

***CARRIAGE OF GOODS BY SEA -
CHANGES TO LAW IN AUSTRALIA***

A NEW ZEALAND PERSPECTIVE

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INTRODUCTION

At an international conference in June to discuss arbitration and maritime law, Professor William Tetley QC, of McGill University, Montreal said:

Until we solve our international jurisdiction and arbitration quarrels, there will be no uniformity in either carriage of goods by sea or multi-modal transport.

He went on to say that one of the international bodies - whether CMI, UNCITRAL, UNCTAD or IMO - must:

...‘take the bull by the horns’ and present a balanced, modern, carriage of goods convention to a diplomatic conference at which reasonable compromises can be reached through frank discussions and in a spirit of concern for the much needed world-wide harmonisation of law.

(Reported in Fairplay, 30 July 1998, 26, 27 “Arbitration on the move”)

His comments were endorsed by Lord Mustill at the same conference.

The conflicting support for the Hague Rules, Hague-Visby Rules, Hamburg Rules and their variation goes on interminably. The CMI to which MLAANZ is an affiliate seems impotent to bring about unification and its latest attempt is likely to prove to be no exception.

The amendment to the Australian Carriage of Goods by Sea Act 1991 adopted in September 1997 is just one further example of the multitude of varied rules with which marine cargo

lawyers and underwriters are faced when dealing with litigation arising from claims. The Australian amendments now get added to the list of variations comprising among other countries China, Japan, Scandinavian countries and also the COGSA draft bill before the US Senate.

It is pleasing that Australia has now, but perhaps only for the moment, resolved the vacillation between preference for Hamburg on the one hand and Hague-Visby on the other. At previous conferences of this organisation there have been discussions where fears were expressed that Australia would opt for Hamburg in its entirety. From a cargo underwriter's point of view this may have been no bad thing. However, commentators on the present amendments have made the point that Australia needs to remain in line with its major trading partners. Indeed this was an expressed principle during the parliamentary debate at the passing of the bill incorporating the Regulations. The compromise now adopted appears reasonable.

The changes now adopted may be a cautious approach. Options are left open for future amendment. There is also the spectre of positive international unification on the horizon despite the pessimism expressed in the writings of the commentators mentioned earlier.

From a New Zealand perspective there should be little difficulty in applying the Regulations in claims brought there where Australian law applies. As case law develops in Australia, New Zealand Courts will gain a perspective of how the new rules should be applied to Australian generated contracts.

One benefit which may come out of this ad hoc approach by various countries is that it will provide a build up of experience in what is presently an experimental position. Such experience will be beneficial in determining particular countries' positions in a more positive way when further and hopefully achievable unification proposals are put forward. Indeed the approach between Australia and other countries including the United States show remarkably similar positions which may auger well for future unification.

THE EFFECT OF THE AUSTRALIAN REFORMS ON NEW ZEALAND

Ironically because of the usual method of enforcement of cargo damage claims, Courts other than Australian Courts are more likely to be interpreting the new Australian rules.

The new Regulations will have application to sea carriage documents for outwards shipment subject to issues which will need to be resolved arising from paramount clauses and other provisions incorporating foreign law contained in bills of lading.

New Zealand has adopted Hague-Visby but such rules are unlikely to apply to shipments into New Zealand and contractual provisions contained in documents evidencing shipment from Australia will apply.

The amendments only apply to Australian inward shipments where these shipments are not otherwise subject to the Hague Rules, the Hague-Visby Rules or the Hamburg Rules (or a compulsorily applicable variation of one or other of those rules) as incorporated in the law of the country of shipment.

An interesting position will also arise where New Zealand Courts and the Courts in jurisdictions other than Australia come to determine the effect of the new laws where the carriage contract provides that a foreign law is to apply. Claims commenced in New Zealand in respect of shipments from Australia will require the New Zealand Courts to apply the Australian domestic law as enacted in the recent amendments but also to take account of the effect of any foreign law incorporated into the contract. The New Zealand Courts will therefore be faced with a large variety of jurisdictional issues.

In a country such as New Zealand which has adopted unamended the Hague-Visby Rules, its Courts are going to be faced with issues involving documents not contemplated by the Hague-Visby Rules, variation to the rules relating to deck carriage and endeavouring to mesh together varied regimes relating to duration and delay.

The issue of duration creates quite considerable problems in New Zealand. The amended Hague Rules now in force in Australia provide in Article 1, Sub-Article 3 as follows:

For these Rules:

- (a) *A carrier begins to be in charge of goods at the time that goods are delivered to the carrier (or an agent or servant of the carrier) within the limits of a port or wharf; and*
- (b) *The carrier ceases to be in charge of the goods at the time the goods are delivered to, or placed at the disposal of, the consignee within the limits of the port or wharf that is the intended destination of the goods.*

Subsequent sub-articles define such limits and in respect of a port or wharf outside Australia recognise those limits fixed by any local law.

This does not, however, assist within an irreconcilable conflict arising out of the New Zealand Carriage of Goods Act 1979. This Act is a code regulating to domestic carriage in New Zealand. The following provisions apply:

2. ***Interpretation*** - *In this Act, unless the context otherwise requires, -*

...

"International carriage", -

...

- (b) *In relation to the carriage of goods by sea, means carriage from any port in New Zealand to any port outside New Zealand, or to any port in New Zealand from any port outside New Zealand, commencing when the goods are loaded on to a ship and ending when they are discharged from the ship:*

5. ***Application of Act*** - *(1) Subject to Sub-Section (4) of this Section and to Section 4 of this Act, this Act applies to every carriage of goods, not being international*

carriage, performed or to be performed by a carrier pursuant to a contract entered into after the commencement of this Act, whether the carriage is by land, water, or air, or by more than one of those modes.

Therefore, even though the Australian Regulations endeavour to extend the Hague Rules regime beyond ship's rail and hook, the New Zealand Courts will be bound to apply the local law beyond that point. This is a different issue from what the Australian law defines as the limits of a port or wharf. The duration provisions as to what constitutes international and domestic carriage in the New Zealand Carriage of Goods Act are not contained in that part of the New Zealand Act where there can be a contracting out.

Crucial issues which arise under these conflicting statutory provisions are the value of package limitation, time limits and liability issues arising out of which parties might be designated contracting and actual carriers.

Quite substantial financial variations will arise from the manner in which the New Zealand Courts resolve interpretation issues arising out of the conflicting statutory regimes. This will lead to claimants seriously considering forum shopping between Australia and New Zealand.

The provisions dealing with the arbitration issue under the Australian amendments have a similar although wider parallel in the New Zealand Maritime Transport Act 1994. Section 210 of that Act provides as follows:

210. Jurisdiction of New Zealand Courts - (1) *An agreement, whether made in New Zealand or elsewhere, has no effect to the extent that it purports to -*

(a) preclude or limit the jurisdiction of the Courts of New Zealand in respect of -

(i) a bill of lading or a similar document of title relating to the carriage of goods from any place in New Zealand to any place outside New Zealand; or

- (ii) *a non-negotiable document of a kind mentioned in Section 209(2) of this Act relating to such a carriage of goods; or*
 - (b) *preclude or limit the jurisdiction of the Courts of New Zealand in respect of -*
 - (i) *a bill of lading, or a similar document of title, relating to the carriage of goods from any place outside New Zealand to any place in New Zealand; or*
 - (ii) *a non-negotiable document of a kind mentioned in Section 209(2) of this Act relating to such a carriage of goods.*
- (2) *Nothing in this Section shall be construed as limiting or affecting any stipulation or agreement to submit any dispute to arbitration in New Zealand or any other country.*

Australia now has a regime whereby the amended Hague Rules can apply to shipments both from Australia and into Australia under certain specified circumstances. It is likely (it has not yet been tested) that no similar regime applies in New Zealand.

UNIFICATION

Reasons for unification

While it is accepted that unification is a desirable goal, outdated international conventions cause more difficulties than they solve. There must be a continuing upgrading of the carriage of goods conventions and the sentiments of Professor Tetley and Lord Mustill referred to above are the only ways of achieving this. There must be compromise.

The world is now a global marketplace and international conventions are the foundation for global commerce. This applies across the spectrum of transportation; communications;

intellectual property; energy generation; health; food and nutrition; weather forecasting and many other areas.

Economic co-operation must prevail. Stability in the global economy arises from the promotion of free markets and open economies. Fair, transparent and efficient business environments must be encouraged.

Trade facilitation is a necessary goal. "History has shown that periods of isolationism and protectionism have led to stagnation and international aggression while periods of openness and expanding trade have translated into...economic strength and peace abroad".

(Bureau of International Organisation Affairs, January 10 1997, internet site - http://www.state.gov/www/issues/io_biz.html)

These are the principles behind the need for unification in cargo transportation which is just one area of burgeoning global trade.

The aim must be:

- (a) To establish a balanced set of rules for use throughout the world.
- (b) This must prevail irrespective of domestic legal traditions and economics and political parochialism.
- (c) To therefore refrain from referring to national laws or concepts.
- (d) To ensure the convention is sufficiently flexible to take account of constantly changing circumstances brought about by the technological and economic developments affecting cross-border trade practices.
- (e) To draft the document consistent with the pursuit of fairness in international commercial relations.

- (f) To take account of the economic realities of international sea transportation and the relationship of the shipping and insurance industries to it.

The quite close parallel between those countries which, including Australia, have gone it alone so to speak is interesting and may auger well for eventual unification which is clearly still a desirable objective. The Comité Maritime International is partway through a long drawn-out process of endeavouring to establish draft articles for a new convention. The report of the International Sub-Committee of CMI is attached. This document has been preceded by interminable meetings between and submissions from member countries.

A New Zealand Sub-Committee of MLAANZ was asked to comment on the draft articles proposed by CMI. In the context of the amendments to Australian law the consensus reached by the New Zealand Sub-Committee is quite pertinent.

By way of introduction, the New Zealand Sub-Committee considered that as the maritime world has variously adopted up to eight different regimes, unification is now urgent. Even more urgent it was considered is parity between Australia and New Zealand where New Zealand has adopted Hague-Visby and Australia has now adopted the amendments contained in the Carriage of Goods by Sea Act 1991 and produced amended Hague Rules. In addition the Australian legislation schedules Hamburg Rules which may yet come into force. The Sub-Committee favoured alternative (e) of the various alternatives submitted in the CMI draft report, ie. to prepare a new convention which would include, *inter alia*, those provisions of the Hague-Visby Rules and the Hamburg Rules which have been shown to be both commercially viable and politically acceptable.

As to the draft suggestions for a new convention the comments of the Sub-Committee under the following headings may be of interest:

1. **Definitions**

While the suggested words in the draft did not have an attached definition, it was considered that the words "contract of carriage by sea" and "transport documents" should be EDI compatible, technologically neutral and sufficiently flexible to allow for future trade processing techniques. It was considered that there should also be definitions of the words "signature" and "writing" which are EDI compatible. The new Australian legislation has of course proceeded a long way down this path already.

2. **Scope of application**

It will be seen that the draft report states that ideally the uniform rules should apply for the whole period during which the goods are in charge of the carrier. This is now incorporated into the law of Australia and may arguably apply in New Zealand. The Sub-Committee was, however, unclear as to whether the draft rules will apply automatically to all inbound and outbound cargo in respect of convention state ports, regardless of the regime applicable at the foreign port of destination/discharge as in the Hamburg Rules. It may mean that they are "potentially" applicable to outbound and inbound cargo if certain connecting factors are satisfied in accordance with Article 10 of the Hague-Visby Rules. It was felt that the form of blanket coverage would produce a more uniform and certain result and of course the new amendments in Australia have incorporated this concept.

3. **Period of application**

The Sub-Committee agreed with this proposed rule. It is important that an enforceable liability regime apply to all portions of multi-modal transport and custody of cargo at terminals or inland depots. The Hamburg Rules regime was favoured. It is suggested that the problems in respect of cargo at terminals/inland depots may be lessened to some extent by future adoption of the Convention on Terminal Operator's Liability. Difficulty will arise, however as stated earlier where there is a strict statutory regime relating to domestic carriage as exists in New Zealand under its domestic Carriage of Goods Act. If

an Hamburg style regime is adopted the New Zealand Carriage of Goods Act 1979 will require amendment.

4. **Liability of the carrier**

The Sub-Committee dealt with the three exceptions to the responsibility for fault of the servants or agents of the carrier. The comments were as follows:

(i) Fault in navigation

It is agreed that if this exoneration is to remain it should remain with the onus remaining on the carrier. The proposal does not seem to be a compromise as suggested unless the onus is to be greater than the "balance of probabilities". It is debatable whether this exoneration should remain when the concept was first introduced by the Harter Act at the end of the last century. It arose at a time when navigation by sea was a genuinely hazardous exercise. The situation now is very different. Modern communications and technical navigation aids abound. If this exoneration remains, carriage by sea will be the only form of transportation under which carriers will have this historic luxury. It is not available to land or air carriers. Also, given the current soft insurance markets it is not necessarily accepted that the abolition of this exclusion will increase the cost of insurance.

(ii) Fault in the management of the ship

It is debatable whether this exoneration should remain in view of the comments as to the borderline between fault in management of the ship and fault in management of cargo. (Similar comments as in (i) also apply).

(iii) Fire

So long as the qualifying words as to fault or privity remain, fire should remain as an exoneration. For the carrier to abrogate liability under this exoneration the onus of proof must be a heavy one.

The Sub-Committee agreed with the report as to allocation of burden of proof and need for a provision on the duties of the carrier. Under allocation of burden of proof the Hague-Visby regime was favoured. The reversal of emphasis in the proposed draft rules is also favoured.

5. **Liability of the actual/performing carrier and through carriage**

The Sub-Committee felt that the proposed rules under this head may simply add to difficulties with recourse for cargo interests. While there is an exception where judicial proceedings against the actual carrier cannot be instituted, nevertheless the rule may force the shipper/consignee into more expensive litigation in foreign jurisdictions.

6. **Delay**

The report considered that a provision on delay was necessary. The Hamburg Rules provision which has now largely been incorporated into Australian law was regarded as being too vague. The Sub-Committee felt that even the proposed Rule may be problematical in certain circumstances. The relative bargaining strengths of the parties is a vital consideration if the matter is resolved by liberty to freely contract outside the convention.

7. **Limitation of liability**

The Sub-Committee favoured the Hague-Visby and SDR Conventions for New Zealand conditions in respect of limitation ceilings. The Hamburg Rules were favoured for definition of the shipping unit.

8. **Transport documents**

It was the Sub-Committee's view that the shipping world should take the brave step to extend the operation of the international convention from a document-centred regime to an actual physical custody basis. Electronic trading is now accelerating. Any new convention must not only recognise the traditional documentation but also be expansive in its recognition of modern technology. The legal difficulties should be capable of being overcome. It appears that it has been proposed that grappling with this problem is to be deferred and that is regrettable. Australia, of course, has taken the first brave new step.

9. **Evidentiary value of the transport documents**

The problems discussed are accepted as real problems. However, care needs to be taken not to remove the *prima facie* evidentiary value of the original documents. The carrier has the right to clause documents under present regimes but there are commercial reasons as to why this is not often done. Great care needs to be taken to protect innocent third parties without notice.

10. **Letters of guarantee**

The Sub-Committee agreed with the comments under this head. It is assumed that letters of guarantee are the same as what is commonly referred to as indemnity letters. The same comments apply here to those under the previous heading as such letters may defraud innocent shipper/consignees without notice.

11. **Notice of loss and time bar**

The Sub-Committee agreed that the three day period may in some cases be too short. The Warsaw Convention provides a longer period for aviation cargo claims and there is no reason why such a longer period does not apply to carriage by sea. So far as the

issuing of proceedings is concerned, the Hamburg Rule period of two years was favoured. This period applies under the Warsaw Convention without difficulty.

12. **Choice of law**

The Sub-Committee agreed that no provision should be made in this respect. This is particularly so if Article 2 as to the scope of application is interpreted in the same way as the Hamburg Rules.

13. **Jurisdiction**

The proposed clause does not create difficulty except that in New Zealand Section 210 of the Maritime Transport Act which has already been referred to in this paper would not permit the ousting of the jurisdiction of the New Zealand Courts by any such provision. If New Zealand accedes to the proposed convention then Section 210 of the Maritime Transport Act in New Zealand would have to be repealed or modified.

14. **Arbitration**

The comments on arbitration were agreed to except that again thought needs to be given to the relative bargaining strengths of the parties. Jurisdiction and arbitration clauses may have the effect of depriving New Zealand shippers/consignees of recourse on grounds of excessive cost if the traditional arbitration centres are nominated. The London Court of Arbitration now has a registry in Sydney. Arbitrations in Australia and New Zealand should be encouraged as more economic methods of settling carriage of goods by sea disputes. Arbitration clauses nominating Australia and New Zealand arbitrations should be encouraged in terms and conditions of bills of lading as well as the proposals for this convention.

Foreign arbitration clauses are just as susceptible to manipulation and abuse by foreign carriers as foreign jurisdiction clauses to frustrate recourse. There is no reason why the

plaintiff cargo interests should not have the choice of compelling arbitration in a relevant venue within their own jurisdiction.

In the proposed arbitration rule the "agreement in writing" proposal is unsatisfactory in its current form. First, the writing requirement must be framed in an EDI compatible fashion (see earlier remarks). Secondly, it clashes with the New Zealand Arbitration Act 1996 which departs from the UNCITRAL Model Law by allowing oral arbitration agreements. Leaving aside whether or not this was a sensible departure, it should be noted that the major reason for the New Zealand Law Commission and Select Committee recommending this departure was a recognition that the "agreement in writing" requirement potentially created practical problems when applied to bills of lading and international contracts in some trades. Thirdly, the proposed wording indicates that a bill of lading containing an arbitration clause signed by both parties is binding, but does not expressly resolve the status of a bill of lading containing an arbitration clause signed by the carrier only (which is the usual position). A number of Courts, mainly in civil law countries have held that such a bill, while in writing, is not an "agreement in writing" unless signed by both parties. The New Zealand Courts have tended to work around this issue or rejected it altogether. One option may be to require the third party consignee to be bound only if it received full notice of the clause and signed it in acceptance. The shipper may not need the same level of protection in direct negotiations with the carrier and this may not be compatible with bill of lading practices anyway. The proposed rule on arbitration should spell out clearly whether or not the parties' signatures are required and whether this relates to all parties or third parties only. Clause 2 in the Arbitration Rule as currently proposed simply continues the present uncertainty.

CONCLUSION

The Australian amendments are going to raise interesting issues in marine cargo claims heard by New Zealand Courts where transportation emanates from Australia.

Clearly the amendments have resulted from substantial consultation with representatives across the whole spectrum of the transportation industries in Australia. This includes the insurance and shipping sectors.

New Zealand itself took an interminable time to incorporate Hague-Visby into New Zealand law. It is unlikely that the political will is there to introduce comparative legislation to that which now exists in Australia. New Zealand did not go through the same soul searching as whether to adopt Hague-Visby or Hamburg. However, in many respects New Zealand has followed Australian legislation particularly in its adaptation of consumer protection statutes in the insurance, finance and contractual areas.

From the point of eventual unification it will be interesting to see whether Australia will move from this intermediate step. In the meantime New Zealand practitioners will need to remain familiar with the various differing regimes existing worldwide. This will not be a new experience.

Sources

1. Bureau of International Organisation Affairs: "International Organisations Benefit US Business"
- Internet site http://www.state.gov/www/issues/io_biz.html
2. UNIDROIT "Principles of International Commercial Contracts - Introduction"
- Internet site http://www.unidroit.org/english/principles/intro_i.htm
3. Report of the Word of the International Sub-Committee of Comité Maritime Internationale
Uniformity of the Law of the Carriage of Goods by Sea

Comité Maritime International

THE PRESIDENT
OF HONOUR

27th January 1998

TO THE PRESIDENTS OF THE NATIONAL ASSOCIATIONS

TO THE MEMBERS OF THE INTERNATIONAL SUB-COMMITTEE

Uniformity of the Law of Carriage of Goods by Sea

The attached draft report summarizes the discussions held and opinions expressed during the four sessions of the International Sub-Committee. Furthermore, it includes drafts of some provisions that may be taken into consideration in the future, if and when it will be decided to review and possibly expand the present uniform legislation. These draft articles are based on the discussions held at the sessions.

The delegates of National Associations who have attended one or more of the four sessions and generally National Associations are invited to send their comments, if any, on the draft articles, not later than 15th April 1998.

Kind regards,


Francesco Berlingieri

COMITE MARITIME INTERNATIONAL

UNIFORMITY OF THE LAW OF THE CARRIAGE OF GOODS BY SEA

REPORT ON THE WORK OF THE INTERNATIONAL SUB-COMMITTEE*

Introduction

The process of unification of the law relating to liability arising out of the carriage of goods by sea, which was begun by the CMI as long ago as 1907, continued satisfactorily until the Visby Protocol of amendment to the Hague Rules was adopted in 1968. At that time there were 73 States parties to the 1924 Convention, including most of the major maritime nations of the world. Some others had introduced the provisions of the Hague Rules into their domestic legislation without ratifying the Convention. With the entry into force of the Visby Protocol in 1977, the uniform system began to fracture, as only a limited number of the States parties to the Convention became parties to the Protocol. Presently there are 83 States parties to the Convention, but only 20 States have become parties to the Visby Protocol. Moreover, although about 8 States simultaneously ratified the Protocol and denounced the unamended Convention, about 12 other States have ratified the 1968 Visby Protocol without denouncing the original 1924 Convention.

After the 1979 SDR Protocol entered into force in 1984, the fracture widened, though confined to the issue of limits of liability. At present only 14 States are parties to the SDR Protocol, of which 12 were already parties to the Visby Protocol but 2 were not.

Therefore, prior to the entry into force of the Hamburg Rules in 1992, the maritime world was divided into six areas, viz.:

1. Where the Hague Rules as amended by the two Protocols were in force: 14 States.
2. Where the Hague Rules as amended only by the Visby Protocol were in force: about 7 States.
3. Where the Hague Rules were in force without any amendment: about 63 States.

* This Report may in the future be subject to revision, as a consequence of the work that will be carried out by other CMI International Sub-Committees and Working Groups on other areas of transport law.

4. Where the provisions of the Hague Rules have been enacted into national legislation without ratification of the Convention: several States.
5. Where the provisions of the 1968 or 1979 Protocols have been enacted into national legislation without ratification of the Protocols: several other States.
6. Where the Hague Rules have not been enacted in any form, with the consequence that domestic law applies unless private international law (conflicts) rules provide otherwise: many States, including most of South America and Africa.

After the Hamburg Rules entered into force, the pace of disunification increased. Of the 25 States at present parties to the Hamburg Rules, 10 were parties to the 1924 Convention and 15 were not. As a consequence the States parties to the unamended Hague Rules are or soon will be reduced to about 53 States. Moreover several States that were not parties to the Hague Rules have enacted or are moving toward enactment of domestic legislation incorporating features of both the Hague Rules and the Hamburg Rules as well as unilateral innovations.

Today, two areas must be added to the six previously described:

7. Where the Hamburg Rules are in force.
8. Where national law combines various provisions of the Hague Rules unamended, the Visby and SDR Protocols, and the Hamburg Rules, in addition to other non-uniform domestic provisions.

The Executive Council of the CMI thought that the time had come to consider whether an attempt should be made to halt this disintegration of uniformity of the law of carriage of goods by sea and, to the extent possible, reverse the process and achieve once again a high degree of uniformity. Several alternatives could be considered, including the following:

- a) To refrain from taking action so as not to interfere with the ongoing process of selection, in hopes that the best system will ultimately prevail.
- b) To promote widespread ratification of the Hamburg Rules.
- c) To suggest amendments to the Hamburg Rules which are designed to overcome real commercial problems and to clarify ambiguities, thereby making the Hamburg regime more broadly acceptable.
- d) To suggest amendments to the Hague-Visby Rules in order to modernize and broaden a regime which is already widely accepted.
- e) To prepare a new convention which would include, *inter alia*, those provisions of the Hague-Visby Rules and of the Hamburg Rules which have been shown to be both commercially viable and politically acceptable.

The Executive Council decided that it was appropriate to solicit the views of the National Associations. To that end it directed, at its meeting in Sydney on 2 October 1994, that the Working Group of Executive Council members previously appointed at its meeting in Oxford on 13 May 1994 should prepare a Questionnaire directed to the Member Associations.

Replies from 26 National Associations were received and a synopsis of the replies was published in the 1995 Yearbook (p. 115-177) followed by a synoptical table showing the most significant changes suggested by National Associations to both the Hague-Visby Rules and the Hamburg Rules.

The International Sub-Committee held four sessions during which the most relevant issues connected with matters dealt with by the aforesaid Conventions were identified and debated. The Reports of the four sessions, prepared by Dr. Frank Wiswall who acted as Rapporteur, are published in the 1995 Yearbook (at p. 229-243) and in the 1996 Yearbook (at p. 360-420).

A report was then prepared by the Chairman for consideration by the Centenary Conference wherein the views of the International Sub-Committee (or of the majority of the delegates who attended its sessions) on each of the issues were summarized.

The most significant amongst the aforesaid issues (liability regime, identity of the carrier, period of application of the uniform rules, jurisdiction and arbitration) were again discussed during the Antwerp Centenary Conference.

It was decided by the Executive Council at its 14th June meeting that the work done so far by the International Sub-Committee should be completed and that even though the CMI should not aim, at least at this stage, at preparing a draft of a new convention, nevertheless some texts on the most important issues should be prepared in order to better clarify the views and the recommendations of the CMI.

Uniformity of the Liability Regime

The Report submitted by the Chairman to the Centenary Conference must be updated in order to consider the opinions expressed at the Conference and, at the same time, to formulate suggestions on the conclusions that should be reached in respect of each of the issues considered so far.

1. Definitions

The following words should be defined

- (a) Carrier
- (b) Actual/Performing Carrier
- (c) Shipper
- (d) Contract of carriage by sea
- (e) Goods
- (f) Transport documents

2. Scope of application

The uniform rules should apply both to outbound and inbound cargo.

3. Interpretation

In accordance with the modern trend of the jurisprudence uniform rules should be interpreted in such a way as to achieve as much as possible international uniformity.

4. Period of application

Ideally, the uniform rules should apply for the whole period during which the goods are in charge of the carrier. The problem, however, arises, as to whether and to which extent they should apply if the goods are taken in charge by the carrier prior to their arrival at the port of loading and/or are handed over to the receiver after they have left the port of discharge. It [has been] [is] suggested that the uniform rules should in any event apply also to the period during which the goods are in the custody of the carrier in terminals or inland depots and are carried from or to such terminals or depots to the port for loading on or after discharge from the ocean vessel.

5. Identity of the carrier

The problem of the identity of the carrier must not be confused with that of the joint liability of the contracting carrier and of the actual (or performing) carrier. In fact even if they are jointly liable the problem of identifying them still exists.

The third party holder of the bill of lading or other transport document may have difficulties in identifying the person against whom a claim in respect of loss of or damage to the goods may be made if the name of such person is not clearly indicated in the document.

In order to give to the consignee a reasonable protection it [was] [is] suggested by some delegates that it could be provided that whenever the relevant transport document does not clearly indicate the name of the carrier, the registered owner of the vessel must be presumed to be the carrier unless he proves that someone else is the carrier and that, in such event, the time bar should not run for the period from the commencement of proceedings until the identification of the carrier by the owner.

It [has also been] [is also] suggested that the carrier must be compelled to indicate his name and address in the transport document and that the breach of this obligation should be sanctioned with the loss of the right to limit his liability.

6. Liability of the carrier

It is generally accepted that the liability of the carrier should be based on fault. On such assumption the following problems require consideration: first, whether the carrier should always be responsible for the fault of his servants or agents; secondly, how the burden of proof should be allocated; thirdly, whether guidelines should be given in order to facilitate the assessment of the fault by setting out the principal duties of the carrier with respect to the ship and the cargo.

(a) Responsibility for the fault of the servants or agents

Traditionally, three exceptions have been made to the general rule "respondeat superior": fault in the navigation of the ship, fault in the management of the ship and fire.

(i) Fault in the navigation. The prevailing view of the National Associations is that this exoneration should be maintained because otherwise the cost of insurance would significantly increase thus affecting the transport cost and because the liability of the carrier would increase litigation and adversely affect the settlement of general average. It has been objected that such exoneration is not justified and that its abolition would not affect the cost of insurance. As a compromise, it has also been suggested to place upon the carrier the burden of proving that the loss or damage has actually been caused by a fault of the master, officers or crew in the navigation of the ship. It would be helpful if National Associations could indicate the reasons for which they favour the maintenance and, respectively, the abolition of this exception.

(ii) Fault in the management of the ship. The opinion of National Associations in respect of this exoneration is almost balanced. Also on this case, it would be helpful to know the reasons in favour or against this exception, which has in the past given rise to significant litigation, since the borderline between fault in the management of the ship and fault in the management of the cargo is not easy to establish.

(iii) Fire. It should be considered whether this must be an exoneration or merely a reversal of the burden of proof provided always that either of them is still justified.

(b) Allocation of the burden of proof.

It seems to be accepted that, as a general rule, the burden of proof should rest on the carrier. The proof the carrier must provide in order to avoid liability may, however, be described in general terms, as in the Warsaw Convention and in the Hamburg Rules, or in specific terms, as in the Hague-Visby Rules, wherein there is a list of events which are treated as cases in which the fault of the carrier is not involved, even though the list is followed by a general description of the situation in which the carrier is not liable.

The majority view is that a list of specific cases in which the fault of the carrier is (deemed to be) excluded serves a useful purpose. In fact the general formula leaves a considerable margin of uncertainty in the assessment of the conditions required in order that the carrier may exclude his liability. The aforesaid list (which should cover all

typical situations beyond the control of the carrier) therefore considerably reduces the situations where recourse must be made to the general rule.

If the majority view referred to above will be confirmed, it could be considered whether the following rules may be appropriate:

1. *The carrier shall be liable for loss resulting from loss of or damage to the goods as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place where the goods were in his charge as defined in article __, unless the carrier proves that neither his fault nor that of his servants or agents contributed to the loss or damage. In order to prove the absence of fault the carrier must provide evidence that he has taken the reasonable measures that the nature of the transport requires and, in particular, the measures described in article _____.*
2. *When the carrier proves that the loss or damage has been caused by one of the following circumstances, it shall be presumed that to such extent neither his fault nor that of his servants or agents contributed to the loss or damage:*
 - (a) *[act, neglect or default of the master, officers and other members of the ship's complement in the navigation of the ship];*
 - (b) *[act, neglect or default of the master, officers and other members of the ship's complement in the management of the ship];*
 - (c) *fire;*
 - (d) *perils, dangers and accidents of the sea or other navigable waters;*
 - (e) *acts of God;*
 - (f) *acts of public enemies;*
 - (g) *arrest or restraints of princes, rulers or people;*
 - (h) *act or omission of the shipper or owner of the goods, his agents or representative;*
 - (i) *strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general;*
 - (j) *riots or civil commotions;*
 - (k) *saving or attempting to save life or property at sea or preventing or minimizing damage to the environment;*
 - (l) *wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods;*
 - (m) *insufficiency of packing;*
 - (n) *insufficiency or inadequacy of marks;*
 - (o) *latent defects of the ship not discoverable by due diligence.*

(a) The need for a provision on the duties of the carrier

The majority view is that such a provision has been and will be in the future of great assistance to courts and to lawyers, as well as to carriers and shippers, because it provides a very useful guideline of what is requested of a diligent carrier, and its abolition would not only deprive all such persons of such important guidelines, but might also - and this would be very dangerous - be construed as an intentional change of the liability regime that has been known and applied for over sixty years.

The duties of the carrier relate to the seaworthiness of the ship and to her fitness to receive and preserve the cargo during the voyage. Article 3(1) and (2) of the Hague-Visby Rules meet this requirement satisfactorily, except perhaps with respect to the time when the duties must be performed.

The question whether the obligation of the carrier should be a continuous obligation or not has been again debated at the Centenary Conference. Several delegates favoured the affirmative solution. Others objected that after the ship has left the port the duty to make (and keep) the ship seaworthy cannot be fulfilled anymore. Still other delegates suggested that this should not be mandatory. The importance of the issue was doubted by some delegates, who observed that whatever solution ensures greater uniformity, that solution should be adopted.

If it will be accepted that the obligation of the carrier to make the ship seaworthy must be a continuous obligation as that of caring for the cargo (the standard of diligence necessarily differs according to whether the ship is in port or at sea), it could be considered whether the following rules may be appropriate:

1. *The carrier shall be bound, before and during the voyage, to exercise due diligence to:*
 - a. *Make and keep the ship seaworthy;*
 - b. *Properly man, equip and supply the ship;*
 - c. *Make the holds, refrigerating and cool chambers and all other parts of the ship, including the containers, if supplied by the carrier, in which the goods are carried fit and safe for their reception, carriage and preservation.*
2. *The carrier shall, for all the time during which the goods are in his charge, properly and carefully keep and care for the goods. He shall also properly and carefully load, handle, stow, carry and discharge the goods.*

7. Liability of the actual/performing carrier and through carriage

The liability of the actual (or performing) carrier should be the same as that of the contracting carrier, except that it should be limited to the part of the carriage performed by him.

The provisions in Article 11 of the Hamburg Rules, whereby the carrier may limit his liability to the transport actually performed by him only if the on-carrier is specifically named, does not take the reality of trade into account. In fact that carrier, when receiving the goods, quite often does not know the name of the on-carrier. It should therefore suffice that the carrier indicates in the document of transport the port of transshipment where the goods will be taken over by another carrier, provided, however, he informs the consignee, when requested, about the name and the address of the principal place of business of the on-carrier. The running of the time bar period should be suspended for the period from the commencement of proceedings against the carrier or the request for information until the time when such information is provided.

If the above comments are accepted it could be considered whether the following rules may be appropriate:

Where a contract of carriage provides that a specified part of the carriage covered by that contract is to be performed by another carrier, the said contract may also provide that the carrier is not liable for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in the charge of the [performing] [actual] carrier during such part of the carriage. Nevertheless, any stipulation limiting or excluding such liability is without effect if:

- (i) the carrier fails to inform the consignee within _____ days of his request about the full name and complete address of the [performing] [actual] carrier; [and
- (ii) judicial proceedings against the [performing] [actual] carrier cannot be instituted in a court competent under paragraph _____ of article _____].

The following provision may then be inserted in the article on limitation of action:

An action against the [performing] [actual] carrier who performs a part of the carriage may be instituted even after the expiration of the limitation

period provided for under _____ if instituted within a time thereafter equal to the time elapsed between the commencement of proceedings against the contracting carrier and the receipt by the consignee of the information on the [performing] [actual] carrier provided for under article _____.

8. Deviation

Since in certain jurisdictions it is uncertain whether the uniform rules apply in case of unreasonable deviation, it would be appropriate to expressly provide that this is the case.

9. Delay

A provision on delay is necessary. As to when delay may be deemed to have occurred, when the parties have not agreed on the time of delivery, the criterion of a reasonable time adopted in Art. 5(2) of the Hamburg Rules seems to be too vague.

As regards the limit of liability, it is thought that the limit should be the same as for loss or damage and not a special limit based on freight.

The provision of Art. 5(3) of the Hamburg Rules is unacceptable.

If it is agreed that a provision on delay in delivery is necessary and that Article 5(2) of the Hamburg Rules is not satisfactory, the only solution appears to be that liability for delay is only conceivable when the time of delivery is expressly agreed in the transport document. If this conclusion is accepted, the following text may be considered:

Delay in delivery occurs when the goods are not delivered at the port of discharge provided for in the contract of carriage within the time expressly agreed upon.

10. Limitation of liability

The compromise adopted by the 1968 Diplomatic Conference, and maintained in the Hamburg Rules, of adding to the package and unit limitation a per kilo limitation, rather than maintaining the old system or replacing it with a per kilo limit has been

revisited by the International Sub-Committee and the majority appeared to still support it.

The question of the type of unit to which reference should be made was considered but not settled. It would appear that this issue should be clarified, rather than left to the interpreter.

There are, however, two solutions: that of the customary freight unit adopted in the U.S. Carriage of Goods by Sea Act, 1936 (s. 4(5)) and that of the shipping unit adopted by the Hamburg Rules (Article 6(1)(a)).

11. Loss of the right to limit

In this respect the provisions of the Hague-Visby Rules (Article 4(5)(e)) and of the Hamburg Rules (Article 8(1)) are almost identical. However the wording of this latter provision is considered to be preferable, because it makes clear that the knowledge that the loss, damage or delay would probably result relates to the loss, damage or delay that has occurred.

12. Transport documents

It should be considered whether documents other than bills of lading should be governed by the uniform rules. The International Sub-Committee has been of the view that this should be the case, in particular for the sea waybills.

In any event it was thought that where the carrier and the shipper agree that a document other than a bill of lading is to be issued, such agreement must be binding on the parties, and the shipper may not thereafter be entitled to demand a bill of lading. Article 14(1) of the Hamburg Rules is not clear in this respect, particularly if it is considered in conjunction with Article 23(1).

The problem then will have to be considered whether also BDI should be regulated in the future in the same uniform rules. This, however, is one of the questions to be dealt with when the issues discussed by UNCITRAL will be examined.

13. Evidentiary value of the Transport Documents

A distinction must be made between the apparent order and condition of the goods and the particulars concerning the goods reference to which is made in Article 3(3)(a) and (b) of the Hague-Visby Rules and in Article 16(1) of the Hamburg Rules.

It is generally agreed that unless a specific reservation is made with respect to the order and condition of the goods, the goods must be deemed to have been received in good order. This rule should apply irrespective of the type of document (i.e. bill of lading or sea waybill) issued in respect of the goods.

As regards the other particulars, it is also generally agreed that if no reservation is made, they must be deemed to be correct and proof to the contrary should not be admissible when the bill of lading (if issued) has been transferred to a third party in good faith. The problem to be considered is whether this rule should apply also when a sea waybill is issued. It is thought that it should be so.

There is instead some disagreement with respect to the question whether the carrier may refuse to insert in the bill of lading particulars he is unable to check and, if so, when he may insert reservations and how such reservations should be formulated.

It is known that the Hague-Visby Rules only provide that the carrier is not bound to insert the particulars he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has no reasonable means of checking but do not provide anything with respect of reservations. In practice, the particulars are always inserted and reservations are then made and the courts apply the provision of the Hague-Visby Rules as if instead of referring to the right not insert the particulars, it referred to the right to accompany the particulars with a reservation.

Reservations are instead regulated in Article 16(1) of the Hamburg Rules, where it is provided that the carrier must insert a reservation "specifying the inaccuracies, grounds of suspicions or the absence of reasonable means of checking".

The question of the admissibility of the so-called "shipper's load and count" was discussed during the third session of the International Sub-Committee (Yearbook 1996, p. 376) and there was a consensus that the carrier should have the burden of proving that he had no reasonable means of checking the information supplied by the shipper.

Several questions should be considered: a) whether the carrier should be permitted to insert reservations; b) if so, in which circumstances; c) on whom the burden of proof lies; d) whether mention should be made in the transport document of the reasons that

prevented the carrier to check the cargo; e) whether special rules should be provided for containerized cargo.

(a) It is fair that the carrier should be permitted to insert reservations, thereby causing a reversal of the burden of proof, when he has reasonable grounds of suspecting that the particulars supplied do not accurately represent the goods and has no reasonable means of checking the description of the goods supplied by the shipper. This is particularly so considering that the carrier cannot prove that the description is not correct.

(b) It is generally accepted that reservations should only be permitted - or be effective - only in the situations described in (a) above.

(c) It is also generally accepted that the burden of proof should lie on the carrier. In this connection the question arises whether, in case the carrier specifies in the bill of lading the grounds of suspicion or the absence of reasonable means of checking (as he is required to do under Article 16(1) of the Hamburg Rules), the burden of proof should be deemed to be met.

(d) There is no such requirement in the Hague-Visby Rules and this is logical, since the Rules do not provide for the right of the carrier to insert reservations, but only for his right to refuse to state the particulars he suspects are incorrect or he is unable to check. Many court decisions in several jurisdictions, however, have held that printed reservations are null and void for they have not been inserted in view of a particular shipment. On the contrary, typed or stamped reservations have normally been considered to be acceptable.

The Hamburg Rules provide instead that the carrier must specify in the bill of lading "the inaccuracies, grounds of suspicion or the absence of reasonable means of checking". This wording is practically taken from Article 3(4) of the Hague-Visby Rules but the practical question that should be considered is whether it is possible to "specify" in the bill of lading (or other transport document) in particular the "grounds of suspicion" and the "absence of reasonable means of checking".

(e) The position in respect of containerized cargo differs from that in respect of bulk cargo and of individual items, such as packages or other units, where containers are

expressly deal with the situation where loss or damage is caused by dangerous goods loaded with the carrier's knowledge of their dangerous character. It is not clear whether or not, in such case, the carrier may claim damages or, by taking the goods on board, he has impliedly accepted to bear all risks.

16. Letters of guarantee

In view of virtually unanimous views that letters of guarantee should definitely be discouraged, it would be wholly counterproductive to include in a uniform regime a provision attempting to regulate them. This matter should be left entirely to national law.

17. Notice of loss

If the loss or damage is apparent, the notice should be given before or at the time of delivery. If it is not apparent, the notice should be given within a very short period of time after delivery, in order to enable the carrier to make immediately the necessary investigations. Three days appears to be a reasonable time limit. In this respect the notice period should begin to run from the time at which the consignee has a reasonable opportunity to inspect the goods.

18. Time bar

The legal nature of the "time bar" differs in the various jurisdictions (see in this respect "Time Bars", II ed. LLP 1993, p. 1-10). In some jurisdictions it may affect the right, in others the action; in some jurisdictions it is a substantive remedy, in others it is a procedural remedy.

The provisions of Article 20 of the Hamburg Rules are considered satisfactory, except that a time limit of one year from delivery is adequate.

As respects the extension of the time limit in the recourse action by one carrier against another it is considered appropriate that such extension be governed by the Convention. A ninety days period is considered reasonable and it should commence upon the date of settlement or of entry of a judgment not subject to further appeal; provided, however, that notice of the claim is given in writing to the person from whom

the indemnity is sought within a short period of time to be established following the one years time limit.

19. Choice of law

It is thought that no provision should be made in this respect.

20. Jurisdiction

It is thought that a provision on jurisdiction is needed. Such provision may be based on Article 21 of the Hamburg Rules except that:

- (i) the second sentence of para. 2(a) must be deleted, since it is in conflict with Article 7(1) of the 1952 Arrest Convention;
- (ii) para. 2(b) must be entirely deleted, since also these matters are governed by the Arrest Convention;
- (iii) para. 4 must be deleted because the matters dealt with therein should be left to national law.

Attention is drawn to the understanding that "plaintiff" and "defendant" in Article 21(1) can only be read as including both the carrier and the consignee.

A provision on jurisdiction could, therefore, be drafted as follows:

1. *In judicial proceedings relating to carriage of goods under this Convention the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:*
 - (a) *the principal place of business or, in the absence thereof, the habitual residence of the defendant; or*
 - (b) *the place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or*

- (c) *the port of loading or the port of discharge; or*
 - (d) *any additional place designated for that purpose in the contract of carriage by sea.*
2. *Notwithstanding the preceding provisions of this article, an action may be instituted in the courts of any port or place in a Contracting State at which the carrying vessel or any other vessel [of the same ownership] may have been arrested in accordance with applicable rules of the law of that State and of international law.*
 3. *No judicial proceedings relating to carriage of goods under this Convention may be instituted in a place not specified in paragraph 1 or 2 of this article. The provisions of this paragraph do not constitute an obstacle to the jurisdiction of the Contracting States for provisional or [protective] [conservative] measures.*

The words "of the same ownership" in paragraph 2, which are reproduced from the corresponding paragraph of the Hamburg Rules and are placed in square brackets, appear to be unnecessary, for under the applicable law a vessel owned by a different person may be arrested in case, for example, the contracting (or performing/actual) carrier is not the owner of the carrying vessel. The reference in the same paragraph to international law may be replaced by a reference to international conventions.

21. Arbitration

Also a provision on arbitration seems to be desirable, for otherwise recourse to arbitration may be made in order to escape from the restrictions placed on the choice of the court of competent jurisdiction. However, contrary to the provision on jurisdiction, there should not be restrictions on the choice of the place of arbitration, which would be left entirely to the parties.

The provision whereby the agreement on arbitration must be evidenced in writing must specify what is meant by that. For example, whether it is sufficient that a bill of lading incorporates an arbitration clause or it is also necessary that the bill of lading (or specifically the arbitration clause) be signed also by the shipper. Such provision should specify that the arbitration clause is not binding on third parties (e.g. the endorsees of the bill of lading) unless expressly accepted in writing by them. If Article 22 of the Hamburg Rules is taken as a basis of a provision on arbitration, its paragraphs 1, 4, 5 (as

amended) and 6 could be adopted. Paragraph 2 should be replaced by the provisions indicated above and paragraph 3 should be deleted.

The following text would be in line with the above suggestions:

1. *Subject to the provisions of this article, parties may provide by agreement in writing that any dispute that may arise relating to the carriage of goods under this Convention shall be referred to arbitration to be held in the place selected by them.*
2. *The term "agreement in writing" shall include an arbitration clause in a bill of lading [or other transport documents] signed by the parties between whom the arbitration is to be held [or incorporated by express reference therein].*
3. *The arbitrator or arbitration tribunal shall apply the rules of this Convention.*
4. *The provision of paragraph 3 of this article is deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith is null and void.*
5. *Nothing in this article affects the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage by sea has arisen.*