

1962

"Exemption Clauses Governing Loss or Damage Resulting from the Inherent Defect, Quality or Vice of the Cargo"

Huibert Drion

Recommended Citation

Huibert Drion, *"Exemption Clauses Governing Loss or Damage Resulting from the Inherent Defect, Quality or Vice of the Cargo"*, 28 J. AIR L. & COM. 329 (1962)
<https://scholar.smu.edu/jalc/vol28/iss4/3>

This Essay is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

delivered his celebrated address on "High Altitude Flight and National Sovereignty," we have, appropriately, the article "The International Astronautical Federation and the Use of Space for Peaceful Purposes" by Dr. Antonio Francoz Rigalt. In a related vein, is the contribution from Dr. Victor J. Delascio, of Venezuela, entitled "Space Explorations and Space Law." One might almost hear the forensic voice of Maître André Garnault, of Paris, France, come from the article entitled "Liability of the Gratuitous Air Carrier Under French Law." Dr. Julian Gazdik, close associate of Professor Cooper in IATA, gives us a close analysis of an important problem in "The Conflicts and State Obligations Under the Warsaw Convention, the Hague Protocol and the Guadalajara Convention." Last, but not least, we have an article from Yugoslavia by Dr. Michel Smirnoff on the "Legal Status of Celestial Bodies."

This introduction and these articles constitute offerings made in great esteem and with affection to Professor John Cooper to commemorate a special occasion. It is hoped they will please him.

EXEMPTION CLAUSES GOVERNING LOSS OR DAMAGE RESULTING FROM THE INHERENT DEFECT, QUALITY OR VICE OF THE CARGO

BY HUIBERT DRION†

THE Hague Conference of 1955, which adopted the Protocol to the Warsaw Convention, has added a new paragraph 2 to Article 23 of the Convention. According to Article 23 "any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void." The new paragraph added by The Hague Protocol provides that "paragraph 1 of this Article shall not apply to provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried."

The drafting history of this new provision may be traced back to the (1953) Rio Session of the Legal Committee of ICAO, which preceded The Hague Conference. This history is instructive of some of the "inherent defects" of international conferences on legal matters, and for that reason it deserves to be studied in some detail. One cannot ignore the drafting history when trying to determine the meaning of the somewhat "cabalistic" formula—to borrow a qualification used by one of its supporters—by which the Warsaw Convention was enriched.

At the Rio Conference, the United Kingdom delegate (Wilberforce) proposed that a provision be inserted in the new Convention. It concerned the air carriers' liability as envisaged at that stage of the discussions. The provision read as follows:

Notwithstanding the provisions of Article 17(1) [being a somewhat re-drafted Article 23] or any other provision of this Convention, for the carriage of live animals, perishable goods or fragile articles, the carrier shall be entitled to provide in the agreement to carry that he shall not be liable for the loss, damage or delay of such animals, goods or articles, and such a pro-

† Professor of Civil Law, University of Leiden, Netherlands.

vision shall be a valid defence to any claim in respect thereof, except in cases where the conditions mentioned in Article 15 (7) apply.¹

Various delegates supported the proposal, others opposed it, for various reasons.²

Answering an objection of the Swedish delegate, Mr. Wilberforce suggested that "the Committee should agree, in principle, that the carrier was not to be entitled to exclude such liability as would have attached in any event apart from the nature of the consignment." After further discussion, the matter was referred to a Working Group, which produced an entirely new formula. It proposed that the following proviso should be added to the new Article 23: "provided that this Article shall not apply to provisions governing loss or damage resulting from wastage in bulk or weight or from inherent defect, quality or vice of goods carried, including live animals."

When calling this an entirely new formula, I did so only with reference to the original U. K. proposal. In fact the Working Group text was not new at all, and it was not meant to be so. On the contrary, the Chairman of the Working Group explained that the text had been taken

verbatim from the Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea, which, in turn, reflected language that had been used for a long time in connection with admiralty contracts, with charter bodies [sic] and with policies of insurance.³

As could be expected, the idea of borrowing a legal phrase "well consecrated in international law," proved agreeable to the majority of the Committee, though there was some discussion as to certain terms. However one problem of material interest raised by the new formula received little attention. The question raised by the Netherlands delegate, whether the new provision would permit carriers to exempt themselves from liability for damages resulting from inherent defects, etc., *in case of negligence*, remained unanswered.⁴ This was the more remarkable because the original proposal by the U. K. delegate had clearly allowed the permitted exemption clauses to extend to cases of carriers' negligence by only excluding their validity in case of wilful misconduct.

The text which the Legal Committee at Rio finally adopted was almost the same as the definitive text of The Hague Protocol, with some interchanging of the rather hazy terminology: Instead of speaking of "inherent defect, quality or vice" (Hague Protocol), the Rio text had "special nature, latent defect or inherent vice," a mere *chassez-croisez* of legal obscurities. At The Hague, the question of whether the new paragraph should and does allow the carrier to contract away his liability for negligence in case of damage resulting from inherent defect, quality or vice received considerably more attention. However the discussion did not result in any conclusion.

A Swedish proposal stated that the carrier would be liable, notwithstanding an exemption clause as referred to in the new paragraph, "if it

¹ 1 Rio Session 77 (1953). Article 15 (7) contained a new formula for the willful conduct provision now contained in Article 25 of the convention.

² *Id.* at 133. Following the objection from the French delegate directed against the inclusion of "fragile articles," the U.K. delegate dropped this part of the U.K. proposal (137).

³ *Id.* at 172.

⁴ *Id.* at 278.

is proved that he or his servants or agents have caused or contributed to the loss or damage by negligence."⁵ The Netherlands proposed a somewhat different text which would not impose on the shipper the burden to prove the carrier's *negligence*, but only that of proving that an outside cause had contributed to the damage. It would then be up to the carrier to prove, in accordance with Article 20, that he had taken all necessary measures to avoid the damage: "provided that, notwithstanding any such clause, the carrier shall be liable, subject to the provisions of Article 20, if it is proved that the damage did not solely result from the special nature, latent defect or inherent vice of the cargo."⁶ Under this proposal the shipper could, for example, claim damages on the evidence that the loss resulting from the inherent defect, etc., was caused by an unwarrantable delay in delivery of the goods. It would then be up to the carrier to prove that he should not be held liable for the delay in accordance with Article 20. Under the Swedish proposal, the shipper would have had to prove the carrier's negligence with respect to the delay.

A U. S. proposal was aimed at placing the full burden of proof as to the absence of the carrier's negligence on the carrier. The result was to be obtained simply by inserting the word "solely" or "exclusively" in the Rio text, which then would read "provisions governing loss or damage resulting *solely* from the special nature, etc."⁷ A similar suggestion was made by the German delegate.⁸

When a vote was taken on the now joint Swedish-Netherlands proposal to add a proviso with respect to damages resulting from outside causes, the proposal was defeated 20 to 8. This still did not make it clear whether the Conference intended to allow the carrier to exempt himself from liability for negligences in cases of damages resulting from inherent defect, etc., because the votes against the Swedish-Dutch proviso probably could as well be explained by a desire to allow the carrier such a contractual freedom, as by the idea that the proviso was not necessary for excluding the cases of carrier's negligence from the ambit of the new paragraph. In a last minute attempt to have the Conference at least state its views on the meaning of the adopted text, the Netherlands delegate declared that he understood the new paragraph to permit the carrier also to exclude his liability for negligence in the cases referred to in the Article. Other delegates were opposed to this interpretation. The U. K. delegate then intervened by saying that "he wondered what purpose was served by these declarations." One would think that the courts which in future must make a choice between the various possible explanations of Article 23, paragraph 2, will have no difficulty in answering *that* question.

The failure of the Legal Committee and the Conference as a whole to resolve the question of whether the new paragraph allows a carrier to contract away his liability for negligence is not surprising when viewed

⁵ 1 Hague Conference 108 (1955). See also 2 Hague Conference 177.

⁶ 1 Hague Conference 109 (1955). The proposals of Sweden and the Netherlands were later combined in 1 Hague Conference 157.

⁷ *Id.* at 108.

⁸ *Id.* at 213. There the words "resulting from" are changed into "to the extent that they result from." In his explanation Dr. Riese said that as a result, "the same result as that of the combined proposal of Sweden, Belgium and the Netherlands would be achieved in a more simple manner." It is respectfully submitted that, assuming the German proposal would achieve its desired effect (see the criticism of the French and Mexican delegates at 213), an important difference as to the burden of proof would result. This point was also overlooked by the Mexican delegate at page 211.

in historical context. As noted above, the paragraph was adopted from the Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea which has a long history of disputed interpretation. In a Protocol to that Convention the High Contracting Parties were allowed to establish that in the case of damage resulting from inherent defect, quality or vice, the holder of the bill of lading may prove the personal fault of the carrier or the fault of his servants or agents. Various countries' legislative bodies, following the Brussels Convention, have made it clear that the defense offered by the legal provision on damage resulting from inherent defect, quality or vice does not extend to cases of negligence. In those countries where this has not been done, the question whether the same solution should or should not be accepted is still a matter of controversy.⁹ This, too, should have been a warning against using the Brussels formula without clarification. Curiously, however, most delegates thought that they exercised caution by borrowing from a well known international convention of long standing. Well known indeed, but well known, too, as a source of long standing controversies. To trust blindly the wisdom of the drafters of the Brussels Convention was probably more an exercise of wishful thinking than of caution. But even if the borrowed Brussels formula were non-controversial in its own context, that would not mean that it offers also a clear and sound solution for the Warsaw Convention. In the Brussels Convention the provision forms part of the defenses offered to the carrier as a matter of law. In the Hague Protocol it is an exception to the principle that the carrier cannot by contract exempt himself wholly or partially from the liabilities imposed by the Convention. These are quite different things, but the main difference seems to have escaped the attention of most of the delegates.¹⁰ The new paragraph 2 of Article 23 does not offer a defense to the carrier; it merely removes the legal bar of Article 23 against contractual exemption clauses in so far as these are concerned with loss or damage resulting from inherent defect, quality or vice of the cargo carried. This means that whenever a contract of carriage contains a provision governing loss or damage resulting from inherent defect, quality or vice, the validity of such a provision cannot be established by invoking Article 23. In order that the new paragraph have the same meaning it has in the Brussels Convention, it should be added to Article 20 or perhaps to Article 21. As it is now, Article 23, paragraph 2 is only concerned with the validity of certain contractual exemption clauses, whereas the original provision in the Brussels Convention deals with the legal liability of the carrier. The arguments used in connection with the legal effect of the provision in the Brussels Convention in case of the carrier's negligence, are of doubtful value when applied to the construction of the Hague Protocol.

Suppose the conditions of carriage contained the following clause: "in no event shall the carrier be liable for damage resulting from inherent defect, quality or vice of the cargo carried." The only question to be answered under Article 23, paragraph 2, would be whether this clause

⁹ An extensive and valuable, yet somewhat prejudiced, discussion of this controversy is to be found in the recent book on the sea carrier's liability. Royer, *Hoofdzaken der Vervoerdersaansprakelijkheid in het Zeerecht*, Zwolle, 250 (1959).

¹⁰ A clear example of this confusion is offered by the intervention of the Spanish delegate at 1 Hague 211 (1955).

is a "provision governing damage resulting from inherent defect, quality or vice of the cargo" as referred to in Article 23, paragraph 2. If so—and it seems difficult to deny it—paragraph 1 of Article 23 does not apply to such a clause in the Conditions of Carriage. Assuming for the moment that, as a consequence, the clause must be held valid, the next thing one must do is to determine whether the contract clause should be construed to apply also to cases where negligence on the part of the carrier has contributed to the damage. More than likely this would be the correct interpretation in view of the initial words "in no event."

Should one reason in another manner, by asking first whether the exemption clause is meant also to apply to cases of carriers' negligence? If so, and if such application to cases of negligence were determined then the clause is not a provision as referred to in Article 23, paragraph 2, "governing damage resulting from the inherent defect, etc." This requires an interpretation of the words "loss or damage resulting from," etc. which, to put it mildly, does not impose itself on the basis of an unprejudiced reading. It is evident that—whatever theory of causality one prefers—there always will be other facts or circumstances besides the inherent defect or quality of the goods, will have played an essential part in causing the damage, whether it be the outside temperature or the humidity, air pressure or the movement of the goods, etc. Perhaps it will be argued that damages can only be said to result from the inherent defect, etc. of the goods, if they do not at the same time result from facts or circumstances for which the carrier is liable. Of course, Article 23, paragraph 2 does not say anything about that, but assume for the moment that this is true. What are the facts or circumstances for which the carrier is liable under the Warsaw Convention? The answer is given by Article 18, in which it is said that the carrier shall be liable in the event of the destruction or loss of, or of damage to, any goods, if the occurrence which caused the damage took place during the transportation by air. This does not bring us very far; damage resulting from inherent defect, etc., for which the carrier would, in principle, be liable under the Convention, necessarily implies an occurrence for which the carrier is made liable by Article 18. Thus the newly added paragraph would have no meaning at all. It may be pointed out that the same reasoning could not be followed under the Brussels Convention. There, a number of well defined positive obligations of duty are imposed upon the carrier. The proposition that, whenever the carrier's failure to satisfy these obligations has contributed to the damage, such damage should not be considered to have resulted from the inherent defect, quality or vice of the goods, would not take away all effect of the legal defense offered with respect to such damages. Here again one sees the danger of transplanting a single phrase of one legal text into an entirely different one.

Perhaps one might argue that the occurrences for which the carrier bears liability should not be determined by Article 18 alone. However, this article when read in combination with Article 20, paragraph 1, holds that the carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures. The carrier becomes liable therefore when his failure to take such precautionary measures results in damage to goods. Applying this to the interpretation of Article 23,

paragraph 2, one would get this result: damages should only be considered to result from the inherent defect, quality or vice of the goods, if no failure on the part of the carrier to take the necessary measures to avoid the damage has contributed to the damage caused. Further, a provision in the contract of carriage should only be considered to govern such damage to the extent it would be applied outside such situations.

Again, this would deprive the new paragraph, introduced to meet allegedly urgent needs of civil air transportation, of any effect it could have. In order to prove the validity of the contract provision, the carrier would have to establish first that the damage did not result from any failure on his part to take the necessary measures for its avoidance. But once having done that, he would not need to invoke the contractual exemption clause, for he would already have offered a complete defense under Article 20 of the Convention.

Perhaps, to allow some meaning to the new paragraph, one can argue that it only purports to allow the carrier, by a provision in the contract of carriage, to shift the burden of proof concerning his negligence to the claimant when damage resulted from inherent defects, etc. However, there is nothing in the text to support such a proposition. *If* one assumes that the words "resulting from" imply that there should not be a concomitant cause for which the carrier is liable, it is hard to understand why the carrier would have to prove that the damage resulted from an inherent defect in order to be able to invoke the contract clause. For then the shipper must prove that negligence of the carrier was also a cause of the damage. Such an "interpretation" of the new paragraph is simply a way of saying that one would prefer such a rule. One cannot say that any other interpretation is less valid. There is nothing nonsensical or palpably unjust in allowing the parties to contract to let the extra risks arising from the inherent defect, quality or vice of the goods be borne by the shipper even in case of negligence of the carrier. Nor is a contract unjust which provides that goods requiring special care, because of their nature or inherent defects, to be carried by the carrier without his being liable for a failure in providing the special care required. Whether this is the most desirable solution is a different thing. However as long as the freedom to contract away liability (and the new paragraph purports to restore that freedom for a restricted number of cases) is not considered immoral. One cannot say that taking the new paragraph at its face value would lead to clearly unacceptable results.

Nor does the drafting history lead to a different conclusion. The only impression one obtains from reading the minutes of the Rio Session of the Legal Committee and those of the Hague Conference is that of confusion and of unwillingness to take a clear stand. The original proposal of the new provision, without any doubt, was intended to allow the carrier to contract away liability in case of his negligence. The French delegate was opposed to such almost unlimited freedom to contract out of liability. Further, he pointed to his domestic legislation which only permitted contractual exclusion of liability with respect to faults of the flying personnel or to risks of the air.

A Working Group was then appointed to consider precisely from what types of damage to animals or to perishable goods the carrier should be entitled to protect himself. It was also to consider the Swedish proposal.

Presided over by the U. K. delegate, who had made the original proposal, the Working Group produced the new formula. It failed to indicate the effects intended in case of carrier negligence.¹¹ Afterwards, proposals were made to add a proviso making it clear that, notwithstanding an exemption clause as referred to in the new paragraph, the carrier would be liable if it was proved that he had been negligent or had not taken all necessary measures to avoid the damage. These proposals were defeated. It is true, that various delegates had said that they thought the addition superfluous. But others expressed a different opinion. An attempt to get a clear statement of intention failed; the question was "wilfully" left for the courts to interpret. This means that the courts, in the absence of any guidance to be obtained from the drafting history, can only look to the text of the paragraph within the context of the Convention. The fact that the wording of the new paragraph was taken from the Brussels Convention does not mean that it should be construed in the same way as in the Brussels Convention. It plays a different part in the Warsaw Convention from the part it plays in the Brussels Convention. Since the arguments used in attaching one or the other construction to the provision in the Brussels Convention have no bearing on the interpretation of the Warsaw Convention, it is also different. The conclusion must be that, as a consequence of the added paragraph, Article 23 does not apply to exemption clauses "governing damages resulting from inherent defect, quality or vice of the cargo," irrespective of whether negligence on the part of the carrier has been a concomitant cause of the damage.

Does this mean that the new paragraph has established the validity of this limited group of exemption clauses. It certainly does not say so. What it does say is only that paragraph 1 of Article 23 shall not apply to these clauses. So their alleged invalidity cannot be based on that provision of the Convention. But whether it could be based on principles of applicable national law is a different question. Since the Convention itself does not contain any other general provision concerning the validity of exemption clauses, *e.g.*, a provision which would exclude their application in case of wilful misconduct (Article 25 as amended by the Hague Protocol only deals with the applicability of the limits of liability specified in Article 22), one must assume that the validity of contractual provisions that are not forbidden by Article 23 may be governed by the applicable national law. True, the unification of the law—the aim of the Warsaw Convention—is somewhat weakened by this interpretation of Article 23, paragraph 2, but there are other fields which the makers of the Convention have left to the national laws. A discussion of what will be the applicable law in the various national legal systems as to the validity of exemption clauses with respect to the carriage of goods would go far beyond the scope of this essay.¹²

So far, little has been said about the exact meaning of the words "inherent defect, quality or vice of the cargo carried." The French and Spanish texts have "nature ou vice propre des marchandises transportées," "la naturaleza o vicio propio de las mercancías transportadas." As stated above, the words were taken from the Brussels Convention, that is to

¹¹ 1 Rio Session 138 (1953).

¹² See a discussion in Drion, *Limitation of Liabilities in International Air Law*, §§ 230-49 (1954).

say, the English words were taken from the English text (Hague Rules) of which the Brussels Convention was a translation. Curiously however, the French text ("nature ou vice propre") differs from the authentic French text of the Brussels Convention, which has "vice caché, nature spéciale ou vice propre." The simplified French and Spanish texts were partly based on the thought that "a vice caché" is always a "vice propre" so that it was not necessary to mention it separately. It was reasoned that, since it was difficult to say goods such as livestock and perishables have a more "special" nature than other goods, the adjective "special" should be eliminated. The result is that, in the language of the Brussels Convention (French),¹³ the terminology of the Hague Protocol is somewhat different from the Brussels text. According to the final clauses of the Hague Protocol the text in the French language shall prevail in the case of any inconsistency ("en cas de divergence") among the three texts. This does not mean, however, that the interpretation of Article 4, paragraph 2, subparagraph m of the Brussels Convention could be of no significance to the interpretation of Article 23, paragraph 2 of the Warsaw Convention. Indeed the phrasing of the latter provision was clearly and consciously inspired by the terminology of the Brussels Convention, on the assumption that after thirty years the interpretation of that Convention would have been sufficiently established by the courts and legal scholars.

It is generally accepted with respect to Article 4, paragraph 2, subparagraph m of the Brussels Convention that, in order to determine whether an inherent defect, quality or vice of the goods has caused or contributed to the damage, it is necessary to establish the degree of care required of the carrier, on the basis of Article 3 of the Convention. Only such damage which would have occurred whether or not the carrier gave all reasonable care required in carrying this kind of goods, may be said to have resulted from the quality or inherent defects of the goods. It is contingent on the assumption that the damage would not have occurred if the goods had been without such quality or inherent defect. Whether the "quality" or an "inherent defect" played a relevant part in causing the damage largely depends on the amount of care demanded from the carrier in the transportation of this kind of goods. Article 3 of the Brussels Convention contains a lengthy description of the care required from the carrier; the Warsaw Convention does not contain such a provision. Because of this and because the new Warsaw paragraph only purports to offer the carrier the chance to limit his liability, it becomes necessary to follow a somewhat different line of thought.

The new provision was introduced in view of the extra risks involved in carrying cargo such as perishables or livestock. Whenever transportation of certain goods, because of their quality, inherent defects or vice, requires special care from the carrier in order that the goods may safely arrive at their destination, Article 23 does not forbid the carrier from contracting away his liability for failing to provide the special care required. It could be said that the special nature of the goods is again

¹³ According to the Minutes at 213, the U.K. delegate would have "recalled that it was the English text of the Brussels Protocol [sic] which was authentic." It seems improbable that this has actually been said, as the Brussels Convention has only been made up in one language—French. Probably it was only pointed out that the original text on which the Brussels Convention was based (the "Hague Rules" of 1921) was in English.

emphasized, although the word "special" was intentionally removed from the text. Actually, there *must* be some deviation from what is normal as to goods carried by air. If not, the door is opened to any exemption clause for the carriage of any goods, since the quality or nature of the goods is always an essential element in determining the kind of damages which the goods may suffer. If a shipment has been handled roughly and arrives in pieces, it is because of the breakable nature of the shipment. Had it been a shipment of gold, there would be no damage. The quality or inherent defect can only be said to have contributed to the damage, if normal cargo, not requiring special care, would not have suffered damage.

If one accepts this interpretation, one gets the following results. If a shipment arrives in damaged condition and the Conditions of Carriage contained a provision negating any liability whatsoever for damage resulting from inherent defect, quality or vice, the carrier can plead that he had taken all necessary measurements to avoid the damage (Article 20). He can also argue that the shipment required special care in order to arrive in good condition and that the damage was a consequence of some failure with respect to that special care. His latter plea will be accompanied by a claim that such comes within the ambit of the exemption clause permitted by paragraph 2 of Article 23.

In many cases the kind of damage for which compensation is claimed will make a *prima facie* case for applicability of the exemption clause. That will be particularly so with the carriage of livestock or perishables, the two categories of goods for which the provision was especially intended. (At a certain stage of the discussion the clause was limited to these two categories.)

The burden of proof as to the exemption clause being applicable to certain damage is on the carrier. Could the contractual provision be phrased in such a way as to shift the burden of proof to the party claiming damages? It is believed that the new paragraph 2 does not allow that. The general rule is that exemption clauses are invalid. The carrier who invokes an exemption clause must prove that it falls within the exception of the second paragraph.

It would be foolish to say that the interpretation here suggested is the only one which can be defended reasonably. Already at the Hague Conference different interpretations have been offered. The addition of the new paragraph to Article 23 introduces a source of litigation, without offering any sure protection to the carrier. The drafters of the new provision had hoped to solve all problems by borrowing their formula from an existing Convention, a kind of legal escapism which international conferences occasionally indulge in. For a number of delegates the formula was attractive because of its brevity. Verbosity certainly is a weakness in a legal text, a weakness most keenly felt perhaps by jurists from Latin tradition. But that does not mean that a short text is necessarily a sound one. Ironically, in this case the text which was preferred for its shortness was taken from that typical—and certainly not the most admirable—example of Anglo-Saxon draftmanship, the Brussels Convention on Bills of Lading. The analogous provisions in the continental conventions on the carriage of goods by railroad (the Berne Convention, usually called the C.I.M.) and on the carriage of goods by road (the

Geneva Convention of 1956, abbreviated as C.M.R.) are more lengthy, though more explicit.¹⁴ They were drafted by continental lawyers in the continental legal tradition. If the new paragraph *had* to be taken from an existing convention, it might have been better to use the old Berne Convention on carriage by railroad as a model. It had already served as such when the provisions on the carriage of goods (especially those on the traffic documents) were drafted at the original Warsaw Convention.

In all fairness to the drafters of the Brussels Convention, it should be pointed out that on this particular point that Convention was better than its partial imitation in The Hague Protocol. This was so not only because the Hague text was based on a different principle (validity of certain exemption clauses) from that of the Brussels formula (legal defense), but also because not all of the relevant provisions of the Brussels Convention have been incorporated into the Hague Protocol. Thus, the Brussels Convention contains a definition of "goods," by virtue of which "live animals" are excluded from the application of the Convention (Article 1, subsection c). "Livestock" being one of the categories of goods for which the new paragraph to Article 23 was thought necessary, this deviation from the Brussels Convention is especially striking. Moreover, Article VI of that Convention gives the carrier full freedom to contract away all liability with respect to shipments other than "ordinary commercial shipments made in the ordinary course of trade . . . , where

¹⁴ The Berne Convention (C.I.M.) contains the following provisions on this subject (Art. 28):

"Le Chemin de fer n'est pas responsable des dommages qui résultent d'une ou plusieurs des causes ci-après: [. . .]

d. danger particulier, soit de perte totale ou partielle, soit d'avarie, notamment par bris, rouille, détérioration intérieure et spontanée, coulage extraordinaire, dessiccation, déperdition, auxquelles certaines marchandises sont exposées par des causes inhérentes à leur nature; [. . .]

f. danger particulier que le transport entraîne pour les animaux vivants; etc. [see also g.]

§ 2. Lorsque, eu égard aux circonstances de fait, un dommage a pu résulter d'une ou plusieurs de ces causes, il y a présomption qu'il en résulte, à moins que l'ayant droit n'ait fait la preuve qu'il n'en résulte pas."

The Geneva Convention (C.M.R.) contains the following relevant provisions:

"Art. 17:

4. Compte tenu de l'article 18, paragraphes 2 à 5, le transporteur est déchargé de sa responsabilité lorsque la perte ou l'avarie résulte des risques particuliers inhérents à l'un des faits suivants ou à plusieurs d'entre eux: [. . .]

d. Nature de certaines marchandises exposées, par des causes inhérentes à cette nature même, soit à perte totale ou partielle, soit à avarie, notamment par bris, rouille, détérioration interne et spontanée, dessiccation, coulage, déchet normal ou action de la vermine et des rongeurs; [. . .]

f. Transport d'animaux vivants.

5. Si, en vertu du présent article, le transporteur ne répond pas de certains des facteurs qui ont causé le dommage, sa responsabilité n'est engagée que dans la proportion où les facteurs dont il répond en vertu du présent article ont contribué au dommage.

"Art. 18:

2. [similar to Art. 28, para. 2, of the Berne Convention]

4. Si le transport est effectué au moyen d'un véhicule aménagé en vue de soustraire les marchandises à l'influence de la chaleur, du froid, des variations de température ou de l'humidité de l'air, le transporteur ne peut invoquer le bénéfice de l'article 17, paragraphe 4,d, que s'il fournit la preuve que toutes les mesures lui incombant, compte tenu des circonstances, ont été prises en ce qui concerne le choix, l'entretien et l'emploi de ces aménagements et qu'il s'est conformé aux instructions spéciales qui ont pu lui être données.

5. Le transporteur ne peut invoquer le bénéfice de l'article 17, paragraphe 4,f, que s'il fournit la preuve que toutes les mesures lui incombant normalement, compte tenu des circonstances, ont été prises et qu'il s'est conformé aux instructions spéciales qui ont pu lui être données."