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van de

Nederlandse Vereniging voor Zee- en Vervoersrecht

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Secretariaat: Prinsengracht 668, 1017 KW Amsterdam, telefoon: 020-6260761, telefax: 020-6205143

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Mededeling

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Met de navolgende begeleidende brief werd door een delegatie van de vereniging de CMI-Questionnaire beantwoord zoals hieronder weergegeven. De vraagstelling is afgedrukt in CMI Newsletter nr. 1-1995.

Dear Sirs,

Please find attached our answers to your questionnaire relating to the liability for the carriage of goods by sea.

We apologize for being so late. Taking this into account we tried not to repeat to much the arguments which already were put forward by other associations.

As you can see, our general line is the promotion of the Hague-Visby regime to the fullest extent. We like to make a note, however, that in the Netherlands one of the interested parties concerned, whilst not disagreeing to the arguments in favour of the Hague-Visby regime, is of the opinion that the Hague-Visby Rules i.a. insufficiently reflect that the contract of carriage by sea is not a mere best endeavours obligation but a result obligation. Therefore, this party, on balance, prefers the Hamburg Rules to the Hague-Visby Rules.

Yours sincerely,

The Netherlands' replies to the CMI-questionnaire relating to the liability for the carriage of goods by sea.

Question 1

The present level of unavoidable proliferation does not raise great concern, at least not yet. A large majority of bill of lading carriage in the world is made under the Hague(-Visby) Rules liability principles either by operation of law or through paramount and jurisdiction clauses in the bills of lading concerned, whilst even further uniformity is achieved through incorporation of such clauses in charterparties, sea waybills and the consignment notes as used in the ferry traffic.

Question 2

As the promotion of uniformity of maritime law is the very basis of the existence of the CMI it is selfevident that the CMI should use its best endeavours to improve the uniformity of the liability rules relating to the carriage of goods by sea as well as the uniformity of their implementation. Also within the area of the regimes 1-5, as referred to in the introduction to the questionnaire, ample scope exists for further uniformity.

Question 3

Certainly not. Straightforward promotion of the Hamburg Rules would decrease the uniformity of maritime law. One of the reasons thereof is the vagueness of several provisions of the Hamburg Rules, in particular of article 5.1. The carrier's liability under the Hamburg Rules is based on the concepts of reasonableness and force majeure, which are subjective by nature. Instead, the Hague-Visby Rules allocate risks as between the parties on the basis of facts and events. In a convention to be ap-

plied worldwide in various systems of national law and in all kinds of different national cultures the Hamburg Rules concepts of reasonableness and force majeure will necessarily lead to much different interpretations. Even within Europe the CMR liability based on similar concepts has led to an enormous casuistry.

We consider the Hamburg Rules as inherently desuniforming.

Question 4

No. The Hamburg Rules, even "improved", are ill-conceived for worldwide uniform application.

Question 5

No, at least not in the form of an additional Protocol. The primary focus of the CMI should be on the promotion of the acceptance of the 1968 and 1979 Protocols by those Hague Rules States which have not already done so.

When considering possible "modernization" of the Hague-Visby Rules we like to make the following caveats:

- (1) The Hague(-Visby) Rules liability regime is primarily based on facts and events, which in view of the required worldwide application of any liability regime in maritime transport, has to be retained.
- (2) An "improved" liability regime will in all probability be mandatory law again. Therefore, it should set minimum rules which should be applied under any circumstances and in any trades.

Mandatory law is meant to protect the economically weak party. Today, however, the bargaining power between the commercial parties in the shipping industry is much more balanced than it was in the past.

Further, one should bear in mind that

ocean shipping today is much more diversified than it was in the beginning of this century when the need for a uniform and mandatory liability regime came up.

This means that the natural boundaries of uniformity of mandatory liability law in maritime transport will be reached sooner than later and that the possible application of many "modernizations" could be left to the parties themselves. As an example, the liability of the carrier for delay is in some trades and in respect of some cargoes almost irrelevant, while in other trades and in respect of other cargoes it might be of paramount importance. Sometimes, in cases of cheap transportation some delay may already be calculated in the freight, while in other cases such as "just-in-time" deliveries parties will agree on an specific arrangement as to the time of arrival of the cargo. Also in respect of other possible modernizations, such as the applicability of the Hague-Visby liability regime to deck-cargo, to carriage under a sea waybill and to a certain period before loading and/or after discharge of the cargo, the commercial parties themselves usually make appropriate arrangements if and when their trade so requires.

It might be that in respect of many modernizations the legislator has no role to play and the CMI only the limited one as referred to in the answer of question 7.

Additionally, after all the Hague-Visby liability is not that much onesided as it is often thought to be. The Mercer report, prepared on request of EU Commission, illustrates that. On page 31 it says that of total claims shippers absorb 18% themselves, insurers end up covering 45% of claims and carriers 37%. Assuming that the 18% absorptions relate to very small claims (the same report indicates on page 30 that 81% of all incidents have a value of less than USD 1000), the remaining balance is by no means onesided. One has to bear in mind that these figures relate to the situation within the EU where the large majority of member states adheres to the Hague-Visby regime plus SDR-Protocol.

Question 6

No. A new convention would enhance the disintegration of uniformity of maritime law. The same danger exists in respect of any new protocol to the Hague

Rules containing modernizations/alterations.

Opening up the present text of the Hague-Visby Rules may initiate a whole plethora of views and wishes, which will have to be compromised with the serious risk that nobody likes the compromise.

Question 7

Primary focus should be on the inducement of the acceptance of the 1968 and 1979 Protocols by the Hague Rules countries and the 1979 Protocol by the Hague-Visby Rules countries. To that effect an action program should be developed, preferably with the assistance of the national associations of the countries which have not yet ratified both the Protocols. Such action program may include direct approaches to governments by the national associations concerned, CMI assistance in the form of organizing seminars, offering legislative assistance, etc.

Additionally, the International Subcommittee should discuss possible modernizations of the Hague-Visby liability regime.

Those adaptations which will appear to be generally acceptable and will not clearly be in conflict with mandatory law should be promoted by the CMI in any other appropriate form (e.g. model provisions of law, recommended contract clauses, etc.) than a new draft Protocol. Uniformity in application should also be enhanced by the CMI and its national associations through seminars, articles and commentaries in legal magazines, etc.

All the above efforts should form part of a coordinated and planned program to be developed and implemented during the next couple of years.

Nieuwe uitgave "Contracten in de Logistiek"

Onlangs is bij de EVO de totaal herziene uitgave "Contracten in de Logistiek" verschenen. In dit boek zijn de volgende negen modelcontracten opgenomen: Engelse en Nederlandse versie Physical Distribution-contract, Vervoercontract (wegvervoer), Afvalstoffenvervoercontract (wegvervoer), Opslagcontract, Arbeidscontract chauffeurs, Leasecontract vervoermiddelen, reparatie- en onderhoudscontract vervoermiddelen, huur (lease)contract intern-transportmiddelen, reparatie- en onderhoudscontract intern-transportmiddelen.

De opgenomen contracten zijn allemaal voorzien van bijlagen en een uitvoerige toelichting. Met deze modellen kunnen mondelinge afspraken op een eenvoudige wijze deugdelijk schriftelijk vastgelegd worden. Daarnaast kunnen de modellen ook als checklist voor bestaande contracten worden gebruikt.

Om een nauwe aansluiting met de praktijk tot stand te brengen is het boek in nauw overleg tot stand gekomen met onder andere physical distributors, vervoerders, leasemaatschappijen en verladingsbedrijven.

Het boek kan beschouwd worden als een totaal nieuwe uitgave ten opzichte van een vorige versie. Suggesties en opmerkingen die wij n.a.v. de eerste druk ontvingen zijn in de nieuwe uitgave verwerkt. Met name het Physical Distribution contract is aangepast en in het Engels vertaald. Voorts is de nieuwste milieuregelgeving in het afvalstoffencontract verwerkt. Bij het arbeidscontract is een uitvoerig arbeidsreglement opgenomen. Tevens is het boek uitgebreid met een model opslagcontract.

De prijs van "Contracten in de Logistiek" (136 pag.) bedraagt f 74,50. EVO-leden betalen f 49,50 (inclusief verzendkosten, exclusief BTW). Geïnteresseerden kunnen het boek bestellen bij de EVO, afdeling klantenservice, Postbus 350, 2700 AJ Zoetermeer (tel. 079-414641).

Mededeling:

De volgende Algemene Ledenvergadering zal te Amsterdam worden gehouden op vrijdag 24 november 1995 om 14.30 uur. Nadere mededelingen volgen.