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THE MARITIME LAW ASSOCIATION

OF THE UNITED STATES

Special Memorandum

from the Committee on Carriage of Goods

Current developments in Congress and in the Administration in Washington impel us to place before the members of the Association the background facts regarding the need for modernizing COGSA, and how that should be accomplished in the best interests of United States export-import business.

At the moment of this writing, various signals are coming from Washington, so that it is not possible now to predict just how this question will be presented to our membership at our 1985 Annual Meeting on May 3. However, it is clear that it will come up in one way or another and that our membership needs solid background material for a clear understanding of whatever COGSA-related issue may be presented at that time.

The heart of the matter is the limitation of the carrier's liability for loss of or damage to goods. The present limitation is $500 per package or, in the case of

goods not shipped in package, per customary freight unit. That formula was established in 1924 when packages were small and money had much higher value than it has today. The base amount was £100, to be converted in round numbers into other currencies; in 1924, £100 was worth U.S.$487.50; today its exchange value is around U.S.$125.

In the late 1950s, the CMI drydocked, so to speak, the Hague Rules, examining all of the provisions of the Rules in the light of changed circumstances against the background of the jurisprudence of all major trading countries. The CMI study was completed at Visby in 1963 and the Belgian Government convened a Maritime Diplomatic Conference, held in 1967-1968, to refine a multilateral treaty.

The principal problem was the unit limitation, which was solved by substituting a weight limitation, expressed in "Poincare'Francs" per kilogram, of about $1.09 per pound. As part of the compromise, an exception, also expressed in "Poincaré Francs", of about $663 per package was agreed upon so that smaller packages would have a higher limitation. The resulting compromise, called the "Visby Amendments", also included a solution of the vexing question of whether packages in packages, particularly those in containers, should have the benefit of the "package" exception to the weight limitation. Several other subjects were dealt with, the solutions for all of which would bring special

aspects of the Hague Rules, as applied in certain other countries, into harmony with United States law.

In 1979, a further amendatory Protocol was agreed at a Maritime Diplomatic Conference to substitute Special Drawing Rights (SDR's) for Poincare Francs, the new limitations being SDRa per kilogram or SDR 660 per package, their dollar value being maintained at close to the same levels.

The "Visby Amendments" have been ratified or adhered to by the following 21 countries: Belgium, Bermuda, Denmark, East Germany, Ecuador, Egypt, France, Gibraltar, Hong Kong, Lebanon, Netherlands, Norway, Poland, Singapore, Sri-Lanka, Sweden, Switzerland, Syrian Arab Republic, Tonga, and the United Kingdom and have been in force since June 23, 1979. The Visby Amendments have also been adopted as domestic legislation in the following 4 additional countries: Argentina, Finland, Liberia and Yugoslavia. In recent months, Finland and Italy have denounced the Hague Rules, preparatory to reaccepting them through ratification of the Visby Amendments.

Beginning in 1968, the United Nations, through its UNCTAD and UNCITRAL arms, undertook a review of the law of carriage of goods by sea in which representatives of the developing nations played a substantial part. In 1978, the United Nations called a convention, at Hamburg, FRG, to consider proposals by UNCITRAL for a new regime with a signifi-

cantly different approach than that of the Hague/Visby Rules. Broadly stated, the Hamburg Rules, as the product of that Convention are known, would impose strict liability on the carrier, eliminating in the process the 16 listed causes of loss with respect to which the carrier is not held liable under Hague/Visby (and, of course, in the United States Carriage of Goods by Sea Act), shift the burden of proof from shipper to carrier, placing upon the carrier the burden of proving freedom from negligence, and create a cause of action for delay in delivery.

Liability under Hamburg would depend upon the finding of negligence, thus fostering litigation. Every cargo case would be a negligence case. The limitation amounts under Hamburg are calculated exactly as in Visby, with an increase of 25%.

To date, the Hamburg Rules have been ratified or adhered to by the following 10 nations: Barbados, Chile, Egypt, Lebanon, Morocco, Romania, Tanzania, Tunisia, Uganda. The Hamburg Rules will not come into effect until a total of 20 nations have ratified or adhered to them.

Efforts to obtain adoption of the Visby Amendments by the United States since 1967 have met resistance from the United States Departments of Transportation and State.

Efforts to obtain ratification of the Hamburg Rules in the United States have been met with opposition from ship

operating interests and cargo insurance interests.

To state it simply, the U.S. Government can veto Visby and, as a practical matter, the MLAUS can veto Hamburg.

In late 1982, representatives of the Bills of Lading Committee of the MLA, the United States Departments of Transportation, Commerce and State, the American Institute of Marine Underwriters, the American Shipowners Association, Shippers National Freight Claim Council, National Industrial Traffic League, and Sea-Land Service, undertook efforts to arrive at a compromise proposal which all interests could support designed to bring the Visby/SDR Rules into force immediately and the Hamburg Rules into force when they become effective by their own terms and when and if a majority of the trading partners of the United States, by dollar value of cargo, have embraced the Hamburg Rules. When the Hamburg Rules became the law under this proposal, the USA would denounce the Hague-Visby-SDR Regime.

Agreement on such a compromise amongst representatives of the organizations above mentioned was reached in April 1983, in Washington, and was approved unanimously by our Committee on Bills of Lading, which recommended approval by our Association.

The argument in favor of the compromise, briefly, ran as follows:

1. We had made next to no headway in procuring adoption of the Visby/SDR Rules since 1968;
2. By agreeing to the compromise we would get the benefits of the changes provided by the Visby/SDR Rules promptly;
3. The likelihood of the Hamburg Rules ever being adopted by a majority of the trading partners of the U.S.A., is so slight that this aspect of the compromise is really a matter of giving almost nothing for what we need.
4. If a majority of our trading partners ever should accept the Hamburg Rules, then the U.S. should do likewise, in the interests of uniformity, to simplify and facilitate international trade.

At the May 1983 meeting, speaking during discussion of the resolution, Mr. George Zacharkow, President of Marine Office of America and the President-elect of the American Institute of Marine Underwriters argued that the compromise proposal should be conditioned upon agreement by the developing countries, which support the Hamburg Rules, to allow United States, and other foreign insurors to conduct insurance business within their territories.

Also speaking with reference to the motion, Mr. Herbert Lord argued that the adoption of the compromise was wrong in principle because:

(1) The Hamburg Rules had not yet come into effect, and might never come into effect, so that establishing a provision to adopt them in the future would not contribute to international uniformity;

(2) The Hamburg Rules constitute a radical change in direction with respect to carriage of goods by sea law, adopted mainly at the urging of the developing nations which had relatively limited experience with the workings of the Hague/Visby/SDR regimes;

(3) The MLA should not precommit itself to support for or acquiescence in the adoption of the Hamburg Rules as the law of the United States at this time, because to do so would be to fetter improperly the MLA in debate regarding the advisability of adopting the Hamburg Rules when, as, and if they ever come into force.

As most readers of this summary will recall, the above-described resolution was not approved at the May 1983 meeting of the MLA.

Since 1983 the MLA's Bills of Lading Committee, and its successor, the Committee on Carriage of Goods (COCOG) have corresponded and met with the Chairman and staff of the House of Representatives Committee on Merchant Marine & Fisheries with the objective of getting that Committee to propose domestic legislation adopting the substantive changes made by the Visby and SDR amendments.

In the course of these efforts, the COCOG learned that another body, the Office of the House Law Revision Counsel, was in the process of "codifying" the U.S. maritime law including that relating to carriage of goods, and was, to an extent, liasing with the House Committee on Merchant Marine & Fisheries.

The combined efforts of the House Committee on Merchant Marine & Fisheries and the House Law Revision Counsel have produced a draft COGSA bill which incorporates the Visby and SDR amendments, repeals the Harter Act, substituting for it the "new COGSA", and substantially alters the wording of the "old COGSA". The change in wording is meant to modernize the language, and not meant to change the substance of the law.

The House Committee on Merchant Marine & Fisheries and House Law Revision Counsel have also produced an alternative draft bill which provides for the repeal of prior law and adoption of the Hamburg Rules when and if the Hamburg

Rules come into force and more of the seaborne trade of the U.S., by value, is with nations which have adopted the Hamburg approach than is then with nations which have not.

Concurrently, the Department of Transportation has prepared a new draft in much the same terms as were used in the 1983 compromise proposal, calling for insertion of the Visby amendments into the old "COGSA" and for renunciation of the Hague Rules and repeal of the old COGSA when U.S. seaborne trade with nations on the Hamburg Rules regime preponderates. Ths DOT bill was reported, as of mid-March, to be circulating through the Executive Branch for comments.

The COCOG has been steadfastly encouraging adoption of the Visby and SDR amendments and discouraging adoption of the Hamburg Rules. As was true in 1983, it seems clear that any bill not providing for the possibility of eventual adoption of the Hamburg Rules (upon the conditions already mentioned) will be blocked by the Executive Branch.

It must be borne in mind, in relation to the carriage of goods by sea, that one is here dealing with an intimately linked system of contracts.

> The contract of sale of the goods (f.o.b. or c.i.f.)
>
> The contract of transportation (b/l or c/p).
>
> The contract (policy) of marine insurance.

The contract (policy) of P & I insurance.

These contracts are all linked together by their costs - the premia for the insurances and the ocean freight for the transportation, all of which are included in the cost of the consumer, whether the sale be on c.i.f. or f.o.b. basis. Any shifting of the placement of the risk will affect all these costs, moving the total upwards. The ultimate goal should be the lowest total cost, for the benefit of the ultimate consumer. The Hamburg Rules will not lower the cost.

Whether the House Committee on Merchant Merine & Fisheries will introduce a bill incorporating the Visby and SDR amendments but not providing for possible adoption of the Hamburg Rules if they are adopted by a majority of our trading partners is, at this writing, not known to the COCOG.

It is possible that by the 3rd of May the MLA may be asked to consider a resolution regarding support of or resistance to one or the other of the several versions presently in draft. It seems likely to the COCOG that the result may require a decision whether the benefit expected to flow from the Visby and SDR amendments at an early date and the advantages of world-wide uniformity on the one hand, outweigh the disadvantages of an early commitment to the adoption at some future date, of the Hamburg Rules, if they should be adopted by a majority of the United States' trading partners.

The Chairman and Vice Chairmen of the COCOG submit this background paper in the hope that it will help all of the MLA's members to consider the subject matter perspective. We should emphasize that this background memorandum is issued on our own personal responsibility, as some aspects of it have not yet been considered by the Committee on Carriage of Goods.

James J. Donovan,
Chairman

John C. Moore,

Dewey R. Villareal, Jr.
Vice Chairmen

April 9, 1985