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COMPILATION OF DRAFT PROVISIONS ON CARRIER RESPONSIBILITY
APPROVED BY THE WORKING GROUP

Note by the Secretariat

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Introduction

1. At its fourth session the United Nations Commission on International Trade Law (UNCITRAL) decided "that within the priority topic of international legislation on shipping, the subject for consideration for the time being shall be bills of lading" and agreed on the topics that should be considered for revision and amplification. 1/
2. At its fifth session the Commission stated that it considered "that the Working Group should give priority in its work to the basic question of the carrier's responsibility" and to that end recommended "that the Working Group keep in mind the possibility of preparing a new convention as appropriate, instead of merely revising and amplifying the rules in the International Convention for the Unification of Certain Rules relating to Bills of Lading (1924 Brussels Convention) and the Brussels Protocol, 1968". 2/
3. The Working Group at its third, fourth and fifth sessions examined the topics within its work programme for those sessions. 3/ The Secretary-General, at the request of the Working Group prepared two reports which served as working documents for the three sessions. 4/ Also at the request of the Working Group two questionnaires were submitted to Governments and to international organizations active in the field and the replies were utilized in the preparation of the reports of the Secretary-General.
4. The present compilation sets forth the draft provisions of the Convention on the responsibility of ocean carriers for cargo which were prepared at the third, fourth and fifth sessions of the Working Group by the Working Group's Drafting Party and adopted by the Working Group.
5. For reasons of convenience the order of the draft provisions in this compilation generally follows the pattern of the Brussels Convention of 1924. The corresponding provisions in the Brussels Convention are cited in parenthesis immediately after the descriptive title of the provision. The final order of the draft provisions will depend on the Working Group's decision as to the form of the

1/ Report of the United Nations Commission on International Trade Law on the work of its fourth session (1971), Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417), para. 19.

2/ Report of the United Nations Commission on International Trade Law on the work of its fifth session (1972), Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17 (A/8717), para. 51.

3/ The first two sessions of the Working Group were concerned with organizational and procedural questions. Report of the Working Group on the work of its second session, Geneva, 22-26 March 1971 (A/CN.9/55).

4/ Report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/63/Add.1); Second report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/76/Add.1).

new rules. In certain cases where the Brussels Convention of 1924 does not contain an equivalent rule, the draft provision is placed in what appears to be the most appropriate order.

6. In order to give the reader the clearest possible view of the work thus far completed by the Working Group, this compilation includes only the texts that have either been adopted or have been prepared subject to brackets signifying less than general approval. References to the paragraphs in the reports of the Working Group which contains particular draft provisions are given in foot-notes. The foot-notes contain references to the discussion by the full Working Group of each provision proposed by the Drafting Party. The foot-notes also set forth the specific reasons stated by the Working Group for placing various provisions in brackets.

DRAFT PROVISIONS APPROVED BY THE WORKING GROUP

A. Definition of "goods" (article 1 (c) of 1924 Brussels Convention)

/Revision of article I (c) "Goods" 5/

"Goods" includes goods, wares, merchandise and articles of every kind whatsoever /except live animals 6/

B. Period of carrier's responsibility (article 1 (e) of 1924 Brussels Convention)

/Revision of article I (e) "Carriage of goods" 7/

(i) "Carriage of goods" covers the period during which the goods are in the charge of the carrier at the port of loading, during the carriage, and at the port of discharge.

(ii) For the purpose of paragraph (i), the carrier shall be deemed to be in charge of the goods from the time the carrier has taken over the goods until the time the carrier has delivered the goods:

(a) By handing over the goods to the consignee; or

(b) In cases when the consignee does not receive the goods, by placing them at the disposal of the consignee in accordance with the contract or with law or usage applicable at the port of discharge; or

(c) By handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over.

5/ Report of the Working Group on International Legislation on Shipping on the work of its third session, Geneva, 31 January to 11 February 1972 (A/CN.9/63) (herein referred to as Working Group, report on third session), para. 25 (1). The draft was adopted by the Working Group (para. 26).

6/ Paragraph 34 of the report of the Working Group on its third session states: "In view of the lack of agreement on the approach to be followed in dealing with live animals, the Working Group decided to defer a decision on the subject."

7/ Working Group, report on third session, para. 14 (1). The Working Group accepted the revision of article 1 (e) and also decided: "(c) to delete article VII of the Hague Rules on the ground that this article was inconsistent with the above revision (article 1 (e) and that, in view of the revision of article 1 (e), no further provision was necessary" (para. 15). This deletion was subject to reservations by some representatives (para. 17).

(iii) In the provisions of paragraphs (i) and (ii), reference to the carrier or to the consignee shall mean, in addition to the carrier or the consignee, the servants, the agents or other persons acting pursuant to the instructions, respectively, of the carrier or the consignee.

C. Responsibility for deck cargo

Possible addition to article 8/

In respect of cargo which by the contract of carriage is stated as being carried on deck and is so carried, all risks of loss or damage arising or resulting from perils inherent in or incident to such carriage shall be borne by the shipper and the consignee but in other respects the custody and carriage of such cargo shall be governed by the terms of this Convention 9/

D. Basic rules governing the responsibility of the carrier (Replacing article 3 (1) and (2), article 4 (1) and 4 (2) of 1924 Brussels Convention)

1. The carrier shall be liable for all loss of or damage to goods carried if the occurrence which caused the loss or damage took place while the goods were in his charge as defined in article [], unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

2. In case of fire, the carrier shall be liable, provided the claimant proves that the fire arose due to fault or negligence on the part of the carrier, his servants or agents.

3. Where fault or negligence on the part of the carrier, his servants or agents, concurs with another cause to produce loss or damage, the carrier shall be liable only for that portion of the loss or damage attributable to such fault or negligence, provided that the carrier bears the burden of proving the amount of loss or damage not attributable thereto. 10/

8/ Working Group, report on third session, para. 25 (2).

9/ Working Group, report on third session, para. 25 (2), foot-note 17 states: "As noted in paragraph 28 below, the Working Group did not reach agreement on this provision, and considered that it should be taken up at a future session of the Working Group."

10/ Report of the Working Group on International Legislation on Shipping on the work of its fourth (special) session, Geneva, 25 September to 6 October 1972 (A/CN.9/74) (herein referred to as Working Group, report on fourth session), para. 28 (3). Most members of the Working Group supported the above text (para. 36).

E. Period of limitation (Article 3 (6) of 1924 Brussels Convention; article 1 (2) (3) of 1968 Brussels Protocol)

Article F 11/

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

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

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

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

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

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

F. Saving life and property at sea (Replacing article 4 (4) of 1924 Brussels Convention)

The carrier shall not be liable for loss or damage resulting from measures to save life and from reasonable measures to save property at sea. 12/

11/ Report of the Working Group on International Legislation on Shipping on the work of its fifth session, New York, 5 to 16 February 1973 (A/CN.9/76) (herein referred to as Working Group, report on fifth session), para. 65 (1). The draft provision was approved by the majority of the Working Group (para. 66).

12/ Working Group, report on fifth session, para. 54 (2). The Working Group adopted the draft provision (para. 55).

G. Choice of forum clauses (No corresponding provision in the 1924 Brussels Convention)

Proposed draft provision 13/

A. (1) In a legal proceeding arising out of the contract of carriage the plaintiff, at his option, may bring an action in a contracting State within whose territory is situated:

(a) The principal place of business or, in the absence thereof, the ordinary residence of the defendant; or

(b) The place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(c) The port of loading; or

(d) The port of discharge; or

(e) A place designated in the contract of carriage.

(2) () Notwithstanding the preceding provisions of this article an action may be brought before the courts of any port in a contracting State at which the carrying vessel may have been legally arrested in accordance with the applicable law of that State. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph A for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action.

(b) All questions relating to the sufficiency or otherwise of the security shall be determined by the court at the place of the arrest.

B. No legal proceedings arising out of the contract of carriage may be brought in a place not specified in paragraph A above. The provisions which precede do not constitute an obstacle to the jurisdiction of the contracting States for provisional or protective measures.

C. (1) Where an action has been brought before a court competent under paragraph A or where judgement has been delivered by such a court, no new action shall be started between the same parties on the same grounds unless the judgement of the court before which the first action was brought is not enforceable in the country in which the new proceedings are brought.

13/ Working Group, report on third session, para. 39 (3). The Working Group approved the report of the Drafting Party that contained the draft provision on choice of forum clauses (para. 40).

(2) For the purpose of this article the institution of measures with a view to obtaining enforcement of a judgement shall not be considered as the starting of a new action.

(3) For the purpose of this article the removal of an action to a different court within the same country shall not be considered the starting of a new action.

D. Notwithstanding the provisions of the preceding paragraphs, an agreement made by the parties after a claim under the contract of carriage has arisen, which designates the place where the claimant may bring an action, shall be effective.

H. Arbitration clauses (No corresponding provision in the 1924 Brussels Convention)

/Proposed draft provision/ 14/

(1) Subject to the rules of this article, any clause or agreement referring disputes that may arise under a contract of carriage to arbitration shall be allowed.

(2) The arbitration proceedings shall, at the option of the plaintiff, be instituted at one of the following places:

(a) A place in a State within whose territory is situated

(i) The port of loading or the port of discharge, or

(ii) The principal place of business of the defendant or, in the absence thereof, the ordinary residence of the defendant, or

(iii) The place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(b) Any other place designated in the arbitration clause or agreement.

(3) The arbitrator(s) or arbitration tribunal shall apply the rules of this Convention.

(4) The provisions of paragraphs 2 and 3 of this Article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

14/ Working Group, report on fourth session, para. 47 (2). The majority of the Working Group approved the proposed draft provision (para. 48).

(5) Nothing in this article shall affect the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage has arisen.

I. Transshipment (No corresponding provision in the 1924 Brussels Convention)

Article D 15/

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

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

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

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

Article E

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

2. However, the carrier may exonerate himself from liability for loss of, damage (or delay) to the goods caused by events occurring while the goods are in the charge of the actual carrier provided that the burden of proving that any such loss, damage (or delay) was so caused, shall rest upon the carrier. 16/

15/ Working Group, report on fifth session, para. 38 (2). The Working Group approved draft article D (para. 39).

16/ Paragraph 43 of the report of the Working Group on its fifth session states: "It was decided that the report of the Drafting Party should be set forth as presented to the Working Group subject to placing brackets around the text of article E, but that it be indicated that there were more members of the Working Group opposed to paragraph 2 of article E than there were members who favoured its inclusion."

J. Limitation of liability (Article 4 (5) of 1924 Brussels Convention; article 2 of 1968 Brussels Protocol)

Article A 17/

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

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

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

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

3. 1 franc means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900.

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

5. By agreement between the carrier and the shipper a limit of liability exceeding that provided for in paragraph 1 may be fixed. 7 18/

17/ Working Group, report on fifth session, para. 26 (2). The Working Group approved these proposed draft provisions (para. 27).

18/ At paragraph 26 (9) of the report of the Working Group on its fifth session, the report of the Drafting Party noted the following:

"9. Paragraph 5 of article A specifies that the carrier and shipper may by agreement raise the limit of the carrier's liability. This paragraph picks up the substance of the first part of article 2 (a) and article 2 (g) of the Brussels Protocol. This provision is set in brackets on the ground that such language may not be necessary in view of the general rule on the right of the carrier to agree to an increase of his liability which is embodied in article 5 of the Brussels Convention of 1924. However, this bracketed language is set forth at this point pending action on general provisions concerning the carrier's right to increase his liability."

/...

Article B

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

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

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

Article C

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