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April 1947

THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

Special Committee to Consider Brussels Convention of 1910 on Collision Damages

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MAJORITY REPORT

This Committee was originally appointed to act under the Chairmanship of Mr. Albert Gould of Boston whose untimely death occurred before a report could be formulated.

The surviving Committee members have reviewed the history of the Convention signed at Brussels in 1910. The United States delegation signed, subject to four reservations. The Convention was submitted to the Senate for ratification in 1937, and hearings held thereafter show serious objection in this country to the proposed amendments to the law of collision damages. In April 1947, the treaty was withdrawn from the Senate by President Truman for restudy and further consideration by the executive branch of the Government.

This Committee has also reviewed the action taken by this Association with regard to the proposals of the Brussels Convention over the period from 1899 to 1946. Prior to 1910, the date of the treaty, this Association three times disapproved the Convention proposal to limit cargo recovery to a share of cargo loss from each of several vessels held at fault. In 1910, the Association reversed itself and approved the treaty as presented. Since that time, this Association has twice, by the action of its members (1927 and 1930), and once by Committee action duly reported to the membership and not disaffirmed (1940), disapproved the proposed changes in the law of collision damages contained in the Brussels Convention.

The present Committee believes that the situation has not changed since the action of this Association in 1927 and 1930, and the report of the Special Committee in 1940, consisting of Messrs. Keating,

Englar and Hupper, and, after independent study, finds itself in agreement with the conclusions of the Special Committee of 1940 and opposed to the ratification of the Brussels Convention and likewise opposed to legislation designed to revise the American law respecting collision damages.

FARNHAM P. GRIFFITHS,
JOSEPH W. HENDERSON,
LEONARD J. MATTESON,
JOSEPH M. RAULT,
ROBERT W. WILLIAMS,
Chairman.

April 1947.

ADDENDUM TO THE MAJORITY REPORT

Summary of Previous Action Taken by the Association

The subject matter included in the Brussels Convention of 1910 was discussed at various international conferences prior to that date.

Antwerp	1898
London	1899
Paris	1900
Hamburg	1902
Brussels Diplomatic Conference, February and September 1905	1905
Bremen	1909
Brussels Diplomatic Conference	1910

The two most important changes in American Law proposed by the Brussels Convention relate to damages in collision cases where both vessels are to blame, and are:

PROPOSITION 1

Division of damages according to degree of respective faults.

PROPOSITION 2

Limitation of cargo recovery against respective vessels to a proportion of cargo damages measured by vessels' degree of fault.

The Maritime Law Association of the United States was founded in 1899, and the above propositions have been considered and acted on at various times by the Association, beginning at its organization meeting in 1899. The Association's action from 1899 to 1930 is reviewed in Document 161 (April 1930), pages 1714 to 1762. Further action is recorded in Document 164 (May 2, 1930), pages 1779 and 1780; Document 252 (April 1940), page 2630; Document 253 (May 1940), page 2649; and Document 305 (June 1946), pages 3086 and 3087.

The action may be summarized as follows:

June 28, 1899—Action by members on Proposition 1, Association divided and makes no positive recommendation. On Proposition 2, Association opposed any change.

May 2, 1902—Committee Report adopted by members expressing neither approval nor disapproval of Proposition 1, and opposing Proposition 2.

May 1905—Resolution adopted by members indicating willingness of Association to approve of a proposed treaty, including Proposition 1 "if necessary to bring about uniformity".

December 8, 1905—Membership action after receiving communication from certain maritime insurance companies disapproving proposed treaty in so far as it includes Proposition 2.

January 28, 1910—Proposed Brussels Convention was considered by membership, and resolution was adopted approving Convention, subject to a reservation that it would not affect the Harter Act.

September 23, 1910—Convention signed at Brussels by American Delegates appointed by Secretary of State included Mr. Charles C. Burlingham, member of the Association. The American Delegation made the following reservations:

(1) Rights under Harter Act reserved.

(2) The Convention is not to be understood to create right of action for death until special Congressional action taken.

(3) The effect of legal presumptions abolished by Article 6 of the Convention are not to be effective so far as the United States is concerned.

(4) All changes in the law with respect to fault and damages are to be applicable in the United States only in Admiralty Courts.

Since the Convention was signed in 1910, it has been ratified by most European countries, including British Dominions, but *not* by the United States or certain South American countries.

September 10, 1922—A special committee, consisting of Charles C. Burlingham, Howard M. Long and Frederic Cunningham, recommended to the Association that a Bill be introduced into Congress to carry out the provisions of the Convention. This report was, by vote of the Association on February 10, 1922, ordered "received, filed and printed and distributed, and the Committee continued".

December 1925—At the mid-winter meeting of the Association, the membership voted to have the Chairman appoint a new committee. This Committee, composed of the following persons:

James K. Symmers
William J. Conlen
Charles R. Hickox
Archibald C. Matteson
Russell T. Mount

made an interim report in January 1927 recommending that the entire membership of the Association be canvassed on the question of the Brussels Convention before rendering its final report. This canvass was made in the Spring of 1927, and the Committee reported in May 1927 that it would not be practical to get Congress to enact legislation limiting cargo's recovery to less than full damages from the non-carrying vessel, and the Association apparently took no vote on Proposition 2 of the

treaty. A majority of the Committee recommended that no change be made as to division of damages.

On May 20, 1927, by a vote of 54 to 25, the membership approved the Committee report opposing any change in division of damages.

In January 1930, at the mid-winter meeting of members, it was proposed to appoint a new committee to watch legislation on the question of the Brussels Convention, but the motion was voted on and not carried.

May 2, 1930, at the annual meeting, after circulating to all members Document 161 showing the entire record of the Association with respect to the Brussels Convention, the Association by overwhelming vote formally resolved that the changes proposed by the Brussels Convention are disapproved.

In March 1940, a special committee consisting of

Cletus Keating
D. Roger Englar
Roscoe H. Hupper

to consider the Bland Bill (H. R. 7637), introduced into Congress for the purpose of ratifying the Brussels Convention, reported to the Executive Committee that it opposed the ratification of the Convention and all legislation designed to revise the American law on collisions, at least until the return of peace and normal conditions. The Committee's action was circulated to all members and reported on at the annual meeting in May 1940.

June 1946—At the annual meeting, the question of ratifying the Brussels Convention was again brought before the membership, and a motion carried directing the President to appoint a new committee to consider the Brussels Convention.

This brings the record to date.

ROBERT W. WILLIAMS,
Chairman.

Dated: March 31, 1947.

MINORITY REPORT

The report prepared by the Chairman and concurred in by some members of the committee recommends that the Association oppose the ratification of the Brussels Convention and likewise oppose any legislation designed to revise the American law respecting collision damages.

The subscriber to this report is unable to agree with the Chairman's proposed report.

While this report does not so state, it is undoubtedly influenced in part, by the message sent by the President of the United States, dated April 8, 1947, as reported in the New York papers, withdrawing from the Foreign Relations Committee of the United States Senate, a number of treaties pending in that Committee on the ground that some had become obsolete and that the situation as to others would be clarified if they were withdrawn for further study and resubmitted with a fresh appraisal of their provisions. It might well be assumed that the Brussels Convention was considered in the second category. Inquiry which has been made of the State Department discloses that this, together with eighteen other treaties were withdrawn because the State Department desired to restudy them and decide whether to resubmit them for further consideration by the Senate. In any event, the Association is not precluded from reconsidering this important subject.

Adequate grounds for such renewed consideration are to be found in the recent opinions of the Circuit Court of Appeals for the Second Circuit, caustically commenting on the lack of power of the Courts of this country, unique in that respect among the great maritime nations, to apportion liability in collision cases in accordance with the degree of fault. *The Gypsum Prince—Voco,* 1946 A. M. C. 309, 316; 153 Fed. 2nd 773 (opinion by Learned Hand, Circuit Judge); *The Matthew Luckenbach—Zacapa,* 1946 A. M. C. 1120, 1123; 157 Fed. 2nd 250 (opinion by Swan, Circuit Judge). A similar attitude was indicated by the Circuit Court of Appeals for the Third Circuit in the *Margaret—Manchester Merchant,* 30 Fed. 2nd 923, where the Court, after first dividing damages in accordance with the degree of fault, thereafter upon rehearing, reluctantly held itself bound by authoritative Supreme Court decisions and divided the damages equally in spite of the fact that the relative faults were quite incomparable.

The general subject has been so frequently reviewed in various reports including Executive Report No. 4, 76th Congress, First Session, of the Senate Committee on Foreign Relations which in 1939 recommended ratification, that it should be unnecessary to discuss the issues and arguments in detail.

It has always been recognized that the principal changes which would be made in the law by this Convention are these:

(1) The Courts would be empowered to divide the damages in collision cases in accordance with the faults of the respective vessels;

(2) Recovery by owners of cargo would similarly be based on the degree of fault chargeable to each vessel;

(3) Legal presumptions would be abolished.

While certain other changes are included in the Convention, they may be considered relatively unimportant.

In the opinion of the undersigned, a change in the rule so as to permit apportionment of damages would result in more equitable decisions and the more effective disposition of collision litigation.

As set forth in the opinions above cited and as is well known to lawyers who have had any substantial experience with collision litigation, instances frequently occur where the statutory fault of one vessel is so inconsequential as compared with the glaring faults of the other as to render it wholly inequitable to assess the damages equally. While the major and minor fault rule is sometimes invoked in some situations, it does not cover all cases and in itself, sometimes results in injustice. The division of damages even under our law is not unknown. It is repeatedly done in litigation involving the collision between three or more vessels, particularly in tugboat cases.

It is our further opinion that such a change in the rule would tend to the more efficient disposition of collision litigation. While under the present law undoubtedly many settlements are made by counsel on an apportionment basis, situations do occur where counsel, less amenable to compromise, insist upon a mutual fault settlement so that the owner of the vessel, guilty of a statutory but trifling fault, has the choice of either paying more than he should or engaging in a desperate and frequently hopeless litigation.

The Appellate admiralty courts exhibit an increasing reluctance to review factual issues of which collision litigation mainly consists.

It is our belief that first, there would be fewer appeals if proper fractional settlements could be made under the changed law and that where the apportionment was grossly inequitable, the Appellate Court would be more open to review.

The second major change and that provocative of the most bitter controversy would likewise limit the recovery of cargo to the degree of fault charged to the offending vessel.

The contention that the so-called innocent owner of cargo should recover his full damages is met by the undeniable fact, insofar as recovery from the carrying vessel is concerned, that the result is contrary to Congressional intent. Both under the Harter Act and the Carriage of Goods by Sea Act, the carrying vessel is not liable for cargo damage due to errors in management and navigation, if the owner of the vessel has exercised due diligence. As is well known, however, under the *Chattahoochee,* 173 U. S. 540, a settlement on the basis of cross liabilities results in a recoupment by the non-carrying vessel from the carrying vessel of half the damages paid by the former to the cargo interests. Thus, as it has been said, "A liability which the statutes put out of the door comes back through the window".

While representatives of cargo interests have urged that the same result is achieved by the both to blame clause in common use, the answer to that argument is that in matters of settlement, it has been frequent practice to discount to some extent the validity of the clause, and in fact, at the present moment, its validity is being challenged and, we understand, will be litigated in the *Nathaniel Bacon—Esso Belgium* litigation in the United States District Court for the Southern District of New York, *United States of America—owner of SS Nathaniel Bacon, and 17 cargo underwriters* v. *SS Esso Belgium, her engines, etc.,* Docket No. 126-101; *Belgian Overseas Transport Corp., S. A.* v. *United States of America, as owner of SS Nathaniel Bacon, and 135 cargo owners, impleaded,* Docket No. 126-167.

The argument that the proposed change in the law would result in confusion in insurance premiums has been answered by demonstration of the fact that as stated in the Senate Report above mentioned, no differential exists in premiums covering cargoes on American vessels and those of nations adhering to the Brussels Convention.

The third principal change effected by the Convention would be the abolition of legal presumptions.

We are of the opinion that this provision of the Convention should be disapproved. The legal presumption arising from the violation of a statute is grounded in sound public policy and should be retained.

Another marked difference of opinion is on the question whether the treaty should first be ratified or whether domestic legislation should be enacted first. It is our opinion that while the question is debatable, less confusion would exist if domestic legislation should come first. An act of Congress should, with certain reservations, be enacted making the principles of the Convention the law of the land in the United States and its territories including both admiralty and common law courts. To limit the proposed changes to the admiralty courts would drive many litigants into the common law courts with consequent determination of difficult issues by a jury rather than an admiralty judge.

The principal object of the Brussels Convention, admittedly disapproved on some occasions by this Association, although it was originally signed by some of its most distinguished members as delegates, and more than once approved by the Association, has been to promote uniformity in the admiralty law. Present confusion is illustrated by such cases as *Galef* v. *United States* (The Magmeric), 25 Fed. 2nd 134, and *The Mandu,* 15 Fed. Supp. 627, modified 1940 A. M. C. 1150, 114 Fed. 2nd 361.

While complete uniformity may be unattainable in this instance as in many others, it is our belief that the provisions of the Convention would strongly tend to that result. Article I of the Convention applies its principles to all litigation regardless of in what waters the collision occurred.

In conclusion we recommend that the Association take appropriate action to have introduced in the Congress of the United States and urge passage of a bill generally embodying the provisions of the Brussels Convention as a part of American law with the following exceptions:

The Harter Act and the Carriage of Goods by Sea Act should not be affected.

Legal presumptions now existing under the laws of the United States should be retained.

WILLIAM E. COLLINS.

April 1947.