INTERNATIONAL MARITIME COMMITTEE

International Subcommittee

on

BILL OF LADING CLAUSES

2.

COMMENTS ON REPORT OF INTERNATIONAL SUBCOMMITTEE

Dated 30th March 1962

MAY 1963

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ASSOCIATION FRANÇAISE DU DROIT MARITIME

OBSERVATIONS SUR LE RAPPORT DE LA COMMISSION INTERNATIONALE DES CONNAISSEMENTS

OBSERVATION PRELIMINAIRE

L'Association Française du Droit Maritime (A.F.D.M.) partage, en ce qui concerne la méthode à suivre pour la modification éventuelle de la Convention de 1924 sur les connaissements, le point de vue de la Commission Internationale (chapitre V de son rapport : « *Action future* »), d'après lequel il s'agit là d'une « question de politique générale pour le C.M.I. » et qu'en conséquence, il n'y a pas lieu de faire, pour le moment, des recommandations à ce sujet.

Cependant, quelle que soit la méthode à adopter, il est vraisemblable que l'entrée en vigueur des amendements qui pourront être adoptés prendra un certain temps assez long.

Or, de l'avis de l'A.F.D.M., il est absolument urgent que le texte adopté en 1959 à Rijeka pour modifier l'*art. 10 de la Convention* (domaine d'application de celle-ci) puisse commencer à s'appliquer dans les plus brefs délais possibles.

Aussi, l'A.F.D.M. émet-elle le vœu que la Conférence Diplomatique se réunisse très prochainement pour adopter le texte de Rijeka, sans attendre l'issue des travaux relatifs aux autres modifications de la Convention.

Voici maintenant l'opinion de l'A.F.D.M. sur les 24 questions traitées dans le rapport de la Commission Internationale :

I. **Question N° 1. - Chargement, arrimage ou déchargement négligent effectué par le chargeur ou par le destinataire.** (Art. 3, § 2).

L'A.F.D.M. estime qu'il n'y a pas lieu d'apporter sur ce point une modification à l'*art. 3 § 2*, car il est à craindre que la clause mettant le chargement, la manutention, l'arrimage ou le déchargement à la charge du chargeur ou du réceptionnaire (alors que ces opérations incombent normalement au transporteur) ne devienne une clause de

FRENCH MARITIME LAW ASSOCIATION

COMMENTS ON THE REPORT OF THE INTERNATIONAL SUBCOMMITTEE ON BILL OF LADING CLAUSES

PRELIMINARY REMARK

As for procedure about the eventual amendment of the 1924 Convention on Bills of Lading, the French Maritime Law Association (F.M.L.A.) shares the view expressed by the International Subcommittee (Chapter VI of the report, under the heading « *Future action* ») whereby « this question of policy is one for the I.M.C. » and consequently, that it is not advisable, at present, to make any recommendations in this respect.

However, whatever the procedure may be, it is to be expected that the coming into effect of the amendments which might be adopted, will take a rather long time.

Now the F.M.L.A. feels that it is utterly pressing that the text adopted in 1959 at Rijeka to amend Article X of the 1924 Convention (field of application of the Convention) may be put into operation within the earliest possible time.

The F.M.L.A. therefore expresses the wish that a meeting of the Diplomatic Conference be held very soon in order to adopt the Rijeka text, without waiting for the end of the studies relating to the other amendments of the Convention.

Here follow the views of the F.M.L.A. on the 24 questions dealt with in the report of the International Subcommittee :

I. **Question n° 1. - Negligent loading, stowage or discharge of the goods by the shipper or consignee.** (Art. III (2).

The F.M.L.A. feels that it is not advisable to bring any amendment to Article III (2) to that effect, as it is to be feared that a clause whereby the loading, handling, stowage or discharge be cast upon the shipper or consignee (when these operations normally fall on the carrier), would become inoperative, perhaps even aggravated by a further

style, aggravée même peut-être par une disposition complémentaire, d'après laquelle, même lorsque ces opérations sont effectuées par le transporteur, celui-ci serait réputé les accomplir pour compte, et comme mandataire, du chargeur ou du réceptionnaire. Il pourrait y avoir là source à de sérieux abus.

Pour le cas, cependant, où contre son avis, la modification suggérée par la Commission Internationale serait admise, l'A.F.D.M. présente les 2 observations suivantes :

1° Il n'apparaît pas opportun de faire débuter le § 2 de l'art. 3 par les mots : « Pour autant que ces opérations ne soient pas effectuées par le chargeur ou le destinataire », étant donné que ce § 2 vise, non seulement les opérations ci-dessus énumérées, mais aussi celles ayant trait au transport, à la garde et aux soins de la marchandise.

2° Il faudrait insérer dans l'art. 3 un nouveau paragraphe (§ 2bis), dans lequel on prenait soin de stipuler que, dans l'hypothèse envisagée, le transporteur ne serait exonéré de sa responsabilité normale qu'à la double condition :

a) que le chargement, déchargement, etc. aient été effectivement faits par le chargeur ou par le destinataire, sans que le transporteur, si c'est lui qui les a effectués, puisse être considéré comme leur mandataire pour ces opérations;

b) que le connaissement indique expressément et de façon très apparente que le chargement, arrimage etc. ont effectivement été faits par le chargeur et que c'est le destinataire qui doit effectuer le déchargement, — cela, afin qu'il ne puisse pas y avoir des surprises désagréables pour le tiers-porteur du connaissement, document essentiellement circulatoire.

II. **Question N° 2. - Avis de réclamation.** (Art. 3, § 6).

L'*art. 3 § 6* énonce sans ambiguïté que l'absence de réserves à destination dans le délai prévu (au moment de la livraison pour les dommages apparents; dans les 3 jours de la livraison pour les dommages non apparents) a uniquement pour effet de créer une présomption, sauf preuve contraire, de livraison conforme à la description du connaissement et qu'elle ne saurait donc produire aucun autre effet.

L'A.F.D.M. est donc d'avis de n'apporter aucune modification à ce texte.

L'adjonction, qui est proposée, des mots : « mais n'aura pas d'autres répercussions sur les relations entre les parties » ne semble apporter aucune clarté ou précision supplémentaire au texte et risque même de l'obscurcir.

Tout au plus, pourrait-on faire la remarque suivante :

provision whereby even when these operations are performed by the carrier, the latter would be considered to perform them on behalf and as authorized agent of the shipper or consignee. This might be the source of serious abuse.

However, in the event of the passage of the amendment suggested by the International Subcommittee, the F.M.L.A. which expressed an opposing view, brings forward the two following comments :

1° It does not seem to be advisable to commence Article III (2) with the words : « In so far as these operations are not performed by the shipper or consignee », as this second paragraph not only aims at the hereabove enumerated operations, but also at those referring to the carrying, keeping and care of the goods.

2° A new paragraph (para 2bis) should be inserted in Art. III whereby good care would be taken to lay down that, in the contemplated assumption, the carrier would only be exempted from his normal liability on the double condition :

a) that the loading, discharge, etc... have actually been performed by the shipper or consignee, without the carrier, if he has performed these operations himself, being possibly considered as their authorized agent for the above operations;

b) that the Bill of Lading specifically provides and in a very obvious way that the loading, stowage etc. have actually been performed by the shipper and that the consignee is the one who must discharge the goods, this in order to avoid unpleasant surprises to a third party holder of the Bill of Lading, which document is essentially circulatory.

II. **Question n° 2. - Notice of claim.** (Art. III (6).

Article III (6) provides unambiguously that the lack of notice given at destination within the required time (at the time of delivery for apparent damage; within three days of the delivery if the damage is not apparent) has merely the object of being prima facie evidence of the delivery of the goods as described in the Bill of Lading and thus, could not have any other effect.

The F.M.L.A. feels therefore that no amendment should be brought to that text.

The recommendation to add the words : « but shall have no other effect on the relations between the parties » does not seem to bring any clarification or any additionnal precision to the text and the F.M.L.A. feels that the above words would even render the text difficult to understand.

At the utmost, the following remark could be passed :

Le 1er alinéa du § 6 (cas des réserves immédiates) parle de la remise de la marchandise « sous la garde de la personne ayant droit à la délivrance sous l'empire du contrat de transport ».

Le 2e alinéa de ce § 6 (cas des réserves dans les 3 jours) parle « de la délivrance », sans plus. Peut-être serait-il utile de préciser qu'il s'agit, là aussi, de la livraison faite à l'ayant-droit. On pourrait alors dire à l'alinéa 2 :

« ...dans les trois jours de la délivrance à la personne indiquée à l'alinéa précédent ».

III. **Question N° 3. - Prescription en matière de réclamations relatives à des délivrances à personnes erronées (« wrong delivery »).** (Art. 3, § 6).

Il est proposé d'établir une prescription de 2 ans à dater de l'émission du connaissement en cas de « wrong delivery », mais le rapport de la Commission Internationale s'abstient d'examiner la question de l'étendue de la responsabilité du transporteur dans ce cas : est-elle entière ou bénéficie-t-elle de la limitation légale ? Autrement dit, la Convention s'applique-t-elle ou non au cas de « wrong delivery » ?

L'A.F.D.M. estime qu'il ne serait pas logique de s'occuper, dans la Convention, du délai de prescription en cette matière, sans s'occuper en même temps de la question de l'étendue de la responsabilité du transporteur.

Elle est d'avis de n'apporter, à ce sujet, aucune modification au § 6 de l'art. 3.

IV. **Question N° 4. - Taux de Conversion. - Unité de Limite** (Art. 4, § 5 et art. 9).

L'A.F.D.M. est d'accord avec la Commission Internationale :

a) pour maintenir l'expression « colis ou unité »;

b) pour remplacer les 100 £ or actuelles par 10.000 francs Poincaré;

c) pour supprimer l'art. 9.

Cependant, dans le texte même du nouveau § 5 de l'art. 4, il faut éviter d'employer l'expression « franc Poincaré », qui est une simple dénomination courante, mais sans caractère officiel.

Il suffira donc de parler, au 1er alinéa du § 5, de 10.000 francs, et d'ajouter, à ce pragraphe, un dernier alinéa, ainsi conçu :

« Le franc mentionné dans le présent paragraphe est considéré comme se rapportant à une unité constituée par soixante-cinq milligrammes et demi d'or au titre de neuf cents millièmes de fin. La conversion en monnaie nationale est effectuée d'après la loi du Tribunal saisi ».

The first line of para (6) (in case of immediate notice) refers to the delivery of the goods « into the custody of the person entitled to delivery thereof under the contract of carriage ».

The second line of said para (6) (in case of notice given within three days) refers to « the delivery », nothing more. It would perhaps be advisable to define more accurately that, there again, it is a matter of delivery to the rightful claimant. It would then be possible to insert in the second line :

« ...within three days of the delivery to the person mentioned in the preceding line ».

III. **Question n° 3. - Time limit in respect of claims for wrong delivery.** (Art. III (6) third para.)

It is put forward to lay down a two years time limit from the date of the Bill of Lading in case of wrong delivery, but the report of the International Subcommittee abstains from considering the question of the extent of the carrier's liability in this respect : is this liability complete or is it subject to the legal limitation ? In other words, does the Convention apply or not to the case of wrong delivery ?

The F.M.L.A. feels that it would not be logical to deal in this Convention with the term of limitation in this respect without dealing at the same time with the question of the extent of the carrier's liability.

The F.M.L.A. is of opinion that no amendment should be brought to Art. III (6) in this respect.

IV. **Question n° 4. - Rate of exchange, Unit Limitation.** (Art. IV (5) and IX).

The F.M.L.A. agrees with the International Subcommittee :

a) to maintain the expression « package or unit »;

b) to replace the existing £ 100,-,- in gold by 10.000 Poincaré francs;

c) to strike out Article IX.

However, in the new text of Art. IV (5), we must avoid to use the term « Poincaré franc » which is only a current appellation without any official capacity.

It will be enough to refer in the first line of para 5 to 10.000 francs and add to this paragraph a second line worded as follows :

« The franc mentioned in this paragraph is understood to be referring to a unit consisting of 65.5 milligrams of gold of millesimal fineness 900. The conversion into national currencies shall be regulated in accordance with the law of the court seised of the case ».

V. Question N° 5. - La responsabilité quasi-délictuelle. - The « Himalaya » problem.

L'A.F.D.M. est d'accord avec les propositions de la Commission Internationale sur les points suivants :

1° Quelle que soit la nature de l'action engagée contre le transporteur (contractuelle ou quasi-délictuelle), celui-ci bénéficiera des dispositions de la Convention.

2° Les préposés du transporteur, recherchés personnellement, bénéficieront également de ces dispositions.

3° L'ensemble des montants récupérables sur le transporteur et sur ses préposés ne devra pas dépasser le montant de la limitation édictée par la Convention.

4° Ni le transporteur ni ses préposés ne pourront personnellement bénéficier des dispositions de la Convention pour les actes ou omissions commis personnellement par chacun d'eux avec l'intention de causer le dommage ou avec conscience qu'un dommage en résulterait probablement. A cet égard, il est préférable de s'inspirer de la formule du Protocole de la Haye à la Convention de Varsovie : « acte ou omission fait, soit avec l'intention de provoquer un dommage, soit témérairement et avec conscience qu'un dommage en résulterait probablement ».

5° Il n'y a pas lieu de s'occuper spécialement de ces actes ou omissions d'une nature grave en matière de fautes nautiques.

Mais, par contre, l'A.F.D.M. estime :

a) que, lorsque ces actes ou omissions d'une nature particulière ont été commis par les préposés du transporteur, il y a lieu, dans la mesure où ils se répercutent sur la responsabilité du transporteur lui-même, de faire une distinction : le transporteur continuerait à bénéficier personnellement de la limitation de responsabilité pour les actes ou omissions des préposés commis témérairement et avec conscience qu'un dommage en résulterait probablement; il perdrait le bénéfice de la limitation pour les actes ou omissions des préposés commis avec l'intention de provoquer un dommage.

b) qu'il n'y a pas lieu de parler des « sous-traitants indépendants » (« independent contractors ») du transporteur, en même temps que de ses préposés. Ces sous-traitants indépendants sont régis soit par le droit commun, soit par un statut qui leur est propre, et la Convention n'a pas à les connaître.

L'ensemble de ces idées pourrait être concrétisé par les nouveaux paragraphes suivants, à ajouter à l'art. 4 :

§ 7. — « Le transporteur peut se prévaloir des dispositions de la Convention qui excluent ou limitent sa responsabilité, que l'action introduite contre lui pour pertes ou dommages le soit sur une base contractuelle ou sur une base quasi-délictuelle ».

V. Question n° 5. - Liability in tort, the « Himalaya » problem.

The F.M.L.A. agrees with the motions of the International Subcommittee on the following points :

1° Whatever the nature of the suit brought against the carrier may be (in contract or in tort), the latter shall be entitled to the benefits of the provisions of the Convention.

2° The carrier's servants sued personally, shall also be entitled to the benefits of the above provisions.

3° The aggregate of the amounts recoverable from the carrier and his servants shall not exceed the limitation sum provided for in this Convention.

4° Neither the carrier nor his servants shall personally be entitled to the benefits of the provisions of the Convention in respect of acts or omissions of such carrier of servants done personally with intent to cause damage or with knowledge that damage would probably result. In this respect, it would be more advisable to take pattern by the formula of the Hague Protocol to the Warsaw Convention : « act or omission done, whether with intent to cause damage, or recklessly and with knowledge that damage would probably result ».

5° There is no need to deal specifically with those acts or omissions of serious offence in respect of nautical faults.

But on the other hand, the F.M.L.A. feels :

a) That when these acts or omissions of a particular character have been done by the carrier's servants, it is recommended, as far as these acts or omissions have repercussions on the liability of the carrier himself, to make a distinction : the carrier would still be personally entitled to the benefit of the limits of liability in respect of acts or omissions of his servants done recklessly and with knowledge that damage would probably result; he would loose the benefit of limitation in respect of acts or omissions of his servants done with intent to cause damage.

b) That there is no need to refer to the carrier's « independant contractors » (sous-traitants indépendants) and servants at the same time. These independent contractors are governed either by common law or by a bye-law of their own, and the Convention does not have to deal with them.

The above views as a whole could be put in concrete form by adding the succeeding new paragraphs to Article IV :

Para 7. — « The carrier is entitled to avail himself of the defences and limits of liability provided for in this Convention, whether the action for loss or damage be brought against him in contract or in tort ».

§ 8. — « Lorsque la responsabilité d'un préposé ou agent du transporteur, ayant agi dans l'exercice de ces fonctions, est mise extra-contractuellement en cause, cette personne peut également se prévaloir des dispositions de la Convention qui excluent ou limitent la responsabilité du transporteur, le montant total des indemnités dues par le transporteur et par cette personne ne pouvant pas dépasser les limites prévues par la Convention. Toutefois, elle ne pourra pas se prévaloir desdites dispositions si les pertes ou dommages ont pour cause un acte ou omission commis par elle, soit avec l'intention de les provoquer, soit témérairement et avec connaissance que des pertes ou dommages en résulteraient probablement ».

§ 9. — « Ni le transporteur ni le navire ne peuvent se prévaloir des dispositions de la Convention qui excluent ou limitent leur responsabilité, lorsque les pertes ou dommages ont pour cause un acte ou omission commis par le transporteur, soit avec l'intention de les provoquer, soit témérairement et avec connaissance que des pertes ou dommages en résulteraient probablement. Ils ne peuvent pas non plus se prévaloir desdites dispositions, lorsque les pertes ou dommages ont pour cause un acte ou omission de leurs préposés ou agents, commis par ceux-ci, ou par l'un d'eux, avec l'intention de les provoquer. »

VI. **Question N° 6. - Dommage nucléaire.**

L'A.F.D.M. est d'accord sur le texte proposé par la Commission Internationale.

VII. **Question N° 7. - « Both to blame Clause ».**

L'A.F.D.M. estime qu'il n'y a pas lieu de traiter dans la Convention de cette clause, motivée uniquement par une particularité du droit américain.

VIII. **Question N° 8. - Animaux vivants, chargements en pontée et mise du navire en bon état de navigabilité.** (Art. 1, al. c, et Art. 3, § 1er).

L'A.F.D.M. approuve la décision de la Commission Internationale de ne faire aucune recommandation en cette matière.

IX. **Question N° 9. - Responsabilité avant chargement et après déchargement.** (Art. 1er, al. e, et art. 7).

La division du contract de transport maritime en trois parties (avant le chargement, pendant le transport maritime proprement dit et après le déchargement), avec application d'un régime juridique différent à chacune d'elles, crée des difficultés, parfois inextricables, —

Para 8. — « When the liability of a servant or agent of the carrier, who has acted in the discharge of his duties, is implicated otherwise then by contract, this person is also entitled to avail himself of the defences and limits of liability of the carrier provided for in this Convention, the aggregate of the amounts recoverable from the carrier and from this person not exceeding the limits provided for in this Convention. However, this person will not be entitled to avail himself of the above provisions if the loss or damage result from an act or omission of such person, either done with intent to cause loss or damage, or recklessly and with knowledge that loss or damage would probably result ».

Para 9. — « Neither the carrier nor the ship shall be entitled to avail themselves of the defences and limits of liability provided for in this Convention when the loss or damage results from an act or omission of the carrier himself, whether done with intent to cause loss or damage, or recklessly and with knowledge that loss or damage would probably result. Neither will they be entitled to avail themselves of the above provisions when the loss or damage results from an act or omission of their servants or agents, done by them, or by one of them, with intent to cause loss or damage ».

VI. **Question n° 6. - Nuclear damage.**

The F.M.L.A. agrees with the text moved by the International Subcommittee.

VII. **Question n° 7. - « Both to Blame clause ».**

The F.M.L.A. feels that this clause should not be dealt with in the Convention, merely justifiable by a peculiarity of the Law of the U.S.A.

VIII. **Question n° 8. - Live animals, cargo carried on deck and making the ship seaworthy.** (Art. I (c) and Art. III (1).

The F.M.L.A. approves of the decision moved by the International Subcommittee to make no recommendation on this particular point.

IX. **Question n° 9. - Liability before loading and after discharge.** (Art. I (e) and Art. VII).

The dividing up of the contract of carriage by sea into three parts (before loading, during the carriage by sea properly so called and after discharge) with application of a different law to each part, creates difficulties sometimes inextricable, — specially when one is unaware of the accurate spot where the damage occured, — and this,

surtout lorsqu'on ignore le lieu précis de la survenance du dommage, — et ce, tant au point de vue de l'étendue de la responsabilité du transporteur, qu'au point de vue des fins de non-recevoir et de la prescription applicables.

L'A.F.D.M. estime qu'un grand service serait rendu aux usagers, comme aux transporteurs, si la Convention était applicable à l'ensemble du contrat, c'est-à-dire depuis la prise en charge de la marchandise par le transporteur jusqu'à sa livraison au destinataire.

Ele émet le vœu qu'une décision soit prise dans ce sens.

X. L.A.F.D.M. estime, comme la Commission Internationale, qu'il n'y a pas lieu de faire une recommendation quelconque au sujet des questions suivantes :

1°. **Question N° 10. - Transbordement.**

2°. **Question N° 11. - Diligence raisonnable.**

3°. **Question N° 12. - Connaissement « reçu pour embarquement. »**

XI. **Question N° 13. - Valeur probante des mentions du connaissement.** (Art. 3), §§ 4 et 5).

L'A.F.D.M. estime que la combinaison des §§ 4 et 5 de l'art. 3 implique que la preuve contraire, dont parle le § 4, n'est possible qu'à l'égard du chargeur, et non à l'égard du tiers-porteur. La jurisprudence française est fixée dans ce sens.

Cependant, pour éviter toute équivoque, il serait peut-être utile d'ajouter, à la fin du § 4, la phrase suivante (inspirée de la formule du § 5) :

« Toutefois, la preuve contraire n'est pas possible à l'égard de toute personne autre que le chargeur ».

On pourrait aussi exprimer la même idée au § 4 sous la forme suivante :

« Un tel connaissement vaudra présomption, sauf preuve contraire à l'égard du seul chargeur, de la réception... etc. ».

XII. **Question N° 14. - Présomption des actions récursoires.** (Art. 3, § 6).

A l'encontre de l'avis de la Commission Internationale, l'A.F.D.M. estime que cette question est importante. Il faut que le transporteur, assigné peut-être la veille de l'échéance de la prescription annale, ait le temps d'assigner, à son tour, son garant, sans que celui-ci puisse lui opposer la prescription annale, dont il peut bénéficier lui-même.

L'action en garantie du transporteur contre son garant doit donc être déclarée recevable, même si elle a été introduite après l'expira-

as much in respect of the extent of the carrier's liability as in respect of pleas in bar and of the prescription to be applied.

The F.M.L.A. feels that it would be of great assistance to the users, as to the carriers, if the Convention was applicable to the contract of carriage as a whole, i.e. from the time the goods have been received into the carrier's charge on to the time they are delivered to the consignee.

The F.M.L.A. expresses the wish that a decision be reached to this effect.

X. The F.M.L.A. agrees with the International Subcommittee that no recommendation whatsoever should be made in respect of the following questions :

1°. **Question n° 10. - Transhipment.**

2°. **Question n° 11. - Due diligence.**

3°. **Question n° 12. - Received for shipment bills of lading.**

XI. **Question n° 13. - Statements in Bills of Lading as evidence.** (Art. III (4) and (5).

The F.M.L.A. feels that the grouping of para 4 and 5 of Article III implies that the contrary proof referred to in para 4, can only be applied to the shipper and not to a third party holder of the Bill of Lading. The French jurisprudence entertains no further doubt about the above.

However, in order to avoid any ambiguity, it would be useful to add to para 4 in fine the following sentence (patterned by the formula or para 5) :

« However, the contrary proof cannot be applied to any person other than the shipper ».

It would also be possible to express the same idea in para 4 by adding the following sentence :

« Such a Bill of Lading shall be prima facie evidence to the sole shipper, of the receipt... etc. ».

XII. **Question n° 14. - Time limit for recourse action.** (Art. III (6).

Contrary to the view of the International Subcommittee, the F.M.L.A. feels that this question is an important one. The carrier who might be sued the day before the one year period comes to an end, should have the time to sue in his turn his guarantor, the latter not being allowed to put forward the one year prescription, to the benefit of which the carrier himself shall be entitled.

The carrier's action in guarantee against his guarantor must therefore be declared admissible, even if it has been brought after the one

tion du délai d'un an, pourvu qu'elle l'ait été (disons) dans le mois, à partir du jour où le transporteur a été lui-même assigné.

Cette idée pourrait se traduire par la formule suivante :

« Les actions récursoires pourront être exercées même après l'expiration des délais prévus par les règles qui régissent ces actions, si elles sont intentées dans le délai d'un mois à partir du jour où les personnes qui les exercent ont été elles-mêmes assignées »

XIII. L'A.F.D.M. estime, comme la Commission Internationale, qu'il n'y a pas lieu de proposer des amendements sur les questions suivantes :

1°. **Question N° 15. - Prescription en matière de retard.** (Art. 3, § 6).

2°. **Question N° 16. - Nature juridique de la prescription annale.** (Art. 3, § 6).

3°. **Question N° 17. - « Invoice Value ».** (Art. 3, § 8).

4°. **Question N° 18. - Prorata Clause.** (Art. 3, § 8 et art. 4, § 5).

5°. **Question N° 19. - Incendie.** (Art. 4, § 2 b).

XIV. **Question N° 20. - Réserve N° 1 du Protocole de signature.** (Art. 4, § 2, alinéas c à p).

Dans la plupart des pays, le réclamateur est admis à faire la preuve de la faute du transporteur ou de ses préposés, autre qu'une faute nautique, dans les cas exceptés (c) à (p) de l'art. 4 § 2, soit parce que cela est stipulé expressément dans leur législation (comme dans l'art. 4 in fine de la loi française du 2 avril 1936), soit parce que cette solution a été admise par leur jurisprudence.

S'agissant d'une solution normale et équitable, l'A.F.D.M. estime qu'il serait préférable que la règle posée dans le N° 1 du protocole de signature figurât dans le texte même de la Convention.

Un nouveau § 2bis de l'art. 4 pourrait être rédigé comme suit :

« La preuve par le transporteur que les pertes ou dommages résultent d'un des cas exceptés prévus aux alinéas (c) à (p) du § 2 ne met pas obstacle à l'administration par le réclamateur de la preuve de la faute du transporteur ou de ses préposés ou agents, autre qu'une faute couverte par l'alinéa (a) dudit § 2 ».

XV. L'A.F.D.M. estime, comme la Commission Internationale, qu'il convient de maintenir le statu quo au sujet des questions suivantes :

1°. **Question N° 21. - Limitation de responsabilité en matière de retard.** (Art. 4, § 5).

year period has come to an end, provided it has been brought (let's say) within one month from the date the carrier was himself sued.

The above idea could be expressed by the following formula :

« The recourse actions may be exercised even after the expiry of the periods provided for by the rules which govern the aforesaid actions, if they are presented within one month from the date the persons who exercise actions have themselves been sued ».

XII. The F.M.L.A. agrees with the International Subcommittee that no amendments should be recommended on the following questions :

1°. **Question n° 15. - Time limit in respect of delay** (Art. III (6).

2°. **Question n° 16. - Legal character of the one year prescription.** (Art. III (8).

3°. **Question n° 17. - Invoice value clause.** (Art. III (8).

4°. **Question n° 18. - The pro rata clause.** (Art. III (8) & Art. IV (5).

5°. **Question n° 19. - Fire.** (Art. IV (2) b).

XIV. **Question n° 20. - The reservation appearing in Protocol of Signature under nr. 1.** (Art. IV (2) c) to p).

In most countries, the claimant is entitled to establish the proof of the fault of the carrier or of his servants, other than a nautical fault, in the exceptions enumerated in Article IV (2) c) to p), either because it is specifically stipulated under their law (as in Article IV « in fine » of the French Law of the 2nd April, 1936), or because this solution has been accepted by their jurisprudence.

It being a normal and equitable solution, the F.M.L.A. feels that it would be advisable that the rule stipulated in the Protocol of Signature under nr. 1 should figure in the text of the Convention.

A new para 2 (bis) drafted as follows, could be inserted in Article IV :

« The proof by the carrier that the loss or damage results from one of the exceptions enumerated in para 2 c) to p), does not prevent the claimant to prove the fault of the carrier or of his servants or agents, other than a fault covered by line a) of para 2 ».

XV. The F.M.L.A. agrees with the International Subcommittee that it is advisable to retain the status quo in respect of the following questions :

1°. **Question n° 21. - Limitation of responsability in respect of delay.** (Art. IV (5).

2°. **Question N° 22. - Cargaisons spéciales.** (Art. 6).

Cependant, au dernier alinéa, il y a lieu de mettre le texte anglais (« ...*or* condition...*or* the circumstances ») en concordance avec le texte français (« ...*et* la condition... *et* les circonstances »).

3°. **Question N° 23. - Paramount Clause.**

XVI. **Question N° 24. - Juridiction.**

L'A.F.D.M. estime utile l'insertion dans la Convention d'une disposition prohibant toute clause attributive de juridiction aux tribunaux d'un Etat non-contractant.

Il serait peut-être également opportun d'examiner la question de savoir s'il ne conviendrait pas de rendre exécutoire dans tout Etat contractant, sans nouvel examen du fond de l'affaire, toute décision en dernier ressort rendue dans un autre Etat contractant.

Paris, le 17 décembre 1962.

Le Président.
M. Pitois

Le Rapporteur,
M. Prodromidès

2°. **Question n° 22. - Exceptional cargo.** (Art. VI).

However, in the last line, the English text (« ...*or* condition... *or* the circumstances ») should be put in concordance with the French text (« ...*et* la condition... *et* les circonstances »).

3°. **Question n° 23. - Paramount clause.**

XVI. **Question n° 24. - Jurisdiction.**

The F.M.L.A. feels that it would be useful to insert in the Convention a provision prohibiting any jurisdiction clause to the Courts of a non-contracting State.

It might also be advisable to consider whether it would not be advisable to put in force in every contracting State, without new consideration of the bottom of the case, any award made in the last resort in another contracting State.

Paris, 17 th December, 1962.

The President,
M. Pitois

The Rapporteur,
M. Prodromidés

ASSOCIATION ARGENTINE DE DROIT MARITIME

MODIFICATIONS A LA CONVENTION DE BRUXELLES CONCERNANT CERTAINES CLAUSES DES CONNAISSEMENTS DE 1924

L'Association Argentine de Droit Maritime, après avoir étudié le Rapport de la Commission Internationale des Clauses de Connaissement présidée par Me Kaj Pineus, fait connaître à continuation ses observations.

I. RECOMMANDATIONS POSITIVES.

1. **Responsabilité du transporteur pour chargement, arrimage ou déchargement négligent effectué par le chargeur ou le destinataire** (art. III (2)).

L'Association Argentine considère que la modification proposée par la majorité de la Commission n'est pas recevable, parce qu'elle peut être contraire à l'obligation du capitaine qui le fait responsable du bon arrimage de la marchandise en ce qui rapporte à la sécurité du navire. Cette obligation, étant d'ordre public, ne peut être abrogée par la volonté des parties. Encore il faut observer que même si les opérations de chargement ou de déchargement sont effectuées par le chargeur ou le destinataire, il n'est pas admissible que le transporteur soit quitte de la responsabilité en rapport à la « garde », « transport » et « soins » qu'il doit procurer aux marchandises. En sus il faut maintenir le principe de la responsabilité du transporteur, pour éviter les difficultés qui pourraient naître en rapport aux actions à introduire, s'ils y avait plusieurs responsables différents.

L'Association Argentine considère qu'il serait préférable enlever le caractère général de la modification proposée, et ajouter un nouveau paragraphe rédigé, plus ou moins, dans la suivante forme :

« *Dans le cas où le chargeur ou le destinateur prend à sa charge certaines opérations de chargement ou de déchargement, respectivement, il subira les dommages ou pertes des marchandises résultant ou provenant des susdites opérations* ».

ARGENTINE MARITIME LAW ASSOCIATION

AMENDMENTS TO THE BRUSSELS CONVENTION RELATING TO CERTAIN CLAUSES IN THE BILLS OF LADING OF 1924

The Argentine Association of Maritime Law, after considering the report of the International Subcommittee on Bill of Lading Clauses presided by Mr. Kaj Pineus, comments thereupon as follows.

I. POSITIVE RECOMMENDATIONS.

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

The Argentine Association considers that the amendment put forward by the majority of the Subcommittee is not admissible, as this amendment may be inconsistent with the master's obligation whereby he is responsible for the proper stowage of the goods with regard to the vessel's safety. This obligation of public policy cannot be abrogated by the will of the parties. It must also be observed that even if the loading and discharging operations are performed by the shipper or consignee, it is not admissible that the carrier be released from his liability to keep, carry and care for the goods. Moreover, we should maintain the principle of the carrier's liability in order to avoid difficulties which could arise when actions are entered, in case several persons would be held responsible.

The Argentine Association considers that it would be advisable to remove the broad complexion of the proposed amendment and to add a new paragraph drafted, more or less, in the following form :

« *Where the loading or discharging operations are performed by the shipper or consignee, respectively, this person will suffer the damage or loss of goods which result from the aforesaid operations* ».

2. Avis de réclamation (art. III, 6) premier paragraphe).

L'Association considère que la modification proposée par la majorité de la Commission en rapport avec les conséquences du défaut d'avis de pertes ou dommages est confuse, parce qu'elle peut donner lieu à diverses interprétations contradictoires. Elle n'est pas appropriée en rapport à la finalité cherchée par la Commission, et même on peut conclure qu'elle n'ajoute rien au sens de la disposition.

L'Association Argentine suggère qu'il faudrait plutôt introduire une disposition destinée à respecter les modalités des opérations de chargement ou de déchargement existantes dans les divers ports du monde. Dans notre pays, les marchandises déchargées du navire sont déposées dans les magasins des douanes, d'où elles sont retirées par les destinataires. C'est-à-dire il n'y a pas une livraison directe du transporteur ou de son agent au destinataire comme en Europe.

Nous suggérons d'ajouter au second paragraphe du numéro 6 de l'article 3 une ajoute comme le suivant :

« *Cet avis, ainsi que celui mentionné au paragraphe antérieur, devront être donnés selon les modalités du port de déchargement* ».

3. Prescription en matière de réclamations relatives à des délivrances à personnes erronées (Art. III, 6) paragraphe 1).

Notre Association ne croit pas acceptable la modification proposée par la majorité, parce qu'elle considère que la délivrance de la marchandise à personne erronée doit être assimilable aux cas de dommages ou pertes qui sont couverts par la prescription annuelle. Il faudrait plutôt modifier le paragraphe 3, en incluant le cas précis en discussion, de la manière suivante :

« En tout cas le transporteur et le navire seront déchargés de toute responsabilité, pour pertes, dommages, ou *non délivrance...* ».

4. Clause Or, Taux de Conversion, Unité de Limite (Art. IV, 5) et IX).

L'Association est complètement d'accord avec la modification proposée par la Commission.

5. La responsabilité quasi-délictuelle. Le problème de l'Himalaya.

Au sujet de cette responsabilité quasi-délictuelle, l'opinion de notre Association est qu'il est convenable que le transporteur puisse se défendre contre les actions de ce genre, dans le cadre de la Convention. Mais elle exprime ses doutes en regard des exonérations et limitations de responsabilité, parce que certains tribunaux pourraient les considérer non applicables à ce type de responsabilité. Tout de même, en regard du capitaine et d'autres préposés de l'armateur, les cas d'exonération ne devraient pas leur être applicables pour les fautes personnelles qu'ils peuvent commettre.

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

The Association considers that the amendment proposed by the majority of the Subcommittee relating to the consequences of the lack of notice of loss or damage is obscure as this amendment can give rise to various conflicting constructions. Neither is this amendment appropriate considering the Subcommittee's purpose and we venture to conclude that it does not add anything to the meaning of the provision.

The Argentine Association suggests that we should rather insert a provision which intends to comply with the methods of loading and discharging operations existing in the various ports of the world. In our country, the goods unloaded from the vessel are stored in the Custom's warehouses, from which they are taken out of bond by the consignees. This means that there is no direct delivery from the carrier or his agent to the consignees, like in Europe.

We suggest to add to the second paragraph of Art. III (6) the following sentence :

« *The above notice, as the one mentioned in the preceding paragraph, shall be given according to the methods of the port of discharge* ».

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

Our Association thinks that the amendment proposed by the majority is not acceptable, as we consider that the delivery of the goods to a person not entitled to them must be similar to the cases of damage or loss which are covered by the one year time limit. The third paragraph should rather be amended by the insertion of the precise matter at issue, as follows :

« In any event the carrier and the ship shall be discharged from all liability in respect of loss, damage or non delivery... ».

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

The Association completely agrees with the amendment put forward by the Subcommittee.

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

As regards this liability in tort, our Association is of opinion that it is suitable that the carrier may protect himself against such actions within the meaning of the Convention. But our Association entertains doubts regarding the exemptions and limitations of liability, as certain Courts might consider them as not applicable to this type of responsibility. However, the cases of exemption should not be applicable to the master and other servants of the Shipowners in respect of personal faults they are liable to make.

6. Dommage nucléaire.

7. Both of blame clause.

L'Association est d'accord avec les conclusions de la Commission.

5 mars 1963.

Atilio Malvagni, Président
José D. Ray, Secrétaire

6. Nuclear damage.

7. Both to Blame clause.

The Association agrees with the conclusions of the Subcommittee.

5th March, 1963.

Atilio Malvagni, President
José D. Ray, Secretary

DANISH MARITIME LAW ASSOCIATION

COMMENTS ON REPORT OF THE INTERNATIONAL SUBCOMMITTEE

Prepared by Mr. André SØRENSEN

The Danish branch of Comité Maritime International is strongly of opinion that C.M.I. should *not* take any action to amend the Bill of Lading Convention of 1924 in any respect.

On page 69 of the report a number of mebers of the Subcommittee have stated what we think is a very important and heavy argument against taking any action to alter the Convention, namely the following :

« The Convention is widely accepted to-day and on the whole it works well. The Convention represents a compromise between carriers and cargo interests and the parties know the position. Would not an amendment have the effect of upsetting this balance ? »

Even if C.M.I. would only try to carry through some amendments, it is most likely that further suggestions would be advanced for discussion and, successively during the negotiations so many alterations would be adopted that you would get quite a new convention which might not work as well in practice as the present one.

However, with a view to a possible action for alteration of some of the provisions of the 1924 Convention — or perhaps a greater part of the Convention — we would make our comments on the positive recommendations and further examinations made by the Subcommittee as follows :

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

We agree to the proposal of adding the words :

« In so far as these operations are not performed by the shipper or consignee ».

This addition is not unreasonable towards the consignee who ought to know the Rules and who should, therefore, also know that the shipper has possibly performed the loading so that the carrier is not responsible

for loss or damage occasioned by negligence of the shipper (or his stevedore).— In our opinion it is not necessary to state in the bill of lading that the loading has been performed by the shipper.

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

We do not agree the proposed addition and are of opinion that Art. III (6), first paragraph, should be left as it is.

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

Also with respect to this paragraph we feel that the wording of the 1924 Convention ought to be maintained.

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

Having regard to the fact that prices of goods, insurance premiums, freight, loading and discharging costs as well as compensation for loss of or damage to cargo are most often — not to say nearly always — fixed in pounds sterling or dollars we are of opinion that the amount of limitation should not be abstract Poincaré francs but sterling or dollars and we suggest that the amount of limitation be fixed at £ 200.- per unit in accordance with the British gentleman's agreement which is now being used in practice.

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

We can agree to a new article provinding as suggested on page 29 of the report, Nos. 1), 2), 3) but not to No. 4). The contents of No. 4) might be used as a remedy to create a new « Himalaya » decision and thereby make null and void the good ideas laid down in Nos. 1), 2) and 3).

We do not agree to the Subcommittee's new provision proposed to be added to Article IV, No. 7.

6. Nuclear damage.

The Subcommittee's recommendation is acceptable.

7. Both to Blame.

We quite agree that the U.S.A. should adopt the same rules about collisions as the rest of the maritime world and we, therefore, also agree to the Subcommittee's decision on this subject.

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

The Subcommittee's decision is in our opinion absolutely justified. The Convention should not be altered with respect to live animals or deck cargo.

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

we agree that status quo should be maintained.

10. Liability when goods are transhipped.

The Subcommittee's decision should be adopted.

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

The question as to whether a shipowner has « exercised due diligence » by putting his ship in the hands of competent repairers is of great importance and, if C.M.I. really intends to alter the Convention, C.M.I. should adopt an article which establishes a clear protection for the shipowner who has employed competent repairers.

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

We agree with the decision of the Subcommittee.

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

The decision of the Subcommittee that there is no need for amending the Convention to meet the point raised is right.

The suggestion made by the minority is in our view not acceptable.

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

If the 1924 Convention be altered, it would be appropiate to add an article regarding time limit for recourse action to avoid that a recourse be lost solely on account of time bar, just because the receiver institutes a lawsuit at the last moment to avoid the one year prescription.

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

Should is be decided to alter the present Bill of Lading Convention, it might be recommendable to enlarge the stipulation of time limit in article III (6) to cover also indirect damage, for instance damage caused by delay.

16. Prescription (Art. III (6)).

The question as to whether the time limit in article III (6) constitutes a « prescription » or a « délai de déchéance » is very interesting and important. It ought to be discussed and clearly decided if the 1924 Convention be altered.

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

We are of opinion that in case the present convention should be altered, it should be discussed whether the new convention should contain a provision to the effect that both types of invoice clauses (the « strict » one and the « alternative » one) are valid in a bill of lading.

18. The pro rata clause (Art. III (8)).

No action should be taken as to the question of pro rata clauses.

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

In a possible new convention there should be a provision to the effect that the burden of proof as to actual fault or privity of the carrier rests on the claimant.

The present article IV (2) b should absolutely not be altered to the effect that the carrier should be responsible for fire caused by default of his servants — whether in the navigation or management of the ship or howsoever else.

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

It is our view that the decisions of the Subcommittee are right.

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

In case the 1924 Convention be altered, it should be provided that the limitation as to value shall also apply with respect to indirect damage by delay.

22. Exceptional cargo (Art. VI).

If the Convention be altered on several points, the last paragraph of the English version with respect to exceptional cargo ought to be maintained. That means that the word « or » should be used instead of the French « et ».

23. Paramount Clause.

In our opinion the Paramount Clause should not be made compulsory.

24. Jurisdiction.

A possible new convention should not embody any provision as to jurisdiction clauses.

We wish to express our appreciation of the excellent and great work done by the Subcommittee — and our thanks for the clear and concentrated report which contains also a good deal of extraordinarily valuable and useful information.

Copenhagen, March 25th, 1963

N.V. Boeg, President

JAPANESE MARITIME LAW ASSOCIATION

MEMORANDUM

Our opinion on said problems is only next one concerning your positive recommendation 1.

Art. III (2) should be amended alternatively as follows :
Alternative A :

« The carrier shall, subject to the provisions of Article IV, properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried, provided that the loading, stowage and discharge are prescribed to be performed by the shipper or consignee in a bill of lading and are so performed. »
Alternative B. :

« The carrier shall, subject to the provisions of Article IV, properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried, provided that the loading, stowage and discharge are performed by the shipper or consignee. »

Teruhisa Ishii, President

Tsuneo Ohtori, Secretary

GERMAN MARITIME LAW ASSOCIATION

COMMENTS ON THE REPORT OF THE INTERNATIONAL SUBCOMMITTEE

The German Maritime Law Association after having carefully studied the report of the International Subcomittee on Bill of Lading Clauses should like to submit the following remarks (the numbers and paragraphs refer to those used in the report of the Subcommittee) :

POSITIVE RECOMMENDATIONS

1. Carrier's liability for negligent loading, stowage, or discharge of the goods by shipper or consignee.

In our opinion the problem discussed here has not enough practical importance to give sufficient reason for altering the Hague Rules. Therefore, the status quo should be retained.

2. Notice of claim.

There exists, besides the supposition of the Hague Rules that the goods are delivered as described in the bill of lading, a second supposition in some national laws. According to this supposition it is deemed that, if a damage is proved, yet there is no fault on the part of the carrier. This second supposition is a special rule of the national laws mentioned and not of the Hague Rules. Therefore, any alteration in this field should be left to national law.

3. Time limit in respect of claim for wrong delivery.

This problem has, in our opinion, no serious practical importance. If an alteration of article III (6) third paragraph is desired one should clarify that the expression « loss or damage » covers the case of wrong delivery, too. If such a clarification is inserted the period of one year seems to be sufficient.

4. Gold clause, rate of exchange, unit limitation.

We share the Subcommittee's view that article IX is to be deleted. Furthermore, we agree to the opinion that the monetary unit used in

the Hague Rules should be the Poincaré Franc and that the conversion into national currency should be undertaken in each single case. The date of conversion should be laid down in the Convention and one should try to find a date of conversion which cannot be influenced by the parties concerned (for example the date of discharge).

The limit of liability is in our opinion not a problem of law but a question of compromise between all interested parties. Therefore, the limit of liability should be discussed between shippers, shipowners, insurance companies etc. In this respect, we are of the opinion that the limit of 10.000 Poincaré Francs as proposed by the Subcommittee should be the utmost which could reasonably be agreed upon.

As far as the definition of « package and unit » is concerned we share the view that the status quo should be retained. A satisfying definition will hardly be found.

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

The Hague Rules are a Convention dealing with contractual liability. Therefore, the problem of liability in tort is in our opinion outside the scope of this Convention. It is rather a general problem of civil law. The danger that a plaintiff bases his claim on a tort alledged to be committed by the defendant can arise in each contractual relation. Therefore, a Convention dealing with one special kind of contract should not give rules on liability in tort.

Furthermore, there is in our opinion no practical need for having special rules on liability in tort in the Hague Rules. It is possible to restrict this liability by suitable bill of lading clauses, both for the carrier and for his servants and agents. The majority of all liner bills of lading already contains such clauses.

6. Nuclear damage.

We agree with the Subcommittee that the Hague Rules should not interfere with any national or international regulation concerning liability for nuclear damage.

7. Both to blame.

We share the view of the Subcommittee.

OTHER SUBJECTS EXAMINED

Nos. 8 - 15, 17 - 21, 23, 24

As far as these numbers of the report are concerned we agree with the Subcommittee that no alteration of the Hague Rules should be proposed.

16. Prescription.

We agree that this problem should be studied. We recommend a clarification that the period mentioned in article III (6) can be prolonged after mutual agreement to this effect between the parties concerned.

22. Exceptional cargo.

In our opinion the French text is the only official one. Therefore, there exists no difference between two official texts but a wrong translation from the official text into the English language. Having this in mind the problem seems to be settled.

23. Future Action.

We are of the opinion that a revision of the Hague Rules brings about the danger that the complete system which, on the whole, works satisfactorily would be set up. In so far we share the view of the Dutch association (Conn. C 4) and of the members of the Subcommittee, who expressed their view in that way (p. 68/69). Even if only an additional protocol would be agreed upon in order to prevent an upset of the whole Convention this would lead to a dissipation of law as it can already be observed in connection with the Warsaw Convention. If the plenary meeting — contrary to our opinion — should decide upon a revision of the Hague Rules by a Diplomatic Conference we suggest that only those states should be invited which have already ratified the Hague Rules (article XVI Hague Rules).

Hamburg, 10th April 1963.

THE CANADIAN MARITIME LAW ASSOCIATION

REPORT ON PROPOSED AMENDMENTS TO THE HAGUE RULES

The Canadian Maritime Law Association takes the general view that the Hague Rules have been a successful example of private international law and as such should only be amended if the amendment clarifies or alters some important matter. Even then the amendment should only be supported if it is likely to be adopted as law by the vast majority of the Hague Rules nations of the world.

Our report is the result of many meetings of our committee, and opinions by a number of groups and individuals. For brevity we provide only our conclusions with the barest argumentation.

Revision of Article X

We agree with the amendment to Article X (see page 5 of the Report of the International Subcommittee on Bill of Lading Clauses), and for our own purposes will recommend that the Canadian Water Carriage of Goods Act 1936 be amended by adding to Section 2 the words « and notwithstanding any stipulation, agreement or undertaking to the contrary » after the words « Subject to the provisions of this Act ».

1. First Positive Recommendation

The first positive recommendatoin is to be found on page 11 of the Report and is a proposed amendment to Article III (2). We believe that the addition of the words « in so far as these operations are not performed by the shipper or consignee » is unnecessary, in the light of the present jurisprudence, and in the light of Article IV (2) (i). The amendment would also cause difficulties for the following reasons :

a) A holder in due course of the bill of lading would never know who had loaded and who was responsible, and a clean bill of lading would lose its value as a document of commerce.

b) The occasion rarely arises when shippers load or discharge, and when they do a charter-party is almost always the form of contract. A notated bill of lading can be issued by the carrier, in any event.

c) Under the change it would be extremely difficult to know who had the burden of proving that the damage was done during the loading or during the voyage. As the Rule now stands the Master's responsibility is clear.

2. Second Positive Recommendation

The second new recommendation is to be found on page 15. We do not support this recommandation as it adds, as we see it, nothing to the Act.

3. Third Positive Recommendation

The third new recommendation is to be found on page 17 of the Report. Here again we do not recommend this change because we believe the Act is clear.

4. Fourth Positive Recommendation

The fourth new recommendation is to be found on page 21 of the Report.

a) We support the change to the Poincaré Franc and the limitation at 12,421.35 Poincaré Francs. (see page 21)

b) The date of conversion should be left to the national law.

c) We do not believe that the Act should be modified in this respect, and believe that « per package or unit » is now clear. (see page 25)

5. Fifth Positive Recommendation

The fifth new recommendation is to be found on page 5 of the Report. We believe that the intention of the proposed amendment arising from the Himalaya decision is good in so far as the Master, the crew, and the stevedores are concerned, and that the Master, the crew, and the stevedores should be protected under the Act. We do not believe other independent contractors should be protected. We question the suggested Article IV on page 31, and believe it would cause more confusion than clarity.

6. Sixth Positive Recommendation

We support the Subcommittee's recommendation re nuclear damage to be found on page 35 of the Report.

7. Seventh Positive Recommendation

We support the Subcommittee's recommendation as found on pages 35 & 36 of the Report.

8. Seventeenth Subject Examined

As to the recommendation to be found on page 55 concerning invoice value clauses, we are of the opinion that it is important to have a fixed and easily determinable figure for each claim. In this regard we believe bill of lading clauses should be permitted if they were to fix damages at some such sum as invoice value plus 10 %.

Submitted by the Bills of Lading Committee of the Canadian Maritime Law Association :

William Tetley (Chairman)
Roland Chauvin
A. Stuart Hyndman
Léon Lalande, Q.C.
L. S. Reycraft, Q.C.
John F. Stairs, Q.C.

14 March, 1963

BILL OF LADING CLAUSES

SUMMARY OF REPLIES

RECEIVED UP TO APRIL 17th 1963 FROM NATIONAL ASSOCIATIONS TO THE REPORT OF THE INTERNATIONAL SUBCOMMITTEE

Revision of Article X

The text accepted by the Plenary Conference at Rijeka 1959 reads as follows :

« The provisions of this Convention shall apply to every bill of lading for carriage of goods from one State to another, under which bill of lading the port of loading, of discharge or one of the optional ports of discharge, is situated in a Contracting State, whatever may be the law governing such bill of lading and whatever may be the nationality of the ship, the carrier, the shipper, the consignee or any other interested person.»

Comments :

British Maritime Law Association (Britain) : The Association confirms that, in its view, the Article should be amended as proposed.

Canadian Maritime Law Association (Canada) : We agree with the amendment to Article X.

Finnish Maritime Law Association (Finland) : In our opinion there should be no reference to an optional port. The reference to the nationality of the ship is only confusing. The words « whatever may be the law governing such bill of lading » seem to be superfluous.

L'Association Française du Droit Maritime (France) : Emet le vœu que la Conférence Diplomatique se réunisse très prochainement pour adopter le texte de Rijeka, sans attendre l'issue des travaux relatifs aux autres modifications de la Convention.

Deutscher Verein für Internationales Seerecht (Germany) : No comments.

Associazione Italiana Di Diritto Marittimo (Italy) : No comments.

The Netherlands Maritime Law Association (Netherlands) : No comments.

Norwegian Maritime Law Association (Norway) : We propose that the Rijeka amendment be followed by this addition :

« The Rules of this Convention shall take effect as enacted in the country of the agreed port of discharge.
If no such enactment is in force, then the Rules of this Convention shall take effect as enacted in the country of the port of loading.
If no such enactments are in force, then the Rules of this Convention shall take effect as enacted in the country where the carrier has his principal place of business.
It shall not be permissible to contract out of the above provisions. »

Swedish Association of International Maritime Law (Sweden) : Supports the proposed amendment.

The Maritime Law Association of the United States (U.S.A.) opposes a conflict of law rule.

Positive recommendations

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

The Subcommittee's recommendation :

« (2) *In so far as these operations are not performed by the shipper or consignee* the carrier shall, subject to the provisions of Article IV properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried. »

Comments :

Associacion Argentina de Derecho Maritimo (Argentina) proposes the following text :

« Dans le cas où le chargeur ou le destinataire prend à sa charge certaines opérations de chargement ou de déchargement, respectivement, il subira les dommages ou pertes des marchandises résultant ou provenant des susdites opérations. »

L'Association Belge de Droit Maritime (Belgium) : Est hostile à toute modification de l'Article III (2).

Britain : Subject drafting the following wording illustrates what we have in mind :

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

Canada : Believes the proposed addition is unnecessary and would also cause difficulties.

Danish Branch of Comité Maritime International and International Law Association (Denmark) : Subject to general reserve expressed under « Future action » we agree to the proposal.

Finland : We would prefer to retain the status quo on this point.

France : Estime qu'il n'y a pas lieu d'apporter sur ce point une modification à l'art. 3 § 2.

Germany : The problem has not enough practical importance to give sufficient reason for altering the Hague Rules. The status quo should be retained.

Italy : Suggests to amend the phrase as follows :

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

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

We suggest to add under paragraph 4 of Article 3 that there shall be a conclusive evidence of the loading and stowing of the goods having been performed by the carrier, unless the contrary is evidenced in the bill of lading. »

The Japanese Maritime Law Association (Japan) submits that Art. III (2) should be amended alternatively as follows :

Alternative A :

« The carrier shall, subject to the provisions of Article IV, properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried, provided that the loading, stowage and discharge are prescribed to be performed by the shipper or consignee in a bill of lading and are so performed. »

Alternative B :

« The carrier shall, subject to the provisions of Article IV, properly and carefully load, handle, stow, carry, keep care for and dis-

charge the goods carried, provided that the loading, stowage and discharge are performed by the shipper or consignee. »

The Netherlands : We do not think the amendment proposed desirable.

Norway : Our board supports the recommended amendments.

Sweden : Our Association prefers the status quo on this point.

U.S.A. : disapproves this amendment but that the Association's delegation to the Stockholm Conference is instructed to support an amendment to Art. III (2) substantially in the following form :

« Subject to the provisions of Article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried, provided, however, that if the shipper or consignee performs any of such operations and the bill of lading so states, the carrier shall not be liable for loss or damage to that shipper's or consignee's goods due to the negligent performance of such operation. »

Yugoslav Maritime Law Association (Yugoslavia) proposes the following text :

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

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

The Subcommittee's recommendation :

« Unless ... (no change) ... within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading *but shall have no other effect on the relations between the parties.* »

Comments :

Agentina proposes the following text :

« Cet avis, ainsi que celui mentionné au paragraphe antérieur, devront être donnés selon les modalités du port de déchargement. »

Belgium : Appuie la réserve exprimé par 2 membres de la Commission qui « préféreraient une règle comportant une sanction plus efficace en cas de réclamation tardive ».

Britain : The Association takes no objection to the words recommended as an amendment to this sub-paragraph.

Canada : We do not support this recommendation.

Denmark : We do not agree to the proposed addition and support the status quo.

Finland : We are of the opinion that the addition to the Rule is of no practical value.

France : Est d'avis de n'apporter aucune modification à l'art. 3 (6) premier paragraphe. As to the second paragraph of Art. III (6) France suggests following addition :

« Si les perte ou dommage ne sont pas apparent, l'avis doit être donné dans les trois jours de la délivrance *à la personne indiquée à l'alinéa précédent.* »

Germany : There exists, besides the supposition of the Hague Rules that the goods are delivered as described in the bill of lading, a second supposition in some national laws. According to this supposition it is deemed that, if a damage is proved, yet there is no fault on the part of the carrier. This second supposition is a special rule of the national laws mentioned and not of the Hague Rules. Any alteration in this field should be left to national law.

Italy : We should very much welcome a more clear wording, such as, for instance, the following : « but it (the rule) shall not affect the provisions of Article IV, paragraphs 1 and 2 ».

The Netherlands : It is suggested not to accept this recommendation.

Norway : We cannot see that the proposed amendment will bring any meaning or real effect into this rule which is devoid on any sense as it stands at present. We still find that a too late claimant should be estopped from claiming, and are glad that our Swedish colleagues have taken up our proposal to this effect in their comments. We can also agree with them that « undue delay » is a vague term, and that 7 days, to run from the effective placing at consignee's disposal, seems a reasonable time limit.

Sweden : The proposal of the Norwegian Association during the preparatory work appears to us on the whole a satisfactory formula :

« Any liability of the Carrier under these Rules shall cease unless notice of the claim has been given to the Carrier or his agents

without undue delay, but no notice shall be required if it is proved that the Carrier or any one for whose acts he is responsible acted recklessly or with intent. »

U.S.A. approves this amendment.

Yugoslavia supports the proposed amendment.

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

The Subcommittee's recommendation :

« In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered; *provided that in the event of delivery of the goods to a person not intitled to them the above period of one year shall be extended to two years from the date of the Bill of Lading.* »

Comments :

Argentina proposes the following text :

« En tout cas le transporteur et le navire seront déchargé de toute responsabilité, pour pertes, dommages, ou non délivrance ... »

Belgium : Est d'accord en principe, sous réserve de certaines modifications de pure forme, et approuve également la première réservation c'est-à-dire que les mots « ou non délivrance » soient ajouté de sorte que la phrase sera libellée « ... pour pertes, dommages ou non délivrance à moins que ... ».

Britain : Without prejudice to the provisions of the Gold Clause Agreement, the Association supports the amendment.

Canada : We do not recommend this change because we believe the Act is clear.

Denmark : We feel that the wording of the 1924 Convention ought to be maintained.

Finland : We are prepared to support the recommendation.

France : Est d'avis de n'apporter, à ce sujet, aucune modification.

Germany : This problem has no serious practical importance. If an alteration is desired one should clarify that the expression « loss or damage » covers the case of wrong delivery too. If such a clarification is inserted the period of one year seems to be sufficient.

Italy : We venture to suggest the following text :

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

The Netherlands : Their Association seems mostly inclined to favour the status quo.

Norway : We support the Swedish proposal on one uniform rule covering all claims under a bill of lading.

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

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

U.S.A. disapproves this amendment.

With regard to the proposal the following text is submitted :

« In any event the carrier and the ship shall be discharged from all liability in respect of *the goods* unless suit is brought within one year after delivery of the goods or the date when the goods have been delivered. »

Yugoslavia favours the status quo.

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

The Subcommittee recommends that :

1) Article IX be struck out.

2) Article IV (5) should read as follows :

« Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 10,000 francs per package or unit, each franc consisting of 65.5 milligramms of gold of millesimal fineness 900, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading. »
This declaration ... (no change) ... on the carrier.
By agreement ... (no change) ... above named.
Neither the ... (no change) ... of lading.

« The date of conversion of the sum awarded into national currencies shall be regulated in accordance with the law of the court seized of the case. »

3) The status quo be retained in respect of package and unit. »

Comments :

Belgium : Est d'accord sur le montant proposé et pour maintenir les mots « colis et unités » mais désire qu'il soit précisé que la conversion en monnaie nationale devra se faire à la date du paiement.

Britain : The Association supports the recommendations.

Canada : We support the recommendations « and the limitation at 12,421.35 Poincaré Francs. » Vide report of Subcommittee on B/L Clauses pages 21/23.

Denmark : Subject to general reserve expressed under « Future action » we suggest that the amount of limitation be fixed at £ 200.-.- per unit in accordance with the British gentleman's agreement which is now being used in practice.

Finland : We have no objection.

France : L'A.F.D.M. est d'accord avec la Commission Internationale :

a) pour maintenir l'expression « colis ou unité »;
b) pour remplacer les 100 £ or actuelles par 10.000 francs Poincaré;
c) pour supprimer l'art. 9.

However, the French Association wants to avoid the expression « franc Poincaré » and says : « Il suffira donc de parler, au 1er alinéa du § 5, de 10.000 francs, et d'ajouter, à ce paragraphe, un dernier alinéa, ainsi conçu :

« Le francs mentionné dans le présent paragraphe est considéré comme se rapportant à une unité constituée par soixante-cinq milligrammes et demi d'or au titre de neuf cents millièmes de fin. La conversion en monnaie nationale est effectuée d'après la loi du Tribunal saisi. »

Germany : We share the view that article IX should be deleted. We agree that the monetary unit used should be the Poincaré Franc and that the conversion into national currency should be undertaken in each single case. The date of conversion should be laid down in the Convention. One should try to find a date of conversion which cannot be influenced by the parties concerned (for example the date of discharge).

The limit of liability is not a problem of law but a question of compromise between all interested parties. Therefore, the limit of liability should be discussed between shippers, shipowners, insurance companies etc. We are of the opinion that the limit of 10.000 Poincaré Francs as proposed by the Subcommittee should be the utmost which could reasonably be agreed upon.

As for « package and unit » we share the view that the status quo should be retained. A satisfying definition will hardly be found.

Italy : Suggests the following text :

« Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of francs per ton or per 40 cubic feet at the option of the claimant, each francs consisting of 65.5 milligrams of gold of millesimal fineness 900, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading.
This declaration ... (no change) ... on the carrier.
By agreement ... (no change) ... above named.
Neither the ... (no change) ... of lading.
Conversion of this sum into national currencies other than gold shall be made according to the gold value of such currencies at the date of payment. »

The Netherlands : The Association agrees in principal to the proposals submitted. The date of payment should, however, be taken as the date of conversion. Further, the Association would prefer to reserve its final opinion as to the amount of the limit.

Norway : We support the amendments.

Sweden : Our Association supports the suggestions.

U.S.A. :

The proposed figure acceptable. The reservation with regard to the date of conversion being harmless and, in fact, meaningless. recommends not to object to the inclusion or exclusion of this provision.

No action in respect of « unit ».

Yugoslavia :

a) supports the proposed amendment.

b) favours « the date of payment » or if this proves inacceptable the « date of final judgement ».

c) proposes that « package » be struck out and instead « actual freight unit » be used as being « the best solution among various perfect solutions ».

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

The Subcommittee's recommendation :

« 1) Any action for damages against the carrier, whether founded in contract or in tort, can only be brought subject to the conditions and limits provided for in this Convention.

2) If such an action is brought against a servant or agent of the carrier or against an independent contractor employed by him in the carriage of goods, such servant, agent or independent contractor 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, his servants, agents and independent contractors in the employment of the carrier, in that case, shall not exceed the limit provided for in this Convention.

4) Nevertheless, the servant, agent or independent contractor shall not be entitled to the benefits of the above provisions if it is proved that the loss or damage resulted from an act or omission of such servant, agent or independent contractor done with intent to cause loss or damage or recklessly and with knowledge that loss or damage would probably result. »

The provisions of sub-paragraph (4) of the proposed new Article will be noted. In order to ensure that the position of a carrier is the same as a servant in such circumstances the Subcommittee further recommends that to Article IV be added a new provision which would have no. 7 and would read thus :

« Neither the carrier nor the ship shall be entitled to the benefit of the defences and limits of liability provided for in this Convention if it is proved that the loss or damage resulted from an act or omission of the carrier himself done with intent to cause loss or damage or recklessly and with knowledge that loss or damage would probably result. »

Comments :

Argentina considers

« qu'il est convenable que le transporteur puisse se défendre contre les actions de ce genre, dans le cadre de la Convention. Mais elle exprime ses doutes en regard des exonérations et limitations de responsabilité, parce que certains tribunaux pourraient les considérer non applicable à ce type de responsabilité. Tout de même, en regard du capitaine et d'autres préposés de l'armateur, les cas d'exonération ne devraient pas leur être applicable pour les fautes personnelles qu'ils peuvent commettre. »

Belgium : Est d'accord sur les points 1 - 4 et sur la disposition destiné à porter le nr. 7 mais prendre ultérieurement position sur les cas des sous-traitants indépendants.

Britain : Whatever provision may be inserted in the Rules to protect servants etc. this in itself will be of no avail without a supplementary provision (possibly by way of a specific Section in an Act of Parliament) which lays down that servants, agents and independent

contractors may, notwithstanding that they are not parties to the Contract of Carriage, benefit from the defences and limits of liability set out in such contract. Apart from this consideration, the Association wishes to reserve its position regarding the actual text suggested as an amendment because it is somewhat doubtful that the words employed will in fact achieve the object as set out on page 29 of the Report.

Canada : Believes the intention of the proposed amendment is good in so far as the Master, the crew and the stevedores are concerned. They should be protected under the Act but not other independent contractors. The suggested provision nr. 7 would cause more confusion than clarity.

Denmark : Subject to general reserve expressed under « Future Action » we can accept nos 1), 2) and 3) but not nr. 4) and nr. 7).

Finland : We are in full agreement with the efforts to have the Convention so amended that cases of the « Himalaya » type will not arise again. The Finnish Association then comments on the proposed draft.

France : The French Association suggests to add to Article IV the following new paragraphs :

« § 7. Le transporteur peut se prévaloir des dispositions de la Convention qui excluent ou limitent sa responsabilité que l'action introduite contre lui pour pertes ou dommages le soit sur une base contractuelle ou sur une base quasi-délictuelle.

§ 8. Lorsque la responsabilité d'un préposé ou agent du transporteur, ayant agi dans l'exercice de ses fonctions, est mise extra-contractuellement en cause, cette personne peut également se prévaloir des dispositions de la Convention qui excluent ou limitent la responsabilité du transporteur, le montant total des indemnités dues par le transporteur et par cette personne ne pouvant pas dépasser les limites prévues par la Convention. Toutefois, elle ne pourra pas se prévaloir desdites dispositions si les pertes ou dommages ont pour cause un acte ou omission commis par elle, soit avec l'intention de les provoquer, soit témérairement et avec connaissance que des pertes ou dommages en résulteraient probablement.

§ 9. Ni le transporteur ni le navire ne peuvent se prévaloir des dispositions de la Convention qui excluent ou limitent leur responsabilité, lorsque les pertes ou dommages ont pour cause un acte ou omission commis par le transporteur, soit avec l'intention de les provoquer, soit témérairement et avec connaissance que des pertes ou dommages en résulteraient probablement. Ils ne peuvent pas non plus se prévaloir desdites dispositions, lorsque les pertes ou

dommages ont pour cause un acte ou omission de leurs préposés ou agents, commis par ceux-ci, ou par l'un d'eux, avec l'intention de les provoquer. »

Germany : The Hague Rules deal with contractual liability. The problem of liability in tort is in our opinion outside the scope of this Convention and is rather a general problem of civil law. The danger that a plaintiff bases his claim on a tort alledged to be committed by the defendant can arise in each contractual relation. A Convention dealing with one special kind of contract should not give rules on liability in tort.

There is no practical need for having special rules on liability in tort in the Convention. It is possible to restrict this liability by suitable B/L clauses, both for the carrier and for his servants and agents. The majority of all liner B/L already contains such clauses.

Italy : Supports the recommendation.

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

Norway : We consider such an enactment important and desirable, in order to bring the Hague Rules in line with the Liability Convention and the Warsaw Convention. As to the details various proposals are put forward.

Sweden : Supports this suggestions.

U.S.A. : The vote in U.S. Association was inconclusive.

Yugoslavia supports « the minority opinion under point no. 3 » (page 33 of the report).

6. Nuclear damage.

The Subcommittee's recommendation :

« This Convention shall not affect the provisions of any international Convention or national law which governs liability for nuclear damage. »

Comments :

Subject drafting there seems to be no objections from any Association to this recommendation.

7. Both to Blame.

The Subcommittee's recommendation :

« *Both to Blame clauses.*

The Subcommittee held that the present position was highly unsatisfactory. The Subcommittee unamously declared it would regard it as a great progress towards the unification of Maritime Law if the United States would accept and adopt the same rules about collisions as the rest of the maritime world and authorized the view to be made fully known to interested parties in the United States. »

Comments :

The recommendation is supported by the Associations. The U.S. Association supports an amendment of the Hague Rules to make valid a both-to-blame clause or otherwise eliminate the difficulties of the U.S. both-to-blame rule, preferably as above proposed, with the understanding, however, that the C.M.I. in reporting the proposed amendments should point out to the Diplomatic Conference that the, both-to-blame amendment deals solely with a problem of U.S. law, and that is should be abandoned if, before the clause of the Diplomatic Conference which deals with the proposed amendments of the Hague Rules the problem is cured by U.S. legislation. »

Other subjects examined.

(Regarding all these subjects the International Subcommittee recommends the retention of the status quo.)

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

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

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

Britain : It is thought by some members that further consideration should be given to evolving a clear definition of the period of the carrier's liability.

France : Estime qu'un grand service serait rendu aux usagers, comme aux transporteurs, si la Convention était applicable à l'ensemble du contrat de transport, c'est-à-dire depuis la prise en charge de la marchandise par le transporteur jusqu'à sa livraison au destinataire. Elle émet le vœu qu'une décision soit prise dans ce sens.

Italy : Wonders whether, whilst enabling the carrier to contract out of his liability as per Article VII, the rules of the Convention had not better be made to apply to the whole period of the carrier's liability, namely from the time of delivery of the goods to him for transportation to the time of their delivery to the consignee.

Norway : In the opinion of one dissenting member, representing cargo interest, the Convention should cover the whole period in which the goods are in the actual position of the carrier or his agents, vide further under 10) below.

10. Liability when goods are transhipped.

Norway : The dissenting member representing cargo interest suggests the following amendments to Article I and Article VII of the Convention :

« Article I.

. . . . . .

. . . . . .

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

Article VII.

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

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

Britain : The Association tentatively suggests that Article III (1) should be amended somewhat as follows :

« Provided that if in circumstances in which it is proper to employ an independent contractor (including a Classification Society), the carrier has taken reasonable care to appoint one of repute as re-

gards compentence and has taken all other reasonable precautions, the carrier shall not be deemed to have failed to exercise due diligence solely by reason of an act or omission on the part of such an independent contractor, his servants or agents (including any independent sub-contractor and his servants or agents). »

Denmark : If the C.M.I. really intends to alter the Convention (vide attitude on this point under « Future Action ») the C.M.I. should adopt an article which establishes a clear protection for the shipowner who has employed competent repairers.

Sweden : Should welcome that renewed efforts be made to try to find a solution to the difficulties caused by the « Muncaster Castle » decision.

U.S.A. : The U.S. Association seeks international uniformity on this point, preferably on the basis of amendment of the Hague Rules to assure that the jurisprudence of all countries will be brought into accord with the jurisprudence of the U.S. and England.

Monsieur le Doyen J. van Ryn, Member of the Subcommittee, who accepted the task to investigate the actual position in the various Countries in respect of « due diligence » has kindly submitted the following report, dated Brussels the 31st March, 1963.

« La Commission internationale m'a chargé de recueillir des renseignements au sujet de l'interprétation donnée dans les principaux Etats contractants à la disposition de l'article III (1) de la Convention de 1924.

Le but de cette enquête est notamment de rechercher si la décision en 1961 par la Chambre des Lords (The Muncaster Castle (1961), Lloyd's Reg. pp. 57/91) est en concordance ou non avec la jurisprudence des autres pays. En cas de divergence, il pourrait être utile de tenter d'élaborer une règle interprétative permettant d'assurer l'uniformité du droit maritime sur ce point.

Le cas tranché par l'arrêt précité peut être résumé comme suit : le propriétaire d'un navire, pour mettre celui-ci en état de navigabilité, le confie à un chantier de réparations navales de premier ordre; en fait, les réparations n'ont cependant pas été exécutées dans toutes les règles de l'art, et ces réparations défectueuses entraînent l'avarie de certaines marchandises transportées. Le propriétaire peut-il être considéré comme ayant exécuté son obligation d'exercer une diligence raisonnable pour mettre le navire en état de navigabilité ? L'arrêt de la Chambre des Lords donne à cette question une réponse négative. Le propriétaire répond donc, non seulement de ses défaillances personnelles, mais aussi de celles du réparateur auquel il s'est adressé.

Je résumerai ci-après les renseignements recueillis au sujet de la solution donnée à cette question ou à des questions analogues dans les différents pays dont les Associations ont bien voulu me documenter.

1. — *Suède.*

Bien que la question n'ait pas été expressément tranchée par les cours et tribunaux (le seul cas où elle aurait pu se poser ayant donné lieu à un règlement amiable), on admet que le transporteur n'échappe pas à sa responsabilité, relativement à la navigabilité, par le seul fait que le navire est régulièrement inspecté et vérifié par une société de classification, ni par le seul fait de demander à un tiers (un chantier naval, un ingénieur naval indépendant, etc.) d'examiner (look after) le navire. L'agréation du navire par une société de classification ou par une autorité officielle fera néanmoins considérer, en principe, que le transporteur n'a pas manqué à son obligation d'exercer une diligence raisonnable. D'autre part, en cas de négligence ou de faute dans l'exécution des réparations par le chantier naval, il faudrait appliquer la règle générale du droit suédois selon laquelle un contractant n'est pas responsable de la négligence commise par un sous-traitant indépendant.

L'absence de toute décision judiciaire laisse planer, semble-t-il, une incertitude assez grande sur l'état actuel du droit suédois en la matière.

2. — *Pays-Bas.*

Avant l'introduction des Règles de La Haye (en 1956), la jurisprudence considérait que le transporteur est responsable de la mauvaise qualité des réparations ou de l'inspection, même si ces tâches ont été exécutées par un chantier ou par une société de classification de premier ordre désignés par le transporteur — à moins qu'il ne s'agisse d'un défaut pratiquement impossible à découvrir sans procéder au démontage complet des installations du navire.

La doctrine est favorable à l'opinion consacrée par la décision en cause du Muncaster Castle (voy. notamment S. Royer, Hoofdzaken der vervoerders aansprakelijkheid in het Zeerecht, 1959, p. 234; Schadee, étude dans Nederlands juristenblad, 1952, p. 732).

3. — *Italie.*

Il n'y a pas de décision judiciaire sur la question.

Mais elle devrait, semble-t-il, être résolue par l'application du droit commun, selon lequel (art. 1228 du Code Civil), le débiteur est en principe — sauf dérogation conventionnelle — responsable des fautes commises par ceux auxquels il recourt pour exécuter ses obligations.

4. — *France.*

La loi française impose expressément au transporteur une obligation de résultat (art. 4).

Bien qu'aucune décision judiciaire relative à un cas d'application de l'article III (1) ne nous ait été communiquée, il semble que l'application du droit commun doive conduire à la même solution qu'en Italie.

MM. Mazeaud et Tunc (Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle) enseignent qu'« il faut poser en principe que le débiteur répond de ses substituts. C'est ce qui résulte du fait qu'il s'est engagé : c'est lui qui est tenu si l'engagement n'est pas respecté » (t. I, n° 990). Et plus loin, en conclusion : « Ainsi l'on peut dire que, sous réserve de rares exceptions légales ou conventionnelles, un débiteur est responsable de tous ceux qu'il introduit dans l'exécution de contrat ».

Examinant plus particulièrement la responsabilité contractuelle des substituts, les mêmes auteurs écrivent (n° 992, p. 1034) : « Elle s'explique essentiellement par la volonté des parties. Le débiteur promet un certain résultat ou une certaine diligence. Il peut lui être permis de se substituer un tiers pour le tout ou partiellement. Mais c'est lui qui assumait l'obligation et qui l'assumait tout entière. Le contrat par lui-même implique donc, sauf clause contraire, que le débiteur garantisse le fait de son substitut, même s'il l'a choisi avec soin, et bien que ce substitut soit dans une large mesure un tiers, ce que n'est pas le préposé. »

5. — *Etats-Unis.*

Il n'y a pas d'arrêt de la Cour Suprême des Etats-Unis sur la question qui nous intéresse. Parmi les décisions des autres juridictions qui m'ont été communiquées, j'en ai relevé quelques-unes qui paraissent révéler une orientation semblable à celle qui a été consacrée par la Chambre des Lords dans l'affaire du Muncaster Castle. Aucune décision en sens opposé n'a été portée à ma connaissance.

1) La « due diligence » requise par la loi n'est pas seulement celle du propriétaire; elle comporte aussi l'exercice de la « due diligence » pas ses « agents and servants » : Yungay, 58 F 2d 351 (S.D.N.Y. 1931). Dans le même sens : Hartford Accident & Indemnity Company v. Gulf Refining Co, 127 F Supp. 469 (E.D. La. 1954), affirmed in this particular, 230 F 2d 346 (5th Cir. 1956).

2) Le propriétaire ne peut s'exonérer de sa responsabilité en faisant valoir qu'il a fait examiner son navire, après un accident en cours de voyage, par les capitaines de deux autres navires et par un agent maritime, — en l'absence de tout inspecteur du Lloyd au port de chargement : Willow Pool, 12 F Supp. 96 (S.D.N.Y. 1935), affirmed 86 F 2d 1002 (2d Cir. 1936).

3) Dans un cas d'avarie par de l'eau de mer pénétrant par un trou provoqué par la rouille, il a été jugé que le propriétaire n'avait pas exercé la « due diligence » dont il est tenu, parce que la corrosion de la coque n'aurait pas dû échapper à l'attention des surveillants et des réparateurs, si ces derniers avaient réellement recouru aux mesures de vérification (hammer testing) qu'ils affirmaient avoir avoir appli-

quées : General Motors Corp. v. / The Olanco, 115, F. Supp. 107 (S. D.N.Y. 1953), affirmed per curiam without opinion, 220 F 2d 278 (2d Cir. 1955).

4) Le fait de se substituer un organisme officiel (Sea Service Bureau) pour l'exercice de la diligence raisonnable (delegation of the duty of due diligence to the Sea Service Bureau) ne constitue pas, en soi, un défaut de diligence de la part du propriétaire; mais ce dernier pourrait être rendu responsable d'un défaut de diligence dans le chef du Sea Service Bureau (en l'espèce, il fut constaté en fait que cet organisme n'était pas en défaut) : James Griffiths, 84 F. 2d 785 (9th Cir. 1936).

6. — *Danemark.*

Suivant la jurisprudence de ce pays, l'étendue de l'obligation imposée au propriétaire par l'article III (1) doit être déterminée par référence aux principes généraux, ce qui conduit à considérer que le propriétaire doit prendre toutes les mesures que l'on peut attendre d'un propriétaire prudent et conscient de ses responsabilités.

Cette obligation doit être considérée comme de droit strict, avec la conséquence que le propriétaire ne pourrait se libérer de sa responsabilité éventuelle par le seul fait qu'il aurait recouru à un sous-traitant indépendant, même s'il s'agit d'une firme de premier ordre.

7. — *Canada.*

La question se ramène à celle de savoir si l'obligation d'exercer la diligence raisonnable est « delegable » on non ».

La jurisprudence décide qu'elle ne l'est pas. L'obligation n'est pas considérée comme remplie par le fait que le propriétaire a été simplement diligent. Elle requiert que la diligence ait été réellement (in fact) exercée par le propriétaire ou par ceux auxquels il recourt dans ce but.

S'il s'est adressé à des spécialistes compétents, la seule conséquence en sera qu'on ne pourra lui reprocher une faute personnelle et, en conséquence, qu'il pourra limiter sa responsabilité.

8. — *Belgique.*

La jurisprudence n'a eu à se prononcer que sur la valeur exonératoire, pour le transporteur, de vérifications et de certificats émanant de *bureaux de classification réputés.* Elle ne s'est pas prononcée sur le cas de fautes commises par des chantiers de réparation.

Elle considère que ces certificats constituent une présomption que le transporteur s'est acquitté de son obligation de « due diligence » (Bruxelles 25 avril 1958, J.A. 126; voy. aussi Bruxelles 10 mars 1951, J.A. 231).

Mais cette présomption peut être renversée. Elle l'est notamment — et la responsabilité du transporteur subsiste, — lorsqu'il est prouvé que les experts des Lloyd's ont commis des fautes ou des négligences : Comm. Anvers, 2 mai 1949, J.A. 331; Id., 16 october 1950, Id., p. 265; voy. aussi, quant au principe : Bruxelles 25 avril 1958, précité.

Le principe de la responsabilité personnelle du débiteur du fait de celui qu'il s'est substitué est reconnu par la doctrine : De Page, Droit civil, II, n° 592, et ce non pas seulement dans le cas où le contrat exigeait l'exécution personnelle : id. La loi n'y déroge que dans le cas du mandat : art. 1994 du Code civil, quand le propriétaire était autorisé à se substituer une autre personne : hors de ce cas, le droit commun s'applique, et le débiteur répond de ceux à qui il a confié l'exécution de ses propres obligations.

Conclusion

Sauf une légère réserve en ce qui concerne le droit suédois, il semble que dans tous les pays ci-dessus mentionnés, le transporteur soit considéré comme responsable des fautes ou négligences commises par les tiers (sociétés de surveillance, bureaux de classification, chantiers de réparation, etc.) auxquels il s'en remet pour la vérification de l'état du navire et pour l'exécution des réparations nécessaires.

Il ne semble donc pas que l'article III, § 1, ait donné lieu à des interprétations divergentes. »

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

Britain : Asks for further time to consider the point.

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

Belgium : Souhaiterait que des modifications soient envisagées au texte actuel de la convention (suppression des mots « sauf preuve contraire » à l'article III (4)).

France : Pour éviter toute équivoque, il serait peut-être utile d'ajouter, à la fin du § 4, la phrase suivante (inspirée de la formule du § 5) :

« Toutefois, la preuve contraire n'est pas possible à l'égard de toute personne autre que le chargeur. »

On pourrait aussi exprimer la même idée au § 4 sous la forme suivante :

« Un tel connaissement vaudra présomption, sauf preuve contraire à l'égard du seul chargeur, de la réception ... etc. »

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

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

Yugoslavia supports the reservation (pages 47 - 49 of the report).

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

Denmark : If the Convention is to be altered (vide attitude to this point under « Future Action ») an article about time limit for recourse action should be added in order to avoid that a recourse action be lost solely on account of time bar merely because the receiver institutes a law suit at the last moment to avoid the one year prescription.

France : Suggests the following addition to Article III (6) paragraph 4 of the French text :

« Les actions récursoires pourront être exercées même après l'expiration des délais prévus par les règles qui régissent ces actions, si elles sont intentées dans le délai d'un mois à partir du jour où les personnes qui les exercent ont été elles-mêmes assignées. »

Italy : Supports the proposal made by the French Association.

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

Denmark : Subject to general reserve expressed under « Future Action » it might be recommendable to enlarge the stipulation of time limit to cover also indirect damage, for instance damage caused by delay.

Sweden : Reference is made to what is said by the Norwegian and Swedish Associations under point number 2) Notice of claim.

16. Prescription (Art. III (6)).

Belgium : Souhaiterait que des modifications soient envisagées au texte actuel de la convention.

Denmark : Subject to general reserve expressed under « Future Action » the question whether the time limit constitutes a « prescrip-

tion » or a « délai de déchéance » ought to be discussed and decided if the 1924 Convention is altered.

Germany : This problem should be studied. We recommend a clarification to the effect that the period mentioned in Art. III (6) can be prolonged after mutual agreement to this effect between the parties concerned.

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

Belgium : Souhaiterait que des modifications soient envisagées au texte actuel de la convention.

Britain : There exists support within the Association that this subject should be further considered.

Canada : We are of opinion that it is important to have a fixed and easily determinable figure for each claim. We believe B/L Clauses shoud be permitted if they were to fix damages at some such sum as invoice value plus 10 %.

Denmark : Subject to general reserve expressed under « Future Action » it should be discussed whether a new convention should contain a provision to the effect that both types of invoice value clauses are valid in a B/L.

18. The pro rata clause (Art. III (8)).

No comments.

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

Denmark : Subject to the reserve expressed under « Future Action a possible new convention should contain a provision to the effect that the burden of proof as to actual fault or privity of the carrier should rest on the claimant.

Italy : We suggest to delete the words « unless caused by the actual fault or privity of the carrier ».

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

France : Estime qu'il serait préférable que la règle posée dans le N° 1 du protocole de signature figurât dans le texte même de la Convention. Un nouveau § 2 bis de l'art. 4 pourrait être rédigé comme suit :

« La preuve par le transporteur que les pertes ou dommages résultent d'un des cas exceptés prévus aux alinéas (c) à (p) du § 2 ne met pas obstacle à l'administration par le réclamateur de la preuve de la faute du transporteur ou de ses préposés ou agents, autre qu'une faute couverte par l'alinéa (a) dudit § 2. »

Italy : Recommends that the text of the reservation in the Protocol of Signature be incorporated in the text of the Convention.

Yugoslavia holds the same view as Italy.

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

Denmark : Subject to the general reserve expressed under « Future Action » in case the 1924 Convention is altered it should say that limitation as to value « shall also apply with respect to indirect damage by delay ».

22. Exceptional cargo (Art. VI).

Denmark : Subject to the general reserve expressed under « Future Action » the word « or » should be used instead of the French « et ».

France : Il y a lieu de mettre, au dernier alinéa, le texte anglais (« ...*or* condition... *or* the circumstances ») en concordance avec le texte français (« ...*et* la condition... *et* les circonstances »).

Germany : In our opinion the French text is the only official one. Therefore there exists no difference between two official texts but a wrong translation from the official text into the English language. Having this in mind the problem seems to be settled.

23. Paramount clause.

No comments.

24. Jurisdiction.

France : Estime utile l'insertion dans la Convention d'une disposition prohibant toute clause attributive de jurisdiction aux tribunaux d'un Etat non-contractant.

Il serait peut-être également opportun d'examiner la question de savoir s'il ne conviendrait pas de rendre exécutoire dans tout Etat contractant, sans nouvel examen du fond de l'affaire, toute décision en dernier ressort rendue dans un autre Etat contractant.

Future action

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

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

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

Denmark : Is strongly of opinion that C.M.I. should not take any action to amend the Bill of Lading Convention of 1924 in any respect.

Even if C.M.I. would only try to carry through some amendments, it is most likely that further suggestions would be advanced for discussion and, successively during the negociations so many alternations would be adopted that you would get quite a new convention which might not work as well in practice as the present one.

France : Supports the view of the Subcommittee « d'après lequel il s'agit là d'une « question de politique générale pour le C.M.I. » et qu'en conséquence, il n'y a pas lieu de faire, pour le moment, des recommandations à ce sujet ».

Germany : We are of the opinion that a revision of the Hague Rules brings about the danger that the complete system which, on the whole, works satisfactorily would be set up. We share the view of the Dutch association (Conn. C 4) and of the members of the Subcommittee, who expressed their view in that way (p. 68/69). Even if only an additional protocol would be agreed upon in order not to upset the whole Convention this would lead to a dissipation of law as can already be observed in connection with the Warsaw Convention. If the plenary meeting nevertheless should decide upon a revision of the Rules by a Diplomatic Conference we suggest that only those states should be invited which have already ratified the Convention (article XVI Hague Rules).

Italy : We believe that, if a set of amended rules is approved by the Stockholm Conference, then a Diplomatic Conference should be called for the purpose of having the amendments incorporated in a Protocol to the 1924 Convention, but that such Diplomatic Conference should anyhow be restricted to the countries which have ratified or adhered to the 1924 Convention.

The Netherlands : In view of cautious attitude adopted throughout, no special recommendations are made.

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

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

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

Yugoslavia is of the opinion « that all the amendments to be agreed upon (new rules and interpretative rules) should be entered in a protocol. Nevertheless a difference should be made between the rules which are considered to be absolutely essential when accepting the protocol and those which are not. Concerning the essential rules no State should be allowed to make reservations, as for the others such reservations should be rendered possible ».

Gothenburg, April 17th, 1963.

Kaj Pineus.

Bill of Lading Clauses

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