

(1) The effect of the shift of the insurance burden resulting from the draft convention would not affect existing insurance arrangements to an extent which would be considered as "radical" by the UNCTAD Committee on Invisibles, Trade and Finance. This is at the very least debatable.

(2) There is a substantial shift, and, if this were not so, there would be little point in having a new convention.

(3) If there is a radical shift it will not have an adverse effect on smaller insurance markets as new sources of liability insurance will appear. In this connexion it is interesting to note that the UNCTAD secretariat report on liability and cargo insurance cover under international multimodal transport operations (TD/B/AC.15/14, dated 14 January 1976, at para. 76) states categorically that "the possibility that the insurance markets of less developed countries will soon become suppliers of extensive liability cover to carriers

(especially to ocean carriers) and to MTOs is extremely remote".

None of these, at times conflicting, views outweighs the arguments in favour of retention of the defence. There will clearly be a shift away from cargo insurance to liability insurance which can only be to the detriment of cargo insurance markets which are unable to benefit from any increase in liability insurance. The cumulative effect of abolition of the existing defences, specific imposition of liability for delay and change in burden of proof will certainly bring about an increase in carriers' costs which will be reflected in higher freight rates. No significant benefit for anyone has been established. ICS therefore strongly recommends:

(a) That the defence of error in navigation be reinstated.

(b) That article 8 be retained as drafted by the UNCITRAL Working Group.

3. Note by the Secretary-General: comments by Governments and international organizations on the draft Convention on the Carriage of Goods by Sea (addendum) (A/CN.9/109/Add.2)*

LIBYAN ARAB REPUBLIC

Before making our comments on the text of the draft Convention article by article, we would like to point out that the Libyan Arab Republic has not acceded to the International Convention for the Unification of Certain Rules relating to Bills of Lading, signed at Brussels on 25 August 1924, as amended by the Brussels Protocol of 1968. However, the Libyan Arab Republic has incorporated the provisions of this Convention into its own maritime law issued in 1953.

Article 1

A. Paragraph 1 does not indicate that the carrier should own or rent a vessel in order that he may implement the contract of carriage. This contradicts article 1, paragraph 1, of the Brussels Convention of 1924.

B. Paragraph 2 made reference to the "actual carrier", and it defined "actual carrier" as any person to whom the contracting carrier has entrusted the performance of all or part of the carriage of goods. We believe that the provisions on "carrier", "contracting carrier", and "actual carrier" will raise many ambiguities in determining liability. We are of the opinion that it would be a better solution to use the term "carrier" contained in the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974.

C. The definition of consignee in paragraph 3 is ambiguous and calls for additional details. The definition fails to clearly indicate according to which regulations or point of reference a person is entitled to take delivery of the goods.

"Consignee" could be defined in the same manner as in the French Act of 31 December 1966 concerning contracts of leasing of vessels and of maritime carriage. In this Act, "consignee" is defined as follows: "Con-

signee means a person who is entitled to receive goods according to the contract of carriage; he is the person whose name is registered in the bill of lading when it is nominal, or who presents the bill of lading upon arrival when the bill has been issued to bearer, or the last endorser when the bill is promissory."

D. Paragraph 4 extends the definition of "goods" to include live animals and goods carried on deck, contradicting article 1, paragraph C of the 1924 Brussels Convention.

We believe that the definition of goods should clearly include luggage not accompanied by passengers.

E. Paragraph 5 defines "contract of carriage". It is possible to omit the last phrase of this paragraph, which reads "where the goods are to be delivered", for it serves no purpose.

It seems necessary to add "consignee" to the definition of contract of carriage; only the shipper and the carrier are mentioned in the definition. The consignee should be enabled to invoke the contract of carriage to which he is not a party. If a bill of lading, which is a document that evidences the goods, did not exist, the consignee would not be able to exercise the rights of the shipper unless he was enabled to utilize them under the provisions of national legislations recognizing such right. In most, if not all countries, there are no such provisions in national legislations; there is no provision enabling a consignee to exercise the shipper's rights.

To avoid recourse to national legislations, it is desirable that the International Convention should include a definition of contract of carriage that establishes the rights of shippers and carriers and indicates the consignee's rights. It is necessary to determine the consignee's rights in case there is no bill of lading.

In addition to the foregoing, it should be explicitly provided that the carrier acquires, under the contract

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of carriage, the right to pursue on behalf of the consignee a claim developing from the contract, especially in reference to the payment of freight charges.

On the basis of the above, the following phrase should be added to article 1, paragraph 5: "Under this contract, the consignee shall be entitled to exercise the shipper's rights and be bound by his obligations."

F. Paragraph 6 defines "bill of lading" as a document which evidences a contract for the carriage of goods by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of this document.

Actually, this definition needs to be reconsidered, as it raises questions concerning the following:

1. The bill which the carrier surrenders before loading the goods (bill on fee of loading).

2. Does this definition mean that the commitment to loading will always fall on the carrier?

3. The text allows the bill of lading to be made out to the bearer. Some national legislations show a tendency to abolish "the bill of lading to bearer" (the new Greek maritime legislation) on the ground that it is inconsistent with the fact that the bill evidences rights of financial value. This is why these national legislations prefer to confine references to nominal bills and promissory bills.

Article 2

A. In paragraph 1 (d) and (e), it is not necessary to add the phrase "or other document" after "the bill of lading". It is preferable to mention "the bill of lading", only to avoid confusion regarding the document which provides the foundation for the applicability of the Convention.

B. Paragraph 4. It should be made clear that the Convention shall not be applicable in case a bill of lading has been issued on the basis of charter agreement when the holder of the bill of lading is at the same time a vessel leaseholder and a party to the agreement. Jurists throughout the world unanimously agreed on this principle, on the basis of 1924 Brussels Convention relating to bills of lading.

This paragraph may also raise apprehensions that, as a result of any endorsement in favour of one of the shipper's agents, the terms of the agreement might not be carried out as long as a bill of lading was issued, because the holder of the bill of lading should not be the shipper or one of his representatives. Accordingly, it is preferable to replace the phrase "the holder of the bill of lading" with the phrase "the non-holder of the bill of lading in good faith".

Article 4

A. Paragraph 2. We think it proper to add the phrase "at the port of discharge" after "the consignee", and to add a new sentence which reads as follows: "When the goods have been delivered to the consignee outside the port of discharge, delivery shall be deemed to have been made at the port of discharge."

B. To be logical, subparagraphs of paragraph 2 should be rearranged in the following order: (c), (a), (b), instead of the present order.

Article 5

A. It should be understood that "fault in navigation" is used in the narrow sense of this expression. Therefore, faults which might occur in "the commercial administration of the vessel" should be excluded from the frame of "fault in navigation".

B. Paragraph 4 concerns exemption from liability in case of fire. We believe that the text should be made clearer. This paragraph concerns one of the cases set forth in article 4, paragraph 2, of the 1924 Convention. The new text is incompatible with the new system of liability, based on evidence of fault on the part of the carrier, and has no parallels in other conventions on carriage. We suggest that the text should read as follows: "In case of fire, the carrier shall be liable, unless he proves that the vessel had its own devices for the prevention of fire, and that when the fire arose, his servants or agents took reasonable measures to prevent it or to reduce its effects, unless the claimant proves the fault or negligence of the carrier, his representatives or his servants."

C. The inclusion in article 5 of the principle of liability for delay is considered an essential amendment of the principles of liability.

D. The measures provided for in article 5, paragraph 6, may constitute a reason for claim in the case of general losses when some of the shipped goods are discarded in order to save the remainder. In this case, the carrier should remain responsible for participating in the general loss with respect to the discarded goods.

We suggest the addition of this phrase: "except for general losses, assistance and rescue".

Article 6

We think that the method of limiting the liability of the carrier on the basis of parcel or of unit and weight according to the provisions of the 1968 Protocol is more efficient than limiting or calculating liability on the basis of weight only.

It is preferable to opt for a system for limiting liability in case of delay calculated on the basis of the amount of the freight charges, rather than to limit liability for delay in the same way that liability is limited in cases of loss or damage.

We also suggest that further ways should be established to limit the basis of the currency into which the liability is converted.

Article 8

This article is concerned with the removal of the right to invoke the limitation of liability in respect of the carrier or his servants. We think it proper to add after "the carrier" the phrase "or his servants or representatives who act within the limits of their functions".

Article 9

This article deals with goods on deck. To avoid ambiguity, there is no need to refer to "or other documents evidencing the contract of carriage". (See comment on article 2 above.)

Article 10

A. The entire article should be re-examined within the framework of the comments presented on article 1 concerning the definition of "carrier". Therefore, the word "contracting" should be deleted wherever it is mentioned in the article as well as from the title of the article.

B. We suggest that the following should be added to paragraph 3: "Nevertheless, the carrier remains bound by the obligations and concessions resulting from such special agreement, the non-fulfilment of which shall be considered an act or omission on the part of the carrier according to article 8."

Article 11

A. The same comment about "contracting" applies.

B. Paragraph 2 is utterly unacceptable. To enable the carrier to exonerate himself from liability for any damage in delivery caused by events occurring while the goods are in the charge of the actual carrier contradicts the text of article 10. We think that paragraph 2 of this article should be deleted.

Article 14

The same comment as above about the need to delete the word "contracting".

Article 16

It seems that the phrase "including any consignee" is redundant. We think it is preferable to include the text which is designed to protect others, and which appears in article 1 of the 1968 Protocol, which amended article 3, paragraph 4, of the 1924 Convention. This text reads as follows:

"At any rate, it is not admissible to prove the contrary when the bill of lading has been transferred to a person who did not act in good faith."

Article 17

For the reasons mentioned above in the comment on article 16, the phrase "including any consignee" should be deleted from article 17, paragraphs 2, 3 and 4.

Article 19

We think it proper to delete the phrase "if any", because we are talking about an existing "document of carriage". Without such a document it is not possible to make a valid claim concerning the state of the goods at the time they are handed over to the carrier.

Article 20

We think that the period of one year should be kept, as provided for in the 1924 Convention and in many national legislations. The one-year period also prevents disputes with the carrier being unresolved for lengthy periods of time.

Article 21

A. We object to paragraph 2. We think that article 17 of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, contains an acceptable provision. This same comment applies to article 22, paragraph A (3).

B. The second sentence of paragraph A (2) contradicts article 7 of the 1952 Brussels Convention for the Unification of Certain Rules relating to the Arrest of Vessels, to which many States have acceded.

Article 23

It is preferable to refer to "any document of carriage" after the reference to "bill of lading", because the phrase "any other document evidencing the contract of carriage" as mentioned in the text causes duplication with "the contract of carriage" referred to in the first line. On the other hand, the phrase "any other document of carriage" refers to the cases in which no bill of lading has been issued.

Article 24

It is our view that this article should be redrafted in such a way that it does not prejudice the application of the York-Antwerp Rules concerning general average settlement.

Article 25

The comment on article 2, paragraph 1, also applies to paragraph 2 of this article.