c'est durant la construction qu'a lieu le transfert de propriété, au fur et à mesure que les choses nécessaires à cette construction sont livrées à bord. Dans beaucoup de pays, d'ailleurs, la législation nationale laisse les parties libres d'en décider autrement. Mais il est intéressant de vérifier si l'accord des parties sur ce point doit être exprimé d'une façon spéciale, s'il peut aussi prévoir le transfert de propriété de choses non encore incorporées au navire et, dans le cas de l'affirmative, à quel moment, question d'une importance particulière à notre époque vu les techniques modernes de l'architecture navale.

Il est en outre nécessaire de s'assurer si l'accord relatif au transfert de propriété serait valable à l'encontre de tiers. Il en est ainsi, semble-t-il, dans certains pays, tandis que dans d'autres l'armateur ne peut acquérir un bon titre s'il n'a pas la possession du navire ou si le transfert n'est pas inscrit dans le registre des navires en construction.

3. REGISTRATION OF SHIPS UNDER CONSTRUCTION

In connection with the above remarks, and also in connection with the problem of security, it is interesting to know the present status of national laws as respects the registration of ships under construction, and more specifically in which countries the provisions of the 1967 Brussels Conventions have been brought into force.

4. SECURITIES ON SHIPS UNDER CONSTRUCTION

The mortgage of a ship under construction, when possible, may serve different purposes, namely to secure the interest of the owner when the property does not pass before delivery and the owner pays a part of the price during construction, or to enable either the owner or the shipyard to obtain finance.

It would be interesting to find out how often ships under construction are mortgaged and by whom in order to establish the practical importance of this problem in the various countries.

When a ship under construction is afloat, she may be subject to maritime liens, which of course arise irrespective as to whether the claim secured by the maritime lien is against the owner of the ship or not. However, since the claims which more likely may arise (i.e. collision or salvage) are normally covered by the third parties liability insurance, no practical problem should normally arise.

The position would be different if other charges might burden the ship during construction irrespective of ownership. It is therefore important to ascertain if claims against the shipbuilder may, in some jurisdictions, be secured by a lien or similar charge on ships which are at the builder's yard, even if the property in those ships has already passed to the owners.

5. RIGHTS AND OBLIGATIONS OF THE PARTIES DURING THE CONSTRUCTION PERIOD

Amongst the many problems which may be considered the following are cited as examples :

a) *Default of the owner*

If the owner delays payment of one or more instalments of the price which fall due during the construction, the builder may find it necessary to rescind the contract. Normally there are special provisions in the contracts which enable the builder to sell the ship after notice of default has been given to the owner. It might be questioned however whether these provisions are valid and how, in any event, should the proceeds of the sale be disposed of.

3. ENREGISTREMENT DES NAVIRES EN CONSTRUCTION

A propos des remarques ci-dessus et aussi du problème des sûretés, il importe de connaître l'état des législations nationales concernant l'enregistrement des navires en construction, notamment de savoir en quel pays les dispositions de la Convention de Bruxelles de 1967 ont reçu force de loi.

4. LES NAVIRES EN COURS DE CONSTRUCTION EN TANT QUE SURETES REELLES POUR CREANCES

Une hypothèque sur un navire en construction, quand elle est possible, peut avoir divers buts, à savoir : assurer l'intérêt de l'armateur quand ce dernier ne devient propriétaire qu'à la livraison et a versé partie du prix au cours des travaux, ou permettre tant à l'armateur qu'au constructeur d'obtenir du crédit.

Pour déterminer l'importance pratique de cette question dans les divers pays, il serait intéressant de se renseigner sur le nombre des navires en construction grevés d'hypothèques et par qui ces hypothèques ont été prises.

Une fois à flot, un navire en construction peut faire l'objet de droits de rétention, et cela, bien entendu, que les réclamations garanties par ces droits soient ou non contre l'armateur. En général, cependant, comme les réclamations les plus probables (c'est à dire celles pour collision ou sauvetage) sont normalement couvertes par une assurance contre la responsabilité envers les tiers, aucun problème ne devrait se présenter en pratique.

Il en irait autrement si d'autres charges pouvaient peser sur le navire durant la construction, que la propriété en ait déjà été transmise ou non. Il importe donc de vérifier si dans certains pays des réclamations contre le constructeur peuvent être garanties par un droit de rétention ou par une sûreté similaire sur un navire qui se trouve dans le chantier du constructeur, même si la propriété en a déjà été transmise à l'armateur.

5. DROITS ET OBLIGATIONS DES PARTIES DURANT LA CONSTRUCTION

Parmi les nombreux problèmes imaginables on peut citer ceux-ci :

a) *Manquement de l'armateur*

Si l'armateur remet à plus tard le versement d'un ou plusieurs acomptes venus à échéance au cours des travaux, le constructeur peut juger bon de résilier le contrat. Il est normal qu'une disposition spéciale du contrat lui permette de vendre le navire après préavis à l'armateur. On peut toutefois se demander si une telle disposition est valable et, en tout cas, ce qu'il adviendrait du produit de la vente.

b) *Default of the builder*

Shipbuilding contracts usually provide for a fixed penalty in case of delayed delivery of the ship, with a maximum in time or in amount and provide further that when the period or the sum is exceeded the owner may rescind the contract. But when the construction is so delayed that it clearly cannot be completed within the time limit set out in the contract, the owner might be interested in rescinding the contract immediately and obtaining the reimbursement of the instalments paid so that he may order another ship elsewhere. The problem thus arises whether he is entitled to do so. Could for instance the doctrine of anticipatory breach apply in England to such a situation ? As regards civil law countries, it may be of interest to state here that the problem would most likely be answered in the affirmative in Italy.

Sometimes contracts authorise the owner, in case of default of the builder, to take possession of the ship, enter the yard, and complete the construction at the expense of the builder. The enforceability of these clauses might however be open to doubt.

c) *Effect of an increase in the cost of labour and materials*

Three alternatives may be envisaged, namely :

(i) that no provision is made in the contract;

(ii) that an escalation clause has been agreed by the parties;

(iii) that the contract expressly states that the price is fixed and not subject to escalation.

The effect of an increase in the cost of labour and materials in each of those three alternatives should be discussed.

6. GUARANTEE OF THE BUILDER

Shipbuilding contracts normally embody a guarantee clause whereby the Builder warrants the ship to be free of defects and undertakes to eliminate at his expense any defect which may arise within a certain period of time after delivery.

Those clauses normally limit the liability of the Builder to repairing the damage or paying the cost thereof, thus exonerating the Builder from liability in respect of damage to other parts of the ship and of indirect damages (loss of earning).

The validity of similar exonerations from liability deserves careful study, which of course must be made against the background of the statutory provisions regarding the liability of the Builder.

Amongst the various problems which may arise, the following may be cited :

a) The clauses exonerating the Builder from liability may be null and void when the defect is due to the (gross) negligence of the

b) *Manquement du constructeur*

Pour le cas de livraison tardive du navire les contrats de construction navale prévoient d'ordinaire une pénalité chiffrée, stipulent un maximum tant pour le délai que pour le montant de la pénalité et ajoutent que, si ce maximum est dépassé, l'armateur pourra résilier le contrat. Mais, quand le retard est tel qu'il soit évident que le navire ne pourra être livré dans le délai imparti par le contrat, l'armateur pourrait avoir intérêt à résilier tout de suite et à se faire rembourser les acomptes déjà versés, de façon à pouvoir commander un navire ailleurs. La question se pose donc de savoir s'il est en droit de ce faire.

En Angleterre, par exemple, la théorie du manquement prévisible (« anticipatory breach ») s'appliquerait-elle en ce cas ? Quant au pays de droit romain, il peut être intéressant de dire ici qu'en Italie la réponse à cette question serait affirmative.

Parfois, en cas de manquement du constructeur, le contrat autorise l'armateur à pénétrer dans le chantier, à prendre possession du navire et à en achever la construction aux frais du constructeur. Cependant, la possibilité d'appliquer une telle clause semble douteuse.

c) *Effet d'une augmentation des frais de main-d'œuvre et de fournitures*

Trois cas peuvent être envisagés, à savoir :

1) Une telle augmentation n'a pas été prévue dans le contrat;
2) les parties sont convenues d'une clause d'échelle mobile;
3) le contrat dit expressément que le prix est ferme, non dépendant d'une échelle mobile.

L'effet d'une augmentation des coûts de main-d'œuvre et de fournitures dans chacun de ces cas devrait faire l'objet de discussions.

6. GARANTIES DONNEES PAR LE CONSTRUCTEUR

Les contrats de construction navale comprennent d'ordinaire une clause par laquelle le constructeur garantit que le navire sera exempt de vices et par laquelle il s'engage à extirper à ses frais tout défaut qui pourrait se révéler dans un certain laps de temps après la livraison.

En général cette clause réduit la responsabilité du constructeur à faire la réparation nécessaire ou à en supporter le coût, ce qui dégage sa responsabilité pour avaries à d'autres parties du navire et pour dommages indirects (perte de profits).

La validité d'une telle exonération mérite une étude attentive, qui, bien entendu, devra tenir compte des dispositions légales concernant la responsabilité des constructeurs de navires.

Parmi les diverses questions qui peuvent se poser on peut citer les suivantes :

a) Les clauses exonérant le constructeur peuvent être nulles et non avenues quand le vice a pour cause une faute (lourde) de sa part (on sait qu'il y a dans les pays de droit romain une distinction entre les divers degrés de faute; quant à ceux de droit coutumier, on pourrait s'y référer à la notion de faute volontaire — « wilful misconduct »).

Builder (it is known that a distinction exists in the civil law countries between various degrees of negligence; as regards the common law countries reference could be made to the notion of Wilful misconduct). Should this negligence be personal, or would also the negligence of the servants of the builder be relevant ? In the first alternative, when the Builder is a legal entity, what negligence can be defined personal ?

b) When the guarantee clause exonerates the Builder from substantial liabilities, the Owner might try, in order to obtain payment of his damages, to sue the Builder in tort. Would tort liability be applicable concurrently with contract liability ?

c) The guarantee of the Builder is always limited in time and is frequently limited to latent defects. Are the time limitations valid in the various domestic laws ? When can a defect be considered latent ?

d) Shipbuilding contracts normally provide that notice of a defect must be given within a short time of its discovery, failing which the Owner's claim is forfeited. It would be interesting to look into the validity of similar clauses.

e) The guarantee clauses often provide that the Builder shall carry out the necessary repairs but that the Owner has the option of having the defect repaired elsewhere, in which case he can recover from the Builder the sum he has spent provided it does not exceed the cost of the repairs at the Builder's yard. This is a limitation of liability, and its validity should be examined. The problem should also be examined of the rights of the Owner when the guarantee clause does not specify how and by whom the repairs may be effected.

f) The liability of the Builder may vary when the design of the ship is supplied by the Owner. However, it may be maintained that the Builder has also the duty to ascertain that the design meets all reasonable technical requirements and particularly all safety requirements.

g) The effect of the approval by the Owner's inspectors of the designs submitted by the Builder should also be considered. It is normally thought that this approval does not reduce the Builder's liability in respect of proper design and good workmanship and is binding upon the Owner only as regards aspects of a non-technical nature, such as aesthetics, colours, location of objects, etc.

h) Similar problems arise in case of changes requested by the Owner during the construction period. Is the Builder bound, in order to avoid liability, to notify the Owner that the change requested by him may prejudice the safety of the vessel or alter her characteristics or performances ?

i) It may then be questioned what is the effect of the approval given by the Classification Society to the plans of the vessel or to specific plants, such as the fire fighting system, etc..

Faudrait-il que la faute fut le fait du constructeur lui-même, ou bien celle d'un de ses employés serait-elle invocable aussi ? Dans le premier cas, si le constructeur est une personne morale, quelle faute pourra être regardée comme personnelle ?

b) Quand la clause de garantie exonère le constructeur de graves responsabilités, l'armateur, pour obtenir réparation de son préjudice, pourrait recourir à une assignation en dommages-intérêts pour faute lourde.

Dans ce cas, la responsabilité délictuelle jouerait-elle concurremment avec la responsabilité contractuelle ?

c) La garantie du constructeur est toujours limitée dans le temps et fréquemment restreinte aux vices cachés. La limitation de temps est-elle valable dans les diverses législations nationales ? Et quand un vice peut-il être considéré comme caché ?

d) Les contrats de construction navale prévoient le plus souvent que notification d'un vice doit être donnée dans un court délai à partir de sa découverte, faute de quoi l'armateur est forclos. Il serait intéressant d'étudier la validité d'une telle clause.

e) La clause de garantie prévoit souvent que le constructeur effectuera les réparations nécessaires mais que l'armateur aura la faculté de les faire exécuter ailleurs, auquel cas il pourra se faire rembourser par le constructeur ce qu'il aura payé pour cela, pourvu que la somme ne dépasse pas le coût de pareilles réparations dans le chantier de ce dernier. Il y a là une limitation de responsabilité dont la validité mérite examen.

Il conviendrait d'examiner aussi la question des droits de l'armateur quand la clause de garantie ne dit pas comment ni par qui les réparations doivent être effectuées.

f) La responsabilité du constructeur peut être affectée par le fait que le plan du navire a été donné par l'armateur. On peut cependant soutenir que le constructeur a aussi le devoir de s'assurer que ce plan répond à toutes les exigences raisonnables de nature technique, notamment à celles concernant la sécurité.

g) L'effet de l'approbation par les experts de l'armateur du plan soumis par le constructeur est aussi une question à considérer. On est en général d'avis qu'une telle approbation ne diminue pas la responsabilité du constructeur quant à la qualité du plan et des travaux et qu'elle ne lie l'armateur que pour ce qui n'est pas d'une nature technique : esthétique, couleurs, emplacement des choses, etc.

h) Des difficultés de même genre naîtraient au cas de modifications demandées par l'armateur au cours de la construction. Le constructeur serait-il tenu, pour dégager sa responsabilité, de signifier à l'armateur que ces modifications risquent de compromettre la sécurité du navire ou d'affecter ses caractéristiques ou ses performances ?

i) On peut ensuite se demander quel est l'effet de l'approbation par la société de classification du plan général du navire ou de plans particuliers tels que celui du système de lutte contre l'incendie, etc.

Can the Owner prove that notwithstanding such approval the safety requirements have not been complied with, or that the quality of the materials employed by the Builder is unsatisfactory ? Can the Builder maintain that the approval by the Classification Society is final and binding, or that it is conclusive evidence that the safety requirements have been complied with ?

March 1973 Francesco Berlingieri

L'armateur, nonobstant une telle approbation, peut-il prouver que les conditions exigées pour la sécurité du navire n'ont pas été observées ou que la qualité du matériel utilisé laisse à désirer ? Le constructeur peut-il soutenir que l'approbation de la société de classification est définitive et irrévocable ou prouve péremptoirement que les conditions requises pour la sécurité du navire ont bien été observées ?

Mars 1973 Francesco Berlingieri

SHIPBUILDING CONTRACTS

Note on the various questions dealt with in the introductory paper from the stand-point of Italian law received from the Associazione Italiana di Diritto Marittimo

1. LEGAL NATURE OF SHIPBUILDING CONTRACTS

Art. 240 of the Italian Navigation Code provides that shipbuilding contracts are governed by the provisions of the Civil Code on contracts for works and materials (contratto di appalto).

The distinction between contracts of sale and contracts for works and materials lies basically in that the object of the former is the transfer of the property of the « res » whilst the object of the latter is the performance of works for the purpose of transforming materials into a new thing.

Thus a contract whereby a builder undertakes to build a vessel is clearly a contract for works and materials, whilst a contract whereby the Owner of a completed vessel transfers the property thereof to others is a contract of sale. There are however situations in which the distinction is not so clear, namely when at the time of signing the contract the vessel is already under construction, albeit not yet completed. It may in fact occur that a builder, when the orders for new buildings are insufficient to make his business profitable, decides to start building some vessels on its own, with the hope of finding customers later.

The contract which is subsequently entered into by the builder cannot, strictly speaking, be qualified as a contract for works and materials as respects that part of the vessel already constructed, whilst it could be so qualified as respects the work which is still required for the completion of the vessel.

Various theories have been put forward in order to decide which of the two contracts prevails in this and similar situations. It has been held for example that if the « res », even if not already built or completed at the time of the contract, is one of a series normally produced by the builder, the contract is one of sale, for the customer does not become a party of the production process. This situation occurs in the production of automobiles and also of yachts built in a series. The same situation may also take place with ships; it has very likely occurred during the last world war when Liberty and Victory ships were built in series. It has on the contrary been held that the

contract is one for works and materials when the performance of the works prevails on the supply of materials.

These theories are however not entirely satisfactory as they do not provide criteria which afford a clear distinction in the situation which has been previously mentioned. It is however important to know whether the contract is one of sale or of works and materials, for the legal rules are considerably different. For example in the contract of sale the risks are transferred from the seller to the buyer at the time of the agreement, whilst in the contract for works and materials the transfer takes place at the time of delivery; the prescription is in the former one year and in the latter two years; the notice of defects must be given within 9 days in the contract of sale and within 6 days in the contract for works and materials.

When Italian law applies, it is therefore advisable to avoid the danger of an uncertain solution of the problem by providing in the contract that except as otherwise provided therein, the rules governing either the contract of sale or the contract for works and materials shall apply. This would enable the parties to know with certainty which legal provisions govern the contract, irrespectively of its actual legal nature since almost all legal provisions relating to both contracts may be contracted out. There are however some exceptions, the most important of which is the rule on prescription. Under Italian law prescription in fact cannot be shortened by the parties (art. 2936. Civil Code,) and this fact is relevant in our case since the prescription of the claims arising out of the guarantee in the contract of sale is one year (art. 1495 Civil Code) and in the contract for works and materials is two years (art. 1667 Civil Code). Should therefore the parties provide for the application of the rules governing the contract for works and materials in a case where there may be doubts as to the possibility of the contract being qualified as one of sale, it would be safer for the Owner to commence any action for damages due to defects of the vessel within one year from the time of delivery and not to rely on the two years prescription period.

2. REGISTRATION OF SHIPS UNDER CONSTRUCTION

Italy has not ratified the Convention relating to Registration of Rights in respect of Vessels under Construction of 27th May 1967. However under Italian law ships under construction must be registered in a special register kept by the Port Authority within the jurisdiction of which the hull will be built. Registration is compulsory and must be effected by the builder prior to the commencement of the construction. Art. 233 of the Italian Navigation Code provides in fact as follows :

« He who undertakes the construction of a ship or a lighter shall previously file with the competent port authority of the place where the hull will be built a declaration indicating the yard and the factory where the hull and the engines will be built and the names of the persons in charge of the constructions.

The Port Authority shall register the declaration in the register of ships under construction. »

Thus ships under construction are registered prior to the construction being actually commenced.

Shipbuilding contracts must be registered in the register of ships under construction, failing which the ship will be deemed to be built for the account of the builder itself. Proof of the contrary is however permitted. The normal practice is to file the declaration required by art. 233 of the Navigation Code indicating therein, when the ship is being built pursuant to a shipbuilding contract, the main data of such contract which therefore is registered concurrently with the registration of the ship under construction. For the purpose of the registration of the contract it is necessary to submit to the Port Authority an application (nota di trascrizione) indicating the names of the builder and of the Owner, the nature and date of the contract, the name of the notary public who has legalized the signature of the parties or in front of whom the contract has been executed and the main characteristics of the ship. A copy of the shipbuilding contract must be attached to the application. However, only the information contained in the application is registered.

Pursuant to art. 242 of the Navigation Code all (contracts and other) deeds which constitute, transfer or extinguish the right of property or other real rights on ships under construction must be registered in the register of ships under construction for the purposes provided for in the Civil Code. According to art. 2644 of the Civil Code deeds, interalia, whereby the right of property or other real rights on ships are transferred from one person to another have no legal effect vis-à-vis of third parties having acquired rights on such ships pursuant to a deed which has been registered prior to the registration of such deed. Conversely, upon registration of a deed, subsequent registrations of other deeds even of prior date have no effect against the person who has acquired a right pursuant to the former deed. In other words, in the relationship between two parties who have acquired conflicting rights on the same ship, the relevant factor is the priority in registration.

These provisions are relevant in so far as the passing of the property of a ship is concerned.

Upon completion, the ship is deregistered from the register of ships under construction and registered in the ships' register in the name of the Owner. When a ship is built for a foreign owner, deregistration from the register of ships under construction is effected upon submission of the export documents.

3. PASSING OF PROPERTY

The time when the property of a ship under construction passes from the builder to the Owner is controversial under Italian law. Two main theories have been in fact upheld : one according to which the

property is acquired by the Owner immediately upon construction and thus concurrently with the progress of construction; the other according to which property passes upon delivery of the ship to the Owner. The first theory is supported inter alia by the fact that the law provides for the registration of shipbuilding contracts and also for a declaration that a ship is built for the account of the Owner, since these requirements would serve no practical purpose if the builder were to remain the Owner of the ship throughout the construction. The second theory is supported inter alia by the fact that all risks during construction are borne by the builder unless the materials are supplied by the Owner in which event the risk of loss or damage to the materials is borne by the Owner, and that it is a basic rule, albeit non compulsory, of Italian law that the transfer of the risks occurs concurrently with the passing of property.

It is known that shipbuilding contracts usually contain specific rules on the passing of property, such as that whereby the property passes from the builder to the Owner in proportion of the sums paid by the Owner. If these clauses are relied on for the purpose of establishing when and to which extent the property has passed to the Owner, vis-à-vis third parties who may have acquired and registered other rights on the ship or, in case of bankruptey of the yard, vis-à-vis the trustee, the registration of the shipbuilding contract becomes relevant.

The passing of property does not in fact become effective on the basis of the contract only, but pursuant to a specific clause in the contract. It is therefore essential that the registration be properly made. In this respect one should bear in mind that as previously stated, only the information contained in the application is registered. It is therefore not sufficient to mention in the application the basic data indicated in art. 253 of the Navigation Code, but the clause of the contract providing for the passing of property must be specifically referred to therein.

In connection with the clause according to which the property passes in proportion with the payments made by the Owner it is interesting to consider the situation when, as it often happens, during the construction the Owner does not pay each instalment, but accepts bills of exchange issued by the builder or issues promissory notes. The problem which arises is whether acceptance of bills of exchange or issuance of promissory notes constitue a payment : although the Owner is under the obligation to pay the amounts shown in the bills or in the notes, under Italian law this is not equivalent to a payment and therefore does not cause the passing of property in proportion of the sums indicated in the bills or in the notes. Of course, this result can be achieved by specifically providing in the contract that the acceptance of bills of exchange or the issuance of promissory notes is equivalent to payment.

Passing of property in proportion with the sums paid means that at a given time the value of the construction must be assessed and

then the total amount paid must be applied to such value in order to establish the percentage paid. When the construction price is a fixed price, the value of the construction should not be established with reference to the market value but to the construction price, failing which there could not be a proper relationship between the amount paid and the value of the construction when, due to increases in the cost of labour and materials, the actual construction price becomes greater than the contract price. An example may clarify the difference which may exist; let us assume that the construction price of a vessel is $ 12,000,000, that the actual cost is $ 15,000,000, and that the Owner had paid, when the progress of the construction is equal to 90 %, $ 10,800,000 : if this figure is related to the contract price the property of the whole construction has passed to the Owner, whilst if it is related to the actual construction cost only 80 % of the property of the vessel would have passed to the Owner.

Special attention must be paid to the passing of property as respects the materials which are not yet physically connected with the ship. The problem as to whether these materials become the property of the Owner prior to their being physically connected to the ship arises both when according to the law the property passes to the Owner immediately upon construction and when according to the contract the property passes proportionally with payment of the contract price. The need of a physical connection does not seem to be required and on this assumption two theories may be conceived. The first one is based on the concept of employment of the materials; thus all materials which have already been used in the construction, even if not physically connected with the ship, would be deemed to have become a part of the ship and their property may pass to the Owner : this would apply to all prefabricated sections. The second theory is based on the concept of destination of the materials to the ship and entails that the property of the Owner may be extended to all materials which are in the shipyard and are identified with the construction number. All materials which are outside the yard may not, on the contrary, be included, for the destination, insofar as they are concerned, has not yet become actual.

This last theory seems to be the one to be preferred, although the matter is, under Italian law, not clearly settled. Therefore a specific provision to the effect that the property of identified materials passes to the Owner upon passing of the property of the ship is certainly helpful in order to clarify the issue.

4. SECURITIES ON SHIPS UNDER CONSTRUCTION

Under Italian law ships under construction may be hypothecated from the time of registration. That means that the « hypothec » may be registered even before the construction of the ship actually commences, since, as pointed out previously under paragraph 3, registration of a ship under construction must be effected prior to the commence-

ment of the works. This does not necessarily mean that the « hypothec » arises at the time of registration, but only that the « hypothec » will arise automatically upon the coming into existence of the ship. The problem when the ship comes into existence for the purpose of the « hypothec » is not settled. Various theories have in fact been put forward, namely :

(i) that the « hypothec » arises at the time of commencement of the construction, or

(ii) that the « hypothec » arises when the construction has reached a stage at which the ship may be deemed to have commenced to exist, or

(iii) that the « hypothec » arises when the ship is completed.

As it has been pointed out (F. Berlingieri, I. Diritti di Garanzia sulla Nave, l'Aeromobile e le Cose Caricate, Cedam, Padova 1965, page 332), the last theory must certainly be rejected, for the ship certainly exists prior to her completion. However, in order that the « hypothec » may arise, the ship must be identifiable and therefore the assembling must have commenced.

« Hypothecs » on ships under construction must be granted by the Owner of the ship, and therefore by the builder or by the Owner according to rights of each of them on the ship at the material time.

« Hypothecs » on ships under construction are quite unusual in the yards practice. The builders in fact do not need such a security to obtain financing, whilst the Owners usually do not need financing during construction and consider a better security for them, as regards the part of the price paid during construction, the passing of the property proportionally to the amount paid to the builder.

Liens may arise on ships under construction.

Under Italian law the liens may be of different categories :

(i) maritime liens;

(ii) possessory liens;

(iii) quasi possessory liens which are conditional upon the « res » being in a certain physical location, albeit not in the possession of the creditor;

(iv) general civil law liens which grant only a right of priority, provided the « res » is still owned by the debtor at the time of enforcement of the lien.

A ship under construction, after having become waterborne, may become the subject matter of maritime liens, such as those securing claims for collision and salvage.

Even before that time, a ship under construction may be the subject matter of quasi possessory liens, and more precisely of the lien securing the claim of the seller of items of machinery for the payment of the purchase price. This lien has a quasi possessory nature, for although it does not require that the « res » remains in the possession of the claimant, still it is conditional upon the claim being registered in a special register kept by the Tribunal in the jurisdiction of which

the « res » is situated and the « res » remaining in such jurisdiction. Thus if after becoming waterborne the ship is moved to another jurisdiction, the lien is extinguished.

To our knowledge no such liens are ever registrered as respects ships under construction.

It may however be interesting to quote the relevant provision of the Italian Civil Code (art. 2762) :

« 2762. Machinery vendors' lien. Whoever has sold machinery for a price higher than thirty thousand lire has a lien for the unpaid purchase price on the machinery sold and delivered, even if such machinery is built in or joined to an immovable owned by the buyer or by a third person.

The lien is conditional upon the registration of documents, witnessing the sale and the claim, in the register indicated by the second paragraph of art. 1524. The registration is made in the tribunal having jurisdiction over the place where the machine is located.

The lien lasts for a period of three years from the date of the sale, and is effective as long as the machine is in the possession of the buyer in the place where the registration was made, except in the case in which it has been fraudulently taken away. »

Art. 1524 provides as follows :

« 1524. Reservation of ownership against third person. Reservation of ownership by the seller can be set up against creditors of the buyer only if it appears from a written document bearing a certain date prior to the date of attachment.

If the sale concerns machinery and the price exceeds thirty thousand lire, the reservation of ownership can also be set up against a third person who acquires the machinery, provided that the agreement of reservation was registered in a special register kept in the office of the clerk of the tribunal having jurisdiction over the place where the machinery is located, and provided that when the machinery was acquired by the third person, it was still in the same place where the registration was made.

The provisions relating to movables registered in public register are unaffected. »

5. RIGHTS AND OBLIGATIONS OF THE PARTIES DURING THE CONSTRUCTION PERIOD

a) *Default of the Owner*

The builder has various remedies under Italian law.

Firstly, pursuant to art. 1460 of the Code Civil, he can refuse to continue the work until payment by the owner of the instalments due by him. The refusal to continue the construction is not permitted if, regard being given to the circumstances of the case, such refusal is against good faith.

Secondly, pursuant to art. 1461 of the Civil Code the builder can also refuse to continue the work when the financial conditions of

the owner have changed in such a way as to endanger the payment of the sums due by him. In this case the refusal is justified even if there is no delay in payments at a given time.

Thirdly, pursuant to art. 1454 of the Civil Code, the builder may intimate the Owner to pay the sums due by him within a reasonable time limit, which in any event cannot be shorter than 15 days, failing which the contract will terminate However, according to art. 1455 of the Civil Code the contract cannot be terminated when the breach is of small signifiance, as respects the interest of the other party. It may be doubtful whether the failure to pay one instalment is significant for the purpose of this provision, but we would be inclined to reply in the affirmative, for the builder has agreed to build the vessel on the basis of a certain financial plan, and the delay in the payment of an instalment may prejudice the satisfactory operation of such financial plan.

Fourthly, the builder may, pursuant to art. 1186 of the Civil Code, request immediate payment of the whole outstanding debt when the Owner has become insolvent or has not provided the securities he had undertaken to provide or decreased those he had provided.

When special provisions are inserted in the shipbuilding contract for the purpose of regulating the consequences of a delay by the Owner to pay any instalments during the construction period, the problem which may arise is whether these provisions are valid according to Italian law.

Shipbuilding contracts often provide that failing payment of any instalment by the Owner, the builder may, after due notice being given to the Owner, cause the vessel under construction to be sold either at public auction or by private treaties and retain that part of the proceeds of sale as is sufficient to indemnify the builder for the damages. Such a provision may not be enforceable when the ownership of the vessel under construction has already been transferred to the Owner, unless the contract be previously rescinded by the builder. This is possible when the contract expressly provides that failing payment by the Owner the contract is automatically terminated (art. 1456 of the Civil Code) or is terminated unless the builder decides otherwise (art. 1457 of the Civil Code). Should such a provision not exist in the contract, then the builder may avail itself of the intimation provided for in art. 1455 of the Civil Code to which reference has already been made above. But in this case doubts may arise as to whether the breach by the Owner is so important as to justify the termination of the contract.

b) *Default of the builder*

During the construction the builder may be in default either because the works are delayed or because they are not carried out in conformity with the contract.

The problem of delay may firstly be looked into.

Unless there are specific provisions in the contract, the Owner may terminate the agreement in case of inordinate delay. Recourse to the provisions of the Civil Code is not normally necessary, for all contracts provide that a penalty must be paid by the builder in case of delay which is not excused by causes of force majeure, and that when the delay exceeds a specified term, the Owner is entitled to cancel the contract or to accept the ship at a price to be agreed. Although the above time limit may not have expired at a certain stage of construction, it may happen that the progress of construction is such that it may with certainty be excluded that the ship may be delivered prior to the expiry of the time limit after which cancellation is permissible. If such a situation arises it may very well be that the Owner is interested in cancelling the contract immediately, in order to recover the instalments paid and to enter into a shipbuilding contract with another builder. Should he have to wait until the expiry if the time limit, delivery by the new builder would of course be postponed by a period which is basically equal to the time which will elapse between the moment when it has become apparent that the first builder will not be able to deliver the ship prior to the expiry of the cancelling period and the actual expiry of such period.

Art. 1662 of the Italian Civil Code provides as follows :

« 1662. Inspection of work in progress. The customer has the right to check the progress of the work and to inspect the condition thereof at his own expense.

When in the course of the work, it is ascertained that performance is not proceeding in accordance with the conditions established by the contract and according to the standards of the trade, the customer can establish a suitable time limit within which the contractor must conform to such conditions; if such time limit expires without results, the contract is terminated without prejudice to the right of the customer to be compensated for damages. »

It may be questioned whether the words « in accordance with the conditions established by the contract » may apply also in respect of time. I think that an affirmative answer is justified, for this provision is a specific adaptation to the contract for works and materials of art. 1454 of the Civil Code which provides as follows :

« 1454. Notice to perform. The other party can serve a written notice on the defaulting party « to perform within an appropriate time, declaring that, unless performance takes place within such time, the contract shall be deemed dissolved.

The time can not be less than fifteen days, unless the parties have agreed otherwise or unless a shorter period appears justified by the nature of the contract or by usage.

If the time elapses without performance having been made, the contract is dissolved by operation of law. »

No doubt may arise as to the applicability of this provision in case of delay in the fulfilment of contractual obligations.

The builder may also be in default in that the works are not carried out in conformity with the contract and the specifications or with good workmanship.

Art. 1662 of the Civil Code, referred to above, certainly applies in such cases, and enables the Owner to rescind the contract if the builder does not comply with the terms and conditions of the contract within a reasonable time limit.

Under art. 1662 of the Civil Code the shipbuilding contract terminates without the need of a judicial decision. The builder however may dispute the right of the Owner to terminate the contract, either because the builder was not in breach having complied with all terms and conditions of the contract and of the specifications or because the time limit given to him so to comply was not reasonable. In this event the competent Court may either decide that the Owner acted in his own right, so that the termination of the contract had actually taken place, or that the request of the Owner was not grounded, in which event the Court will find that the termination did not occur.

Some shipbuilding contracts provide that when the builder is in default, the Owner may either enter in the yard and continue the construction at the expenses of the builder or take possession of the ship. The first power granted by this clause to the Owner is unenforceable since the Owner cannot take possession of the yard's facilities in order to continue the construction, nor use the yard's workmen with whom he has no contractual relationship. Under Italian law no action exists which may be of avail to the Owner in this case.

As regards the right to take possession of the ship, one should distinguish according to whether the property on the ship has already wholly passed to the Owner or not, In the affirmative, the Owner may, if the builder refuses to deliver the ship to him, avail himself of the right, granted to the proprietor by art. 948 of the Civil Code, to obtain the possession of its property. He can also, alternatively, obtain from the competent court an order addressed to the builder for the delivery of the ship (art. 633 of the Code of Civil Procedure). Art. 642 of the Code of Civil Procedure provides that the immediate enforceability of an order to pay a sum of money or to deliver a movable asset may by granted when the claim is evidenced by a promissory note, by a cheque, by a stockbroker's certificate or by a notarial deed and that it may also be granted when grave prejudice may ensue from a delayed enforcement. In the case of shipbuilding contracts the Owner can avail himself either of the form of the contract, when the contract is in the form of a notarial deed or, more likely, of the last alternative, viz. that grave prejudice would be suffered if the delivery of the ship were delayed.

In case the property has not yet passed or has not entirely passed, the Owner can only avail himself of the last action referred to above, which however implies the payment of the tax on judgments, equal to ... % of the amount adjudged. Such amount, in the case of an order to deliver a ship under construction, is equal to the value of

the ship at the time the order is issued. It is obvious, therefore, that this may prove to be a very costly remedy, which practically cannot be used by the Owner. Clearly the right to take possession of the ship has a practical importance only when the ship is waterborne for otherwise the Owner could not take her away from the yard precincts.

c) *Effect of an increase in the cost of labour and materials*

Art. 1664 of the Civil Code privides as follows :

« When, as a consequence of unforeseeable circumstances, there has been an increase or a decrease of the cost of labour or of materials such as to bring about an increase or a decrease of the total price agreed by the parties greater than 10 %, the contractor or the customer may request the revision of the price. The revision may be granted only as respects the increase or decrease which exceeds 10 %. »

On the basis of this provision, when the shipbuilding contract only indicates the price without either stating that it is a fixed price or that the price is subject to escalation, the builder may request the increase of the contract price whenever the increase of the cost of labour and materials is in excees of 10 %.

The risk of an increase is therefore borne by the builder up to 10 % of the construction price and by the Owner for the excess.

The provision of art. 1664 is not of a compulsory nature and therefore may be contracted out by the parties. The view, however, has been expressed that the intention of the parties to modify the allocation of the risk of an increase (the problem of a decrease in prices is merely theoretical nowadays) in the cost of labour and materials must be very clearly expressed. The parties may agree on a different allocation of this risk in two different ways, viz. (a) by specifically regulating, with an escalation clause, the increase of the purchase price consequential upon an increase in the cost of labour and materials, and (b) by providing that the whole risk is borne by the builder.

(a) *Escalation clauses.* Usually the escalation clauses differ from the system set forth in art. 1664 of the Civil Code in that they provide an immediate transfer of the risk unto the Owner, without any franchise. The intention of the parties to do so should, however, be clearly expressed in the clause, failling which it might be upheld that only an increase such as to cause an increase of the total price greater than 10 % is at the risk of the owner. Sometimes escalation clauses provide for an immediate transfer of the risk, so that any increase whatsoever causes an increase in the construction price, but provide also that the risk is again shifted to the builder. This system is the opposite of that provided for in Art. 1664 of the Civil Code and it is certainly to be recommended that, in order to avoid any possible doubt as to the purpose of the clause, the shifting of all risks above the ceiling on the builder be clearly set out. In this respect we would refer to the comments which will be made below as respects the fixed price clauses.

(b) *Fixed prices clauses.* It has recently been maintained that a clause providing that the price is fixed does not displace the allocation of risks provided for by Art. 1664 of the Civil Code, since it only refers to normal situations, whilst Art. 1664 comes into operation when the increase in the cost of labour and materials is due to unforeseeable circumstances. On the basis of this reasoning shipbuilders have sometimes tried to maintain that an increase in the cost of labour due to the coming into force of a new collective agreement was unforeseeable at the time when the shipbuilding contract was discussed and signed, and that therefore such an increase justifies, notwithstanding the fixed price clause, an increase in the construction price pursuant to Art. 1664 of the Civil Code. It seems to us that the intention of the parties is certainly not to allocate to the builder the risk of an increase in the cost of labour and materials only as regards the increase which may be caused by foreseeable events : their intention is to provide for a price which is not subject to any escalation in any circumstances whatsoever. A provision whereby the price of the construction is a fixed price would not even be necessary for an increase which is due to foreseeable events, since such increase would not give rise to any right of an increase in the construction price. It is therefore clear that the fixed price clause aims at allocating unto the builder the entire risk of increase of cost of labour and materials. When Italian law applies it would however be advisable, in order to avoid any possible doubt as to the intention of the parties, to provide expressly that the provision of Art. 1664 of the Civil Code is superseded by the fixed price clause.

Another provision of the Civil Code could be held to apply to Shipbuilding Contracts in connection with the increase in the cost of labour and materials, that is Art. 1467 which reads as follows :

« 1467. Contract for mutual counterperformances. In contracts for continuous or periodic performance or for deferred performance, if extraordinary and unforeseeable events make the performance of one of the parties excessively onerous, the party who owes such performance can demand dissolution of the contract, with the effects set forth in article 1458.

Dissolution cannot be demanded if the supervening onerousness is part of the normal risk of the contract.

A party against whom dissolution is demanded can avoid it by offering to modify equitably the conditions of the contract ».

The applicability of this rule to contracts for works and materials is disputed in that these contracts are governed by a specific rule, namely by Art. 1664 reference to which has been made above. It seems to us that this is the correct approach, for Art. 1664 aims at ensuring a reasonable allocation of risks between the parties and at avoiding, by means of such allocation the cancellation of such contracts which is deemed to be contrary to the general interest. If this approach is acceptable cancellation of a shipbuilding contract pursuant to art. 1467 of the Civil Code would not be permissible.

It may, however, be interesting to note that cancellation pursuant to Art. 1467 is permissible only in respect of obligations which have not yet been fulfilled or to the extent to which they are not fulfilled. If, therefore, the construction is in progress and the property has passed to the Owner, the cancellation should not affect the constructed vessel although it is doubtful whether the Owner would have any practical advantage therefrom. Cancellation on account of excessive onerousness is possible only when the excessive onerousness is due to extraordinary and unforeseeable events, so that the remedy is not available when the events which have caused the onerousness could be reasonably foreseeable. The onerousness must be « excessive », and Art. 1467 clarifies that this means a burden which exceeds the normal contractual risk.

Although in our opinion Art. 1467 of the Civil Code should not be applicable to shipbuilding contracts, if the parties intend to exclude any such cancellation it might be convenient so to provide expressly.

6. GUARANTEE OF THE BUILDER

Articles 1667 and 1668 of the Civil Code provide as follows :

« 1667. Deformity and defects of the works. The contractor is bound to warrant the customer against non-conformity or defects in the work. The warranty does not apply if the customer has accepted the work and the changes or defect were known to him or were detectible, provided that such defects were not passed over in silence by the contractor in bad faith.

The customer shall, under penalty of forfeiture, notify the contractor of the non-conformity or defects within sixty days from the discovery thereof. The notice is not necessary if the contractor acknowledged such non-conformity or defects or concealed them.

The action against the contractor shall be prescribed in two years from the date of delivery of the work. A customer who is sued for payment can always enforce the warranty, provided that notice of the non-conformity or defects was given within sixty days from discovery thereof and within two years from delivery ».

« 1668. Contents of warranty against defects in work. The customer can demand that the non-conformity or defects be eliminated at the expense of the contractor or that the price be reduced proportionately, without affecting compensation for damages in case of fault of the contractor.

However, if the non-conformity or defects in the work are such as to render the work completely inadequate for its purpose, the customer can demand the resolution of the contract ».

Art. 240 of the Navigation Code in its turn provides as follows :

« The action against the builder for damages due to deformities and defects is prescribed with the lapse of two years from the delivery of the vessel.

The Owner who is sued for the payment of the price may always enforce the guarantee, provided, however, he has given notice of the deformities or defects within the said two years period.

It may be interesting to consider each aspect of the legal provisions referred to above and compare them with the corresponding contractual rules.

(a) *Nature of the guarantee*

It is a highly controversial question in Italy whether the guarantee provided for in Art. 1667 of the Civil Code is an absolute warranty or a warranty based on fault. Those who have upheld the first theory have compared the warranty of the contractor to the warranty of the seller which is certainly an absolute warranty. Those who have upheld the second theory have compared the warranty of the contractor to the warranty of the seller which is certainly an absolute warranty. Those who have upheld the second theory have pointed out that under Italian law obligations are based on fault and that the warranty of the contractor being an obligation to make good the defects or to indemnify the customer for its damages, it must be based on fault. It seems to us that under the Civil Code of 1865, which remained in force until 1942, the second theory was certainly more in line with the provisions of the law and with their background, which are the provisions of art. 1643 of the French Civil Code for the sale and of art. 1792 of the same Code for the contract for works and materials. Whilst in fact Art. 1643 states that the seller « est tenu des vices cachés, quand même il ne les aurait pas connus », art. 1792 only provides that the responsibility of the « entrepreneur » lasts for ten years, and, except for the shipbuilding contract which, however, has been defined as a contract of sale, the liability of the « entrepreneur » seems to have always been based on fault. The new Italian Civil Code has changed the previous system, by providing in art. 1668 that the customer, in addition to his right to ask the contractor to make good the defect, may also claim damages when the defect is attributable to a fault of the contractor. This provision has been often used to support the theory that the warranty of the contracor is absolute; it has in fact been pointed out that reference to fault with respect to the claim for damages implies that fault is not relevant in so far as the obligation to make good the deformities and the defects is concerned. No definite conclusion seems, however, possible and therefore it is today an open question whether the warranty of the builder according to the provisions of the Civil Code and of the Code of Navigation is an absolute warranty or not.

Coming now to the contractual provisions, it seems to us that the normal wording of the guarantee clause is such as to indicate the intention of the parties to provide for a (limited) absolute warranty, i.e. a warranty whereby the builder undertakes to make good the deformities and the defects in any event, irrespective of his fault, but exonerates himself of any further liability.

Contractual clauses should, however, better clarify this point, in order to avoid possible conflicts.

(b) *Rights of the Owner under the guarantee*

Pursuant to Art. 1668 of the Civil Code the Owner may at his option demand either that the builder eliminate the deformity or the defect at his expense or that the price be decreased proportionally to the depreciation that the deformity or defect has caused to the ship. When the deformity or defect is attributable to the fault of the builder the Owner is also entitled to claim damages.

It is convenient to consider each of these rights of the Owner separately.

(aa) *Elimination of the defect or deformity.* It is controversial whether the customer may directly eliminate the deformity of the defect or whether he has to ask the contractor to do so. Those who support this latter theory point out that the provision refers only to the right of the customer to ask the contractor to eliminate the deformity or the defect, and that, therefore, the customer cannot do so and, if the contractor refuses to comply with his request, the customer must sue the contractor. The result of this theory is that the contractor would be entiled to carry out the repairs only after the contractor has refused to comply with the judgment ordering him to eliminate the deformity or the defect. This theory is clearly against common sense, for no customer, and more specifically no shipowner, can wait for years, until a judgment is obtained, prior to eliminating a defect which may sometimes even prevent the proper running of the ship. It seems to us, therefore, that art. 1668 should not be construed so to prevent the Owner to effect the repairs and then to ask the builder to refund him the amount spent. However, the issue is not settled and therefore the rights of the Owner should be clearly specified in the contract. Normally, shipbuilding contracts provide that the Owner has the option of carrying out repairs and recovering the cost thereof within the limits of the yard's costs or that he may do so elsewhere than at the builder's yard when the ship cannot be conveniently brought to the builder's yard : these provisions overcome the problems which may arise in the construction of art. 1668.

The wording of the guarantee of the builder in most shipbuilding contracts refers only to bad design, defects of materials and bad workmanship, whilst art. 1668 refers to defect generally and then to deformities, which cover any non-compliance with the provisions of the contract and of the specifications which may not be qualified as a defect. The question may be raised whether the lack of any reference to this latter category of non-compliance implies the intention of the parties to contract out the provision of art. 1668 of the Civil Code. We are of the opinion that, unless there is a very clear wording to this effect, the guarantee of art. 1668 remains operative as respects deformities and therefore the problem remains as to whether the Owner is entitled to effect the works necessary to bring the ship in

line with the contract and the specifications or must ask the builder to do so.

(bb) *Depreciation.* According to art. 1668 the Owner has the option to request that the defect or deformities be eliminated or to request a reduction in the building price. The guarantee clause in shipbuilding contracts usually provides that the builder's obligations are confined to repairing or substituting the parts which are affected by a vice. The problem arises whether this wording implicitly excludes the option of the Owner to obtain a reduction in the building price instead of requesting that the vice be eliminated. This seems to be the correct construction of the clause, for it clearly indicates that the builder has no other obligation than repairing or substituting the parts affected by vices. But since the contractual guarantee usually covers only vices, the limitation referred to above is not applicable to deformities in respect of which the reduction of the building price may still be requested by the Owner, alternatively with the elimination of the deformity.

(cc) *Damages.* As stated above, the guarantee clause in shipbuilding contracts always provides that the obligation of the builder is confined to repairing or substituting the parts affected by vices and that any other damages suffered by the Owner, such as loss of earnings, etc. are excluded from the guarantee. By art. 1668 of the Civil Code, the liability of the builder is on the contrary extended to all damages suffered by the Owner when the builder is at fault. The guarantee clause has therefore the effect of exonerating the builder from a statutory liablity. The validity of exoneration clause is governed by art. 1229 of the Civil Code which provides as follows :

« 1229. Exoneration of liability clauses. Any agreement which, in advance, excludes or limits the liability of the debtor for fraud, malice or gross negligence is void.

Any agreement which, in advance, exonerates from or limits liability in cases in which the act of the debtor or his servants or agents constitutes a violation of a duty arising from rules of public policy is also void ».

The interpretation of this provision is unsettled. According to one theory the nullity of exoneration clauses applies only to the (gross) fault or privity of the debtor; according to another theory the nullity applies also to the gross fault of the servants or agents of the debtor.

The arguments put forward in favour of the first theory are based on the wording of art. 1229 itself and of art. 1228 which provides as follows :

« 1228. Liablity for acts of servants or agents. Unless otherwise agreed by the parties, the debtor who avails himself of the services of third persons in the performance of the obligation is also liable for their malicious, fraudulent or negligent acts. »

It has been pointed out that art. 1228 provides that the debtor is liable for the faults of his servants or agents « unless otherwise agreed by the parties » and that this implies the validity of exoneration clauses as respects faults of servants or agents. It has also been pointed out

that art. 1229 in its first paragraph refers only to the fault of the debtor, and that this does not cover the faults of the servants or agents as it appears from the fact that the servants or agents are specifically mentioned in the second paragraph.

The arguments which have been, or may be put forward in favour of the second theory are on the one hand that articles 1228 and 1229 do not clearly support the first theory and that such theory would enable the debtor to escape any liability by delegating the fulfilment of his obligations to his servants or agents. The fact that in the first paragraph of art. 1229, reference is made to the debtor only, whilst in the second paragraph reference is also made to the servants or agents of the debtor does not, in our opinion, indicate an intention to confine the nullity of the exoneration clauses to the fault or privity of the debtor, for the debtor, pursuant to art. 1228, is also liable for the faults of his servants or agents whilst reference to the servants or agents was necessary in the second paragraph in as much as the acts of the principal do not include those of his servants or agents. More doubts may arise on the meaning of art. 1228 and more precisely of the words « unless otherwise agreed by the parties » : the view has been expressed that these words only mean that art. 1228 is not of a cogent character, without positively regulating the cases in which the debtor may exonerate himself from liability in respect of the faults of his servants or agents.

It is therefore doubtful under Italian Law whether the exoneration of the builder from liability as respects indirect damages is valid in so far as the fault of his servants or agents is concerned. In the affirmative, the further problem arises of establishing when, in case of legal entities, a fault may be qualified as personal.

The extent to which a fault of the officers of a corporation may be qualified as « personal » fault of the corporation is not clearly established in Italy. The problem has been more frequently discussed as respects Governmental Authorities and Governmental Agencies for whom it is now settled that the fault of any employee must be qualified as fault of the Authority or Agency in question, for the reason that the concept of legal entity of the public administration is a more technical concept, and therefore there cannot be a fault of the public administration as such, but only a fault of the persons who work in it. The question whether the same rules should apply also with respect to corporations has to our knowledge never been discussed, although there might be some reasons which could justify a similar solution to the problem.

As regards the concept of gross negligence (colpa grave), although at present it is disputed that the fault may be divided into different categories, there is no doubt that, at least with respect to art. 1229 of the Civil Code, the guarantee of the fault still exists and must be related to the principles of Roman law, according to which the

light fault (culpa levis) existed when the obligation to exercise the diligence applied by the bonus pater familias was not fulfilled, whilst the gross fault (culpa lata) existed when not even the minimum degree of diligence anyone would have observed was not used.

c) *Designs or materials supplied by the Owner*

When the designs and the materials are supplied by the Owner, the builder is under an obligation to ascertain whether they are affected by any vice and may be liable if he has failed to exercise due diligence to do so or to notify the Owner of any vice he has discovered: Court of Cassation 16th February 1955, Cantieri Navali Riuniti v. Ministero Tesoro, 1956 Dir. Mar. 161. His liability terminates only if he has notified the Owner and the Owner has expressly requested him to comply with the designs or to use the materials. Shipbuilding contracts often provide that the guarantee does not cover the parts supplied by the Owner and the question therefore arises as to whether such a provision exonerates the builder from his obligation of ascertaining possible defects of such parts. It seems to us that the answer should be in the affirmative, but, of course, the validity of the exoneration is limited by art. 1229 of the Civil Code, so that the builder will remain liable if his omission to ascertain a defect may be qualified as gross negligence.

The obligation of the builder varies according to the nature of the parts supplied by the Owner and of the work which the builder has to do. If in fact the builder has to build the vessel or any part thereof on the basis of plans supplied by the Owner, or if the builder has to employ in the construction materials supplied by the Owner, such obligation exists. But if the builder has only to install on board the ship a piece of equipment supplied by the Owner, the builder is under no obligation to ascertain whether the design of the equipment is proper or the materials used for its construction are satisfactory: he may only be under the obligation to advise the Owner whether the performance of that piece of equipment is likely to be satisfactory.

d) *Equipment supplied by subcontractors*

The builder is liable for all works done or equipment supplied by subcontractors and his statutory guarantee therefore covers all such works and equipment. This is in most cases confirmed by the Italian shipbuilding contracts, but sometimes contracts provide that in case of auxiliaries or other machinery not manufactured by the builder the Owner shall only be entitled to the benefit of any guarantee given by the manufacturers. The purpose of the clause is clearly to exonerate the builder from any liability as respects vices of such auxiliaries or machinery. The clause is valid without any limit if art. 1229 of the Civil Code allows the contractor to exonerate himself from liability for all faults of his servants or agents (including independent contractors); it is on the contrary valid only within the limit of the light fault of the servants and agents if the nullity to exoneration clauses must be extended also to the gross fault of servants and agents.

The clause, however, applies only to vices and not to deformities; if the auxiliaries or other machinery are different from those indicated in the contract or specifications the builder is liable. In addition, the builder is also liable if the characteristics of the auxiliaries or other machinery, even if complying with the specifications, are insufficient or, in any event, not such as to enable the Owner to operate the ship properly.

d) *Approval by Classification Societies*

The designs of the ship, the materials used in the construction and each single machinery are normally approved by the Classification Societies under whose control the construction is made. Unless the contract otherwise provides, such approvals do not reduce the obligations and the liability of the builder although they may influence the estimate of the degree of fault which may be attributable to the builder. Sometimes shipbuilding contracts attribute a greater value to some approvals granted by Classification Societies by providing, for example, that the approval of the quality of materials is final and binding upon the parties. In this case, the clause should not be qualified as an exoneration clause, but as an agreement on the burden of proof, for its effect is to attribute the value of conclusive evidence to the approval granted by the Classification Societies. The clause would consequently be valid without any limitation, irrespective of the interpretation of art. 1229 of the Civil Code. If, on the contrary, the purpose of the clause is to exonerate the builder from liability for vices which have not been noticed by the Classification Societies' inspectors, the validity of the clause depends upon the interpretation of art. 1229.

f) *Approval by the Owner*

During the construction the Owner may be asked to give his approval to the designs and plans of the ship, to materials used for its construction or to pieces of equipment fitted or to be fitted on board. Unless the contract otherwise provides, all such approvals do not in any way diminish the obligations and the guarantee of the builder, and are binding upon the Owner only as regards the layout of the ship, the type and location of equipments, cabins, public rooms, etc., aesthetics and other aspects of the construction which do not influence the proper running of the ship.

Any provision in the contract attributing a greater effect to the Owner's approvals must be qualified as an exoneration clause and treated accordingly.

g) *Changes ordered by the Owner and extras*

Changes and extras ordered by the Owner may affect the characteristics of the ship, her safety and performance. They may, for example, increase or decrease the stability, increase the draught, decrease the autonomy, etc. The obligations of the builder in this respects are similar to those falling upon him in case of designs and materials

supplied by the Owner. The builder, therefore, must notify the Owner of the effect of any change or extra on the contractual characteristics of the vessel and obtain the approval of the Owner, unless these effects are so obvious that the approval of the Owner may be implied in his request to effect the change or to provide the extra.

Since, however, doubts may arise as to the extent of the builder's obligations, contracts should regulate this matter expressly.

h) *Notice of defects and deformities*

Pursuant to art. 1667 of the Civil Code the guarantee is not due by the contractor with respect to apparent defects and deformities. This, however, does not mean that the defects and deformities which are not latent are not covered by the statutory guarantee, but that for those defects notice must be given by the Owner, under penalty of forfeiture of all his rights, prior to or at the time of delivery. Even if tests are made in the presence of the Owner some time before delivery, the lack of any remark at that time does not prejudice the right of the Owner to give notice, as respects defects which are not latent, until the time of delivery.

Most shipbuilding contracts do not deal specifically with apparent defects and only provide that notice of any defect must be given within a certain period of time after discovery. If the guarantee clause expressly provides that the statutory guarantee shall not be applicable, the notice period applies in all circumstances, and consequently in respect of defects which are not of a latent character the notice period will commence to run as from delivery, since the defect, being apparent, was or should have been known by the Owner at the time of delivery. If the guarantee clause does not refer to the statutory guarantee, it will supersede the statutory guarantee to the extent it is in conflict with it but no more, and consequently the provision whereby defects which are not of a latent character must be notified prior to or at the time of delivery will remain in force.

The notice period is sixty days according to art. 1667 of the Civil Code and the guarantee period two years. Art. 240 of the Navigation Code provides that the prescription period is two years, but by providing that the Owner may always enforce the guarantee in the way of counterclaim if he has given notice within the two years period, impliedly confirms that the duration of the statutory guarantee is two years. The fact, however, that no reference is made in art. 240 to the notice period of sixty days justifies the opinion that such statutory notice period is not applicable to shipbuilding contracts, in respect to which, therefore, the Owner has only the burden of notifying the defects and deformities within two years from delivery.

Shipbuilding contracts usually provide for a notice period and for a guarantee period, which is either six months or one year. The validity of a clause shortening the guarantee period has been disputed on the ground that the guarantee period is nothing else than the prescription period and that pursuant to art. 2936 of the Civil Code, prescription

periods cannot be modified by the parties. However, the prevailing opinion is that the guarantee period is a different thing from the prescription period as it appears from art. 1669 of the Civil Code which, with reference to immovables, provides as follows :

« 1669. Destruction of and defects in immovables. In the case of buildings or other immovables intended by their nature to last for a long period of time, if within ten years from completion the work is totally or partially destroyed by reason of defects in the soil or in construction, or if such work appears to be in evident danger of destruction or reveals serious deficiencies, the contractor is liable with respect to the customer and his successors in interest, provided notice of said destruction or defects has been given within one year of their discovery.

The right of the customer is prescribed in one year from the notice ».

In the case of major defects to immovables the guarantee period is therefore ten years and the prescription period one year.

Clauses shortening the guarantee period are therefore valid and binding upon the parties.

Also clauses providing for a notice period are valid, since provisions whereby something must be accomplished under penalty of forfeiture of the claimant's rights are in principle permitted by Italian law, provided, however, they do not render too difficult for the claimant the enforcement of his rights (art. 2965 of the Civil Code). A period equal to that of art. 1667 of the Civil Code is therefore certainly valid; it seems to us that also a shorter period may be valid, for the only thing the Owner has to do within the contractual period is to notify the defect or the deformity to the builder. The present communications systems enable the Owner to receive without delay all information about what happens on board his ship, and therefore if a defect is discovered when the ship is at sea, the Owner may be immediately informed and thus is put in the position to notify the builder.

The statutory guarantee of the builder should be automatically renewed with respect to the parts which are affected by a vice from the time of respairs. However, the law is not clear in this respect and therefore it would be advisable to regulate the matter in the contract.

7. BANKRUPTCY OF THE BUILDER

According to art. 81 of the Italian Bankruptcy Law, contracts for works and materials terminate upon the bankruptcy of the contractor unless the trustee in bankruptcy declares within twenty days from the adjudication in bankruptcy that he will step into the contract in lieu of the bankrupt and gives adequate guarantees for the fulfilment of the contractor's obligations under the contract. Termination has no retroactive effect and therefore the part of the contract already performed when the builder is adjudicated bankrupt is not prejudiced by the bankruptcy. If, therefore, under the contract the property of

the ship under construction has already passed to the Owner prior to the bankruptcy of the builder, the bankruptcy does not affect the right of ownership and the Owner may claim delivery of the ship if this is technically possible.

If the trustee does not decide to complete the construction, the Owner cannot claim damages on account of the failure of the builder to deliver the ship. Bankruptcy in fact is not a breach of contract and therefore the unfulfilment of a contract consequent to bankruptcy does not entitle to damages.

May 1973 Associazione Italiana di Diritto Marittimo

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RIDER TO THE STATEMENT OF THE RATIFICATIONS OF AND ACCESSIONS TO THE INTERNATIONAL MARITIME LAW CONVENTIONS

AJOUTE A L'ETAT DES RATIFICATIONS ET ADHESIONS DES CONVENTIONS INTERNATIONALES DE DROIT MARITIME

RIDER TO THE STATEMENT OF THE RATIFICATIONS OF AND ACCESSIONS TO THE INTERNATIONAL MARITIME LAW CONVENTIONS

In a communication dated June 13th 1973, the Ministère des Affaires Etrangères, du Commerce Extérieur et de la Coopération au Développement de Belgique advises that on June 4th 1973 H.E. Mr. Aly Hamdy Hussein, Ambassador in Brussels of the Arab Republic of Egypt, signed the international Acts listed hereunder of which Belgium is the depositary :

1. Protocol signed at Brussels on May 27th 1967, to amend the International Convention for the Unification of certain Rules relating to Assistance and Salvage at Sea and the Protocol of signature, signed at Brussels on September 23rd 1910;

2. Protocol signed at Brussels on February 23rd 1968, to amend the International Convention for the Unification of certain Rules relating to Bills of Lading and Protocol of signature, signed at Brussels on August 25th 1924;

3. International Convention relating to Registration of Rights in respect of Vessels under Construction, signed at Brussels on May 27th 1967;

4. International Convention for the Unification of certain Rules relating to Maritime Liens and Mortgages, signed at Brussels on May 27th 1967.

AJOUTE A L'ETAT DES RATIFICATIONS ET ADHESIONS DES CONVENTIONS INTERNATIONALES DE DROIT MARITIME

Suivant une communication datée le 13 juin 1973, le Ministère des Affaires Etrangères, du Commerce Extérieur et de la Coopération au Développement de Belgique avise que S.E. Monsieur Aly Hamdy Hussein, Ambassadeur de la République Arabe d'Egypte à Bruxelles, a, en date du 4 juin 1973, procédé à la signature des actes internationaux ci-dessous, dont la Belgique est dépositaire :

1. Protocole signé à Bruxelles le 27 mai 1967, portant modification de la Convention Internationale pour l'unification de certaines règles en matière d'assistance et de sauvetage maritimes et Protocole de signature, signés à Bruxelles le 23 septembre 1910;

2. Protocole signé à Bruxelles le 23 février 1968, portant modification de la Convention internationale pour l'unification de certaines règles en matière de connaissement et Protocole de signature, signés à Bruxelles le 25 août 1924;

3. Convention internationale relative à l'inscription des droits relatifs aux navires en construction, signée à Bruxelles le 27 mai 1967;

4. Convention internationale pour l'unification de certaines règles relatives aux privilèges et hypothèques maritimes, signée à Bruxelles le 27 mai 1967.

4

ERRATA

ERRATA

DOCUMENTATION CMI 1972

VOLUME III

Amendments - Rectifications

(Page 241)

BUNDESREPUBLIK DEUTSCHLAND
instead of - au lieu de
Deutsche Bundes Republik

Change of address :
Changement d'adresse :
(page 275)

M. Robert DE SMET, Avocat à la Cour d'Appel, Professeur à l'Université de Louvain, *176,* Avenue Franklin Roosevelt, 1050 Bruxelles, Belgique.

DOCUMENTATION CMI 1973

VOLUME I

Rectifications au projet de texte des nouvelles Règles d'York et d'Anvers.

Règle IX (*page 31*)
Deuxième ligne :
... *aura* été nécessaire de brûler...
au lieu de
... *aure* été nécessaire de brûler...

Règle X (*page 31*)
Première ligne :
(*a*) Quand un navire sera entré dans...
au lieu de
Quand un navire sera entré dans...

REGLE XI (*page 35*)

Troisième ligne :

(a) ... et les approvisionnements consommés durant la prolongation *du* voyage...

au lieu de

(a) ... et les approvisionnements consommés durant la prolongation *de* voyage...

5

IN MEMORIAM

IN MEMORIAM

We regret to announce that Mr. Teruhisa ISHII, President of the Japanese Maritime Law Association and Titulary Member of the Comité Maritime International, passed away on July 16th 1973.

Mr. Teruhisa ISHII was responsible for the organization of the International Conference held in Tokyo in 1969 and was Vice-President of the Bureau at that conference. He was appointed a Vice-President of the Comité Maritime International by the First Assembly of November 6th and 7th 1972.

The Comité Maritime International wishes to express its deep sympathy to the Japanese Maritime Law Association.

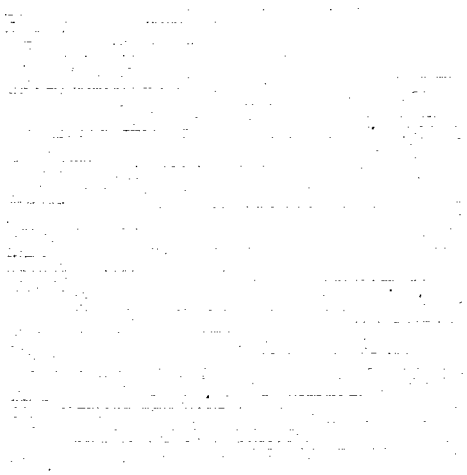
IN MEMORIAM

Nous regrettons d'annoncer que Monsieur Teruhisa ISHII, président de l'Association Japonaise de Droit Maritime et membre titulaire du Comité Maritime International, est décédé le 16 juillet 1973.

Monsieur Teruhisa ISHII fut chargé de l'organisation de la Conférence Internationale de Tokyo, 1969, et assuma la vice-présidence du Bureau de cette conférence. Il fut élu vice-président du Comité Maritime International à la Première Assemblée tenue les 6 et 7 novembre 1972.

Le Comité Maritime International prie l'Association Japonaise de Droit Maritime de trouver ici l'expression de ses sincères condoléances.

INDEX



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