DOCUMENT NO. 529
JUNE, 1968

THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

REPORT OF THE BILL OF LADING COMMITTEE

I

VISBY AMENDMENTS TO THE HAGUE RULES

Action on the Visby Amendments was completed by the Brussels Diplomatic Conference on February 23, 1968. A copy of the resulting Protocol is attached hereto, marked "Exhibit A".

Most of the Visby Amendments are not controversial, simply filling needs which had received general support. They have been explained fully in previous reports of your Committee and require no further comment at the present time. However, there are three items which do require comment, as follows:

A. *Scope of Applicability.*

Article 5 of the Protocol amends Article 10 of the Convention to broaden the scope of applicability to cover any bill of lading issued in a Contracting State (even if the goods are loaded in a Non-Contracting State) and also so as to give the force of law to any bill of lading clause which stipulates for applicability of the Hague-Visby Rules in circumstances in which they would not otherwise apply (outward from Non-Contracting States and inward to Contracting and Non-Contracting States). This Article also specifically permits any Contracting State to broaden the scope of applicability to include inward shipments.

This Article does not broaden the scope of the Convention to reach as wide as present U. S. law and is, therefore, somewhat disappointing. However, it was the best that could be obtained and leaves it open to the United States to maintain the full scope of U. S. law so your Committee recommends approval.

B. *Limitation Amount per Unit.*

Article 2 (a) of the Protocol amends Article 4 (5) of the Hague Rules so as to fix the limitation amount at Fr. P. 10,000 (U.S. $662) per package or unit or Fr. P. 30 (U.S. $1.98) per kilogram (equivalent to U.S. $.90 per pound), whichever is the higher.

Limitation on this basis was approved in advance of the final phase of the Brussels Conference on behalf of United States interests representing shippers and consignees.

Organizations reflecting the views of United States shipowners and cargo underwriters supported a proposal to fix the new limitation at Fr. P. 12,500 (U.S. $827.50) per package or unit or Fr. P. 20 per kilogram (U.S. $.60 per pound), whichever is the higher, and the shipowner group accompanied this with a proposal that, if any weight limit higher than Fr. P. 20 per kilogram were agreed upon, it should be limited to a fixed amount or "ceiling" per package or unit.

The ceiling concept was advanced by certain countries at Brussels, one proposal being Fr. P. 200,000 (U.S. $13,240) per package or unit, but the proposal was rejected.

It is your Committee's impression at the present time that United States cargo underwriters would not oppose the limitation of $662 per package or unit or $.90 per pound but that this limitation would be opposed by United States shipowner groups unless accompanied by a ceiling.

Since the indicated desire of shipowner groups for a ceiling arises from economic rather than legal considerations, it is the view of your Committee that it would be inappropriate for the Association to take a stand on this point, leaving it to the interested groups to advance their own views at Congressional hearings if they are then advised to do so. With reservation of the right of any interested group to seek adoption of a ceiling, your Committee recommends that the Association approve the new limitation system.

C. *The Container as One Unit or the Container and Its Contents as Several Units.*

There has been much discussion as to whether or not a container or other means of consolidating packages or units, such as a pallet or flat, should be considered a single unit for limitation purposes

under the Hague Rules as they presently exist. It has been held in the United States that six packages consolidated on a pallet were a single unit and there is a *dictum* that a container, freighted at a flat rate per container, was a single unit.

Preparatory to the second phase of the Conference, there was also discussion as to whether or not a container should be treated as a package or unit in the Protocol. In terms of the new Protocol limits of $662 per package or $.90 per pound, if the container were treated as the package, the $.90 per pound would always be the limit, the breaking point being 735.5 pounds at which the limitation on the weight basis would be $662 and containers always being used for more cargo than that.

This problem was resolved at Brussels by a compromise, Art. 2 of the Protocol, amending Hague Rules Art. 4 (5) by a new Art. 4 (5) (c) which reads:

> "c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the Bill of Lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit."

Thus, a bill of lading receipting for

"One container said to contain carboys of acid"

would constitute a single limitation unit while a bill of lading receipting for

"One container said to contain 100 carboys of acid"

would constitute 101 limitation units, the container itself being a separate limitation unit, which is important only if it is not owned by the carrier.

Under an enumerated bill of lading for a container in which break-bulk cargo was consolidated, a mixture of limitation systems might result. Suppose, for example, that the bill of lading receipted for:

One container said to contain:

5 printing presses and
50 cartons of typewriters,

assuming also that the container itself belonged to the shipper and weighed 3 tons, the printing presses weighed 1 ton apiece and the cartons of typewriters weighed 40 pounds apiece. The limitations would then be:

Container: 6720# x $.90	=	$ 6,048
Presses: 5 x 2240# = 11,200# x $.90	=	10,080
Typewriters: 50 x $662	=	33,100
Total:		$49,228

Of course, it should be remembered that these are only *limits* and the carrier's liability will not in any case exceed the consignee's loss. In the example cited, the presses might be subject to the limitation but the container itself and the typewriters probably would not be.

Sir Kenneth Diplock of the United Kingdom delegation, who was chairman of the Drafting Committee which produced this compromise, stated on the record of the Diplomatic Conference that the parties would be free to stipulate for alternative freight rates depending on whether or not the consolidated packages or units are enumerated in the bill of lading. Your Committee has had the benefit of seeing the report submitted to the Secretary of State by the United States Delegation under date of April 26, 1968, which controverts Sir Kenneth Diplock's statement, and contends that the shipper would have the choice of enumerating the packages or units in the container without having to pay a higher rate of freight.

D. *Conclusion.*

Your Committee recommends (1) that the Association take no position with regard to the question whether or not there should be a ceiling limiting the amount of liability for any package or unit to which the Fr. P. 30 per kilogram ($.90 per lb.) limitation would be applicable and (2) before or in connection with any ratification or legislative enactment of the principle of Article 2 of the Protocol, inserting a new Article 4, Paragraph 5 (c) it should be made certain whether or not alternative freight rates may be charged, depending on whether or not the consolidated packages or units are enumerated in the bill of lading. With those exceptions, your Committee

recommends that the Association approve the Visby Amendments and further that the Association urge the United States Government to give the amendments the force of law by enactment of domestic legislation and by ratification of the Visby Protocol.

II

CONTAINERS

Your Committee has just received a report of the CMI Working Group on Containers, recommending a Draft Convention on International Combined Transport. The Convention would provide a set of rules for liability of any "Combined Transport Operator" ("CTO") who issued a special form of Combined Transport Bill of Lading to cover carriage of goods between two countries, of which at least one is a Contracting State, by at least two modes of transport of which at least one is by seagoing vessel. Applicability of the Convention could be avoided simply by omitting reference to the Convention from the Combined Transport Bill of Lading.

The system of liability under the Draft Convention is that, with the exception of force majeure and certain listed causes beyond his control the CTO shall be liable for any damage suffered by the goods unless the CTO can show that the damage happened during carriage on a sea-going vessel, in which case the Hague/Visby Rules, shall apply.

Your Committee has the draft Convention under study and will make informal recommendations for the guidance of the CMI's International Sub-Committee which will meet on June 10, 1968 at Brussels. These comments will not in any way purport to express the views of the Association. Thereafter, it is expected that a revised Draft Convention will be circulated for study by the National Associations preparatory to the Plenary Session of the CMI to be held at Tokyo March 30/April 5, 1969. Your Committee expects to make full recommendations to the Association in that regard to assist the Association in formulating a position at its 1968 Fall Meeting.

III

LETTERS OF INDEMNITY

As a matter of completeness, your Committee has mentioned this subject in each of its semiannual reports. However, nothing has happened since 1959 and, although the President of the CMI's International Sub-Committee on this subject insists that the matter is not dead, it seems unlikely that anything further will happen. Accordingly, it is your Committee's intention to omit mention of this subject in the future unless and until there is a development to report.

May 1, 1968

Respectfully submitted,

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*Albert F. Chrystal
*Abraham A. Diamond
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*Leon Sarpy
Edward C. Schmeltzer
Dewey R. Villareal, Jr.
John W. R. Zisgen
John C. Moore, Chairman

*Prevented from attending and therefore not concurring in this report.

EXHIBIT A

PROTOCOL TO AMEND THE INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES OF LAW, RELATING TO BILLS OF LADING, SIGNED AT BRUSSELS ON 25th AUGUST 1924

(text adopted by the Conference)

The Contracting Parties,

Considering that it is desirable to amend the International Convention for the unification of certain rules of law relating to bills of lading, signed at Brussels on 25th August 1924,

Have agreed as follows:

Article 1

1. In Article 3, paragraph 4 shall be added:

"However, proof to the contrary shall not be admissible when the Bill of Lading has been transferred to a third party acting in good faith".

2. In Article 3, paragraph 6, sub-paragraph 4 shall be replaced by:

"Subject to paragraph 6bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen".

3. In Article 3, after paragraph 6 shall be added the following paragraph 6bis:

"An action for indemnity against a third person may be brought even after the expiration of the year provided for in

the preceding paragraph if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall be not less than three months, 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".

Article 2

Article 4, paragraph 5 shall be deleted and replaced by the following:

"a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of Frcs. 10.000 per package or unit or Frcs. 30 per kilo of gross weight of the goods lost or damaged, whichever is the higher.

b) The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged.

The value of the goods shall be fixed according to the commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the Bill of Lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.

d) A franc means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900'. The date of conversion of the sum awarded into national currencies shall be governed by the law of the Court seized of the case.

e) Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

f) The declaration mentioned in sub-paragraph a) of this paragraph, if embodied in the Bill of Lading, shall be prima facie evidence, but shall not be binding or conclusive on the carrier.

g) By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in sub-paragraph a) of this paragraph may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that sub-paragraph.

h) Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly misstated by the shipper in the Bill of Lading".

Article 3

Between Articles 4 and 5 of the Convention shall be inserted the following Article 4bis:

"1. The defences and limits of liability provided for in this Convention shall apply in any action against the carrier in respect of loss or damage to 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 not being an independent contractor), such servant or agent 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 such servants and agents, shall in no case exceed the limit provided for in this Convention.

4. Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this Article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result".

Article 4

Article 9 of the Convention shall be replaced by the following:

"This Convention shall not affect the provision of any international Convention or national law governing liability for nuclear damage".

Article 5

Article 10 of the Convention shall be replaced by the following:

"The provisions of this Convention shall apply to every Bill of Lading relating to the carriage of goods between ports in two different States if:

a) The Bill of Lading is issued in a contracting State, or

b) the carriage is from a port in a contracting State, or

c) the Contract contained in or evidenced by the Bill of Lading provides that the rules of this Convention or legislation of any State giving effect to them are to govern the contract

whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

Each contracting State shall apply the provisions of this Convention to the Bills of Lading mentioned above.

This Article shall not prevent a Contracting State from applying the Rules of this Convention to Bills of Lading not included in the preceding paragraphs".

Article 6

As between the Parties to this Protocol the Convention and the Protocol shall be read and interpreted together as one single instrument.

A Party to this Protocol shall have no duty to apply the provisions of this Protocol to Bills of Lading issued in a State which is a Party to the Convention but which is not a Party to this Protocol.

Article 7

As between the Parties to this Protocol, denunciation by any of them of the Convention in accordance with Article 15 thereof, shall not be construed in any way as a denunciation of the Convention as amended by this Protocol.

Article 8

Any dispute between two or more Contracting Parties concerning the interpretation or application of the Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

Article 9

1. Each Contracting Party may at the time of signature or ratification of this Protocol or accession thereto, declare that it does not consider itself bound by Article 8 of this Protocol. The other Contracting Parties shall not be bound by this Article with respect to any Contracting Party having made such a reservation.

2. Any Contracting Party having made a reservation in accordance with paragraph 1 may at any time withdraw this reservation by notification to the Belgian Government.

Article 10

This Protocol shall be open for signature by the States which have ratified the Convention or which have adhered thereto before the 23rd February 1968, and by any State represented at the twelfth session (1967-1968) of the Diplomatic Conference on Maritime Law.

Article 11

1. This Protocol shall be ratified.

2. Ratification of this Protocol by any State which is not a Party to the Convention shall have the effect of accession to the Convention.

3. The instruments of ratification shall be deposited with the Belgian Government.

Article 12

1. States, Members of the United Nations or Members of the specialized agencies of the United Nations, not represented at the twelfth session of the Diplomatic Conference on Maritime Law, may accede to this Protocol.

2. Accession to this Protocol shall have the effect of accession to the Convention.

3. The instruments of accession shall be deposited with the Belgian Government.

Article 13

1. This Protocol shall come into force three months after the date of the deposit of ten instruments of ratification or accession, of which at least five shall have been deposited by States that have each a tonnage equal or superior to one million gross tons of tonnage.

2. For each State which ratifies this Protocol or accedes thereto after the date of deposit of the instrument of ratification or accession determining the coming into force such as is stipulated in §1 of this Article, this Protocol shall come into force three months after the deposit of its instrument of ratification or accession.

Article 14

1. Any Contracting State may denounce this Protocol by notification to the Belgian Government.

2. This denunciation shall have the effect of denunciation of the Convention.

3. The denunciation shall take effect one year after the date on which the notification has been received by the Belgian Government.

Article 15

1. Any Contracting State may at the time of signature, ratification or accession or at any time thereafter declare by written notification to the Belgian Government which among the territories under its sovereignty or for whose international relations it is responsible, are those to which the present Protocol applies.

The Protocol shall three months after the date of the receipt of such notification by the Belgian Government extend to the territories named therein, but not before the date of the coming into force of the Protocol in respect of such State.

2. This extension also shall apply to the Convention if the latter is not yet applicable to those territories.

3. Any Contracting State which has made a declaration under §1 of this Article may at any time thereafter declare by notification given to the Belgian Government that the Protocol shall cease to extend to such territory. This denunciation shall take effect one year after the date on which notification thereof has been received by the Belgian Government; it also shall apply to the Convention.

Article 16

The Contracting Parties may give effect to this Protocol either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation the rules adopted under this Protocol.

Article 17

The Belgian Government shall notify the States represented at the twelfth session (1967-1968) of the Diplomatic Conference on Maritime Law, the acceding States to this Protocol, and the States Parties to the Convention, of the following:

1. The signatures, ratifications and accessions received in accordance with Articles 10, 11 and 12.

2. The date on which the present Protocol will come into force in accordance with Article 13.

3. The notifications with regard to the territorial application in accordance with Article 15.

4. The denunciations received in accordance with Article 14.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, duly authorized, have signed this Protocol.

DONE at Brussels, this 23rd day of February 1968, in the French and English languages, both texts being equally authentic, in a single copy, which shall remain deposited in the archives of the Belgian Government, which shall issue certified copies.