



**UNITED NATIONS
GENERAL
ASSEMBLY**



Distr.
LIMITED

A/CN.9/WG.III/WP.14
28 November 1973

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Working Group on International
Legislation on Shipping
Sixth session
Geneva, 2 February 1974

DECK CARGO: WORKING PAPER BY THE SECRETARIAT

CONTENTS

	<u>Paragraphs</u>
Introduction	1 - 2
A. Provisions on inherent risks of on-deck carriage	3 - 10
B. Requisites for valid carriage on deck and consequences when on deck carriage not specified in contract of carriage	11 - 15

Introduction

1. The Working Group, at its fifth session, decided that the topics regarding the Brussels Convention of 1924 1/ to be examined at its sixth session should include: "(a) definitions under article I; (b) elimination of invalid clauses; (c) deck cargo and live animals." 2/

2. The Working Group considered issues regarding deck cargo at its third session (First report by the Secretary-General on responsibility of ocean carriers for cargo: bills of lading, A/CN.9/63/Add.1, paras. 42-66, herein referred to as the first report of the Secretary-General). The Working Group adopted a revised version of article 1 (c) directed at resolving the issues raised. 3/ However, a number of questions raised were left for consideration at a subsequent session of the Working Group. 4/ This paper considers alternative measures for resolving these problems.

A. Provision on inherent risks of on-deck carriage

3. At its third session the Working Group adopted a revised definition of article 1 (c); the purpose of the revision was to bring deck cargoes within the definition of "goods" contained in article 1 (c) of the Brussels Convention of 1924. 5/ The revised definition of "goods" (article 1 (c)) reads as follows:

1/ References to "Brussels Convention of 1924" or to the "Brussels Convention" are to the International Convention for the Unification of Certain Rules relating to Bills of Lading; League of Nations, Treaty Series, vol. CXX, p. 157, No. 2764; United Nations Register of Texts of Conventions and other Instruments Concerning International Trade Law, vol. II, p. 130 (United Nations Publication, Sales No. E.73.V.3).

2/ 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, para. 76, herein referred to as Working Group, report on fifth session).

Definitions under article I of the 1924 Brussels Convention and the elimination of invalid clauses on bills of lading are discussed in the third report to the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/WG.III/WP.12). The topic of carriage of live animals is considered in a study prepared by the secretariat of UNIDROIT (A/CN.9/WG.III/WP.14).

3/ Report of the Working Group on International Legislation on Shipping on the Work of its third session (Geneva, 1 January to 11 February 1972), A/CN.9/63, para. 25 (herein referred to as Working Group, report on third session).

4/ Working Group, report on third session, paras. 25-29.

5/ Working Group, report on third session, para. 25 (1), 26. See also: Compilation of Draft Provisions Approved by the Working Group (A/CN.9/WG.III/WP.13) (herein cited as the "compilation"), section A.

/...

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

4. The Working Group then discussed what, if any, rules relating specifically to deck cargoes should be contained in the Convention.
5. The Drafting Party recommended that the following provision, as a possible addition to article IV, be placed before the Working Group:

Pending proposal A

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 the Convention. 7/

6. The Drafting Party also reported that in considering this provision the Working Group should take account of certain suggestions that were made by various members of the Drafting Party. 8/

6/ Ibid., para. 25 (1). The exclusion of live animals from the Convention rules was the subject of examination by the Working Group at its third session (Report on the third session, paras. 30-34). It was decided to defer further discussion until a report on the subject, to be submitted by UNIDROIT, had been studied by the members of the Working Group. The definition of goods in article 1 (c) of the Brussels Convention of 1924 excludes live animals. Article 1 (c) states: "Goods" includes goods, wares, merchandise and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck."

See UNIDROIT, Study on carriage of live animals, A/CN.9/WG.III/WP.11.

7/ Working Group, report on third session, para. 25 (2). See also the compilation, section C.

8/ These suggestions are as follows:

"(a) That the words 'incident to' be deleted from the text;

(b) That the phrase 'which by the contract of carriage is stated as being ... and is so carried' be deleted, so that the clause would read as follows: 'In respect of cargo carried on deck', etc.;

(c) That the provision be modelled upon article 17, paragraph 4, of the Convention on the Contract for the International Carriage of Goods by Road (CMR) done at Geneva on 19 May 1956. This Convention states in part:

'... The carrier shall be relieved of liability when the loss or damage arises from the special risks inherent in one or more of the following circumstances:

(a) Use of open unsheeted vehicles, when their use has been expressly agreed and specified in the consignment note: ...'"

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

/...

7. The Working Group at its third session discussed the proposed provision on inherent or special risks; divergent views were expressed, but no final decision was reached. As has been noted, the Working Group at its fifth session decided that this item would be included on the agenda of the sixth session. 9/

8. The viewpoints of the members of the Working Group with respect to the inclusion of the foregoing pending proposal A were summarized as follows:

Views were expressed both for and against the draft provision presented in brackets in paragraph 2 of the report under the heading "possible addition to article IV". This provision would have the effect of relieving the carrier from liability for loss or damage resulting from the special risks associated with on-deck carriage. Some representatives objected to the future consideration of this provision on the ground that deck cargo should be included within the Hague Rules on the same footing as all other cargo, and that the question should not be reopened. On the other hand, other representatives felt that a provision such as the "possible addition to article IV" should be included in the Hague Rules, and that its inclusion should be considered at a future session of the Working Group. Some representatives considered that this effect would in any case follow from the general rules of liability, provided that these rules were based on fault; these representatives concurred with the view expressed by the Drafting Party that this proposal should be considered in connexion with the rules of liability in article IV. 10/

9. The article 4 rules of liability were discussed at the fourth session of the Working Group and the following basic rules on liability were adopted:

"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." 11/

10. In considering pending proposal A, above, the Working Group may wish to consider whether adoption of such a special provision for deck cargo would modify the effect of the basic rule of liability based on fault adopted at the fourth session of the Working Group and set forth above and, if so, the extent and character of such modification. 12/

9/ Working Group, report on fifth session, para. 74.

10/ Working Group, report on third session, para. 28.

11/ Working Group, report on fourth session, para. 28 (3).

12/ In comments transmitted on 24 May 1973 the United Kingdom stated the following:

"The United Kingdom considers that the new article which sets out the basic liability of the carrier would be sufficient to deal with problems of loss arising from carriage on deck both from the carrier's point of view and the shipper's. Accordingly the United Kingdom would be prepared to see no reference to deck cargo in the revised rules."

/...

B. Requisites for valid carriage on deck and consequences when on-deck carriage not specified in contract of carriage

11. The Working Group's Drafting Party submitted the following recommendations to the Working Group:

4. The Drafting Party considered that further provisions on deck cargo were needed and agreed that such provisions should reflect the following principles:

(a) The carrier shall be entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper, or with statutory requirements, and possibly with usage.

(b) Any agreement between the carrier and the shipper to the effect that the goods can or may be carried on deck must be reflected in a statement in the bill of lading.

(c) If the bill of lading does not contain the statement referred to in paragraph (b) above, it shall be presumed that the carrier and shipper have not entered into such an agreement, but as against the shipper, the carrier shall be entitled to prove and invoke the true agreement.

The Drafting Party also agreed that the following principles should be given further consideration:

(d) If an agreement with the shipper that cargo shall be carried on deck is not reflected in the bill of lading, then the carrier shall not be entitled to invoke such agreement against a consignee who has acquired the bill of lading in good faith.

(e) If goods are carried on deck in breach of the principles referred to in paragraph (a) above, then the carrier shall be liable for all losses direct and indirect of on-deck storage.

Members of the Drafting Party expressed views both in favour and against the principles referred to in paragraphs (d) and (e) above. The Drafting Party recommended that these questions be given further consideration in order that a decision might be taken at the next session of the Working Group. 13/

12. The Working Group discussed the recommendations made by the Drafting Party; the report on the session summarized this discussion as follows:

Some representatives stated that the principles set out in paragraph 4 of the Drafting Party's report would be relevant only if a provision containing special rules regarding the carrier's responsibility for deck

13/ Working Group, report on third session, para. 25 (4).

cargo were subsequently added to the Hague Rules. On the other hand, one representative noted that these provisions are not related to the issue of liability for deck cargo but rather to the requirement that the carrier insert in the bill of lading a statement that the goods are or may be carried on deck in accordance with an agreement with the shipper. The legal effect of the failure of the carrier to insert such a statement in the bill of lading would be that such carriage of goods on deck would constitute a breach of contract. 14/

13. One representative submitted a proposal to achieve the objective quoted above. This proposal reads as follows: 15/

Pending proposal B

1. The carrier shall be entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper, with usage or with statutory requirements.

2. If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier shall insert in the bill of lading a statement to that effect. In the absence of such a statement the carrier shall have the burden of proving that an agreement for carriage on deck has been entered into; however, the carrier shall not be entitled to invoke such an agreement against a third party who has acquired the bill of lading in good faith.

3. Where the goods have been carried on deck contrary to the provisions of paragraph 1, the carrier shall be liable for loss of or damage to the goods which result solely from the carriage on deck in accordance with the provisions of article 4, paragraph 5 as amended by the 1968 Additional Protocol/. 16/ The same shall apply when the carrier in accordance with paragraph 2 of this article is not entitled to invoke an agreement for carriage on deck.

14. In considering pending proposal B the Working Group may wish to take account of the two conflicting views expressed at the third session: (1) that the principles upon which the proposal is based would be relevant only if a provision

14/ Working Group, report on third session, para. 29.

15/ Working Group, report on third session, para. 29, foot-note 19.

16/ The reference is to rules on limitation of liability. At its fifth session the Working Group adopted revised rules with respect to the limitation of liability. Working Group, report on fifth session, para. 26 (2).

along the lines of pending proposal A were to be added to the Convention; 17/ (2) that pending proposal B was independent of the basic issue of liability and related rather to the need for requiring a statement in the bill of lading whenever goods were (or might) be carried on deck. 18/

15. The Working Group may also wish to consider whether a provision along the lines of pending proposal B, above, would be useful to promote uniformity with respect to the consequences of unauthorized on-deck storage. As was noted in the report of the Secretary-General (part III, para. 31), under some legal systems, unauthorized on-deck stowage of goods under some circumstances might be deemed a "deviation" (a serious breach of contract) which would make the carrier an insurer of the goods. Under such a view, the carrier might be liable for loss or damage to the goods in the absence of fault, or even if the storage on deck did not cause the loss or damage. It will be noted that pending proposal B (a) preserves the rules on limitation of liability and (b) provides in subparagraph 3 for liability "which results solely from the carriage of goods on deck". Thus, if the ship should sink with loss of all cargo as a result of a storm, and without the fault of the carrier, it seems that pending proposal B would preclude the application of the "deviation" (serious breach of contract) rule. 19/

17/ The United Kingdom in its May 1973 comments states: "Furthermore, the United Kingdom considers a provision such as paragraphs 25.4 (a)-(c) of A/CN.9/63 /paras. 1 and 2 of draft proposal B/ unnecessary, since it will be for the carrier to show if damage occurs to deck cargo, that such damage was not the result of his fault - and such fault could include stowing on deck in circumstances when this was not usual. If such a provision were included it would be appropriate to allow an exemption for loss or damage resulting from the risks inherent in carriage on deck where there was prior agreement that the goods should be so carried. The United Kingdom would also be opposed to any proposal such as that contained in subparagraph (e) of the same paragraph /which deals with the consequences of not complying with the requirements set forth regarding on-deck carriage and which is quoted at foot-note 27 above/. As regards the proposal in subparagraph (d) of the same paragraph and also in paragraph 2 of foot-note 19 to A/CN.9/63 /paragraph 2, last phrase of draft proposal B/ the United Kingdom feels that this can be discussed under the topic of reserve clauses and guarantees."

18/ Working Group, report on third session, para. 29.

19/ Cf. Working Group, report on fifth session, paragraph 47, foot-note 16. The report on the fifth session sets forth, in paragraph 26 (2), a text adopted by the Working Group (article C) dealing with "wilful misconduct".