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Diplomatic Conference Organized Jointly
by CCNR, the Danube Commission and ECE
for the Adoption of the Convention on
the Contract for the Carriage of Goods
by Inland Waterway
(Budapest, 25 September–3 October 2000,
agenda item 6)

CONSIDERATION OF THE DRAFT CONVENTION ON THE CONTRACT FOR THE CARRIAGE OF GOODS BY INLAND WATERWAY (CMNI)

Transmitted by the Government of Germany

Note: The secretariat reproduces below the comments and proposals by the Government of Germany concerning the text of the draft CMNI Convention as reproduced in document ECE/TRANS/CMNI/CONF/2 and CMNI/CONF.(99)2.

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CENTRAL COMMISSION FOR THE NAVIGATION OF THE RHINE
DANUBE COMMISSION
UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE

I. GENERAL

The Government of the Federal Republic of Germany welcomes the work to standardize the regulations concerning the contract for the carriage of goods by inland waterway. It considers that the adoption of a Convention on the Contract for the Carriage of Goods by Inland Waterway is an important step in the efforts to facilitate the international carriage of goods on inland waterways.

The Government of the Federal Republic of Germany is taking a stand, as appears below, on provisions it considers should be improved. This stand is not restricted to proposed amendments of a material nature. In view of the scheduled date of the Diplomatic Conference and the need to clarify various points, it also concerns the wording of the draft. No mention has been made, however, of mistakes in spelling and punctuation. Proposals for amendments concerning the wording of the draft only appear in italics. Amendments deriving from drafting proposals are underlined in the text.

The comments which follow are not exhaustive. The delegation of the Federal Republic of Germany reserves the right to submit further proposals during the Diplomatic Conference.

II. CONCERNING THE DRAFT CONVENTION

The title

The German title should be brought more into line with the French text. The term "inland navigation" should be used uniformly throughout the English text.

Proposed wording:

"Convention relative au contrat de transport de marchandises en navigation intérieure (CMNI)"
"Convention on the Contract for the Carriage of Goods by Inland Navigation* (CMNI)"

*Translator's note: This is not an acceptable solution in English. "Navigation" is the act of steering a correct course, not the medium of carriage. The English title should be kept (cf. "by sea", "by air").

The preamble

The wording of the preamble needs to be brought into line in view of the disparities between the French and the English texts.

Proposed wording:

"The States Parties to this Convention:

Having recognized the need and desirability of establishing uniform rules concerning contracts for the carriage of goods by inland waterway,

Have decided to conclude a Convention for this purpose and have thereto agreed as follows:"

Re article 1

In the definitions of article 1, figures should be used instead of paragraphs. In paragraph 2 the words "auf Binnenwasserstrassen" should be added after "Güterbeförderung", by analogy with the French text. In paragraph 6, "Ladung" should be replaced by "das Verladen", since "Ladung" generally refers to the cargo itself and not the loading procedure. The wording of paragraphs 7 and 8 should be improved.

In view of the numerous references in the Convention which may lead to controversy, it should be specified, on the basis of article 15 of the Convention on the law applicable to contractual obligations, that they refer to rules of law in force. A new paragraph 9 could be included for the purpose.

In the English text, "telecopy" should be replaced by "facsimile".

"Article 1

Definitions

2. 'Actual carrier' means any person to whom the performance of carriage by inland waterway or of part of the carriage has been entrusted by the carrier;

6. 'Transport document' means a document which evidences a contract of carriage by inland waterway and the taking over or loading of goods by a carrier, made out in the form of a bill of lading or consignment note or of any other trade document;

7. 'Goods' does not include either towed or pushed vessels or the luggage or vehicles of passengers; where the goods are consolidated in a container, pallet or similar article of transport or where they are packed, "goods" includes such article of transport or packaging if supplied by the shipper;

8. 'In writing' includes, unless otherwise agreed between the parties concerned, the transmission of information by electronic, optical or similar means of communication, including, but not limited to, telegram, facsimile, telex, electronic mail or electronic data interchange (EDI), provided the information is accessible so as to be usable for subsequent reference.

9. The law of a State applicable in accordance with this Convention means the rules of law in force in that State other than its rules of private international law."

Re article 2

(a) Re paragraph 1

In paragraph 1, the terms used in the French and English translations of "Ladehafen oder Übernahmeort" and "Löschhafen oder Ablieferungsort" are not suitable. The term "State party" ("Etat partie") should be used to translate "Vertragsstaat".

(b) Re paragraph 2

Instead of the expression "to which maritime rules apply", the wording of the United Nations Convention on maritime law "einer Seeordnung unterliegen" should be used.

(c) Re paragraph 3

The phrase "This Convention is applicable without regard to the nationality ..." should be replaced by "This Convention is applicable without regard to the country of registration, ..." since vessels do not have a nationality but are simply country-registered.

Proposed wording:

"1. This Convention is applicable to any contract of carriage of goods by inland waterway whereby the port of loading or the place of taking over of the goods and the port of discharge or the place of delivery stipulated in the contract are located in two different States of which at least one is a Contracting Party to this Convention. If the contract stipulates a choice of several ports of discharge or places of delivery, the port of discharge or the place of delivery to which the goods have actually been delivered shall determine the choice.

2. This Convention is applicable if the purpose of the contract for carriage by inland waterway is the carriage of goods, without trans-shipment, both on inland waterways and in waters to which maritime rules apply, under the conditions set out in paragraph 1, unless:

(a) A marine bill of lading has been made out in accordance with the maritime law applicable, or

(b) The distance to be travelled in waters to which maritime rules apply is the greater.

3. This Convention is applicable without regard to the country of registration, place of registration or home port of the vessel or to whether it is a maritime or inland navigation vessel and without regard to the nationality, domicile, head office or place of residence of the carrier, the shipper or the consignee."

Re article 3

(a) Re paragraph 3

As in the German and French versions, the English paragraph should contain two sentences.

The French and the English texts differ from the German text. The phrase “as prescribed by the regulations in force” does not appear in the German text. Since this provision is based on article 3, paragraph 1 of the Hague Rules, wording closer to the original should be used.

(b) Re paragraph 4

In paragraph 4, it is not clearly specified whether “dans un délai approprié” (within an appropriate period of time) refers to the agreement of the shipper or to the loading. It should be specified that, even if an obstacle to navigation exists, the carrier may only trans-ship the goods if he has been unable to obtain the agreement of the shipper within an appropriate time. The term “usages portuaires” (port practice) should be clarified.

The French and English texts should be adapted to the German version of the introductory sentence of paragraph 4, by inserting after “dans un autre bateau”/“to another vessel” the words “ou type de bateau déterminé”/“or type of vessel”.

(c) Re paragraph 5

In the French and English versions the translation of “Betrieb” is missing.

Proposed wording:

“3. The carrier shall decide which vessel is to be used. He shall be bound, before and at the beginning of the voyage, to exercise due diligence to secure that, taking into account the goods to be carried, the vessel is in a state to carry the cargo, is seaworthy and is properly manned and equipped and is furnished with the necessary national and international authorizations for the carriage of the goods in question.

4. Where it has been agreed that the carriage shall be performed by a specific vessel or type of vessel, the carrier shall be entitled to load or trans-ship the goods in whole or in part on to another vessel or type of vessel without the agreement of the shipper only if …”

(a) (the proposed amendments concern the German text only)

(b) (the proposed amendments concern the German text only)

“5. Except as provided by the obligations incumbent on the shipper, the carrier shall ensure that the loading, stowage and immobilization of the goods does not affect the safe functioning of the vessel.”

Re article 4

(a) Re paragraph 1

The wording of paragraph 1 is not identical in the different languages.

(b) Re paragraph 2

As in the French and English versions, "vertragliche" may be deleted in the German text. As in the French and English versions, "vertragliche" may be deleted in the German text.

(c) Re paragraph 3

In the German version of paragraph 3, "sowohl" should be inserted after "soweit".

Proposed wording:

"Article 4

Actual carrier

1. Where the carrier has entrusted the performance of the carriage or part thereof to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage to do so, the carrier nevertheless remains responsible for the entire carriage according to the provisions of this Convention. All the provisions of this Convention governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him.

2. Any agreement with the shipper or the consignee extending the carrier's responsibility according to the provisions of this Convention affects the actual carrier only to the extent that is agreed to by him expressly and in writing. The actual carrier may avail himself of all the objections validated by the carrier under the contract for carriage."

3. (the proposed amendments concern the German text only)

Re article 6

(a) Re paragraph 2

In paragraph 2, the words "zur Beförderung" may be deleted, since they do not appear in the French and English texts. In the French and English texts, the phrase "prise en charge"/"taken over" should be replaced by "remise"/"handed over". In accordance with the French and English versions, in (c) "Art" should be replace by "Natur". The text of (e) contains a grammatical mistake which should be deleted.

(b) Re paragraph 3

The wording of the second sentence of paragraph 3, "anwendbaren internationalen oder innerstaatlichen Vorschriften" should be translated in French as "la réglementation internationale ou nationale applicable" and in English by "applicable international or national regulations".

Proposed wording:

"2. The shipper shall furnish the carrier, before the goods are handed over and in writing, with the following particulars concerning the goods to be carried:"

(c) (the proposed amendments concern the German text only)

(d) (the proposed amendments concern the German text only)

"3. … According to what has been agreed with a view to carriage, the shipper shall also make provision for appropriate marking conforming to the applicable international or national regulations or, in the absence of such regulations, in accordance with rules and practices generally recognized in inland navigation."

Re article 7

(a) Re paragraph 1

The German and French wording of the first sentence should be brought into line. In the English text, the wording of paragraph 4 ("polluting features of these goods") should be used. The second sentence should be deleted since the obligation to mark or label dangerous or polluting goods is already covered by the general marking obligation in article 6, paragraph 3, second sentence.

(b) Re paragraph 2

Paragraph 2 can be deleted, since the obligation to hand over the documents required for the carriage of dangerous or polluting goods is included in the general obligation to hand over the required documents set out in article 6, paragraph 2, second sentence.

(c) Re paragraph 3

Paragraph 3 should be deleted.

The first sentence contradicts article 9, whereby the carrier may terminate the contract if he does not have the accompanying documents required for carriage. According to the first sentence, the action to be taken is determined not by the Convention itself but by the law applicable at the place where the voyage was interrupted or alternatively at the place of delivery. If the purpose of the first sentence is to specify that, in the event of an obstacle to carriage or delivery, the rights to which a carrier who does not wish to terminate the contract is entitled are

determined by the law applicable in terms of the context, this provision is unnecessary. Article 29, paragraph 1, stipulates that questions not settled by the Convention are to be dealt with in accordance with the national regulations in force.

The second sentence is the subject of reservations since the question of whether the carrier has the right to request reimbursement of his disbursements is settled by article 9 or by national law when it is applicable. In cases in which he is referred back to national law, it seems inappropriate for the Convention to regulate the obligation to reimburse expenses.

(e) Re paragraph 4

As in the provisions of other transport conventions (cf. Hamburg Rules, article 13, paragraph 4), the carrier's right not only to be able to unload but also to destroy or render innocuous dangerous or polluting goods which are an actual danger to other property even when he has been informed of the risks, should be made subject to the proportionality principle. This right should only be granted to the carrier insofar as circumstances may require.

As in the French and English versions, the phrase "gefährliche oder umweltschädliche" should be deleted for drafting reasons.

Proposed wording:

"Article 7

Dangerous or polluting goods

1. If dangerous or polluting goods are to be carried, the shipper shall, before handing over the goods, and in addition to the particulars referred to in article 6, paragraph, 2, inform the carrier in writing about the danger and inherent polluting features of these goods and the precautions to be taken.

[2. deleted]

[3. deleted]

2. In the event of immediate danger to life, property or the environment, the carrier shall be entitled to unload and, insofar as circumstances require, destroy or render innocuous the goods, even if, before they were taken over, he was informed or was apprised by other means of the nature of the danger or the polluting features of these goods.

3. Where the carrier is authorized to take the measures referred to in paragraph 2 above, he may claim compensation for damages."

Re article 8

Article 8 needs to be amended.

Paragraph 1 provides for liability in respect of practically all the shipper's obligations, even if no fault can be attributed to the shipper. Since the shipper's liability is linked to the fault committed, contrary to international law concerning transport by land, it seems inappropriate to make provision for objective liability for the shipper.

This is also valid for the acts and omissions of the servants and agents of the shipper for which he is also responsible (paragraph 2) even if no fault can be attributed to him. In principle, a person's liability resulting from a contractual relationship of obligation is only engaged in respect of faults committed by others. Paragraph 2 wrongly departs from this principle. The corresponding requirement applicable to the carrier does not include such a provision either. In accordance with article 17, the carrier is indeed required to take responsibility for subordinate acts, but under article 16 he is only liable when a fault has been committed and the scope of such liability is limited.

It would therefore be appropriate to regulate the shipper's liability on the basis of article 12 of the Hamburg Rules, which stipulates that:

> "The shipper is not liable for loss sustained by the carrier or the actual carrier, or for damage sustained by the ship, unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents. Nor is any servant or agent of the shipper liable for such loss or damage unless the loss or damage was caused by fault or neglect on his part."

The wording proposed below makes article 8, paragraph 2, unnecessary.

Paragraph 1 (b) should be made more specific in order to establish that the shipper is liable in the event of the inaccuracy or the inadequacy of identification marks, not only in the case of dangerous or polluting goods but also for other goods.

As far as wording is concerned, reference should be made in paragraph 1 (a) not only to "particulars" but also to "instructions", particularly in relation to the terms used in article 6, paragraph 2.

Proposed wording:

"Article 8

Liability of the shipper

The shipper shall be responsible for all the damages and costs incurred by the carrier or the actual carrier by reason of the fact that:

(a) The particulars or instructions referred to in articles 6, paragraph 2, or 7, paragraph 1, are missing, inaccurate or inadequate;

(b) The packaging or the marking of the goods is inadequate;

(c) The necessary accompanying documents are missing, inaccurate or inadequate. However, this will apply only if it is proved that the damage was caused by the fault of the shipper or his servants or agents."

Re article 9

(a) Re paragraph 1

Paragraph 1 may give the impression that the carrier also has the possibility of terminating the contract when the particulars to be supplied by the shipper (e.g. dimensions, number or weight) are of no importance in relation to the carriage to be performed in accordance with the contract. This would substantially affect the shipper's position. The right to terminate the contract should be restricted to cases in which a failure to perform the obligations prevents the carrier from correctly meeting his own obligations.

(b) Re paragraph 2

Paragraph (b) is in contradiction with paragraph (a) when the voyage has begun but the distance travelled is short. Although the carrier has the right to demand compensation equal to not less than one third of the freight where the voyage has not yet begun, this right is liable to be less than one third once the voyage has begun. The carrier should therefore be given the following choice: either to claim one third of the freight as dead freight, or to claim freight in proportion to the distance travelled, demurrage charges and damages.

For drafting reasons, the expression "bereits verladene" should be omitted from the introductory sentence to article 9, both in French and in English; it is impossible to discharge a cargo unless it has previously been loaded.

Proposed wording:

"Article 9

Termination of the contract by the carrier

1. The carrier may terminate the contract if the shipper has failed to perform the obligations set out in article 6, paragraph 2 or article 7, paragraphs 1 and 2, preventing the carrier from performing the carriage in accordance with the contract.

2. If the carrier makes use of his right of termination, he may unload the goods at the shipper's expense and may choose to claim the payment of one of the following amounts:

(a) One third of the agreed freight or

(b) In addition to any demurrage charge, compensation equal to the amount of the costs incurred and the loss caused and, where the voyage has begun, freight in proportion to the distance travelled in relation to the voyage overall."

Re article 10

(a) Re paragraph 1

The expression "Havarei Grosse" is not only not found in German law but is not used in international conventions either (cf. for example, article 54 bis, paragraph 5 (g) of the Convention on jurisdiction and the enforcement of judgements in civil and commercial matters of 27 September 1968, in the wording of the Convention on the accession of the Kingdom of Spain and the Portuguese Republic to this Convention of 26 May 1989). The expression "grossen Haverei" should therefore be replaced.

(b) Re paragraph 2

Paragraph 2, which is the subject of reservations of principle, should be deleted.

The possibility of a link with the place of delivery or discharge in paragraph 2 entails a legal uncertainty.

The provision of (a) to the effect that the determination of the time or the duration of the delivery is subject to the law applicable at the place of delivery is in contradiction with article 5. The latter contains a special provision concerning the delivery time (which probably corresponds to the "duration" of delivery). A reference to the law applicable at the place of delivery is therefore meaningless. This is also the case if the duration of delivery is taken to mean the time limit for discharge. This special reference is not appropriate here either since the question of the time available for the discharge of the cargo is definitively linked to the other contractual obligations.

The provision also contained in (a), whereby the law of the place of discharge determines the place of discharge, is meaningless. The expression "modalités de livraison" (arrangements for delivery) is not clear. The form in which the goods should be delivered depends on the nature of the goods, which is known when the contract of carriage is signed. Insofar as prescriptions of public law are applicable, there is no need to refer to the regulations concerning collisions. Lastly, the provision whereby the law of the place of delivery determines the "treatment" of the goods in the event of "an obstacle to delivery" is in contradiction with article 29, which refers to liability in the event of an obstacle to carriage. A separate treatment of the cases referred to is not justified.

Subparagraph (b) departs from the general principles of international private law without justification. As a matter of principle, the question of whether and to what extent the carrier can secure the amounts owed to him by a lien is a matter of liability. Also as a matter of principle, the question of whether and to what extent the carrier can secure the amounts owed to him by asserting a right of retention depends on the law of the State in which he finds himself.

(c) Re paragraph 3

For drafting reasons, "sonstige dritte Person" should be replaced by "einen Dritten".

Proposed wording:

"Article 10

Delivery of the goods

1. The consignee who, following the arrival of the goods at the place of delivery requests their delivery, shall, in accordance with the contract of carriage, be responsible for the freight and other charges due on the goods, as well as for his contribution to any general average. In the absence of a transport document, or if such document has not been presented, the consignee shall be responsible for the freight agreed with the shipper if it corresponds to market practice.

[2. deleted]

2. The handing over of the goods to an authority or a third party under the legislation or administrative requirements in force in the port of discharge or the place of delivery shall be considered a delivery."

Re article 11

(a) Re paragraph 2

In accordance with the wording of article 5, paragraph 1, second sentence of CMR, and for reasons of logic, the third sentence should read as follows: "… if permitted by the law of the [State]". The French and English versions should be adapted accordingly.

(b) Re paragraph 3

The wording of the English text should be improved.

(c) Re paragraph 5

The word "soll" used in the introductory sentence of the German text should be translated as "devrait" in French and "should" in English. In (c) of the English text, "whether" should be replaced by "where". In (e) of the English text, the phrase "ou, à défaut" has not been translated.

Proposed wording:

"2. The original of the transport document must be signed by the carrier, the master of the vessel or a person authorized by the carrier. The carrier may require the shipper to countersign

the original or a copy. The signature may be in handwriting, printed in facsimile, perforated, stamped, in symbols or made by any other mechanical or electronic means, if permitted by the law of the State where the transport document was issued.

3. The transport document shall be prima facie evidence, unless proved to the contrary, of the conclusion and content of the contract and of the taking over by the carrier of the goods. In particular, it shall establish the presumption that the goods have been taken over with a view to carriage in the condition described therein."

"5. The transport document, in addition to its name, should contain the following particulars:"

(c) "The name or number of the vessel, where the goods …" (remainder unchanged);

(e) "… their name according to the requirements in force, otherwise their general shipping name."

Re article 12

(a) Re paragraph 1

The provision of (a) to the effect that it is impossible to check the particulars contained in the transport document when the goods have not been counted, measured or weighed "at the shipper's expense" is confusing. The purpose of this provision is not, in fact, to settle the payment of expenses. It should also be specified that measurement of the vessel is only mentioned as an example of a situation in which it has not been possible to check the particulars in the transport document concerning dimensions and weight, for cases in which other means of checking, such as weighing the goods, have not been resorted to.

In the English text, "reasonable grounds" should be replaced by "grounds". In the German and French texts there is no reference to "raisons objectives".

(b) Re paragraph 3

In paragraph 3, the presumption in question should only apply to containers locked or sealed by the shipper since containers which are not locked or sealed may be opened without anyone knowing. The presumption that the loss or damage to the goods was not occasioned during carriage would then be unjustified.

From the drafting point of view, the structure of the sentences should be amended accordingly.

Proposed wording:

1. The carrier is entitled to include in the transport document reservations concerning:

"(a) The dimensions, number or weight of the goods, if he has grounds to suspect that the particulars supplied by the shipper are inaccurate or if he had no reasonable means of checking such particulars, especially …;"

"3. When, in accordance with the particulars set out in the transport document, the goods are placed in a container sealed or locked by the shipper or in the holds of the vessel and sealed by the shipper and when the container or the seals are still intact when they reach the port of discharge or the place of delivery, it shall be assumed that the loss or damage to the goods was not occasioned during carriage."

Re article 13

The text of paragraph 4 contains a grammatical error which should be eliminated.

Proposed wording:

4. (the proposed amendments concern the German text only)

CHAPTER IV

The heading of Chapter IV should be brought into line with the French text.

Proposed wording:

(the proposed amendments concern the German text only)

Re article 14

The heading of article 14 should be brought into line with the French text.

Proposed wording:

(the proposed amendments concern the German text only)

Re article 15

The texts in the different languages should be made uniform. In the German text, in (b) "Anweisungen" should be replaced by "Weisungen".

Proposed wording:

"Article 15

Conditions for the exercise of the right of disposal

The shipper or, in the case of article 14, paragraphs 2 and 3, the consignee, must, if he wishes to exercise his right of disposal:

"(a) Where a bill of lading is used, submit all originals prior to the arrival of the goods at the scheduled place of delivery;

(b) Where a transport document other than a bill of lading is used, submit that transport document which shall include new instructions given to the carrier;"

Re article 16

The German text is too far removed from the French and English texts.

Proposed wording:

(the proposed amendments concern the German text only)

Re article 17

The wording of the heading should be improved. In paragraph 1, as in article 3 of CMR, the word "dienstlichen" should be deleted. In the introductory sentence to paragraph 3 in English the word "such" should be deleted. Paragraph 4 should be deleted since this provision already appears in article 20, paragraph 5.

Proposed wording:

(the proposed amendments of the heading of the article and paragraph 1 concern the German text only)

"3. If an action is brought against the servants and agents …"

[4. deleted]

Re article 18

(a) Re paragraph 1

The introductory sentence is grammatically wrong; in addition, the German version of (c) departs from the French and English versions. In (e), the terminology of article 19, paragraph 4(d) should be used. The wording of the French and English versions of (d) should be adapted to the German.

(b) Re paragraph 2

The provision of the first sentence which presumes that the carrier could not have avoided the damage is meaningless. If it is presumed that the damage was caused by a circumstance which led to the exoneration of the carrier from liability, it is unnecessary to make

provision for the other presumption that the carrier was unable to avoid that circumstance. Consequently, the phrase "which the carrier could not have prevented and the consequences of which he could not have averted" should be deleted from the first sentence.

Other drafting changes are proposed.

Proposed wording:

"Article 18

Special exonerations from liability

1. The carrier shall be exonerated from liability when the loss, damage or delay are the result of one of the circumstances listed below or one of the risks listed below:

(c) Carriage of the goods on deck or in open vessels, where such carriage has been agreed with the shipper or is in accordance with the practice of the particular trade, or if it is required by the regulations in force;

(d) The nature of the goods which exposes them to total or partial loss or damage, especially through breakage, rust, decay, desiccation, leakage, normal wastage (in volume or weight), or the action of vermin or rodents;

(e) The lack of or defective condition of packaging in the case of goods which, by their nature, are liable to loss or damage when not packed or when the packaging is defective.

2. When, in the circumstances of the case, the loss or damage could be attributed to one or more of the circumstances listed in paragraph 1 or one of the risks listed in paragraph 1 of the present article, it is presumed to have been caused by a circumstance or risk which the carrier could not have prevented and the consequences of which he could not have averted. This presumption does not apply if the injured party proves that the loss suffered does not result, or does not result exclusively, from one of the circumstances or one of the risks listed in paragraph 1of this article."

Re article 19

(a) Re paragraph 1

The wording of paragraphs 4 and 5 should be improved. The wording of the French and English versions should be closer to the German version in paragraph 4 and in article 18, paragraph 1 (d).

Proposed wording:

"4. In respect of goods which by reason of their nature are exposed to normal wastage, the carrier shall only be held liable, whatever the length of carriage, for that part of the wastage which exceeds normal wastage as determined by the parties to the contract or, if not, by the regulations or established practice at the place of destination."

5. (the proposed amendments concern the German text only)

Re article 20

(a) Re paragraph 1

There is a contradiction between (a) and (b) which is incapable of solution. Since a container should be considered a loading unit within the meaning of (a), the two provisions establish different maximum limits of liability for a container.

In addition, the abbreviation "TEU" in brackets in (b) is incorrect since it does not indicate a given type of container but a unit of measurement (20 feet). It may also give the impression that liability is to be limited still further, by derogation from maritime law. For a 20-foot container of a permissible gross weight of 20,320 kg, the liability would be considerably less than two units of account per kilogram. For a 40-foot container of a permissible gross weight of 30,480 kg, the liability per kilogram would be even less.

Taking the normal situation of a 20-foot container and assuming that it is three-quarters full, this gives a gross weight of approximately 15,000 kilograms, giving a maximum limit of acceptable liability of 30,000 units of account, according to the basic rule of two units of account per kilogram. The distribution could then be 25,000 units of account for the contents of the container and 5,000 units of account for the container itself. The amount of 5,000 units of account is based on amounts found in general conditions of commerce, for example, the amount of 15,000 Netherlands guilders established in the general conditions of commerce of Fa. Rheinkontainer B.V., Rotterdam.

(b) Re paragraph 4

In (a), the requirement that the shipper should specify the "nature" of the goods should be discarded. This specification is unnecessary since only the value of the goods is a determining factor. It is not necessary for the shipper to specify expressly the higher value of the goods. It is sufficient to include this higher value obligatorily in the transport document. Since the carrier makes out the transport document, he is necessarily aware of the higher value. In (a), provision should be made for the possibility of indicating a higher value for the packaging, for example, if a more expensive refrigerated container is used.

For drafting reasons, the appropriate legal term "Haftungshöchstbetrag" should be used in paragraph 4.

Proposed wording:

“Article 20

Maximum limits of liability

1. Subject to article 21 and paragraph 4 of this article, and regardless of the action brought against him, the carrier shall under no circumstances be liable for amounts exceeding 666.67 units of account per package or other loading unit, or 2 units of account per kilogram of weight, specified in the transport document, of the goods lost or damaged, whichever is the higher. If the package or other loading unit* is a container and if there is no mention in the transport document of any package or loading unit other than those consolidated in the container, the amount of 666.67 units of account shall be replaced by the amount of 5,000 units of account for the container without the goods it contains and, in addition, the amount of 25,000 units of account for the goods which are in the container.

*Translator’s note: The French text has “unité de compte”. In view of the text of the previous sentence (“colis ou autre unité de chargement”/ “package or other loading unit”), it is suggested that a typing error has crept into the text in this and the following line.

2. …

3. …

The carrier is not entitled to the benefit of the maximum limits of liability:

(a) Where a higher value of the goods or the packaging is specified in the transport document and the carrier cannot refute the accuracy of this particular or where the parties have expressly agreed to higher maximum limits of liability.

4. …”

Re article 21

The syntax should be corrected in all the versions. In addition, the terminology should be adapted to the other provisions of the Convention (article 17, paragraph 3 refers to “defences and limits of liability”).

Proposed wording:

“1. The carrier or the actual carrier is not entitled to the defences and limits of liability provided for in this Convention or in the contract of carriage if it is proved that he himself caused the damage by an act or omission, either with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.”

Re article 22

In relation with Chapter IX which is also entitled "Scope", the heading should read:

"Article 22

Application of the defences and limits of liability"

Re article 23

This provision should be entitled "Avis de dommage" (Notice of damage).

In paragraph 1, instead of "Übernahme zur Beförderung", "Übergabe" should be used, as in the French version.

The text in French and English of paragraph 3 does not correspond to the German text and should be adapted in accordance with CMR.

In paragraph 5 it should be indicated more clearly, particularly in the French text, that the consignee is not required to prove that the notice was given to the carrier within 21 days, but that he sent the notice during the 21 day period and that it reached the carrier.

Proposed wording:

"Article 23

Notice of damage

1. The acceptance without reservation of the goods by the consignee is prima facie evidence of the delivery by the carrier of the goods in the same condition and quantity as when they were handed over to him for carriage."

"3. Where the loss or damage to the goods is apparent, any reservation on the part of the consignee must be formulated in writing specifying the general nature of the damage, at latest at the time of delivery, unless the consignee and the carrier have not checked the condition of the goods."

"5. No compensation shall be payable for damage resulting from delay in delivery unless the consignee can prove that he reported the delay within 21 consecutive days following delivery of the goods and that the notice reached the carrier."

Re article 24

(a) Re paragraph 2

The French version should be brought more into line with article 17, paragraph 3 and the German text.

(b) Re paragraph 3

The second sentence, which is contrary to the objective of legal standardization should be deleted. A uniform position should be taken on the status of the contract. In the third sentence, it should be specified that these are apportionment procedures which serve to implement the overall limitation of liability.

(c) Re paragraph 4

The wording should be based more on the Hague-Visby Rules (article 3, paragraph 6 bis).

Proposed wording:

"2. The person against whom an action is brought may at any time during the running of the limitation period extend that period by a declaration in writing to the injured party. This period may be further extended by another declaration or declarations.

3. The suspension and interruption of the limitation period are governed by the law of the State applicable to the contract of carriage. The filing of a claim during proceedings to apportion limited liability shall interrupt the limitation for all rights resulting from an event which has led to damage.

4. Any action for indemnity by a person held liable under this Convention may be instituted even after the expiration of the limitation period provided for in paragraphs 1 and 2 of this article, if proceedings are instituted within a period of 90 days commencing from the day on which the person instituting the action has settled the claim or has been served with process, or if proceedings are instituted within a longer period as provided by the law of the State where proceedings are instituted."

Re article 25

(a) Re paragraph 1

For drafting reasons, the phrase "sous réserve des dispositions de" should be replaced by "sous réserve de".

(b) Re paragraph 2

(aa) Re (a)

Subparagraph (a) should also include the case of a fault resulting from the choice made by the carrier.

The possibility anticipated in the draft of exoneration from liability in the event of damage caused by third parties does not only concern a fault committed by a third party but also an error of choice by the carrier which has led to the damage caused by a third party. For

example, a negligent carrier may select a boatmaster who does not possess adequate qualifications and an accident may occur as a result of this lack of qualifications. Exoneration from liability would be inappropriate in the case of a fault of this nature committed when the choice was made.

(bb) Re (b)

The provision in (b) concerning the burden of proof is the subject of reservations. It means that in the event of a fire or an explosion the carrier is solely responsible if the shipper can provide proof of a fault committed by the carrier or his servants or agents or if the vessel has defects. This is not appropriate since, generally speaking, it will be impossible for the shipper to provide such proof. Generally, he does not know under what circumstances the fire or the explosion took place.

The only acceptable provision would be one in which the burden of proof as regards the absence of a fault or the proper state of the vessel falls on the carrier. It is not, however, necessary to include a separate provision for the purpose since according to article 16 and article 17, paragraph 1, the boatmaster may be exonerated from liability if he proves that the damage was caused in circumstances which a diligent carrier could not have prevented and the consequences of which he could not have averted.

Subparagraph (b) of paragraph 2 should be deleted. We propose that the wording of article 25, paragraph 2 (b) could possibly be kept.

The text of (c) is not clear. It is not indispensable and the wording should at least be adjusted.

According to this provision, exoneration from liability is accepted only in connection with initially existing defects of the vessel, in other words which existed before the start of the voyage, which a diligent carrier could not have detected. This requirement is unnecessary. In such a case, the carrier has already been exonerated under article 16. If it is nevertheless wished to keep the requirement, it should at least be specified that it only applies to defects of the vessel already existing prior to the voyage.

(c) Re paragraph 3

This requirement, for which there is no international precedent, is the subject of reservations and should be deleted.

We do not see why, derogating from the basic rule of article 16, the carrier should be exonerated from liability in the event of damage occurring on land as a result of his simple or manifest negligence. If the carrier took over the goods on land, he must respect his fundamental commitments, namely, his obligation to supervise them. Similarly, we do not understand the sense of the phrase “without prejudice to article 16”. The existence of different arrangements constitutes precisely a derogation from article 16. The possibility that this provision opens up of derogating from article 17 is equally unacceptable.

It is globally contrary to the principle of good faith for the carrier simply to rule out responsibility for the acts of his servants. Nor do we understand why it would be possible, aside from the carriage by vessel, to depart from the reasons for exoneration from liability established in article 18. The reasons for exoneration from liability established in article 18 correspond to those established in the conventions concerning carriage by land. The fact of allowing fewer or more reasons for exoneration from liability to be established by contract is contrary to article 25, paragraph 1, the aim of which is to preserve legal certainty. Similarly, we do not understand why it should be possible to derogate, to the advantage or disadvantage of the carrier, from the calculation of compensation referred to in article 19. If such a condition exists, the carrier runs the risk, in the event of damage occurring on land, also of being made liable for the financial losses of the shipper, a risk very difficult to assess. Lastly, we would enter reservations regarding the possibility of reducing still further the maximum limits of liability which are already extremely low, in the event of damage occurring on land. For a shipper who has experienced damage, the place where it occurred is of no importance.

If, as in the Hague-Visby Rules, it is not wished to submit liability for damage occurring on land to the requirements of the Convention, this can be done by limiting the scope of the Convention. An alternative would be to permit each State to enter a reservation permitting it to make free provision, for both shipper and carrier, for the possibility of contractual arrangements concerning liability for damage occurring prior to the loading of the goods on board the vessel and after their discharge. The disadvantage of a solution of this nature is that its effect on the legal certainty which the Convention should ensure would not be negligible.

<u>Proposed wording</u>:

"Article 25

Nullity of contractual stipulations

1. Any <u>contractual</u> stipulation intended to exclude, <u>to</u> limit or, <u>subject to the provisions of article 20, paragraph 4, to</u> increase the liability …
Notwithstanding the provisions of paragraph 1 of this article and without prejudice to article 21, contractual stipulations shall be authorized specifying that the carrier is not responsible for losses arising from:

(a) An act or omission by the master of the vessel, the pilot or any other person in the service of the vessel, pusher or tug during navigation or in the formation or dissolution of a pushed or towed convoy, unless the act or omission results from an intention to cause damage or from reckless conduct in the knowledge that such damage would probably result, <u>or unless the loss would not have been caused if the carrier had shown due diligence in the choice of the persons in the service of the vessel</u>;"

(b) deleted, or possibly:

"Fire or an explosion on board the vessel, <u>if he can prove</u> that the fire or explosion resulted <u>neither</u> from a fault of the carrier <u>nor a fault of</u> his servants or agents or a defect of the vessel;"

(c) deleted, or possibly:

"The defects prior to the voyage of his vessel or of a rented or chartered vessel if he can prove that such defects could not have been detected prior to the start of the voyage despite due diligence;"

(d) …

[3. deleted]

Re article 26

In the heading and text of article 26, "Havarei" should be replaced by "Haverei".

Re article 27

The wording of paragraphs 1 and 2 should be simplified. It should also be specified in paragraph 1 that only the overall limitation of liability is involved. The French and English versions of paragraph 2 should be brought more into line with article 25, paragraph 3 of the Hamburg Rules and the German text.

Proposed wording:

"Article 27

Other applicable provisions and nuclear damage

1. This Convention does not modify the rights or duties of the carrier provided for in international conventions or national law relating to the limitation of liability of owners of ships or vessels for all rights resulting from an event which has already led to damage.

2. The carrier shall be relieved of liability under this Convention for damage caused by a nuclear incident, when the operator of a nuclear installation or other authorized person is liable for such damage pursuant to the laws and regulations of a State governing liability in the field of nuclear energy."

Re article 28

Paragraph 1, fourth sentence and paragraph 2 should be deleted.

The use of Special Drawing Rights is customary in transport law; however, the use of gold francs is outmoded. In the interests of legal certainty, the use of Special Drawing Rights should be standardized.

In addition, the conversion in paragraph 2 of Special Drawing Rights to units of account/gold contains mistakes. According to the latest parity established on 31 March 1978 between Special Drawing Rights and gold, a Special Drawing Right corresponds to 15 gold

francs (the latter being defined in accordance with the old Poincaré franc as 65.5 milligrams of gold of millesimal fineness 900). Taking into account the value of gold, which has increased considerably since 1978, a SDR corresponds to 2.5 gold francs or, a maximum of 3 gold francs, in accordance with article 9, paragraph 4 of the Convention concerning International Carriage by Rail (COTIF) as set out in the Protocol of 3 June 1999.

In paragraph 2 of the draft, a conversion factor of 18.75 is used for the maximum limit of liability per package or other shipping unit and per kilogram of goods. If the conversion factor was set at 15, the maximum limit of liability per package or other shipping unit should be 10,000 units of account/gold (666.67 Special Drawing Rights x 15 = 10,000 units of account/gold), and, for each kilogram of goods, 30 units of account/gold (2 Special Drawing Rights x 15 = 30 units of account/gold).

In view of the problem caused by the use of gold francs, this alternative to Special Drawing Rights should be abandoned.

Proposed wording:

"Article 28

Unit of account

1. The unit of account referred to in article 20 of this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in article 20 are to be converted into the national currency of a State according to the value of such currency at the date of judgement or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Rights, of a Contracting State which is a member of the International Monetary Fund is to be calculated in accordance with the method of evaluation applied by the International Monetary Fund in effect at the date in question for its operations and transactions."

Re article 29

Paragraph 4 may wrongly give the impression of being a derogation from paragraphs 2 and 3. In fact, paragraph 4 establishes a basic rule which is specified in paragraphs 3 and 4. This rule should therefore precede paragraphs 2 and 3. Paragraphs 2 and 3 should also be drafted as a statutory presumption in accordance with article 4 of the Convention on the law applicable to contractual obligations of 19 June 1980.

The provision of paragraph 4 which states that the lex fori can provide for the application of another national law should be deleted. On the one hand, this provision is poorly drafted, and on the other it calls in question the meaning of article 29 in its entirety. In fact, it is precisely the provisions concerning collisions which should definitively determine the applicable law. If each State has the possibility of establishing derogations where collisions are concerned article 29 becomes ineffective.

Proposed wording:

"Article 29

Additional national provisions

2. If no agreement has been made, the law to be applied is that of the State with which the contract of carriage is most closely connected.

3. It is presumed that the contract is most closely connected with the State of the carrier's principal place of business at the time when the contract was concluded, if the port of loading or the place where the goods are taken over, or the port of discharge or the place of delivery or the shipper's principal place of business is also in that State. Where the carrier has no place of business on land and if he has concluded the contract on board his vessel, it is presumed that the contract is most closely connected with the State in which the vessel is registered or whose flag it flies, where the port of loading or the place where the goods are taken over, or the port of discharge or the place of delivery or the shipper's principal place of business are also located in that State."

Re Chapter IX

The German heading should be brought into line with the French and English texts.

Proposed wording:

"CHAPTER IX

SCOPE"

Re article 30

Article 30 should be deleted.

Paragraph 1 enables Contracting States to exclude certain waterways from the scope of the Convention. We do not understand the purpose of this provision. According to article 2, the Convention is applicable when the port of loading or taking over of the goods and the port of discharge or delivery stipulated in the contract are located in two different States of which at least one is a Contracting Party to this Convention. The choice of the waterways on which the carrier voyages does not determine the choice. The non-application of the Convention on certain waterways is therefore irrelevant.

If the purpose of article 30 is to permit a Contracting State to exclude from the scope of the Convention contracts under which goods must be carried only on certain specific inland waterways on the national territory of that State, article 30 is unnecessary. Article 2 already stipulates that the Convention is not applicable when the ports of loading and discharge are located in the same State.

Re article 31

In the introductory sentence, the customary international formula should be used. In addition, the wording of (a) should conform to that of article 2, paragraph 1.

Proposed wording:

"Article 31

Extension of the scope

Each State may, at the time of signing this Convention or of depositing its instrument of ratification, approval or acceptance, at the time of its accession, or at any time thereafter, declare that it will also apply the provisions of this Convention.

(a) to contracts for the carriage of goods in accordance with which the port of loading or taking over of the goods stipulated in the contract and the port of discharge or delivery stipulated in the contract are located on its territory;"

Re article 32

Throughout, "Haftungsregel" should be replaced by "Haftungsvorschrift" in the German text, "clause" by "réglementation" in the French text and "stipulations" by "provisions" in the English text, since these are not contractual arrangements but legal requirements.

(a) Re paragraph 1

The introductory sentence should be adapted to the wording generally used in international conventions.

In addition to these drafting changes, following the proposed amendments to article 25, paragraph 2 (a), exoneration from liability should be limited to faults committed by third parties, while the exoneration from liability of the carrier who commits a fault in the choice of his personnel should be abandoned.

(b) Re paragraph 2

In paragraph 2, the requirement concerning entry into force should be brought into line with that of article 35, paragraph 1. Instead of "transport operations", "contracts of carriage" should be used as being more accurate.

(c) Re paragraph 3

The wording of the first sentence should be improved. In particular, the time as from when the clause concerning liability referred to in article 32, paragraph 1 (and not the admissible declaration referred to in paragraph 1) is no longer in force should be specified.

The provision figuring in the second sentence whereby the withdrawal is not to apply to goods which have not yet been delivered is confusing. It gives the impression that a new law on liability may be applied to contracts signed before the requirement concerning liability has ceased to have effect. This is contrary to the general principles of legal chronology.

Proposed wording:

"Article 32

Regional provisions concerning liability

1. Each State may, at the time of signing this Convention or of depositing its instrument of ratification, approval or acceptance, at the time of its accession or at any time thereafter, declare that in respect of the carriage of goods between ports of loading or places where goods are taken over and ports of discharge or places of delivery, both of which are situated on its territory or on the territory of a State which has made the same declaration, the carrier shall not be responsible for loss caused by an act or omission by the master of the vessel, pilot or any other person in the service of the vessel, pusher or tower during navigation or during the formation of a pushed or towed convoy, unless the act or omission results from an intention to cause damage or from reckless conduct in the knowledge that such damage would probably result, or unless the loss would not have been caused if the carrier had shown due diligence in the choice of the persons in the service of the vessel.

2. The provision concerning liability referred to in paragraph 1 shall enter into force between two Contracting States when this Convention enters into force in the second State which has made the same declaration. If a State has made this declaration following the entry into force of the Convention for that State, the provision concerning liability referred to in paragraph 1 shall only enter into force on the first day of the month following a period of three months as from the notification of the declaration. The provision concerning liability shall be applicable only to contracts of carriage signed after its entry into force.

3. A declaration made in accordance with paragraph 1 may be withdrawn at any time by notification to the depository. In the event of withdrawal, the provisions concerning liability referred to in paragraph 1 shall cease to have effect on the first day of the month following the notification or at a subsequent time indicated in the notification. The withdrawal shall not apply to contracts of carriage signed before the provisions concerning liability have ceased to have effect."

Re article 33

Paragraph 2 should be brought into line with articles 31 and 32.

The requirement of paragraph 3 whereby a protocol is applicable only "in the relations between the Contracting States" which have ratified it seems too restrictive. If considerably fewer States than the number of Contracting States to the CMNI Convention were to ratify the Protocols, the latter would have little effect. For this reason we propose that a protocol should always become applicable once the law of the State which has adopted it is applied.

It is also necessary to make provision for a requirement similar to article 35 concerning the entry into force of the protocol. This requirement should be inserted before the present paragraph 3.

Following the deletion of article 30 proposed above, the reference in the present paragraph 3 to article 30 should also be deleted.

Proposed wording:

"Article 33

Additional protocols

2. Each State may declare, at the time of signing this Convention or depositing its instrument of ratification, approval or acceptance, or at any time thereafter, that it also approves one of the protocols or both.

3. A protocol approved in accordance with paragraph 2 is applicable.

(a) When the Convention is applicable in accordance with articles 2 and 31 and

(b) When the law of the State for which the protocol has entered into force is applicable.

4. A protocol shall enter into force in the State which has approved it when this Convention enters into force in that State. For a State which has approved a protocol after the Convention has entered into force for that State, the protocol shall enter into force on the first day of the month following a period of three months as from the notification of the declaration of approval.

5. A protocol may be denounced individually pursuant to the provisions of article 36 below, without implying denunciation of this Convention."

Re article 34

(a) Re paragraph 1

We do not understand why paragraph 1 provides for signature of the Convention by "European" States only. This provision gives rise to unnecessary questions of interpretation. The Convention should be open to all States. The reference to accession is unnecessary since it is already mentioned in paragraph 2.

(b) Re paragraph 2

The proposal to open the Convention to all States will involve amendments to paragraph 2.

Proposed wording:

“Article 34

Signature, ratification, accession

1. This Convention is open for signature by all States from … to … at the headquarters of the depository.

2. All States may become Contracting Parties to this Convention:

(a) By signing it without reservation of ratification, acceptance or approval;

(b) By signing it subject to a reservation of ratification, acceptance or approval, and thereafter ratifying it, accepting or approving it;

(c) By acceding to it.

3. …”

Re article 35

(a) Re paragraph 1

Account should be taken of the alternative version whereby a State becomes a Contracting State in accordance with article 34 (a) by a signature without reservation.

Moreover, the Convention should enter into force when five instruments of ratification or accession have been deposited.

(b) Re paragraph 2

The meaning of “For all other Parties” should be specified. In addition, entry into force should not be established on the first day of the third month following the deposit of the instrument in question. In accordance with paragraph 1, this date should be established on the first day of the month following a period of three months after the deposit of the instrument in question.

In accordance with the above proposal for paragraph 1 concerning the entry into force of the Convention following the deposit of five instruments of ratification, acceptance, approval or accession, this figure is included in paragraph 2.

Proposed wording:

"Article 35

Entry into force

1. This Convention enters into force on the first day of the month following the expiration of a period of three months as from the date on which five States have deposited their instruments of ratification, acceptance, approval or accession or have signed this Convention without reservation of ratification, acceptance or approval.

2. For each State which ratifies, accepts or approves this Convention or accedes to it following the deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention shall enter into force on the first day of the month following a period of three months as from the deposit of its instrument of ratification, acceptance, approval or accession."

Re article 36

The wording of paragraph 3 should be brought into line with that of article 35.

Proposed wording:

"3. The denunciation shall take effect on the first day of the month following the expiration of a period of one year as from the date of deposit of the instrument or after a longer period referred to in the denunciation."

Re article 37

In the heading of the French and English versions, "amendements/amendments" should be replaced by "amendement/amendment".

Paragraph 2, no example of which exists in similar conventions, is the subject of reservations and should be deleted. Although Contracting States to the original Convention are free to adopt the protocol amending the Convention or to remain Contracting States to the original Convention, it would be preferable for third States only to have the possibility of being Contracting Parties to the amended Convention.

Proposed wording:

"Article 37

Review and amendment

At the request of not less than one third of the Contracting States to this Convention, the depository shall convene a conference of the Contracting States for revising or amending it. The review Conference shall define by consensus its rules of procedure."

Re article 38

The wording of article 38 should be amended. In view of the fact that the Convention establishes amounts for liability which are liable to change over the years, provision should be made for a simplified revision procedure, following the example of other more recent conventions (cf. Strasbourg Convention of 4 November 1988 on the Limitation of Liability of Owners of Inland Navigation Vessels and article 8 of the 1996 Protocol amending the 1976 Convention on Limitation of Liability for Maritime Claims).

Proposed wording:

"Article 38

Revision of the amounts for limitation of liability and unit of account

1. Notwithstanding the provisions of article 37, when a revision of the amount specified in article 20 and in article 28, paragraph 2, or the substitution of either or both of the units defined in article 28, paragraphs 1 and 2 by other units is proposed, the depository shall, when not less than one fourth of the Contracting Parties to this Convention so request, submit the proposal to all members of the United Nations Economic Commission for Europe, the Central Commission for the Navigation of the Rhine and the Danube Commission and to all Contracting States and shall convene a conference only for the purpose of altering the amount specified in article 20 and in article 28, paragraph 2, or of substituting either or both of the units defined in paragraphs 1 and 2 of article 28 by other units.

2. The conference shall be convened at earliest six months after the day on which the proposal was transmitted.

3. All Contracting States to the Convention are entitled to participate in the conference, whether or not they are members of the organizations referred to in paragraph 1.

4. The amendments shall be adopted by a majority of two thirds of the Contracting States to the Convention represented at the conference and taking part in the vote, provided that not less than one half of the Contracting States to the Convention are represented when the vote is taken.

5. During the consultation concerning the amendment of the amount specified in article 20 and in article 28, paragraph 2, the conference is to take into account the lessons learned from the events leading to the damage and in particular the extent of the damage so caused, variations in money value and the incidence of the amendments envisaged on insurance costs.

6. (a) The amendment of the amount in accordance with this article may take effect at earliest five years after the day on which the Convention was opened for signature and at earliest five years after the day on which an amendment introduced previously in accordance with this article entered into force.

(b) An amount may not be increased such that it exceeds the amount of the maximum limitation of liability specified by this Convention, increased by six per cent per annum, calculated according to the principle of compound interest as from the day on which the Protocol was opened for signature.

7. The depository shall notify all Contracting States of any amendment adopted in accordance with paragraph 4. The amendment is deemed to have been adopted after a period of eighteen months following the day of notification, unless during such period not less than one fourth of the States which were Contracting States at the time of the decision concerning the amendment have informed the depository that they will not adopt that amendment; in such case, the amendment is rejected and does not enter into force.

8. An amendment which is deemed to have been adopted in accordance with paragraph 7 shall enter into force eighteen months after its adoption.

9. All Contracting States are bound by the amendment unless they denounce this Convention in accordance with article 36 not later than six months before the amendment enters into force. The denunciation takes effect when the amendment enters into force.

10. When an amendment has been decided but the scheduled eighteen-month period for adoption has not elapsed, a State which becomes a Contracting State during that period is bound by the amendment if it enters into force. A State which becomes a Contracting State after that period is bound by an amendment adopted in accordance with paragraph 7. In the cases cited in this paragraph, a State is bound by an amendment as soon as it enters into force or as soon as the Convention enters into force for that State if this takes place subsequently."

Re article 39

(a) Re paragraph 1

In view of the considerable experience of the Secretary-General of the United Nations as depository of international conventions, it would be appropriate that he should also be designated as depository of this Convention. No other depository should be designated in parallel with the Secretary-General of the United Nations since, in addition to duplicating the workload, this would also make for unnecessary complications resulting from possibly diverging practices by the depositories.

(b) Re paragraph 2

The proposal relating to article 34, paragraph 1, whereby the Convention is open to accession by all States necessitates an amendment of letter (a). In fact, the depository cannot distribute a certified true copy of the Convention to all the States in the world. The depository should, however, distribute a certified true copy of the Convention to all States which took part in the Diplomatic Conference or to States signing or acceding to the Convention.

The French and English translations of the introductory sentence to letter (b) are incorrect. As in the case of other conventions (cf. 1976 Convention on Limitation of Liability for Maritime Claims), States which have only signed the Convention should also be informed.

In the description of the tasks incumbent on the depository, account should be taken of the fact that different declarations may also be made concerning the protocols. The wording of letter (b) should be adapted to take account of the terminology of article 77 of the Vienna Convention on the Law of Treaties (replacement in (i) of "ratification" and "deposit of an instrument" by "notification", deletion of "reservation" since this point is covered by "declaration" and in (v) deletion of "required").

(c) Re paragraph 3

Paragraph 3 should be deleted. This requirement is not necessary if, in accordance with paragraph 1, the Secretary-General of the United Nations is designated as depository.

Proposed wording:

"Article 39

Depository

1. This Convention shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall:

(a) Distribute certified true copies of this Convention and its Protocols to all States which have participated in the Conference on the international standardization of law concerning the carriage of goods by inland waterway, or which have signed this Convention or acceded to it;

(b) Inform all States which have signed or acceded to this Convention:

(i) Of any new signature, notification or declaration made, indicating the date of the signature, notification or declaration;

(ii) Of the date of entry into force of this Convention and its Protocols;

(iii) Of any denunciation of this Convention or of a Protocol and of the date on which such denunciation is to take effect;

(iv) Of any amendment adopted in accordance with articles 37 and 38 of this Convention and of the date of entry into force of such amendment;

(v) Of any communication required under a provision of this Convention or its Protocols."

III. DRAFT ADDITIONAL PROTOCOL NO. 1 CONCERNING LOADING AND DISCHARGE TIMES AND DEMURRAGE IN INLAND WATERWAY TRANSPORT

In general, we would draw attention to the fact that in the German version the paragraph numbers should be given in brackets (i.e. "(1)" instead of "1").

Re article 1

(a) Re paragraph 1

The reference to other "national regulations" may lead to confusion since in accordance with article 33, paragraph 3 of the Convention as it stands, the implementation of the Protocol only takes effect when it is incorporated into national law and applied as such. It is not relevant to include other national requirements which derogate from article 1, paragraph 2 of the Protocol. This contradicts the objective of the Protocol which is an international standardization of the law. We also have reservations about prescribing internationally that national requirements must be established by a regulation (and not by a law).

(b) Re paragraph 2

As we said in paragraph 1, the reference to "national regulations" should be deleted. The reference to article 3, paragraphs 1 to 5 should also be deleted, since article 3 does not contain a definition of the working day. It should also be specified that days on which it is not possible to load or discharge because of a rise in water levels or risks due to the presence of ice should not be taken into account in the loading and discharge times.

Proposed wording:

"Article 1

Loading and discharge times

1. When the loading of the goods is the responsibility of the shipper or the discharge that of the consignee, the latter must, as agreed in the contract of carriage, within the agreed periods for loading and discharge, load or discharge the quantity of goods, of which the weight, dimensions or number have been defined.

2. Where no contractual provisions exist, a minimum of 250 t of bulk goods or 125 t of packages must be loaded or discharged per working day. No account is taken of days on which the loading or the discharge of goods of any type is impossible for reasons independent of the responsibility of the shipper."

Re article 2

The wording of paragraphs 2 and 4 should be amended. The word "indications" should be used uniformly.

Proposed wording:

"2. If the indication of the point of loading or discharge is not given in sufficient time before the place of loading or discharge is reached, or if the draught, the safety of the vessel or local regulations and installations do not permit the vessel to be presented at the point of loading or discharge determined in accordance with paragraph 1, the carrier may, if he does not obtain new indications despite the request made by him in that regard, berth at any other suitable point of loading or discharge, taking the shipper's or the consignee's interests into consideration as far as possible.

4. In the case of paragraphs 2 and 3 above, the carrier is entitled to reimbursement of the additional expenses occasioned. The loading and discharge times within the meaning of article 1 shall not be affected by the modification of the point of loading or discharge."

Re article 3

(a) Re paragraph 2

In the second sentence, the phrase (in the French text) "donné plus tard ou soit un dimanche, soit un jour férié" is unsatisfactory from the point of view of the drafting.

(b) Re paragraph 3

In accordance with the wording of paragraph 2, reference should be made in the third sentence to "arrival of the vessel at the point of loading or discharge" and not to "arrival of the vessel".

(c) Re paragraph 5

The word "allgemeinen" is unnecessary and may be deleted (concerns the German text only).

(d) Re paragraph 6

In paragraph 6, the reference to a quantity of goods specified in paragraph 1 is erroneous. Article 1 prescribes a period for loading and discharge. This should be taken into account in paragraph 6.

Proposed wording:

"Article 3

Beginning and end of the loading and discharge times

2. Notice of readiness for loading or discharge must be given during local working hours. Notice given later, or on a Sunday or a holiday, shall be considered as having been given on the next working day. The notice shall be effective even if the vessel has not yet reached the point

of loading or discharge. Such notice shall nevertheless be deemed not to have been given and must be repeated when the vessel is not ready for loading or discharge at the start of the period indicated in the notice. In this case, the carrier must reimburse the resulting additional costs.

3. Notice of readiness for loading or discharge may be given in any form usual in the particular trade, including verbally. It shall become effective when received by the shipper or consignee or at the address indicated by one of them. If it is not possible to contact the shipper, consignee or designated recipient, the notice may also be transmitted to the port authorities with effect on arrival of the vessel at the point of loading or discharge or made public according to usual local practice. If the person to whom the notice is addressed refuses to acknowledge its receipt, the carrier shall have the right to have it registered by an official document at that person's expense.

…

5. If it is agreed that loading or discharge may also take place on a Sunday or a normal holiday, the loading and discharge time shall begin on that day.

6. Loading and discharge times end when, in accordance with article 1, the quantity of goods has been loaded or discharged in its entirety."

Re article 5

(a) Re paragraph 1

The wording of paragraph 1 is not precise. A right of demurrage should also be granted to the carrier if he was scheduled to load the goods himself but they were not delivered in time by the shipper.

(b) Re paragraph 2

For identical reasons to those mentioned in connection with article 1, paragraph 1, the references to "national regulations" may lead to confusion. Since, unlike the loading and discharge times, the Protocol does not specify how the demurrage is to be calculated, it can be specified by means of a reference to the regulations concerning collisions, which determine the law applicable to the contract of carriage, that the Contracting States to the Protocol may regulate the amount of the demurrage by law.

(c) Re paragraph 3

While it is hardly in keeping with the general principles of law to have a debtor pay damages in connection with a delay when circumstances for which he is not responsible have prevented him from furnishing a service, it is consistent to commit the shipper or the consignee to the payment of demurrage if, objectively and even if he is not responsible, he is not in a position to furnish his services. It should therefore be specified in paragraph 3 that the time during which the loading or discharge of goods of any kind is impossible for reasons for which the shipper is not responsible is not taken into account.

The word “allgemeiner” should be deleted since whether a holiday is globally recognized or not is not a determining factor.

Proposed wording:

“Article 5

Demurrage

1. If the shipper or the consignee are responsible for the loading or discharge of the goods, but the goods are not loaded or discharged during the period specified in article 1, the carrier may claim demurrage according to the category and size of the vessel for any time in excess of the loading or discharge time. This also applies if the carrier is responsible for loading but the shipper has not made the goods available during the loading time.

2. If the amount of the demurrage to be calculated on the basis of days or hours of time exceeding the period is not agreed in the contract of carriage and if the law applicable to the contract of carriage does not specify the amount of the demurrage, it shall be established in accordance with local practice.

3. Demurrage is to be paid continuously and without interruption for each day and each hour of excess time, including Sundays and normal holidays, as well as for days and hours during which loading or discharge is not possible on account of events or circumstances for which the carrier is not responsible. Days on which loading or discharge of goods of any kind is not possible for reasons independent of the responsibility of the shipper are not taken into account.”

Re article 6

(a) Concerning the heading

The requirement does not govern the waiting period but the carrier’s rights when, after the expiry of the loading or discharge time the goods have not yet been delivered or have only been delivered in part. This should be covered in the heading.

(b) Re paragraph 1

The requirement of paragraph 1 (which in German should read: “… selbst wenn das Laden dem Absender nicht obliegt”) may be deleted since this point is already covered in paragraphs 2 and 3. Paragraph 1 should therefore be deleted.

(c) Re paragraph 2

The condition that the carrier “shall no longer be bound by the contract” goes too far. He should be left the possibility of deciding whether or not to remain bound by the contract. We therefore propose a right of termination, in accordance with article 9 of the Convention.

(d) Re paragraph 3

The wording of paragraph 3 should be amended. In particular we propose that the phrase "if the shipper does not terminate the contract" should be deleted since it is self-evident that it is impossible to conform to the contract if it has been terminated.

(e) Re paragraph 4

This requirement should be deleted. It would not be pertinent to grant the shipper a right of termination in accordance with the reference to paragraph 3 in the event of the partial delivery of the goods and to exclude the right of termination in the absence of any delivery. Since termination by the shipper before the start of the voyage is already regulated in general in article 5 of Protocol No. 2, there is additionally a risk of contradiction when both protocols are applicable.

In relation with the proposal to delete paragraphs 1 and 4, the numbering of the paragraphs and the references to paragraphs 3 and 5 should be adjusted accordingly.

Proposed wording:

"Article 6

Termination or partial carriage after expiry of the loading time

[1. deleted]

1. If by the expiry of the loading time or, if necessary, an agreed consecutive waiting period, the shipper has delivered no goods, the carrier may terminate the contract and claim the payment of either of the following amounts:

(a) one third of the agreed freight or

(b) the demurrage and the reimbursement of the costs occasioned and the loss caused.

2. If during the period referred to in paragraph 2 above only part of the cargo has been delivered, the carrier shall be entitled to commence the voyage with an incomplete cargo and to demand the freight for the agreed full cargo and the reimbursement of the additional costs occasioned by the fact that the cargo is incomplete.

[4. deleted]

3. …"

Re article 7

The wording of paragraph 1, first sentence should be brought into line with the version proposed above of article 6, paragraph 1 of Protocol No. 1 (formerly article 6, paragraph 2 of

Protocol No. 1). Paragraphs 1 and 2 should be combined since paragraph 1 regulates a case (non-receipt of the goods) constituting an impediment to delivery within the meaning of paragraph 2. Lastly, the requirement of paragraph 2 whereby "the circumstances render (it) impossible" to obtain instructions from the shipper, should be deleted, since its meaning is not clear. It is proposed to use wording specifying that the shipper cannot be contacted within an appropriate period, or delays in giving instructions or that the instructions cannot be executed.

Proposed wording:

"Article 7

Impediments to delivery

If the consignee refuses to receive the goods by the expiry of the loading time or, if necessary, an agreed consecutive waiting period, if he cannot be determined or if there is any other impediment to delivery, the carrier shall notify the shipper without delay and ask for instructions. If the shipper cannot be contacted within an appropriate time, or if he delays in giving instructions or if the instructions cannot be executed, the carrier shall then be permitted to discharge the goods himself, at the consignee's expense, and to store them according to local requirements in a warehouse or in some other safe form at the expense and risk of the consignee. The shipper shall pay the carrier the charges and expenses not paid by the consignee."

Re article 8

Article 8 is meaningless since Protocol No. 1 is equivalent to national law once it has been adopted by a Contracting State. In addition, it cannot be specified in an international convention to what extent a point is regulated by a requirement or a law nor is it possible to designate the competent body to take a decision of that nature. Article 8 should therefore be deleted.

IV. DRAFT PROTOCOL NO. 2 CONCERNING THE CALCULATION OF FREIGHT AND THE DISTRIBUTION OF SHIPPING CHARGES IN INLAND WATER TRANSPORT

As in the case of draft Protocol No. 1, we would recall that in the German version the paragraph numbers should be placed in brackets (i.e. "(1)" instead of "1").

Re article 1

(a) Re paragraph 1

The wording of paragraph 1 should be amended.

(b) Re paragraph 2

The terminology used in article 6, paragraph 2, first sentence, subparagraph (a) and article 11, paragraph 5, subparagraph (f) should be brought into line with that used in the draft Convention.

It should also be specified in an additional provision that the particular “unknown” entered in the transport document in relation with the dimensions, the number or the weight does not permit the decisive value of these particulars for the calculation of the freight to be called in question.

(c) Re paragraph 3

The purpose of the provision proposed is clearly to contribute to bringing contractual tariff requirements into force. However, the special reference (to the law applicable at the place of loading) is the subject of reservations.

As a matter of principle, the lex fori determines to what extent the provisions of the national law in force are applicable, independently of the law applicable to the contract. We do not understand the reason for the derogation from this principle and why these provisions in force would only be applicable at the place of loading.

This observation is all the more relevant in that it is not specified that these provisions are applicable in an international context. The requirement should therefore merely contribute to bringing into force the national requirements which require to be implemented internationally.

The link between paragraph 2 and paragraph 3 should also be specified. Since the object of paragraph 3 is clearly to contribute to the implementation of certain national tariff requirements, which involves a restriction of the freedom of contract, paragraph 2 should be applicable provided that the freight is established by national requirements. In order to make this clearer, we propose that paragraph 3 should be divided into two separate paragraphs. The first paragraph would establish that the customary freight is to be paid if no other freight has been agreed upon. The second paragraph, which would be separate from the first, would establish the predominance of certain national requirements.

Proposed wording:

“Article 1

Calculation of freight

1. Freight shall comprise only actual transport by vessel; the shipper shall bear the loading and stowing charges and the consignee the discharge costs, unless there are contractual provisions to the contrary.

2. When agreement is reached on the freight in terms of the dimensions, number, weight or quantity of the goods, the particulars contained in the transport document shall be deemed to be

authentic, unless there is proof to the contrary. <u>This is also the case if the particulars are accompanied by a reservation to the effect that no appropriate means of checking their accuracy exist</u>.

3. In the absence of an agreement <u>on the freight, the customary freight is to be paid</u>.

4. <u>This requirement does not affect the provisions in force of the lex fori which regulate the freight, whatever the law applicable to the contract</u>."

<u>Re article 2</u>

In paragraph 1, "Schleppkähne" should be replaced by "Schlepplöhne". In paragraph 3, "Haverei Grosse", which does not exist in German law, should be replaced by "große Haverei".

<u>Proposed wording</u>:

"Article 2

Navigation charges

1. <u>Unless otherwise provided</u>, the carrier shall bear the navigation charges, particularly harbour, lock, canal and bridge dues, pilotage and charges incurred in the ordinary course of the voyage for pushing and towing and, subject to article 4, paragraph 6, letter (a), lighterage.

2. …

3. The above provisions do not affect cases of general average."

<u>Re article 3</u>

In paragraph 1, "Zeitpunkt des Abschlusses des Frachtvertrages oder" should be deleted, in line with the French and English texts. In paragraph 2, the phrase "established by agreement between the parties" is unnecessary since this point can be specified by the phrase "unless otherwise provided".

<u>Proposed wording</u>:

"Article 3

Low water

1. The agreed freight shall be increased by a low-water supplement for carriage on inland waterways where water levels fluctuate, unless account was taken of this when the freight was agreed.

2. The amount of the low-water freight supplements shall be established in accordance with commercial usage, unless the Parties provide otherwise."

Re article 4

(a) Re paragraph 2

In letter (a), explosion and fire should be removed from the list of situations which the carrier should not have prevented, since these events may effectively be the result of a fault committed by the carrier or his servants.

(b) Re paragraph 3

It should be specified that the carrier cannot terminate the contract if the shipper has exercised his rights in accordance with paragraphs 5 and 6 and has required the contract to be performed.

As regards the fact that the shipper is still required to take responsibility for the cost of loading and discharge in the event of termination, as the second sentence provides, we think that this point should vary depending on the person deemed responsible for the costs under the contract (cf. article 1 of Protocol No. 2).

(c) Re paragraph 4

It is not appropriate to provide that the consignee should have the right to terminate the contract if the right of disposal has been transferred to him. Only Parties to the contract can terminate the contract. The transfer of the right of disposal does not make the consignee a Party to the contract.

In addition, the provision whereby the carrier may claim the payment of costs of preparing for the voyage is irrelevant. Since an obstacle to navigation within the meaning of the Protocol is a situation for which none of the Parties is responsible, it is not usual to require the shipper also to be responsible for costs for which the carrier is normally responsible.

(d) Re paragraph 5

In addition to amendments to the wording, the phrase "or the consignee" should be deleted in paragraph 5, since, as was indicated in connection with paragraph 4, the consignee is not a Party to the contract and cannot terminate it. It is in any case unnecessary to mention the consignee since his financial obligations are regulated by article 10, paragraph 1 of the Convention.

(e) Re paragraph 6

In the first sentence, "or the consignee" should be deleted for the reasons given above.

(f) Re paragraph 8

The first sentence is incomprehensible. On the one hand, a person cannot "declare" that he is no longer required to fulfil a contract. This obligation is either officially lifted or the person in question asserts his right of termination. On the other hand, this requirement contradicts paragraphs 5 and 6, whereby the shipper may require the carrier to perform the contract. In this case, the carrier must meet the requirement. If he fails to do so, it is not appropriate in connection with the second sentence of paragraph 8 to grant him the rights referred to in paragraphs 5 and 6.

Instead of the requirement of paragraph 8, therefore, it should be established that the carrier is not required to follow the shipper's instructions if they are not reasonable.

Proposed wording:

"Article 4

Obstacles to navigation

2. The following events and situations are deemed to be obstacles to navigation:

(a) A situation which the carrier could not have prevented and the consequences of which he could not have averted, such as war, mobilization, military operations, riots, terrorist activities, strikes, lockouts, blockades, or measures and actions by the administrative authorities;

(c) Natural phenomena such as floods, ice and danger of ice, and high and low water, which prevent navigation from proceeding.

3. If an obstacle to navigation under paragraph 2 above arises before the goods are loaded on board the vessel, the shipper and, subject to paragraphs 5 to 8, the carrier may terminate the contract without damages being incurred. If an obstacle to navigation under paragraph 2 above arises after the goods are loaded on board the vessel, but the voyage has not commenced, the first sentence shall apply provided that loading and discharge charges and demurrage, if these operations have taken place outside the loading time, shall also be the responsibility of the shipper if he is responsible for bearing the loading charges in accordance with article 1, paragraph 1 of this Protocol.

4. When an obstacle to navigation under paragraph 2 above arises after the loading of the goods and the start of the voyage, the shipper may terminate the contract. If he exercises this right and if he is responsible for bearing the loading charges in accordance with article 1, paragraph 1 of this Protocol, he must take over the costs of discharging the goods. In addition to any demurrage, he shall pay freight in proportion to the distance travelled in relation to the voyage overall.

5. Instead of terminating the contract, the shipper may require the carrier to wait until the obstacles to navigation have been removed. In this case, he must pay the carrier an amount of

demurrage during the waiting period at least equal to the amount that would be due for exceeding the loading period, additional charges for the protection of goods and, if necessary, a low-water supplement, in accordance with article 3.

6. If, despite the obstacle to navigation, it is possible to continue and complete the voyage without danger for the vessel or the goods loaded, the shipper may require the voyage to continue; in this case he must pay:

(c) All additional charges and expenses occasioned in respect of navigation without impediment.

7. The carrier may make the execution of the shipper's or the consignee's instructions subject to paragraphs 5 and 6 above, provided that he is guaranteed the additional charges and expenses due.

8. The carrier <u>is required only to follow the instructions referred to in paragraphs 5 or 6 insofar as this is not liable to give rise to disadvantages for the management of his company nor damage to shippers or consignees of other freights</u>."

<u>Re article 5</u>

Article 5 contains many points requiring clarification. It is not clear why paragraph 1 contains a clause giving predominance to article 4, paragraph 4 which, unlike article 5, paragraph 1, regulates the situation when the voyage has already begun. This article also contains points to be amended in relation to article 9 of the Convention. Article 9 of the Convention only regulates the right of termination of the carrier. But it does not seem pertinent, in the event of termination by the shipper, to give the carrier more rights in general than if he had terminated the contract himself.

In order to avoid contradictions in appreciation, the rights referred to in paragraphs 1 and 2 should be brought into line with those referred to in article 9, paragraph 2, letter (a) of the Convention. In accordance with the proposals made in relation to article 9, paragraph 2, letter (a) of the Convention, the carrier should discharge at the shipper's expense the goods already loaded and should be able to choose to claim the payment of one third of the agreed freight or, in addition to any demurrage charge, compensation equal to the amount of the costs incurred and the damage caused and, where the voyage has begun, freight in proportion to the distance travelled in relation to the voyage overall.

To supplement this, a requirement should be incorporated to the effect that he is not entitled to dead freight if the motive for termination is acceptable to the carrier. It is not appropriate to impose on the shipper the payment of costs resulting from situations unrelated to the risks for which he is required to accept responsibility.

Paragraph 3 should be deleted, since a similar provision already appears in article 9, paragraph 2.

Paragraph 4 should be deleted since article 9, paragraph 2 of the Convention gives no example and its meaning is absolutely not clear.

Proposed wording:

“Article 5

Shipper’s right of termination

Without prejudice to article 3, paragraphs 3 and 4, the shipper may not terminate the contract of carriage unless he pays the carrier, according to the latter’s choice, the loading and discharge costs and

(a) One third of the agreed freight or

(b) In addition to any demurrage charge, compensation equal to the amount of the costs incurred and the loss caused and, where the voyage has begun, freight in proportion to the distance travelled in relation to the voyage overall.

If the termination takes place for reasons that the carrier must accept, the carrier’s right in accordance with letter (b) of the first sentence becomes void.”