

**HISTORICAL AND CURRENT JURIDICAL ASPECTS OF
COOPERATION BETWEEN INTERNATIONAL, SCHEDULED
LINER SHIPPING ORGANISATIONS:**

A SOUTH AFRICAN PERSPECTIVE

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“ Research dissertation presented for the approval of the Senate in fulfillment of part of the requirements for the degree of Master in Laws in approved courses and a minor dissertation. The other part of the requirement for this degree was the completion of a programme of courses”

Cape Town 1998

1999-02-11

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CHAPTER I

INTRODUCTION

Shipping companies involved in the scheduled liner shipping trade are essentially concerned with providing a regular ocean transport service to shippers. This service consists of a fixed sailing pattern on a publicised schedule operating on a specific geographic trade route. It is essentially a regular service with voyages tendered to take place on certain dates or at fixed intervals.

Each international trade route has its own fascinating history of conflict, competition and cooperation between liner shipping companies in what has historically been largely a free market and trade. Britain and some of the traditional maritime powers such as the Scandinavian countries, the Netherlands and Greece have long held an aversion to State intervention¹. With the introduction of steam at the turn of the century, and the resultant over supply of vessels and vessel space on the major trade routes, the market became highly competitive and the going tough for ship owners. The first manifestation of cooperation between liner shipping companies formed to combat competition was what became termed a "liner conference" on the British East India Trade in the mid 1850s. Liner conferences subsequently emerged as a phenomenon on all of the major trade routes, the main reason for their formation being to combat competition by joining forces, fixing freight rates and employing a variety of obstructive techniques to squeeze out non-conference members from the specific trade route the relevant conference served. The main obstructive methods adopted by conferences have been: rate wars, certain inducements to shippers to remain loyal to the conference, conciliation machinery, and action against outsiders.²

¹ A.Z. Davies *Belief in the Sea*; provides a highly detailed account of legislation in the shipping industry from a British point of view.

² See B.M. Deakin in collaboration with T. Seward; *Shipping Conferences. A study of their*

Early liner conferences were substantially loose agreements between the shipping companies which involved a messy, relatively unstructured arrangement in respect of freight and working capital. There was little or no direct capital integration. An administration was generally established for the purpose of fixing freight rates and sailing schedules to be applied uniformly among the conference member lines.

Liner Conferences defined:

Liner conferences were characterised in a recent publication by the United Kingdom Department of Transport³ as follows:

“ A standing arrangement under which operators of liner services on a particular route or routes act together to agree a common structure of freight rates to be implemented by all members of the conference. In addition to this fixing of freight rates to be charged for services, a conference agreement may contain other provisions such as loyalty rebates to shippers, allocation of capacity shares, revenue pooling and the harmonisation of schedules. In most trades access to the conference is normally subject to the agreement of existing members ('closed' conferences)⁴; in trades with the United States, however, membership must by law be open to any shipping line in the trade ('open' conferences). Lines which do not belong to the conference are variously termed as non-conference operators, independents or 'outsiders'. It is possible for a line to operate within the conference in one trade and as an independent in another.”

The essential characteristics of liner conferences are that they are shipping cartels⁵ associating with main aims: 1) the regulation of traffic on a designated trade route

Origins Development and Economic Practices at p 63.

³ Department of Transport. Liner shipping and Freight Rates. A United Kingdom- Northern Europe Comparison at p 106.

⁴ See Chapter 4 p.. for a discussion on the significance of the distinction between open and closed conferences.

⁵ Lipsey Steiner Purvis Courant. Economics, Ninth Edition define a cartel as “Firms which form an agreement aimed at maximising profits and to eliminate competition among themselves.”

with the creation, management and administration of a fixed freight tariff, binding on all the member lines of the conference; and 2) the resistance of competition from non conference members, mainly through the ability to provide a more efficient service along with loyalty incentive systems to shippers, due to the padding provided by the significant resources backing the conference. Conferences were able to endure losses over a period of time, charging cheaper freight rates and providing other incentives to shippers, until the market became intolerable for outsiders.

Scheduled transport in international trade requires massive capital expenditure and highly rationalised operations. In many cases speed and reliability appear to be of greater concern to the shipper than freight charges.

Liner conferences in the past have been criticised as being monopolistic structures resulting in higher freight rates, and having a negative influence on the importing or exporting country's balance of payments; specifically where the conference members are not nationals of the relevant country. The country is therefore denied a source of revenue. The United Nations Committee for Trade and Development (UNCTAD), held a conference of plenipotentiaries on a code of conduct for liner conferences which was signed by some 90 countries in December, 1973. The code was adopted but, due to changes in the international shipping market and later political influences, the code never acquired real teeth. Of major significance of the code however is the attempt, to secure for developing countries and outsiders to the conference, a right to participate in the shipping services trade by pegging liner activities to an artificial 40:40:20 ratio, whereby 40% of the trade could be held by the liner conference, 40% was to be allocated to "National Shipping Lines"⁶ and the

⁶ Chapter 1 of The UNCTAD code of conduct for Liner Conferences defines a National Shipping line as " a vessel-operating carrier which has its head office of management and its effective control in that country and is recognised as such by an appropriate authority of that country or under the law of that country"

remaining 20% was to be reserved for outsiders to the conference serving a trade route.⁷

There is a great deal of literature propounded by economists canvassing the issue as to whether liner conferences are in fact monopolistic in nature and whether there should be government or international regulation of conference activities.⁸

Sir Donald Anderson, the Chairman of P&O in 1958 stated the following in defence of the liner conference system:

“Shippers want to be able to buy or sell large or small quantities at short notice with knowledge that shipping space will be available. They want their goods to be carried in large or in small lots, regularly or irregularly, in season or out of season, at ordinary temperatures, or chilled, frozen or deep frozen. Their shipment may be dry or liquid, dirty or clean, safe or dangerous, live or dead, animal, vegetable or mineral. The essence of the liner conference system is that it constitutes a real service, as essential to trade and commerce on the route it serves as rail and bus services combined to distant and isolated communities”.⁹

Other than the efforts of UNCTAD with The Code of Conduct for Liner Conferences, there are a number of other organisations and governmental bodies such as the European Community, The Federal Maritime Commission, the Organisation of Economic Cooperation and Development and a variety of other international bodies which enforce legislation or multilateral agreements in attempts to regulate and

⁷ See Chapter 4 below for a more detailed discussion of the UNCTAD Code of Conduct for Liner Conferences.

⁸ See; B.M. Deakin Shipping Conferences. A Study of their Origins Development and Economic Practices, also Conference Report International Symposium on Liner Shipping. Bremen 1998; Containers, Conferences and Competition, Economist Intelligence Unit. Roy Pearson Container Ships and Shipping Lines; Sletmo and Williams Liner Conferences in the Container age, U.S. Policy at Sea.

⁹ Roy Pearson. Container Ships and Shipping p21

harmonise the activities of cartels and other associations of shipping companies in the liner shipping trade.¹⁰

The past two centuries have been characterised by a great deal of technological advancement which has had considerable impact on the efficiency of shipping between countries as well as on ship operator's strategy, and trade in the global arena. In order to achieve superior efficiency, harness available technology and become more competitive, shipping companies on the various trade routes have tended to progress toward more structured capital and resource combination and integration.

In order to achieve this resource integration, more complex juridical relationships and structures have evolved between liner shipping companies in the nature and form of multinational associations, ranging from conferences, shipping pools, restructuring or stabilisation agreements, vessel sharing arrangements, partnerisation, to joint ventures, consortiums and mergers. These multinational associations have elements of partnership agreements and depending on the degree of integration can, in some instances be classified as multinational companies. The liner shipping industry today is in turmoil with three major factors facing the industry being: the growth of strategic alliances, the introduction of massive container ships into the main box trade and the impact of mega carriers on rates paid by shippers.

The modern trend seems to be toward mergers, i.e. comprehensive capital integration by shipping companies; not only on a regional /intercontinental basis but on a global scale. The two major examples of capital and resource integration on a global scale are the formation of the "global alliance", consisting of Nedlloyd (which has effectively merged with P&O Containers), Mitsui, OSK Lines, American

¹⁰Chapter 4 of this dissertation deals with some of the international, regional and governmental organisations, canvassing their approach to liner conferences and some of the attempts to regulate conferences and liner shipping activity.

President Lines and Orient Overseas Container Line and the recently formed "grand alliance" between Nippon Yusen Kaisha, Neptune Orient and Hapag lines. These alliances have integrated resources to provide a service which is scheduled and synchronised for global operational scales.

Chapter 2 of this dissertation concentrates on the history and current position of cooperation between the various shipping lines involved in the international trade routes connected to South Africa. The birth and demise of the conference system in the South African trade is rehearsed.

In chapter 3, the various legal structures employed in creating the complex juridical machinery orchestrating a modern multinational shipping consortium are analysed, focusing on internal dispute implications as well as aspects of external contractual as well as delictual liability and the consequent insurance implications of the various participant juristic personae and organisation as a whole.

Chapter 4 provides a broad overview of some of the international organisations and governmental bodies intervening in the liner shipping industry which have sought to regulate and control the liner shipping trade on an international or regional level.

Chapter 2

THE HISTORY AND CURRENT POSITION OF LINER CONFERENCES IN SOUTH AFRICA¹¹

The history of conference activity in South African trade extends over a period of some 116 years. The dominant role historically has been played by the South Africa/Europe Conference, due to South Africa's trade links with the United Kingdom and Europe. The activities on this trade route have had the greatest impact on

¹¹David Sagie's *The Role of Liner Conferences in South African Shipping* provides a lucid account of the development and history of Liner Conferences in South Africa, a work to which this author is greatly indebted. See also Bower 1983, *A century of Service 1883-1983*.

shipping in the South African environment. This historical overview thus concentrates on the activities of this conference and its relationship with the government. Liner shipping is divided, for analysis purposes, into four distinct eras :

[2.1] Era 1 - 1883 The Formation of the First Agreement between Union and Castle Lines to World War II and the disbandment of the Conferences

[2.2] Era 2 -Post World War II to 1977, when the container revolution took place

[2.3] Era 3 - The birth of the container era to the fall of the "apartheid" regime

[2.4] Era 4 - The "post apartheid" era and a look at the course which shipping is navigating in contemporary South African trade, with reference to current inter-liner relationships as well as government/ liner relationships.

2.1 1883 - World War II

The first manifestation of cooperation between shipping companies on the South African trade routes was the formation of an agreement between Union Castle and Clan Lines in 1883. This agreement was essentially undertaken to resist the emergence of other liner companies into the trade and to ensure the award of the lucrative and much coveted British Mail contract.

1886 saw the introduction of the first deferred rebate by the Union Castle and Clan Line cartel designed to encourage use by shippers of the cartel and to discourage use of the Cape and Natal Merchant's Line which had recently entered into the trade.

In 1892 British Colonial Line joined the cartel which was now termed a conference. 1893 saw the first conference agreement on the South Africa/North America trade.

1897 ushered in the formation of the South African Mercantile Association which was equivalent to and a predecessor of the modern "Shippers' Council"¹². This body was formed to safeguard the interests of shippers, signifying that the future of liner shipping activity was to be dominated by tension between the conferences on the one hand and the Shippers Council on the other. The impact of the respective bargaining powers of the conferences and the government fluctuated over the years.

1904 saw the admittance of the Houston Line to the South Africa/ Europe Conference following a cut throat rate war. Six months later the British India Steamship Line was admitted as a member. Two years later the first attempt was made to legislate against rebates which failed due to British government opposition. The Royal Shipping Commission on shipping rings¹³ accepted that the conference system was necessary if regular service and stable freight rates were to be maintained. Deferred rebates were thus accepted in principle and regulatory governmental legislation and intervention opposed.

The remainder of this period up to World War II was witness to a series of trade booms and subsequent depressions. The resultant of the over capacity and over supply of vessels, caused the conferences and shipping companies to experience a significant reduction of their bargaining power vis. a vis. shippers.

From 1921 onwards there was a demonstrative increase in the activities of European liner companies notably; German, Dutch and Italian lines, which began to take over from the previously dominant British liner companies.

¹²The Shippers council was formally established by legislation with the promulgation of the 'Shipping Board Act 53 of 1926'.

¹³A commission of the British Government in 1900, commissioned to investigate the efficiency and necessity of liner conferences and other shipping cartels.

The British mail contract brought with it priority berthing, financial reward and direct access to government policy and was therefore vigorously sought after by shipping companies. Competition revolved centrally around securing this contract from the government in this era. With the advent of World War II, the conferences were forced to disband and the vessels were commissioned for national service.

2.2 The era from post World War II to the advent of containerisation

This era was characterised by conflict between the government and the conference as to the determination and fixing of freight rates. The relationship between government and conferences was delineated and defined by the "Ocean Freight Agreement" (OFA). The Ocean Freight Agreement was a contractual relationship between the conference and the government. The Government was represented by the Shipping Council, established in terms of the Shipping Board Act 20 of 1926 and the Perishable Produce Export Control Board established under the provisions of the Perishable Products Export Control Act 53 of 1926. The Perishable Products Export Control Board represented the industries and organisations engaged in the export of perishable products. The powers of this Board were increased through the years, obliging all exporters to arrange shipping through the Board. The Shipping Board represented Shippers of other exports. The Ocean Freight Agreement guaranteed low freight rates for South African exports and imports in exchange for government support at predetermined freight rates which would ensure an agreed capital return to conference member lines. Ocean Freight Agreements were entered into for certain periods of time with an undertaking to negotiate further agreements on expiry. The new agreement for this era was signed on 1 January 1947.

The National Party took power in 1948 and from the outset, adopted an unreservedly clear policy on nationalisation, giving greater powers to both the Shipping Council and the Perishable Produce Export Control Board in order to further entrench regulation of South African exports through these Boards.

The basic philosophy was that the South African government should have full control over South African cargo. The conflict that developed was in essence that

the South African government threatened with restrictive legislation while the Conference demanded freedom to determine its freight rates and structures. The 1955 Ocean Freight Agreement, signed on August 15 1955, provided a formula for fixing freight rates which conferred on the government almost complete control over freight rates and capital return, indicating a decline in whatever monopoly power the conference had ever enjoyed.

A further factor which influenced the activities of the conferences was the founding of Safmarine in 1946 which in essence evolved into a "national shipping line". No conference could ignore the existence of Safmarine and were, through strong national influence, obliged to admit Safmarine as a member line.

2.3 The introduction of containerisation

The early 1970s saw increased competition from outsider liner companies. The South Africa Europe conference was forced to investigate a total change in its carrying system. In 1973 Enterprise Container Line and Mediterranean Shipping Company entered the South Africa Europe trade, introducing vessels with a combination of break bulk and bulk containers on deck into the trade. The conference was spurred by this competition to take a crucial, strategic decision to invest in containerisation on a large scale.

The late 1960's, early 70's also saw increased port activities and cargo flows due to the closure of the Suez Canal and the 1967 Arab six day war. With containerisation came a larger rationalisation of the conferences activity. In 1976 the South Africa Europe Container Service (SAECS) was introduced as the first multinational shipping consortium serving the South African trade.

At the time SAECS was formed, there was 22 members of the South Africa/ Europe liner conference while there were 10 participants¹⁴ in the SAECS consortium. Liner companies cooperate within the SAECS consortium agreement by the provision of a core fleet of vessels providing a scheduled service to be run by a central executive and management body in which the participant liner companies have representation.¹⁵ It is interesting to note that the introduction of SAECS coincided with pressure from the developing nations and the publication of the UNCTAD's Code of Conduct¹⁶, which purported to obligate conferences to facilitate "National Shipping Lines" to acquire a 40% share in the shipping trade of goods shipped from the nation on the relevant route [Safmarine was assigned a 40% trade share in the consortium, which approximate trade share Safmarine still holds in SAECS].

The conference made a large capital contribution by modernising their vessels, converting to container vessels. The government pumped massive capital expenditure into the shipping industry by providing containerisation facilities to South African ports. The 1977 signing of the Ocean Freight Agreement, due to this large investment by the conference and contribution towards South African port facilities, ensured the conferences a significantly improved capital return of 12.5% in the determined freight rates. This Ocean Freight Agreement was operative from the 1st of January 1977 and is annexed for historical interest, as Appendix #1.

The Government at this time continued to maintain control over freight rates and to a large extent protected South African exports. Containerisation had a major impact on liner shipping operations and brought with it a change in the legal carrying liability of the carrier and a number of novel logistical problems.

¹⁴The founding members of SAECS were; Compagnie Maritime des Chargeurs Reunis (CMCR), CMB, Compagnie Generale Maritime (CGM), Deutsche Afrika Linien (DAL), Lloyd Triestino, Nedlloyd, Safmarine, British & Commonwealth, Ellerman Harrison Container Lines (EHCL) and Overseas Container Lines Ltd. (OCL)

¹⁵See chapter 3 for an analysis of legal structures of multinational shipping consortiums.

¹⁶See Chapter 4.

Containerisation resulted in the introduction of the "Through Bill of Lading" which is a Bill of Lading evidencing the carriage of goods from the shipper's premises to those of the ultimate consignee and specifies precisely the terms and conditions of carriage. This called for considerable increase in the level of cooperation and integration between liner operators in the nature of pooled resources, centralised marketing mechanisms, equipment control and integrated operational planning. The legal structures constituting cooperation evolved from loose agreements to highly sophisticated, structured juridical machinery.

The last Ocean Freight Agreement between the Government and the conference was signed in 1992, operative till 31 December 1996 and is attached as appendix #2. A separate agreement was entered into with the Perishable Products Export Control Board which is recorded as being operative until 31 December 2001 and is attached as appendix #3. At the time of signing these agreements, it was the government of the day's intention to gradually phase out protectionist and interventionist policy. The deregulation of perishable product exports was to be more gradual than other exports.

The conference system made a tremendous contribution to the development of South African trade during the time of political isolation in the era of "apartheid". It was one of few truly international forums in nature and assisted South Africa to continue trading during trade sanctions.

This period also saw a gradual proliferation of outside, non-conference activity and competition, resulting in the diminishment of the market share of the conference service over the years.

2.4 The modern era

The present government no longer interferes to the same extent in the liner shipping services industry. The Perishable Products Exports Control Board has been largely deregulated, at a faster rate than originally anticipated at the signing of the 1992

OFA. Exports need no longer be negotiated through this body and shippers are free to export through any representative body and elect any line they wish.

Prior to the National Party relinquishing power, the South Africa Europe Conference held approximately 80% of South African trade. This trade share has diminished significantly and with the Mediterranean Shipping Company making notable inroads into the Conference's trade share; the Conference has been forced to drop the fixed tariff system. The conference has instead adopted a more flexible approach to the freight rates charged by members in order to facilitate negotiation of freight rates with shippers.

The creation of a fixed tariff requires large investment of both time and resources, individual commodities are evaluated and formulas created to cater for fluctuating currency and bunker prices¹⁷. The once complicated and intricate bureaucracy of the European Conference Secretariat which is responsible for the determination of freight charges, has now become a mere guideline for the members of the conference to follow. The 1988 conference constitution, which contains certain rights and duties for conference members is annexed as Appendix # 4.

A distinguishing feature of the conference was the establishment of a fixed tariff which conference members were bound to charge shippers. Since the conference no longer enjoys government protection, a higher degree of flexibility has had to be adopted. The Conference Secretariat at its stage of greatest power, was an intricate bureaucracy with a relatively grand office in London. Currently there is only a small office in London which publishes this tariff structure as a mere guideline for members of the Conference.

¹⁷Mathematical formulas are put in place known as Currency Adjustment Factors (CAF) and Bunker Adjustment Factors (BAF). The lines were bound to these formulas within the conference constitution.

A greater deal of resource integration and capital pooling of the members within the South Africa Europe Conference has emerged as a trend. SAECS is still very much alive and taking on new significance. Safmarine and Deutsche Afrika Linen have formed a joint venture within SAECS, known as SAFDAL. SAFDAL is to be managed from Cape Town and Hamburg with its head office established in Cape Town. P&O Nedlloyd have merged within the SAECS consortium to form P&O/Nedlloyd. The parties constituting SAECS are currently: Safmarine, Deutsche Afrika Linen, P&O/Nedlloyd, CMB- Transport nv, Ellerman Harrison Container Line Limited (EHCL) and Lloyd Triestino di Navigazione SpA (LT).

The legal structures of the SAECS consortium include a company founded in London, to enter as a juristic person into certain employment, lease and other necessary contracts. A central executive and management body has been created by agreement between the lines. The executive body and management bodies have no separate juridical personality, instead the lines party to the consortium delegate authority for the generation and implementation of specified operational and strategic tasks. Each member line has a "trade share" in the consortium expressed as a percentage, which also reflects that lines' voting rights in the central body. Provision is made for a core fleet of vessels, bound to a fixed schedule and supplied by specific lines party to the SAECS agreement, to which the other lines are allocated space by means of a cross charter party.¹⁸ Each line, party to the SAECS agreement enters into its own Bill of Lading with their shipper client.

The SAECS consortium is divided into two services which operate on two different geographical trade routes. The "UK/NWC" service includes ports in Norway, Sweden, Lithuania, Finland, Estonia, Latvia, Poland, Baltic Ports of Russia, Denmark and Germany, all North Sea ports in Germany, Netherlands and Belgium, all Atlantic and channel ports of France, all ports in Spain north of the northern border of Portugal, all ports in the United Kingdom of Great Britain, Northern Ireland

¹⁸ See Chapter 3 for clarification and discussion of these concepts.

and Eire. The “med” service services ports in Portugal, all Spanish Ports south of the southern border of Portugal, Gibraltar and all European Mediterranean ports. For each service, a financial pool is created in which certain expenses and revenue are pooled and utilised and distributed by the Management office under the delegated authority of the executive board. A method of implementation of the service has evolved known as the “hub and spoke” concept. Central ports such as Durban in South Africa and Las Palmas (in the Canary Islands, South of Portugal) or Madeira are served by the larger, core fleet, container carrying vessels. The containers are then distributed by smaller vessels to the European ports from the Islands. The “hub and spoke” method allows a far quicker turnaround time, resulting in a more efficient service.

The South Africa/ Far East conference (Safari) has taken a similar route into obscurity, with the proliferation of major competitors on the route, being majority Japanese and Taiwanese Shipping organisations. This trade route is rapidly changing with the negotiation of trade agreements with Far Eastern countries.

Due to the role of the Federal Maritime Commission and the so called “open conference” system enforced in the United States of America,¹⁹ the South Africa/ North American conference remains in existence. This conference is an “unpooled” conference, the two major participating lines being Safmarine and Lykes line of Houston Texas, operated with combination containers, bulk and break bulk cargoes simultaneously.

There is not, at present, a coherent government policy on shipping in South Africa. A number of commentaries have been published by organisations such as the General Transport Union which encourages ratification of the UN Code of Conduct on Liner Conferences²⁰ and the formal entrenchment of a national line due to what

¹⁹ See Chapter 4 for a discussion of this system.

²⁰ Transport and General Workers Union 1997 publication; Redistribution and Democratisation of Ownership and control. p 27 “ There is no free or undistorted market in

would seem to be a fundamental distrust in a free-market system. There are no certain answers to the question of exactly where government will now head with shipping policy in South Africa ²¹.

The Ship Registration Act 58 of 1998 has recently been promulgated, creating a shipping register which is designed to encourage, and renders it advisable, for liner shipping companies wishing to compete on South African trade routes, to register their ships on the South African register in order to encourage government contracts, support and investment and to facilitate the finance of vessels. Chapter 5 of the new Ship Registration Act, aims to confer limited real rights on the mortgagor of a vessel registered on the new ship register. Mortgages can be recorded against the ship's register, which affords the financier real security and preferent claims by virtue of the limited real right recorded against the registered vessel. The provisions of this new Act are aimed at encouraging financial services to invest in the South African shipping trade.

The Competition Act²² was recently Gazetted²³ creating the Competition Commission²⁴, a body with considerable power in the determination of what constitutes undesirable and restrictive commercial conduct. This Act redefines the application of competition law in South Africa. The Competition Commission is afforded certain powers, to control and prevent restrictive practices performed by dominant business organisations. The Competition Commission is in its fledgling stages and it is premature to predict what impact it will have on liner companies cooperating and competing on South African Trade Routes. What is clear however, is the possibility that the new Competition Commission may be employed as arsenal to intervene in, and control the activities of dominant liner shipping organisations.

transport- by definition transport involves a relationship between the transport market, public spending and government regulation.”

²¹ See the 1996 Green paper on National Transport policy for some issues canvassed by Government.

²² Act No. 89 of 1998

²³ Gazette No. 1942, on 30 October 1998.

²⁴ Chapter 4, s 19 of Act 89 of 1998.

South Africa is also a member of the World Trade Organisation and as such is bound to the provisions on the General Agreement on Tariff and Trade 1994 (GATT). The GATT contains an agreement on Trade in Services. Basic obligations are contained within the framework agreement known as the 'most favored nations' obligation which states that parties " shall accord immediately and unconditionally to services and service providers of any other Party, treatment no less favorable than it accords to like services and service providers of any other country".²⁵

Decisions were taken for maritime services by parties to GATT in July 1996 with the goal to eliminate restrictions applied by governments of parties to the GATT. 18 countries agreed to take part in the negotiations to liberalise trade over a period of time. The philosophy behind these negotiations and the aim of the relevant provisions of the GATT is to liberalise trade in services. This places considerable pressure on the South African government to abstain from the protectionist measures of the past. The WTO has more recently agreed on a General Agreement on Trade in Services (GATS) which applies most significantly to financial services but also has provisions on the liberalisation of maritime services.

The shipping trade has a number of related industries and services; forwarding agents and groupage operators have emerged as links between carriers and shippers. Shippers are free to shop around for the best deal. The whole nature of the game from a South African point of view has changed drastically since the deregulation of freight rates. The search for a suitable carrier of cargo now centers around the most efficient service at the cheapest freight rates, which are no longer protected by government. As will be seen in Chapter 4 of this dissertation, the European Union in its enforcement of Antitrust legislation is not so concerned with interrelation of liner shipping companies, as with the emergence of so called "multimodal" transport services in which companies cooperate to provide overland carriage, and which pose a threat of freight rate piracy and market domination.

²⁵Part II of the General Agreement of Trade in Services.

CHAPTER 3

LEGAL STRUCTURES AND LIABILITY IMPLICATIONS OF A TYPICAL, MODERN, MULTINATIONAL SHIPPING CONSORTIUM.

Companies carrying on business as ocean carriers seek to associate for the purpose of combining strengths to provide a single, coordinated liner shipping service. These shipping companies hail from diverse nationalities (hence differing legal systems) and they each have their own culture of service, clientele, capital resources and infrastructure. A legal structure consisting of rules, contracts and abstract entities must be negotiated to form the basis of this association.

The legal structures created are designed to cope with and supply mechanisms for the complexities of executive functions, management, accounting, capital interest, marketing, external liability and to provide for the reciprocal rights and duties of the lines party to the association.

This chapter provides a broad overview of the major issues facing an association of this nature and analyses the structures and mechanisms typically utilised to cope with these issues. Aspects of dispute resolution between the lines inter se and contractual and delictual liability of the member lines are focused on.

3.1 Legal Structures:

The agreement forming the basis of an association of this nature can be termed a "consortium agreement."²⁶ As the companies party to this agreement will be established in different jurisdictions, it is essential that the agreement contain a

²⁶The Oxford Illustrated Dictionary defines a consortium as "an association of business organisations".

choice of law clause in order that the reciprocal rights and obligations created by and contained in the agreement can be interpreted and defined in accordance with the principles of that legal system. The choice of law clause avoids the quagmire of problems posed by a conflict of laws when it is necessary to revert to the agreement to define rights and obligations in a particular forum. Due to the historical international influence of the English Admiralty law, English law in a shipping consortium is often the most appropriate choice.

The provision of a scheduled liner service involves a myriad of logistical problems, requiring an effective executive and managerial structure. The service is operated on a vast geographical area, utilising many and varied services for the effective carriage and distribution of containers. Time zones are crossed and many jurisdictions served.

A company is described in Corporate Law²⁷ as not susceptible to definition as it can assume a variety of forms. A distinguishing characteristic of a company is however that it is an independent entity with juristic personality. The board of directors is established as an organ for the creation and implementation of administrative functions, but the company adopts the consequences as a separate entity. The company with its separate legal personality may not be the appropriate vehicle for an association of shipping companies, as the companies seeking to associate will require a measure of independence from the association for the purposes of marketing and to avoid obvious fiscal problems due to differing nationalities. The company as an entity lacks flexibility as it must be pegged to a specific jurisdiction, usually through registration. Where it is expedient for the companies seeking to associate to fully integrate capital, management, and profit, a merger can be effected.

²⁷Corporate Law, Second edition; Cilliers, Benade, Henning, Du Plessis and Delpont. p 49

A partnership can be defined as “ a contract between two or more parties whereby each contributes or undertakes to contribute towards an enterprise to be carried on jointly by them with the object of making a profit and of sharing it between them.”²⁸ A partnership is not an appropriate vehicle for association in that although there must be some pooling of revenue in a joint fund, the main objective of the association is not joint profit, but to achieve a common sailing schedule and to allocate space on the vessel to the member lines so as to provide an efficient service. A partnership also brings with it the problem of joint liability under most jurisdictions. The lines party to the association will prefer to avoid joint liability, maintain a degree independence and to collect their own freight from shippers.

The agreement underlying the association will thus need to be comprehensive and create appropriate abstract bodies to act as agents in implementing executive and managerial functions on behalf of the lines party to the agreement. The lines will be bound to decisions taken by those bodies. The functions and powers of the executive and managerial bodies are not contained in any legislation, such as a national Companies Act. For this reason, such powers and administrative functions of those bodies must be precisely defined in the consortium agreement with sufficient built in flexibility to cope with omnipresent variables inherent in an undertaking which is by nature transmutative.

The consortium agreement will contain a clause whereby the lines agree to hold themselves bound to the decisions taken by those representative organs within the confines of their delegated and defined administrative and managerial functions.

Representation of the executive body will also need to be defined and delineated in the consortium agreement. A company is represented by its shareholders who have voting rights in accordance with their share capital. A similar mechanism can be created whereby the lines are allocated voting rights in accordance with their capital

²⁸Robert Sharrock; Business Transactions Law, Third edition. p.281

and other interest or investment in the service. This capital interest can be determined by means of a formula which takes into account the vessels and other capital outlay supplied by the member line as well as that lines' interest in the trade in terms of the amount of cargo flows the line provides on the route serviced. This interest in the trade can be expressed as a percentage and can also be used to determine space allocation on the vessels utilised in the service.

The representative bodies so formed will have no separate legal personality, but the consortium agreement will need to provide an indemnity whereby the lines undertake to indemnify those representatives should they incur liability in the performance of their duties and mandate on behalf of the member lines.

A company within a particular, mutually convenient jurisdiction will usually be floated in order to enter, as a legal person, into employment, lease and other necessary contracts. The lines party to the consortium agreement will be shareholders of the company with the necessary executive representation. The company can be used as a vehicle to enter into contracts on behalf of the lines in the performance of the service of carriage. A clause in the consortium agreement will be necessary whereby the lines undertake to indemnify the company, should the company incur liability in the performance of its functions. The indemnity, if related to the carriage of goods, can be limited in respect of a certain amount, or the amount catered for in the London Convention²⁹.

The consortium agreement will provide for the pooling of certain revenue and costs. Due to the multinationality of the parties to the agreement, a single currency must be agreed upon in terms of which pool contributions are calculated, a formula providing for currency fluctuation must also be agreed upon. The financial pools can be administered from a fund located in a "tax haven", by the management body in order to avoid fiscal problems which may be experienced due to the income tax regimes of

²⁹International Convention on Limitation of Liability for Maritime Claims 1976.

the different nations of which the member companies are nationals. The consortium agreement can provide for intermittent audits of the costs and revenue administered in this manner.

Intrinsic to the provision of an international liner service is that many and diverse services from different contractors in different ports are required to load, discharge and distribute containers, enter and leave ports etc. The member lines all derive benefits from these services which are provided to the carrier vessel. Typical costs to be pooled are bunker charges, vessel remuneration, inland haulage, terminal handling charges, port taxes, wharfage fees and container, reefer container and equipment costs. The member lines may also wish to, intermittently charter space to non members, the income or freight collected from this charter would be delineated as poolable revenue in terms of the financial pool structures embodied in the consortium agreement. The consortium agreement will provide detailed rules to which the member lines undertake to bind themselves in respect of the procedure for pooling and the financial management thereof.

It is evident from the above that the juristic characteristics of the organisational structure underlying the consortium closely resemble and have rationally evolved from concepts and structures developed in company law. The organisation does not however fall within the jurisdiction of a particular nation and is not clothed with independent juristic personality. The inherent advantage is thus that the organisation is not directly subject to governmental control and bureaucracy of a particular state, which affords a great deal of flexibility in structuring the powers, functions and liability of the representative bodies. The antithesis of this flexibility and independence is that there is no national forum which has inherent jurisdiction to adjudicate on internal disputes and to control the exercise of the functions of the representative bodies. For this reason it is essential that the consortium agreement provide an effective mechanism for internal dispute resolution.³⁰

³⁰Internal Dispute Resolution is explored later in this chapter.

The organisation is also not subject to the direct control of a national fiscus, which allows for significant flexibility in the collection, administration and distribution of funds. Many "off shore tax havens" are available in which a fund can be floated and income tax avoided. The income generated will not be subject to a compulsory audit as is the requirement in the company law of most countries. It is accordingly essential that the lines construct and agree to an accounting system which defines income to be pooled and provides formulas to calculate expenses to be born by the member lines. Due to the logistical complexities intrinsic in a venture of this nature, the definition and classification of services and other essentials will form the bulk of the recorded and executed agreement. An independent audit at regular intervals can be agreed upon between the lines to ensure proper and accurate administration of income, expenditure and funds.

3.2 Vessels, space allocation , contracts of carriage, and other contingent contracts:

Central to the consortium arrangement, is the availability and provision of vessels to cater for the scheduled transportation of cargo. Member lines may own the vessels directly or as disponent owners, or vessels may be chartered into the service in terms of a charter party entered into by one of the lines party to the consortium ("the owner line"). A binding mechanism must be established between the member lines to provide for this vessel sharing arrangement.

Contracts of affreightment are the subject of a body of law which has developed over centuries. This body of law is generally termed "the law of carriage of goods by sea". The law of carriage has developed principles for the construction of the contracts embodying the rights and obligations of the parties to the carriage agreement. The analysis which follows is a broad overview of the relationships of

contract and agency created between the lines. The reader's basic knowledge of the relevant concepts involved is taken for granted.³¹

As emphasised throughout this dissertation, the service provided is a regular service on a specified trade route. The lines will delegate authority to the executive and management bodies to create and administer a schedule which will provide for sailing frequency, ports serviced and the type of vessel to be utilised (taking into account factors such as tonnage, capacity, speed, fuel consumption, technical compatibility with the containers used by the other lines, classification and other necessary characteristics). The service provided by the consortium will require a foundational, core fleet of vessels. Each line is to be allocated space on the vessels scheduled to sail at fixed intervals in order to cater for the cargo it introduces to the service.

A contract whereby space on a vessel is let out to another party is generically termed a "charterparty". The rights and obligations between the lines party to the consortium agreement which provide the core fleet vessel and the line party to the consortium which rents the space on the vessel will be defined and circumscribed by what can be regarded as a hybrid between a slot and time charterparty with sui generis characteristics. Christopher Hill³² states the following in respect of time charterparties:

" Under the provisions of a time charterparty the ship owner agrees that the ship named in the document, including her Master and crew, shall be placed at the disposal of the charterer for his use and employment over a defined period of time...The owner remains responsible for the insurance on his ship. The remuneration for his use of the ship in this manner is customarily paid on the basis of an agreed daily hire rate payable monthly or semimonthly in advance.

³¹Reference can be made to works such as Scrutton on Charterparties or Carver on The law of Carriage to clarify the concepts referred to in this dissertation

³²Lloyds List Practical Guides, Maritime Law, fourth edition at p186

A fundamental feature of a time charter is that the charterer has no control of the vessel. The Master and crew remain in the employment of the ship owner and are at all times his servants in the law.”

Christopher Hill³³ defines a slot (or space) charterparty on the other hand as a contract whereby “ the ship owner or operator ‘rents out’ or hires a ‘piece’ of space (a percentage of the total available space on the vessel) for carrying TEU’s³⁴ in return for which he receives hire calculated in accordance with the number of slots (accommodation for each of the TEU’s) payable whether or not those slots or spaces are actually used.”

The vessel sharing relationship between the lines party to the consortium agreements contains characteristics of a time charterparty in that each line enters into a separate charterparty with the owner line for the duration of the consortium agreement or for so long as the vessel is available to the service. The owner line remains responsible for the Master and crew and the insurance of the vessel.³⁵ The relationship also contains features of slot or space charterparties in that the member line is allocated a percentage of space on the vessel in the consortium agreement which may be expressed in terms of a trade share percentage as indicated earlier.³⁶

The vessel sharing arrangement concluded between the consortium member lines can be distinguished from ordinary charterparties in that the owner line will undertake in the consortium agreement that its vessel is to be bound to the schedule to be administered by the management body. The owner thus retains control and responsibility for the master and crew of the vessel, but a certain amount of control as to the sailing frequency and management of the vessel is delegated to the

³³p186 *ibid*.

³⁴ A TEU is the jargon used for the containers described as ‘ twenty foot equivalent units’.

³⁵The owner line will enter into a P&I Club and undertake Hull and Machinery insurance. The member line can undertake in the consortium agreement to enter into defined insurance clubs and that the Hull and Machinery insurance policy will provide for a certain cover.

³⁶p 18 *supra*.

appropriate body. The owner line will also undertake to enter a classification society nominated by the owner line and approved by the executive body. Remuneration for the use and enjoyment of the space on the vessel is not received directly from the charterers of such space, instead the charterers (member lines) undertake to pay into a fund to be administered by the management body and controlled by the executive. The owner line will receive remuneration from this fund and will agree in the consortium agreement that the remuneration is to be at an appropriate market rate.

The legal relationship can accordingly be seen as one of agency whereby the lines delegate certain powers to the management body and undertake to indemnify that body in respect of the exercise of its delegated functions. The essential contractual nexus between each line as owner/ disponent owner of the vessel on the one hand and charterer on the other is recircuited through an abstract body which functions as a control panel of sorts. The rights and obligations of the parties to the charterparty will be controlled and orchestrated by this body. The parties undertake, contractually, to be held bound by the strategic and other authorised decisions of the abstract body.

The line supplying the vessel undertakes that the vessel will comply with the sailing schedule created by the executive body. The "off hire" clauses will of necessity be fairly specialised and contained, not in the specific charterparty entered into between each line, but in the consortium agreement itself. The owner line will be saddled with the duty to inform the management body of the occurrence of any incidents declared an "off hire" incident. The member lines thus agree that the management body exercise their express contractual right to place the vessel "off hire". The "off hire" clause will relate to those factors in the control of the owner line such as delay due to the nationality of the crew or flag of the vessel. Incidents which can be attributed to the fault of the agents or servants of the owner line specifically will also generally entitle the management body to place the vessel off hire. The sailing schedule is to be adhered to, but a certain amount of flexibility must be allowed to the owner line to increase speed and take other measures to comply with the schedule as closely as possible. Indulgences of delays and the circumstances

and manner in which these indulgences are granted, must therefore be comprehensively defined.

The owner line will also undertake that the vessel remains within the confines of a designated geographic trade route. Deviation from this trade route will contractually entitle the management body to place the vessel off hire. If the vessel is delayed due to incidents on the designated trade route beyond it or its servant's or agent's sphere of control, the management office will generally not be entitled to place the vessel off hire and the vessel will continue to receive its freight.

The vessel will be chartered into the service for a considerable period of time. It will naturally be necessary to afford the right to the owner line to conduct standard maintenance and to dry-dock the vessel at defined intervals. The management body will have no right to declare the vessel "off hire" during these predetermined maintenance periods.

A charterparty is subject to the ordinary principles of contract, no specific provisions are obliged to be incorporated but it may be appropriate to import the provisions of the Hague, Hague-Visby or Hamburg rules.³⁷ Advanced rules of interpretation have however developed over the years throughout international fora in relation to concepts such as "off-hire", "demurrage", "deviation" and other incidental aspects and contingencies of carriage of goods by sea. These rules of interpretation will apply in interpreting and applying the vessel sharing arrangements underlying the consortium agreement.

As stated above, a separate charterparty will be entered into between each line party to the consortium agreement with the vessel owner/ party which provides the vessel to the service. This charterparty can be termed a "cross charterparty" in that it has cross reference to the powers conferred on the management body in the

³⁷ U.N Conventions on the Carriage of Goods by Sea

consortium agreement and in that although the lines are not co-charterers, each is bound by the same terms in a separate charterparty. The consortium agreement will contain a clause obligating the member lines to execute a cross charterparty at the commencement of the operation of the service. The cross charterparty defines the rights and obligations of the shipping lines inter se in relation to the lease of that lines' allocated space on board the vessel.

The ship owner's obligations will generally be defined as the careful carriage and custody of the goods and the provision of a seaworthy and technically suitable vessel. The charterer's obligations will generally be remuneration and the obligation to inform of any dangers inherent in the goods shipped and the use of suitable cargo containing equipment, as well as the responsibility for claims by cargo interests i.e. if the claim is not attributable to the owners failure to carefully carry, stow etc. The Hague or Hague Visby or Hamburg rules may be incorporated into the contract. An arbitration clause will usually be inserted in the agreement to resolve disputes between the parties in relation to the cross charterparty.³⁸ Authority to exercise the rights and obligations of the lines party to the agreement, is delegated to an appropriate abstract body.

Each line will enter into an independent contract of affreightment with the shipper of the cargo. This contract of affreightment will be evidenced in a separate Bill of Lading issued by the line or its agent to the individual shipper. The line will also collect its owned freight negotiated with the shipper, from the shipper on the terms negotiated. The collection of freight by that line is not subject to the control of the executive or management body. The line will be reflected in this Bill of Lading as the Principal Carrier, notwithstanding that the line has little control over the actual carriage of those goods. The shipper will ordinarily seek to hold the Principal Carrier (reflected in the Bill of Lading) responsible for damage caused as a consequence of the carriage of the goods. A clause in the consortium agreement should be inserted

³⁸ See below on internal dispute resolution.

whereby the line reflected as the Principal Carrier undertakes to take out cargo insurance and insurance for liabilities not arising from the operation of the vessel. An indemnity should also be inserted whereby the line reflected as the Principal Carrier undertakes to indemnify the owner line should the shipper seek recourse against the owner line or management office.³⁹

The Bill of Lading evidences of the contract of carriage, but the shipper is not party to the relationship between the owner line and the consortium, member line chartering the space reflected in the terms of the cross charterparty. It is foreseeable that situations may arise where the shipper may seek recourse against the owner line in terms of the principles of delict, tort or bailment (breach of the duty of the bailee to carry safely or deliver intact). If a wrongful act or neglect of the owner of the vessel or its servant or agent causes loss or damage to the shipper, the shipper may elect to proceed against the vessel in rem or the vessel owner/operator in personam on this basis instead of electing its contractual claim for damages against the Principal Carrier. Arrest of the vessel will certainly be possible in a sympathetic forum where fault can be attributed to the vessel owner.⁴⁰

The consortium agreement will be implemented for a considerable period of time. During this period, the availability of cargo and the demand for space on board vessels will inevitably fluctuate with the whims of the market. For this reason, a large amount of flexibility must be afforded in the consortium agreement to the management and executive bodies. Power must be delegated by all member lines to the appropriate bodies to charter in vessels should the trade require more vessel space, or to charter out the core fleet vessels should demand for space from shippers of cargo diminish to an extent where it is uneconomical to maintain the full quota of core fleet vessels in the service i.e. the executive committee "fine tunes" or manipulates the size of the fleet and the frequency of sailing. The powers of the

³⁹See below on external liability.

⁴⁰See p 33 below for a discussion on Himalaya Clauses and methods seeking to avoid ship owners liability.

abstract representative bodies in this regard should be precisely defined in the consortium agreement and the lines will undertake to be bound by those decisions taken. If vessels are chartered out, the remuneration for those charterparties will form poolable revenue; the owner line will continue to receive the remuneration provided for in the consortium agreement. The member lines are allocated space on core fleet vessels in terms of their trade share other agreed means. Failure by a line to utilise its trade share could result in damages to the other consortium members due to the wasted space. An obligation will generally be placed on the member line chartering the space to fill its cargo quota. "Dead Freight" is the term given to damages for breach of contract by a charterer to fill its space allocation.⁴¹ Calculation and payment of such damages will generally be stipulated in the consortium agreement with reference to the cross charterparty.

If the management office determines that a vessel needs to be chartered in, the consortium agreement must provide for a great many eventualities. A line must be nominated to enter as a party into the charterparty and the other lines must undertake to indemnify the nominee line for liabilities arising as a consequence of the charterparty. The consortium agreement should render it incumbent that an appropriate P&I club is entered and that suitable Hull and Machinery insurance is taken out in respect of the chartered in vessel. The remuneration for the vessel is to be paid from the financial pool. Member lines may also be given a right of first refusal to provide one of their vessels when the management body is seeking a vessel to charter in. The consortium agreement must ensure that the relevant body charters in an appropriate vessel in relation to technical compatibility, speed, consumption etc.

Power can also be delegated to the relevant representative body, to charter out space on a core fleet vessel to non-member lines. Again, the owner line must be

⁴¹Scrutton on charterparties p406.

indemnified for liabilities arising out of such a transaction. The remuneration received from these external space charterparties will form poolable revenue.

The consortium agreement can further provide for container pools, whereby the lines agree to pool containers and space in containers and create abstract bodies situated in the appropriate ports which are serviced by the liner service and to arrange for storage and inland haulage of the containers. The legal principles applying to the creation of these inland organisations which will be responsible for the efficient management of container storage and distribution, will be similar to those relating to the creation of the management body. The lines can also lease containers and container space between themselves and enter into container-hiring agreements or agreements for renting space in a container. This relationship ensures the efficiency of the service, in that containers are more readily available and the necessity to ship and store empty containers will be greatly reduced. The nightmarish logistics inherent in the nature of the service entail that some of the lines will be shipping into only one port serviced on the route, while the vessel will load the cargo of other lines at that port (see p15 on the 'hub and spoke' concept). These logistical problems can be reduced by an efficient container sharing, distribution and storage arrangement between the member lines.

An undertaking will usually be inserted in the consortium agreement whereby the lines obligate themselves to provide containers of a certain standard and technical compatibility to the service (e.g. the fittings of the containers used must be compatible with the stowage facilities of the vessel). A clause will usually be inserted in the consortium agreement entitling the vessel owner line to refuse to carry incompatible containers. Should a container introduced to the service be defective, the line providing the defective container will undertake to indemnify the other lines. The bodies responsible for container distribution established in the consortium agreement will have offices located in appropriate ports and will be delegated certain powers and functions by the member lines in relation to the handling of containers on behalf of the member lines.

The lines will also undertake in the consortium agreement to use common terminals and port facilities. The management body or container management body will be authorised to enter into and negotiate terms for terminal, stevedoring and other essential service contracts. The authorisation will extend to standard service contracts recognising that circumstances may arise where the representative will need to enter into extraordinary contracts which deviate from standard contracts in order to ensure that the goods are safely distributed. The line to whose cargo the service is provided (usually the Principal Carrier) will be the party to the service contract as represented by the appropriate body.

3.3 External liability:

Providing and operating a service of this nature creates a substantial risk and exposes a variety of participants to third party (or delictual) liability. A great many contractual relationships are initiated in and for the implementation of the service. The liner companies party to the service provided for in the consortium agreement and which are potentially exposed to external liability can be divided into the following categories in terms of the risk created by their contribution to the service:

- a) The owner/ disponent owner/ charterer of the vessel
- b) The owner, user or hirer of the container carried
- c) The Principal Carrier who enters into a contract of affreightment evidenced by a Bill of Lading.

Potential liability can flow from an endless array of sources, diverse relationships may arise, ranging from employment and financing contracts to the claim in tort or delict of hapless persons injured in the course of implementation of the service. Litigation by contractors and third parties will inevitably follow from the implementation of the service and a common approach to this ineluctable contingency of the service will be negotiated by the lines and entrenched in the consortium agreement. The member lines should agree in the consortium agreement to consult together from time to time to adopt a common practice as regards the handling and defending of claims.

The owner of the vessel chartered into the service should undertake in the consortium agreement to take out comprehensive Hull and Machinery Insurance from an acceptable underwriter. Declaration and adjustment of General Average by the ship owner will need to be modified in the consortium agreement due to cargo interests being represented by diverse parties. The owner line should undertake in the consortium agreement to rather claim from the Hull and Machinery underwriters than declare General Average where that election is available to the line and where the General Average does not consist mainly of cargo expenses or sacrifices. In this respect a practice has developed in the Hull and Machinery insurance market whereby the owners' underwriter provides insurance to the Owner in circumstances where the Owner, to avoid a costly General Average collection which also inconveniences the Owner's clients, absorbs Cargo's (and other interests') liability in General Average. This has become known as the "General Average absorption clause" which ranges from limits of between \$250000 to as high as \$2000 000. The owner line may also undertake to the other lines not to declare General Average where the Average Adjuster declares it uneconomical to involve cargo interests.

The consortium agreement will provide for a number of indemnities as against the representative bodies in the performance of their functions and as against the Line providing the vessel or entering into a charterparty contracting a vessel into the service.⁴²

Most jurisdictions provide procedures for the arrest or attachment of a vessel by a party which has a maritime claim recognised as conferring jurisdiction on the forum into which the vessel enters. Arrest of the vessel will result in a considerable proliferation of costs to the other member lines. If the claim relates to a container employed by a member line or to the carriage of goods by a member line but, fault can be attributed to the vessel operator, this may result in the vessel being detained in one of the ports serviced. To cater for this eventuality, the duty will be placed on

⁴²See the discussion on contracts above.

the consortium member lines who are reflected as the Principal Carrier in the Bill of Lading, to use a standard Bill of Lading referred to in the consortium agreement, which contains a so-called "Himalaya Clause". The doctrine of privity of contract entails that only the parties to the contract of carriage evidenced in the Bill of Lading can rely on any exclusion clauses and other benefits in the contract. Unlike our Roman Dutch law, the English Law does not recognise an agreement in favor of a third party. The inclusion of a Himalaya clause is an attempt to introduce a separate, collateral clause.

Clause 18 of the CONLINEBILL⁴³, (Bill of Lading) is an example of such a clause which reads as follows:

" 18. Exemptions and Immunities of all Servants and Agents of the Carrier.

It is hereby expressly agreed that no servant or agent of the carrier (including every independent contractor employed from time to time by the carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Merchant⁴⁴ for any loss, damage or delay arising directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, but without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defense and immunity of whatsoever nature applicable to the Carrier or to which the carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purposes of all the foregoing provisions of this clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including

⁴³Liner Bill of Lading. Liner Terms approved by the Baltic and International Maritime conference, Amended January 1st 1950, August 1st 1952, January 1st 1953 and January 1st 1978.

⁴⁴"Merchant" is synonymous with Shipper.

independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract evidenced by this Bill of Lading.

The carrier shall be entitled to be paid by the Merchant on demand any sum recovered or recoverable by the Merchant or any other from such servant or agent of the Carrier for any such loss, damage or otherwise.”

The “Himalaya clause” constitutes an elaborate method of attempting to evade the effects of the doctrine of privity of contract. Conferring the limitation and other benefits available to the Principal Carrier, on the ship owner, has been accepted as possible. The question as to whether the last sentence of the clause is enforceable is questionable and the subject of much legal debate.⁴⁵ This addition clearly seeks to dissuade the shipper from instituting action against the shipowner and other subcontractors to the carrier.

As the effectiveness of the “Himalaya Clause” in evading misdirected claims is not completely waterproof, it will also generally be agreed between the lines in a clause contained in the consortium agreement that the Container Owner or Principal Carrier absorb the claim and only seek recourse against any other member line to which liability can be attributed insofar as a judgment is obtained and settled by the line which has undertaken in the consortium agreement to deal with the relevant claim. It is essential for the efficient and harmonious operation of the service that litigation between the member parties be limited as far as possible. The lines may thus undertake in the consortium agreement to seek recourse in the first instance against any other third party to which liability can be attributed before seeking satisfaction from one of the lines party to the consortium. The consortium agreement will contain a clause to the effect that the relevant line will undertake all reasonable steps to recover the amount from any third party before seeking recourse against a member line.

⁴⁵See Carver on Carriage and Glass and Cashmore Introduction to the law of Carriage p41-49.

Each line will undertake in the consortium agreement to take out comprehensive insurance in respect of each specific risk to which the member line exposes the service.

Liability flowing from respect of contracts concluded by the lines will not create as great a problem as prospective delictual liability. The party to the contract will usually claim contractual damages directly from the line with which it concluded the contract. In certain circumstances, the litigant may have a claim against more than one liner company party to the consortium.

Prospective third party litigants may however experience problems in determining precisely with which party it contracted and has established a contractual nexus. A great deal of the contracts are concluded by the representative bodies created by the consortium agreement acting as agents of one of the member lines, or by agents instructed directly by the liner company, not catered for in the consortium agreement. Prospective litigants could examine the categories of parties listed above (i.e. the owner of the vessel or container or principal carrier) to determine in what respect the relationship is founded and trace the contractual relationship from this basis.

3.4 Internal dispute resolution:

From the forgoing analysis, it is clear that the relationships between the companies party to the consortium are defined by mutual agreement, the principles of contract law therefore predominantly apply in determining the rights and obligations of the parties in any instance and incident arising from the implementation of the service in terms of the agreement. Since the relationship vests in contract, the principle of party autonomy dictates that parties should be free to agree how their disputes are

to be resolved, subject only to such safeguards as are necessary in the public interest.⁴⁶

Arbitration is a long-standing, relatively advanced and popular form of dispute resolution incorporated into international commercial relationships. This dissertation cannot hope to touch on all the concerns and ramifications of this vast topic, but seeks to impress the major concerns to shipping companies party to an international ship operating consortium in electing and defining by mutual agreement their method of dispute resolution.

As highlighted earlier, the parties to the consortium in the majority of such affiliations hail from different nationalities. The parties will execute the consortium agreement itself as co-contractants, the rights and obligations contained therein will apply across the board to all members. There will also be a number of subsidiary contracts entered into between individual parties for specific purposes. These subsidiary contracts are contracts such as charterparties, container hiring agreements and marketing and distribution agreements. Each of these contracts from the main consortium agreement to the subsidiary contracts will need to contain an Arbitration Clause in terms of which each party is afforded the right to refer a dispute to the arbitration tribunal agreed on by following the binding referral procedure. This right of referral to arbitration is available to the parties insofar as the dispute concerned arises as a direct consequence of the contract i.e. is directly related to the rights and obligations contained in the contract.

Since the member lines are vested in separate countries, it is essential that an appropriate arbitration tribunal seated within a country with suitably advanced arbitration laws, is elected. Maritime arbitration as a concept is fairly advanced in the cities of many modern maritime nations. London for instance has the London

⁴⁶The principle of party autonomy is referred to by Lord Saville in 1997 Lloyds Maritime Law Quarterly in a lecture on the English Arbitration Act of 1996.

Maritime Arbitration Association (LMAA), Paris has a competitive international arbitration organisation, and in New York the arbitration services of the NYMCA can be employed. The agreement to provide for recourse to arbitration rests primarily on commercial motivations. The expertise of the arbitrators in carriage, relating to both the practical technicalities and legal ramifications will be of fundamental concern to the parties in nominating the tribunal in the arbitration clause inserted in their agreement. The different Arbitral bodies located throughout the world are professional organisations charging fees for their services and will take great care in advertising the expertise of their services to the shipping industry. The geographic location and language of the tribunal in relation to the member lines will naturally be an important factor to consider in deciding on the election. The choice of law clause in the underlying agreement is another obvious factor in considering the appropriate arbitration tribunal.

Of major concern from a legal point of view is to ensure that the country in which the tribunal is established has suitable legislation to cater for arbitration and the enforcement of arbitration awards. There is a substantial body of international law on international arbitration. The United Nations Commission on International Trade Law (UNCITRAL) adopted a Model Law on international commercial arbitrations in 1985, which motivated many countries to analyze and investigate their arbitration laws. The United Nations published the Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958. A major purpose of national arbitration legislation should be to ensure that the award of the arbitrator is rendered enforceable, the nation's courts can be granted certain powers of review as well as intermediate powers to ensure that the arbitration procedure is correctly implemented.

The relationship between the parties to an international shipping consortium agreement is complicated by highly intricate operational requirements both in relation to the use of equipment and capital as well as the administration of funds and expenses. Players in the service are spread over a vast geographic area, often with diverse languages and currencies. The shipping market is also subject to considerable fluctuation. Technological advances have substantial impact on the

methods of carriage and cargo distribution used by the cargo carriers. Disputes are thus often highly complex and the parties, due to the competitiveness of the market, require absolute confidentiality in respect of sensitive information placed before the tribunal for the purposes of dispute resolution. For the foregoing reasons, the parties will in all likelihood require that the decision of the arbitrators are not to be subject to appeal. The arbitrators appointed to decide the dispute are deliberately chosen for their knowledge and insight into the intricacies and peculiarities of the trade in which the parties are engaged.

It should be ensured that the national legislation of the country in which arbitration is to be held, entitles the parties by agreement to oust the jurisdiction of the court. The arbitration clause will often provide that the decision of the arbitrator is final and binding and not subject to appeal. Excluding the right of appeal will also limit the considerable expense and wasted time of further litigation. The court should have the power to make certain interim awards in a deadlock situation relating to procedural aspects such as leading of evidence. The following was stated in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*⁴⁷ “ the purpose of interim measures of protection...is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute. Provided that this and no more is what such measures aim to do, there is nothing in them contrary to the spirit of international arbitration.”

The nature of arbitration entails that the contractants can determine the structure of the arbitral body and the procedure to be followed in declaring and deciding a dispute. Due to the complexity of the disputes and the diversity of the parties thereto, it is advisable that a panel of arbitrators be provided for. The panel should consist of at least three arbitrators where there are two parties to the dispute, or more where more than two disputants are involved. This renders it possible that

⁴⁷[1993] A.C. 334

each party may elect one specific arbitrator from a designated pool of arbitrators. The remaining arbitrator should be appointed by an independent outsider, usually by an official of the Arbitration organisation agreed upon by the lines in the arbitration clause. The selection process should also empower an appropriate independent official, at the instance of one of the parties to the dispute, to appoint an arbitrator where one of the lines fails to exercise its right of appointment. This will ensure that delaying tactics by disputants are avoided as far as possible.

Service of notices and the method of defining the issues in dispute can also be contained in the arbitration clause, alternatively the procedural practice of the arbitration organisation can be adopted. Due to the remoteness, language and other barriers which may exist between the parties; it is advisable to provide for a relatively long notice period for the other party to reply to a declaration of dispute. It should also be provided in the arbitration clause that notice be given in writing.

The powers of the arbitration tribunal are defined in the agreement between the parties, but arbitration has evolved into a sophisticated practice and the organisations providing arbitration services have developed sound codes of procedure and powers to which the parties can agree to hold themselves bound. Ensuring a fair and effective procedure has been central in the development of arbitration as a concept. The procedure prescribed to the tribunal should ensure that evidence is brought properly before the tribunal. The various components making up the service are scattered throughout the world. Providing oral evidence may in many circumstances may prove to be a logistical nightmare. The procedural code will usually provide for alternative means of delivering evidence, e.g. evidence on affidavit or some form where the veracity thereof is beyond question. Another benefit of arbitration is that the arbitral body can develop sound procedural codes which are commercially efficient by extracting the most effective, tried and tested rules of procedure from jurisdictions throughout the world. The procedural code of the arbitration organisation will be another factor in the selection of the arbitration body by the member lines.

Arbitration is theoretically private in most countries, hence the award remains confidential between the parties. Hill⁴⁸ points out that it is controversial whether confidentiality is beneficial to the shipping community. It can be argued that not reporting awards results in stagnation of the development of maritime law in relation to the legal issues raised in determining the dispute. On the other hand, it is in the interests of the parties that sensitive information is not disclosed and the continuation of the service compromised.

The greatest benefit of arbitration to the parties engaged in liner shipping associations, is that they are not fastened to the jurisdiction of a specific forum. There is a great deal of flexibility in appointing people of appropriate legal expertise with specialised knowledge in the practicalities of shipping. A measure of fairness exists in that each party may appoint an arbitrator of its preference. Arbitration has developed considerably over the years with a great many countries recognising the need for enforcement of international arbitration awards and providing appropriate mechanisms. The potential for dispute between the lines in providing a service of this nature is massive. The legal relationships between the different lines are diverse and the income accrued and expenditure incurred considerable. Modern maritime arbitration services, provide a fitting, efficient means of resolving the disputes of modern, multinational shipping consortia.

⁴⁸Maritime Law, fourth edition at p236.

CHAPTER 4

A GLANCE AT SOME ATTEMPTS TO REGULATE ACTIVITIES OF LINER SHIPPING ASSOCIATIONS, AND SOME OF THE IMPORTANT BODIES INTERVENING IN INTERNATIONAL LINER SHIPPING.

Ocean transport endures as a point d'appui to trading nations for the export and distribution of its national products. Freight charges are one of the key factors in the pricing of goods and products. Any study of laws and multilateral agreements implemented to regulate ocean transport activities cannot be divorced from the contemporary political and economic motivations underlying their creation.

The liner shipping trade has traditionally been, and continues to be dominated by the liner companies based in developed countries who control the shipping market. Of major concern to these maritime powers is the threat of market dominance posed by shipping cartels and other forms of alliances. The United States and the European Community have sought to curb this threat with Antitrust laws which subject the activities of these alliances to certain control criteria to be enforced by organs created for this purpose. The Eastern maritime states have in the past enforced certain protectionist measures to counteract the economic power of Western maritime states. The maritime powers have also, through a number of forums, attempted to develop common policies and measures aimed at ensuring the mutually beneficial continuance of global shipping activities. Obviously, of common interest to these states is to prevent the emergence of global shipping corporations which dominate the market and are able to dictate freight charges. This common interest is, at the same time subject to the tension that each maritime power is seeking to bolster its own economic power and autonomy.

The latter part of the twentieth century has been witness to the emergence of a number of new nations. The United Nations recognises these Emerging and Developing nations and has been used as a forum in which these nations voice their concerns as to the international market place. The underlying concern of the

developing nations is that it is undesirable for a trading nation to be dependent on foreign shipping.

An analysis of the international laws and bodies influencing liner shipping and their genealogy, would require a weighty tome with considerations of politics, economics and law, leagues beyond the scope or agenda of this dissertation. This chapter aims to give a broad overview of some of the important international bodies, casting a glance at some of the measures they have adopted in an attempt to regulate the activities of associations of liner shipping companies. Organisations exercising influence over international shipping activities can be divided into A. International and B. National organisations. International organisations can be classified as:

(a) United Nations organs and specialised agencies [such as the International Maritime Organisation (IMO), UNCTAD, and the United Nations Commission on International Trade Law (UNCITRAL)]

(b) Intergovernmental organisations [such as The Organisation for Economic Cooperation and Development (OECD), International Institute for the Unification of Private Law (UNIDROIT) and the Council for Mutual Economic Assistance (MEA)] and;

c) Non-governmental organizations [such as the Comité Maritime International (CMI), the International Chamber of Shipping (ICS), the International Shipping Federation (ISF), the International Chamber of Commerce (ICC) and the Council of European and Japanese National Ship owners Associations (CEJNSA).

In what follows, the efforts of the United Nations Committee for Trade and Development (UNCTAD) are briefly canvassed with a contextual reference to some of the concerns surrounding the negotiations at the time. A fleeting glance is taken at the Antitrust laws of the United States and the European Union. Lastly, the Organisation for Economic Cooperation and Development is discussed as an important forum for excursus and harmonisation of liner shipping policy of the world's most powerful shipping nations.

4.1 UNCTAD and The Code of Conduct for Liner Conferences.

The major maritime nations in 1971 in a forum named the Consultative Shipping Group (CSG), propagated the view that liner conferences were essential to international shipping for the maintenance of stable freight rates and for the general stability of scheduled liner transport. International regulation of liner conference activity was vehemently opposed by this group. The group was instrumental in developing and motivating the principle of "self regulation" which entailed that the public interest would best be served if shipping companies were free to conduct their business within the confines of a code of conduct. The developing nations on the other hand were concerned with market dominance which in their view was bolstered by an unregulated conference system and which denied them a source of revenue and means of controlling their own exports. A weapon in the arsenal of the developing nations would be to implement protectionist policies and frustrate conference access to their ports and facilities.

The UNCTAD Final Act of Conference Plenipotentiaries on a Code of Conduct for Liner Conferences⁴⁹ attempts to cater for the concerns of both the developing nations as well as those raised by the Consultative Shipping Group. The code makes interesting reading and is annexed with an introductory note by Franklin K. Willis as appendix #5

At the time of the adoption of the Code of Conduct, liner conferences enjoyed almost unbroken, monopolistic power. To cater for the concerns of the developing nations, an artificial cargo sharing formula was created whereby the developing nation was to recognise a "National Shipping Line"⁵⁰ which would be entitled to 40% of the export trade from that nation. The conferences would be obliged to make a further 20% of the trade available to outsiders. These cargo sharing provisions were never

⁴⁹Done at Geneva, April 1974

⁵⁰See Chapter 1 of Appendix#5, Definitions.

really implemented after adoption of the code, but considerable pressure was placed on ratifying states and conferences to attempt to reach the goal of allowing the developing state to participate in its trade to the percentage agreed on in the code. A major reason for the failure of the objectives of the code of conduct to ensure developing countries a trade share, is that outsiders made considerable inroads into the conference trade share, causing the influence of conferences to decline. The main goal of the cargo sharing provisions has, over time and with the changing shipping climate been rendered fairly ineffective.⁵¹ The Maritime powers also no longer accept the provisions of this code as the cargo sharing provisions are said to offend the objectives of the Lome Convention and other multinational trade agreements concluded with developing nations. The cargo sharing provisions do however represent a certain goal for empowerment which is now being sought by means other than the code.

The European Economic Commission (E.E.C) published a compromise of the cargo sharing provisions of to apply to E.E.C member States, which became known as the Brussels package. On 15 May 1979, the European Council promulgated a regulation⁵² detailing the terms upon which the Member States should ratify or accede to the U.N code. It was regulated that the arbitrary cargo sharing ratio should not apply between member states, a commercial basis for distributing cargo to the developing countries was to be sought instead; such as allocated space charters on conference lines instead of the "National Shipping Line" provisions of the code.

Another significant principle which found favor in the Code of Conduct, is the "principle of self regulation." The conference of plenipotentiaries, attended by some 90 countries, accepted that United Nations intervention and regulation of shipping activities is basically unhealthy. The principle also highlighted the need for

⁵¹See Conference Report. International Symposium on Liner Shipping IV. Bremen 1988 for detailed statistics of conference activities and trade shares.

⁵²Regulation No. 954/97 published in OJ 1979 L.121

transparency of conference activity and that conferences should cooperate with government bodies to implement efficient shipping policies. The principle of self regulation propounded by the CSG that the industry should be confined to a code of conduct to be enforced internally, was accepted in principle by the plenipotentiaries. In this regard, see Article 5 of appendix#5.

4.2 The European Commission (EC).

The European Commission ("the Commission") is a body established in terms of the Treaty of Rome, assigned certain far reaching jurisdictional powers to enforce European Community competition policy. The European Community adopts a basic free trade policy, but restricts monopolistic economic activity which has no beneficial features or is abusive of a dominant position. The problems sought to be regulated by the commission are in essence:⁵³ (a) Prevention of agreements which have the effect of restricting competition, either between the parties themselves or third parties, *and which do not have any beneficial features*. (b) The need to control attempts by monopolistic or dominant firms to abuse their position and prevent new competition emerging. (c) To ensure that workable competition is maintained in oligopolistic industries. (d) To counter mergers which concentrate the market and diminish the competitive pressures within it. Richard Whish⁵⁴ states that Competition Law is really a matter of who makes important commercial decisions: the market itself, or the competition authorities which control the firms' behavior. The exercise of competition authority is " as transient and subject to change as political thinking generally".

The basic framework of what constitutes unlawful competition in the EC is found in Articles 85 and 86 of the Rome Treaty. Article 85 prohibits restrictive trade practices of undertakings, with the underlying policy of preventing cartel and other

⁵³ See Richard Whish. Competition Law. 3rd Edition.

⁵⁴ *ibid*.

agreements which amount to restrictive trade practices.⁵⁵ Article 86 prevents the abuse of a dominant position within the market. Article 85 allows for the application for "block exemptions" which can be granted to agreements or categories of agreements by the commission, acting under powers conferred upon it by the regulations of the Council of Ministers. Block exemptions are valid without specific authorisation.

Liner Conferences are entitled to apply for a block exemption in terms of Regulation 4056/86⁵⁶ which applies to international maritime transport services from one or more community ports, other than tramp services. The block exemption for liner conferences exempts agreements which have as their object the fixing of rates and conditions of carriage and certain other objectives such as the coordination of shipping timetables, the determination of the frequency of sailing's, the regulation of carrying capacity and the allocation of cargo. The exemption is granted subject to certain conditions, such as nondiscrimination and obligations regarding inter alia consultations with users and loyalty arrangements.

The Commission has also been given by regulation 479/92⁵⁷, the ability to grant block exemptions to some shipping consortia. The exemption is granted subject to the condition of transparency. The consortium is to lodge the provisions and terms of the consortium agreement with the directorate of the commission, along with certain other details of contracts held by the consortium. SAECS qualifies for a block exemption under these provisions and is obliged to lodge details of the consortium with the commission in accordance with the conditions of transparency.

The concept of "joint dominance" in Article 86 of the Rome Treaty is a wide provision without any allocation of block exemptions. The first inquiry is to whether the undertaking enjoys a position of dominance in the market, the second inquiry is to

⁵⁵See Richard Whish *ibid.* for a detailed discussion of these concepts.

⁵⁶Published in JO 1962 275/1

⁵⁷Published in OJ 1992 L55/3.

whether the undertaking has abused this position of dominance. The Commission has the right to impose fines of up to 10% of the previous years turnover against any shipping company found breaching competition law. The provisions of Article 86 have been used by the commission to fine and restrict the practices of multimodal transport associations i.e. associations which are a combination of both maritime and overland transport.

In *Atlantic Container Line AB and others v European Commission*⁵⁸, multimodal rate fixing was banned and immunity from fines was withdrawn on an application for block exemptions of the new liner agreement⁵⁹. More recently, a fine imposed on CMB, Nedlloyd Lines and two other lines (members of the Central West African Lines Conference) was upheld by the European Court. The fine was imposed for abuse of a dominant position via an agreement with the Zaire office for maritime freight, by undercutting independent lines' rates, and via loyalty agreements in breach of antitrust regulations.⁶⁰ This is an example of the commission using the provisions of Article 86 and the theory of joint dominance, notwithstanding the block exemption.

Europe has always permitted 'closed conferences' i.e. conferences which restrict their membership and deny access to outsiders, but has sought to enforce transparency of these cartels and other associations and at the same time prevent 'unhealthy' market domination.

4.3 The Federal Maritime Commission (FMC)

The FMC is a body created by an act of congress⁶¹ with far reaching jurisdictional powers for the enforcement of the United States of America's maritime laws and

⁵⁸Case T-395/94, OJ No. C392 of 31/12/1994 p15

⁵⁹See also *SUNAG v Compagnie Maritime Belge and others* OJ NO. C 351 of 30/12/1995

⁶⁰See *Lloyds List Africa Weekly Issue No.075*. Fri. 18/10/1996.

⁶¹The Federal Commission Act

policies. The U.S.A has a long history of competition law with the Sherman Act, the first act of congress seeking to enforce antitrust laws, passed over 100 years ago. The basic point of departure of antitrust law, as propounded by Neale and Goyder⁶², is that " the public interest is best protected from the evils of monopoly and price control by the maintenance of competition."

The U.S. is the only jurisdiction which enforces an 'open conference system'. In terms of this system, the conference is obliged to admit players of the trade route served, as members into the conference if the outside company complies with certain provisions. The conference is obliged to publish and furnish the FMC with its price structure and other pertinent information. The FMC is given extremely wide powers of discovery and acts as an administrative agency with quasi- judicial powers, with the right to impose fines and ban certain activities. A right of appeal to the Federal Courts vests with liner shipping companies. A conference serving the U.S is obliged to be completely transparent, and their freight determination structure is subject to authorisation by the FMC.

It is argued that the 'open conference' system confers extraterritorial reach to the FMC. It poses problems as to jurisdiction, as one country unilaterally attempts to impose on others its own theory and laws concerning the international liner industry. The attitude of the United States to this criticism has been that foreign shipping vessels must realise that when foreign vessels engage in trade in the U.S. it is on the condition of observance of U.S. law. It can be argued that the interventionist and regulatory approach adopted by the FMC, with the 'open conference' requirements, raises significant questions as to its jurisdiction and compatibility with the principle of International comity⁶³.

⁶²A.D. Neale and D.G. Goyder. A study of Competition Enforced by Law. Third Edition.

⁶³Comity of Nations can be defined as the courteous and friendly understanding by which nations respect the laws and usage's of every other, so far as it may be without prejudice to its own rights and interests.

The debate as to the effectiveness of the US approach to liner shipping activity is a long-standing and complex one which this dissertation does not seek to resolve. GK Sletmo and E.W. Williams, in their book⁶⁴; analyse the issues surrounding effectiveness of the U.S. interventionist approach in depth and propose alternatives.

4.4 The Organisation for Economic Cooperation and Development (OECD)

The OECD is an international organisation consisting of 29 of the world's most economically powerful states. The organisation was formed in 1961, an extract from the OECD web site⁶⁵ indicating membership of the organisation and date of joining, is annexed as appendix #6. The organisation consists of a council with its committees and a secretariat. The council meets once a year at ministerial level. Finance, trade, foreign and other ministers from member countries set priorities for the work that would best support their common policy making needs. Committees for specific subject areas are set up under the council which conduct discussions, aided by the research and guidance of the Secretariat, on specific issues on policy making⁶⁶. The OECD can be described as an international forum for the exchange of policies on the basis of reciprocity.

The Maritime Transport Committee of the OECD, has been significantly active in international shipping policy, since the inception of the OECD in 1961. It played a central role in research and discussions surrounding the efforts of UNCTAD in the adoption of the Code of Conduct for Liner Conferences. The committee strongly promotes the principle of free and fair competition on a global basis and has set up consultations with non OECD member countries, seeking to promote convergence of competition rules and national policy on free and fair trade. These consultations

⁶⁴Liner Conferences in the Container Age. U.S. Policy At Sea

⁶⁵<http://www.oecd.org/about/member-countries.html>

⁶⁶See the web site at <http://www.oecd.org/about/organise.htm> for a detailed synopsis of how the OECD is organised.

have been set up with a number of nations present, including recent consultations with the ex Soviet Union states, and the Eastern and Central European states.

The Maritime Transport Committee prides itself as being the only international forum in which maritime transport issues are considered from policy and economic angles. The Committee seeks to reach a formal understanding of maritime transport policies with non OECD members, bringing to these discussions the basic perspective that the benefit of trade and investment liberalisation is to open national markets further to global competition.

The significance of the influence of the OECD on international shipping policy cannot be understated. Much of the convergence of national laws on competition and other shipping service policies, is attributable to this forum.

CHAPTER 5

SOME CONCLUDING OBSERVATIONS

Shipping operations are international activities which are inevitably subject to the laws and regulations of the many jurisdictions which they serve. Globalisation has brought with it a greater unification of the policies and laws of maritime nations. International Governmental Organisations have emerged as a fairly recent phenomenon with the central agenda of harmonisation of international trade laws with the fundamental goal of global trade liberalisation.

There are four recognised main international trade routes: (a) The transpacific (b) The Far East - Europe trade route (c) The transatlantic trade and (d) The Europe - Australia trade. In the earlier part of this century until fairly recently, these trade routes were dominated and monopolised by liner conferences. Non conference members in the later part of this century have made significant inroads into conference activity. Further factors in the diminishment of conference power is the emergence of the developing nations who threatened the conferences with protectionist measures, and the increased international and local governmental

intervention in, and control of conference activity. Price fixing with sound financial results has become increasingly difficult for these cartels to achieve in the international liner shipping trade. What has emerged as a trend in place of conferences, are alliances of shipping companies. These alliances are closed agreements whose primary objective is to reduce investment in working capital and operating costs. Technological advances such as methods of carriage and distribution and modern business technologies such as Electronic Data Interchange (EDI)⁶⁷ have enabled the liner shipping companies to pool resources and schedule trade far more effectively than in the past.

The impetus of governments integrating policies in a more comprehensive and coordinated manner is increasing with the efforts of organisations such as the OECD. The tension between the power of private shipping operations and governmental power now takes place mainly in the global arena. The OECD is currently conducting discussions on the emergence of global strategic alliances in which non-member countries have voiced their concern of the danger of over capacity and market domination brought about by these global strategic alliances. The European Commission has flexed its muscle recently with Article 86 'joint dominance' fines⁶⁸ and the European Union, since the recent introduction of the common currency, is seeking to curb the scope and use of tax havens.

What this dissertation aimed to achieve was firstly, to highlight the tension between government and the players in international shipping commerce from a South African perspective, and secondly to give some insight into the legal mechanics of a typical modern day consortium. Consortiums pose a particular problem to prospective litigants seeking to enforce their claim against the responsible party. Insurance is an essential lubricant for the consortium machinery.

⁶⁷Information technology, facilitating the negotiation of Bills of Lading.

⁶⁸See p 49 supra.

With the termination of trade sanctions, the conference system is losing its significance. The South African government will be hard pressed to resist the magnetism of trade liberalisation and harmonisation of international antitrust policy. The General Agreement on Trade in Services (GATS) places new obligations on the government in the future to adhere to International policy. The new South African ship register creates interesting possibilities for financial investment in the shipping and shipbuilding industry, and the role of government support.

Regulations of any activity are never static and carved in stone but are a manifestation of the politics of the day. The shipping market is particularly volatile and linked to the large scale financial services industry, which itself exersises a significant influence on policy. Shipping companies will alter their cooperation strategy and the legal structures underlying their associations in order to comply with the regulations governing their activities, whilst aiming to acheive maximum profitability and efficiency.

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A G R E E M E N T

BETWEEN

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA,

THE PERISHABLE PRODUCTS EXPORT

CONTROL BOARD

AND

THE CONFERENCE

Relative to the ocean conveyance of goods between

The Republic Of South Africa and Europe

Operative from the 1st January 1977 to 31st December 1991.

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C O N T E N T S

- SECTION 1. PREAMBLE
2. DEFINITIONS
3. SERVICES TO BE PROVIDED
4. PERISHABLE CARGO
5. COSTS TO BE RECOVERED IN OCEAN FREIGHT RATES
6. DETERMINATION AND MODIFICATION OF OCEAN FREIGHT RATES
7. SUPPORT FOR THE SERVICE
8. EXCEPTIONAL OR CHANGED CIRCUMSTANCES
9. LEGAL PROVISIONS
10. PERIOD OF AGREEMENT
11. SIGNATURE OF THIS AGREEMENT

ARTICLES OF AGREEMENT MADE THIS FIFTEENTH DAY OF JUNE IN THE
YEAR ONE THOUSAND NINE HUNDRED AND SEVENTY-SEVEN (HEREINAFTER
REFERRED TO AS "THIS AGREEMENT") BETWEEN THE GOVERNMENT OF THE
REPUBLIC OF SOUTH AFRICA, THE PERISHABLE PRODUCTS EXPORT CONTROL
BOARD AND THE CONFERENCE

SECTION 1

PREAMBLE

WHEREAS

1. The Conference have advised the Government that it is their firm conclusion that South Africa could not stand aloof from the general trend in world shipping to carry increasing proportions of the general cargo trade in containers.
2. The Government have accepted this conclusion of the Conference.
3. The Conference have proposed that, on the basis of their assessment of the probable cargo flows between Europe and South Africa, a new type of shipping service should be constituted in accordance with the details outlined in Section 3 of this Agreement.
4. The Government and the Board have accepted the proposals of the Conference with regard to the types and numbers of the ships to be employed in the new service and the frequency of the sailings which would be required.

5. The Government, the Board and the Conference have agreed that, in order to ensure the most economic utilisation of the new service to be provided by the Conference, it would be advisable to accommodate in the new service both general cargo and perishable cargo on the strength of the indication available to them that the inclusion of the latter type of cargo would reduce the overall cost per ton of all cargo carried in the service.

NOW, THEREFORE, THE GOVERNMENT, THE BOARD AND THE CONFERENCE AGREE THAT -

Having regard to the longstanding contractual arrangements which have existed between them with respect to the shipping services which the Conference have provided in order to meet the requirements of the seaborne trade between Europe and South Africa, the introduction of the new types of service referred to above should likewise be governed by a mutually acceptable contractual arrangement as set out in the following Sections. However, it is agreed and recorded that the Board is a party to this Agreement only to the extent as set out in the Agreement.

It is further agreed that no indulgence or relaxation by, or on the part of any of the parties to this Agreement in the implementation of the terms of the Agreement shall, under any circumstances whatsoever, during the currency of this Agreement be regarded or construed as a waiver by any of the parties of any rights which they have in terms of this Agreement.

SECTION 2

DEFINITIONS

The Government, the Board and the Conference agree that in this Agreement, unless otherwise provided:

"THE GOVERNMENT" shall mean the Government of the Republic of South Africa.

"THE BOARD" shall mean the Perishable Products Export Control Board constituted pursuant to the provisions of Act 53 of 1926, as amended, of the Parliament of the Republic.

"THE CONFERENCE" shall mean the following members of the South and South-East African Conference which participate in the carriage of the seaborne traffic between the Republic and Europe:

THE UNION-CASTLE MAIL STEAMSHIP COMPANY, LIMITED.

THE CLAN LINE STEAMERS, LIMITED.

ELLERMAN & BUCKNALL STEAMSHIP COMPANY, LIMITED.

SPRINGBOK SHIPPING COMPANY, LIMITED.

THOS. & JAS. HARRISON LIMITED.

HALL LINE LIMITED.

HOUSTON LINE LIMITED.

THE PENINSULAR & ORIENTAL STEAM NAVIGATION COMPANY.

BLUE STAR LINE, LIMITED.

NEDLLOYD/...

NEDLLOYD LIJNEN B.V.

COMPAGNIE MARITIME BELGE s.a.

REDERIAKTIEBOLAGET TRANSATLANTIC.

WILH. WILHELMSSEN.

COMPAGNIE GENERALE MARITIME.

COMPAGNIE MARITIME DES CHARGEURS REUNIS.

LLOYD TRIESTINO.

SOUTH AFRICAN LINES LIMITED.

SOUTH AFRICAN MARINE CORPORATION, LIMITED.

DEUTSCHE OST-AFRIKA-LINIE G.m.b.H.

IGNAZIO MESSINA & C.

OVERSEAS CONTAINERS LIMITED.

COMPANHIA NACIONAL DE NAVEGACAO

and also such other shipping lines as, with the concurrence of the Government, the Board and the Conference, may subsequently become participants in the carriage of the sea-borne traffic between the Republic and Europe, and which by means of their formal notification to the Government and the Board through the Conference, shall undertake to adhere to the terms and conditions laid down in this Agreement.

"BULK VESSELS" shall mean those vessels which are specifically designed for the carriage of homogeneous bulk dry cargoes.

"CELLULAR CONTAINERSHIP" shall mean a ship designed so that the major part of the underdeck spaces available for cargo is subdivided into cells or "slots" into which, or from which, containers can be inserted or removed vertically, and which

containers/...

containers are held in place by guides.

"CONTAINER" shall mean a box, made of metal or of wood or of both, of standard dimensions designed to fit into the cells of a cellular containership. Such containers are of standard 8 foot width, but may be of varying heights and may have a length of 20 or 40 foot. A "twenty-foot Container", for the purposes of this Agreement, shall mean a container of dimensions 8 foot width, 20 foot length and 8 foot or $8\frac{1}{2}$ foot height, unless otherwise agreed to by the parties to this Agreement.

"CONVENTIONAL VESSEL" shall mean a ship in which access to the major part of the underdeck spaces available for cargo is obtained through deck hatches, and in the loading and unloading of which cargo is lifted on and off by shore cranes or ship derricks or cranes and is stored in the lower holds or 'tween decks into which the ship is subdivided.

"EQUALISATION" shall mean the costs borne by the Lines in moving containers between the shippers' or receivers' premises and the terminal, less the revenue collected from the shipper or receiver which revenue approximates to the costs that the shipper or receiver would have borne under a conventional service in moving goods to or from the nearest or more convenient port previously served by the Conference.

"FORCE MAJEURE" shall mean any cause happening or event not within the control of the Government, the Board and the Conference including (without prejudice to the generality of the

foregoing)/...

foregoing) an act of God, fire, storm, tempest, perils or accidents of the seas and rivers, war risks and war-like or other hostile acts (whether any war or hostilities be actually declared or not), acts of piracy, restraints of governments (whether de facto or de jure), rulers or peoples or governmental or statutory Acts, orders, rules, regulations or requisitions, revolution, insurrection, riots, civil commotion, strikes, lock-outs and labour disputes.

"GENERAL CARGO" shall mean all cargo except such perishable cargo as is defined below.

"IMBALANCE MOVEMENTS" shall mean the movement of empty containers to an area or country or continent required in order to redress the fact that the numbers and types of filled containers moving into that area, country or continent are not equal to the numbers and types of filled containers required to move cargo out of that area, country or continent.

"THE INITIAL PERIOD" shall terminate on the 31st December, 1984.

"NEW TECHNIQUE SHIPS" (or Vessels) shall mean cellular containerships and/or Roll-on/Roll-off ships and/or similar purpose vessels.

"PERISHABLE CARGO" shall mean cargo consisting of perishable products as defined in the Perishable Products Export Control Act No. 53 of 1926, as amended, of the Parliament of the Republic.

"ROLL-ON/ROLL-OFF VESSEL" shall mean a ship which is designed in such a manner that access to the major part of the under=

deck/...

deck spaces available for cargo on the ship is obtained by a wide ramp to the shore and additional ramps within the ship, and from which, and on to which cargo is carried by wheeled vehicles or trailers using these ramps.

"SLOTS" shall mean the cells into which a cellular container-ship is divided, so that a single "slot" is a cell capable of accommodating a single container.

"SUIT" shall mean that number of containers sufficient to fill all the designed underdeck and on-deck capacity of a cellular containership.

"TERMINAL" shall mean the special facility within a port at which a new technique ship berths, which facility is designed and equipped for the loading and discharge of such a vessel and the receiving, stacking, and delivery of its cargo.

"TRAMP VESSELS" shall mean those vessels which ply for hire on a casual basis and are not regularly employed in a given trade.

SECTION 3/...

SECTION 3

SERVICES TO BE PROVIDED

A. The Government, the Board and the Conference agree that the following services shall be introduced by the Conference as soon as ships can be delivered and shore facilities provided:-

North European Service

1. A service consisting of 9 cellular containerships, each capable of carrying the equivalent of approximately 2 450 twenty-foot containers, to be operated on a basic schedule of an approximately 6 day frequency. Any change in such number of vessels, or in such basic schedule of frequency, shall be introduced by the Conference only in consultation with the Government and the Board. The Government, the Board and the Conference agree that this service shall initially call at the following ports in North Europe (including the United Kingdom): Hamburg, Bremerhaven, Rotterdam, Zeebrugge, Le Havre and Southampton, and at the ports of Cape Town, Port Elizabeth and Durban, as well as such other ports as may be decided upon in consultation between the Government, the Board and the Conference.
2. A complementary service also between ports in North Europe (including the United Kingdom and Scandinavia)

and/...

and in Southern Africa to carry those general cargoes which either cannot be accommodated by the cellular containerships referred to above, or which emanate from, or are destined to ports at which the cellular containerships are not scheduled to call, and which cannot more economically be carried by coastal services or inland transport. This complementary service will be operated by 4 roll-on/roll-off vessels of specifications agreed upon between the Government and the Conference, and by whatever conventional vessels may from time to time be required to serve the trade. The provision of refrigerated space and the inclusion of perishable cargo in the complementary service will be subject to mutual agreement between the Government, the Board and the Conference.

Mediterranean Service

3. A service consisting of three cellular containerships, each capable of carrying the equivalent of approximately 1 300 twenty-foot containers, to be operated on a basic schedule of an approximately 17 day frequency. Any change in such number of vessels, or in such basic schedule of frequency shall be mutually agreed upon between the Government and the Conference. This service is to call at the Mediterranean ports of Barcelona, Marseilles,

Leghorn/...

Leghorn and Trieste and at the ports of Cape Town, Port Elizabeth and Durban as well as such other ports as the Government and the Conference may mutually agree upon.

4. A complementary service, also between Mediterranean ports and Southern African ports, to carry those general cargoes which either cannot be accommodated by the cellular containerhips referred to above, or which emanate from, or are destined to ports at which the cellular containerhips are not scheduled to call and which cannot more economically be carried by coastal services or inland transport; this complementary service to be operated, initially at least, by conventional vessels. The provision of refrigerated space and the inclusion of perishable cargo in this complementary service will be subject to mutual agreement between the Government, the Board and the Conference.

B. The Conference will arrange the services to be provided by the cellular containerhips and complementary services in such a manner as to ensure, to the best of their endeavours, the provision of adequate services to cover the general cargo trade between Europe and South Africa, excluding those cargoes which customarily move by tramp or bulk vessels and, in doing so, the Conference undertakes not to discriminate, in the allocation of shipping space, against any particular types of general cargo on account of such types of cargo bearing a relatively low rate of freight.

The/...

The fullest possible economic use shall be made of space available in the new technique ships before general cargo is carried in conventional vessels.

- C. The Government and the Conference agree that the financial provisions of this Agreement shall apply to the operation of the services described above but shall not embrace any fully refrigerated vessels used for the carriage of perishable cargo or vessels performing voyages under the South African Ocean Mail Contract dated 16th May, 1963.
- D. If, in order to provide proper coverage of the trade, the Government and the Conference agree that the Conference shall introduce further new technique vessels in excess of the numbers specified in paragraph A above, the financial provisions of this Agreement shall apply also to such vessels. The provision of refrigerated space and the inclusion of perishable cargo in such vessels, will be subject to mutual agreement between the Government, the Board and the Conference.

SECTION 4/...

SECTION 4

PERISHABLE CARGO

A. North Europe Trade

1. The Conference undertakes to provide, within the capacity of the ships and services outlined in paragraph A.1 of Section 3, the following specially equipped space and insulated containers therefor in each cellular container-ship employed in the North Europe trade:
 - (a) Approximately 176 "slots" equipped with a refrigeration system suitable for the carriage of deep-frozen or special perishables in insulated containers.
 - (b) Approximately 352 "slots" equipped with a refrigeration system suitable for the carriage of fruit in insulated containers.

2. The Board undertakes that, in preference to using any other shipping space to North Europe, and subject to mutually acceptable rates of freight being negotiated in terms of paragraph C of this Section:
 - (i) when perishable products other than deciduous and citrus fruit are available for shipment, to utilise to the maximum extent the slots referred to in paragraph A1(a) of this Section;

(ii)/...

(ii) when deciduous and citrus fruits are available for shipment, to utilise the slots referred to in paragraph A1(b) of this Section as follows:-

(a) 5 000 cubic metres a week over a 35 week season on the understanding that this quantity of fruit will be provided by the Board for shipment on the basis that deciduous fruit will be carried from the beginning of the deciduous fruit season until the beginning of the citrus fruit season whereafter citrus fruit will receive preference in the allocation of the relevant number of slots throughout the citrus fruit season; and

(b) the remainder of the 352 slots with deciduous fruit over a 17.5 week season.

3. In the event of the Conference Lines installing refrigerated slots and providing insulated containers in excess of the numbers mentioned in paragraphs A1(a) and A1(b) of this Section, the Government, the Board and the Conference agree that the additional capital cost of such slots and insulated containers, as well as such other costs as are defined in the accounting schedules, will be borne by the Conference Lines and will not be covered by the financial provisions of this Agreement. Similarly, the revenue earned on perishable cargo conveyed in the excess refrigerated slots thus provided by the Conference/...

ference shall be excluded from the financial provisions of this Agreement.

B. Mediterranean Trade

The Conference undertakes that the cellular containerhips used in the Mediterranean trade (see Section 3 paragraph A 3 above) will each provide approximately 108 slots equipped with a refrigeration system suitable for the carriage of all types of perishable cargo.

C. The Government, the Board and the Conference agree that -

(1) Since the inclusion of perishable cargo in the new service will reduce the cost per ton of all cargo carried in the service, the additional costs to be incurred by the Conference in order to accommodate perishable products in the slots enumerated in paragraphs A.1. and B. of this Section shall be borne by all users of the service in both the northbound and the southbound trades, and not only by the exporters of perishable products.

(2) The volume of refrigerated space referred to in paragraph A.1. of this Section shall be available for the shipment of any perishable products whenever the Board so requests, subject to reasonable notice being given by the latter to the Conference.

(3)/...

- (3) Although the Board will use its best endeavours to utilise the facilities provided for the carriage of perishable cargo to the extent indicated in paragraph A.2. of this Section, the Board does not accept a financial responsibility arising from the non-availability of perishable products for shipment at any particular time.
- (4) Adjustments in the freight rates of individual perishable commodities shall not only affect the freight rates of other perishable products, but will affect the rates applicable to all other commodities conveyed in the service, in a manner similar to that which is provided for in respect of general cargo in paragraph 9(d) of Section 6.
- (5) The freight rates and conditions of carriage applicable to perishable cargo from time to time, including the initial rates which are to apply in respect of the various types of perishable cargo, shall be determined by negotiation between the Board and the Conference, the two parties recognizing that such negotiations may result in different rates of freight applying to different categories of space and containers and in different periods of shipment.
- (6) Notwithstanding the provisions of sub-paragraph 5 above, any subsequent adjustments of the rates of freight applicable to perishable cargo referred to in paragraph A2 of this Section shall be negotiated with the object

of/...

of achieving percentage freight rate adjustments similar to any percentage adjustments in the freight rates on general cargo which may be reflected by the implementation of the provisions of Sections 5 and 6 of this Agreement. It is recorded, however, that in any such negotiations special consideration shall be given by the Conference to any representations which may be submitted to it on behalf of the shippers of perishable cargo other than deciduous and citrus fruit because of the constraints that are being placed on the exporters of these products in the light of the Board's undertaking referred to in paragraph A.2(i) of this Section.

- (7) If the Board wishes to utilise the facilities provided in the North Europe trade (see paragraph A.1 of this Section) to a greater extent than is provided for in paragraph A.2. of this Section, or to utilise the facilities provided in the Mediterranean service (see paragraph B of this Section), it is recorded that the Board and the Conference shall not be obliged in any negotiations between them with respect to the freight rates which will apply to perishable cargo in these particular cases, to have regard to the content of, and the outcome of the implementation of the provisions of Sections 5 and 6 of this Agreement. The same condition will apply if the Board wishes to utilise

- (a) such additional facilities as the Conference may install in the North Europe trade as are referred

to in paragraph A.3 of this section which, in any event, do not form part of this agreement; and

(b) facilities in the complementary services referred to in Section 3, paragraphs A.2 and A.4 or in the new technique vessels referred to in Section 3 paragraph D.

(8) The Conference undertakes that the specially equipped spaces and insulated containers specified in paragraphs A and B of this Section shall upon each occasion when they are made available for the carriage of perishable cargo, meet the technical requirements of the Board, to which end the Board will provide full particulars of its requirements to the Conference; furthermore the Conference undertakes to exercise due diligence in order to ensure continued compliance with those requirements whilst the specially equipped spaces and insulated containers are being used for the conveyance of perishable cargo.

(9) The Board's commitment in respect of paragraph A.2. of this Section is conditional upon the solution of the ventilation and other technical problems involved.

SECTION 5/...

SECTION 5

COSTS TO BE RECOVERED IN OCEAN FREIGHT RATES

The costs involved in the movement of cargo and containers, shall be properly recovered from the relative rates of freight to be determined by the procedures described in Section 6 in respect of -

- (a) Services operated by cellular container ships.
- (b) Services operated by the roll-on/roll-off ships (if and when established).
- (c) Services operated by conventional ships in terms of paragraphs A.2 and A.4 of Section 3.

The Government and the Conference therefore agree that -

- 1. The costs recoverable under the conventional services (see paragraphs A.2 and A.4 of Section 3) will be -
 - (a) those operating costs recoverable under the Ocean Freight Agreement dated 22nd August, 1966, plus
 - (b) the appropriate capital charges as set out in paragraphs 4(b) and 4(c) of Section 6.

(c)/...

(c) It is recognised that, as the new technique ships are introduced, the pattern of the conventional services is likely to change and that some amendments may be required to the accounting procedures established under the Ocean Freight Agreement dated 22nd August, 1966, in order to relate the results of those services to those of the new technique ships. The Government and the Conference agree to make such alterations to those procedures as may from time to time be required for that purpose and, in particular, if the conventional services should cover substantial quantities of both South African and non-South African cargoes, to make equitable allocations of costs between the two types of cargo so as to arrive at the costs applicable to the South African trade.

2. The overall net costs recoverable under the cellular container-ship services (see paragraphs A.1 and A.3 of Section 3) will be:

(a) Cargo charges:

- (i) Marketing costs
- (ii) Container control costs
- (iii) Terminal and depot costs not recoverable from inland tariffs

Lifting containers in and out of ship
Stacking and sorting of containers
Handling containers on and off road/rail
vehicles

Cost/...

Cost of packing and unpacking containers.

(iv) Net cargo claims

(v) Coastal feeding and transshipment costs.

(b) Container costs and allowances:

(i) Container capital charges

Replacement allowance

Return on capital

(ii) Container short term hire charges

(iii) Container running costs

Insurance

Maintenance and repairs

Refurbishment

Cleaning

(c) Ship costs and allowances:

(i) Ship capital charges

Replacement allowance

Return on capital

Pre-finance charges on the new vessels

(ii) Ship running costs

Crew wages and messing

Stores, maintenance and repairs

Insurance

Administration of ships

(iii)/...

(iii) Ship voyage costs

Port dues and charges

Fuel

(d) Container cost not recoverable from Inland Tariff:

Positioning costs of containers

Imbalance movements

Equalisation (in lieu of extra port calls)

Container storage costs

(e) Head office expenses:

Central Conference Programming and Scheduling Organisations. Member Lines' Head Office costs as apportioned to the South African trade.

3. The way in which the above costs are to be established for the purpose of this Agreement is set out in the accounting schedules to be agreed upon between the Government and the Conference.
4. The costs recoverable under roll-on/roll-off and any similar services (see paragraph A.2 of Section 3) will depend on the nature of the vessels employed in these services and on the nature of the cargo they carry. The Government and the Conference agree that the costs applicable to these services will be determined in a manner similar to the determination of the costs in respect of the cellular container ship services outlined in paragraph 2 above. A separate set of accounting procedures will be agreed upon between

the/...

he Government and the Conference in respect of the roll-on/
roll-off service.

SECTION 6/...

SECTION 6

DETERMINATION AND MODIFICATION OF OCEAN FREIGHT RATES

The Government and the Conference agree that the following financial arrangements shall apply to the services operated under this Agreement and listed under Section 3 -

1. Although, as provided for in Section 10, the period of validity of this Agreement shall be 15 years, the financial arrangements shall be subject to renegotiation on the termination of the initial period of the Agreement, as defined in Section 2, and shall be subject to review at the request of any party at intervals of three years thereafter.
2. This Agreement shall cover the determination of the ocean freight rates on the basis of the costs as defined in Section 5. The ocean freight rates shall be the tariff rates or the appropriate contract rates of the Conference ruling as at 1st January, 1977 or as subsequently modified to take into account the introduction of the new technique service or in accordance with the provisions of this section.
3. The ocean freight rates operative under this Agreement shall be subject to review annually. Any tariffed inland charges such as terminal LCL or zonal charges may, however, be adjusted by the Conference at more frequent intervals as circumstances/...

cumstances require. It is recognised that adjustments to these freight rates by way of a Currency Adjustment Factor or such other surcharges as are customary in international shipping to cover exceptional changes in costs or conditions may become necessary between the dates of two reviews. Such emergency situations will require prompt action.

4. At each freight review the ocean freight rates shall be adjusted to such a level as will, throughout the period in which the revised level of freight rates is expected to operate -

- (a) cover the anticipated costs of providing the services as set forth in Section 5;
- (b) provide an allowance for replacing the fixed assets employed in the trade, based upon the replacement cost of the vessels, containers, and other equipment (which constitute fixed assets for the purposes of this Agreement) calculated at the following rates on a straight line basis and determined in accordance with the provisions of paragraph 5 of this Section;
 - (i) new technique ships (for the first 15 years of each ship's life) at 6.333% p.a.;
 - (ii) containers (for the first 7½ years of each container's life) at 13.333% p.a.;
 - (iii) conventional vessels (for the first 20 years of

each/...

each ship's life) at 4.75% p.a.;

- (iv) other equipment at appropriate rates to be mutually agreed to by the Government and the Conference;
 - (v) improvements to conventional vessels made in order to adapt them to the new techniques at a rate which allows the improvement to be written off during the remaining years of each vessel's life of twenty years.
- (c) provide a return on the capital employed in the trade calculated at the rate of $12\frac{1}{2}\%$ p.a. on the first cost of new technique ships and $10\frac{1}{2}\%$ p.a. on the first cost of the containers as determined in the Accounting Schedules and at $12\frac{1}{2}\%$ p.a. on the first cost of conventional ships written down at the rate provided for in paragraph 4(b)(iii) of this Section and at a rate on ancillary equipment, such rate and ancillary equipment to be agreed upon between the Government and the Conference as and when such equipment is introduced;
- (d) provide for such adjustment in respect of any cumulative surplus or deficit from the inception of this Agreement to the date of the Review as is necessary to ensure that during the initial period of the Agreement as defined in Section 2, the Conference shall earn an average return on capital as calculated in accordance with the provisions of sub-paragraph (c) of this paragraph.

(a) The replacement cost of fixed assets (see paragraph 4(b) of this Section) at the relevant date shall be determined by taking the cost of the asset as determined in accordance with the accounting schedules to be agreed upon between the Government and the Conference, and proceeding as follows:-

(i) Allocate the cost of the asset to the participating countries, instalment by instalment, in the following proportions:-

Republic of South Africa 50%

Europe:

United Kingdom	At each budgetary session the re-
West Germany	lative proportion of each European
Netherlands	country for the following year will be
Belgium	agreed upon between the Government and
France	the Conference on the basis of the
Italy	anticipated trade volumes both
Scandinavia	northbound and southbound.

(ii) Convert each such sum to the currency of the participating country at the exchange rate ruling at the date of payment of the instalment.

(iii) Adjust each such sum, as expressed in the currency of the participating country, by reference to

movements/...

movements in the consumer price index of that country between the date of payment of the instalment and the relevant date.

(iv) Convert each such adjusted sum, as expressed in the currency of the participating country, to the tariff currency at the exchange rate ruling at the relevant date.

(v) The replacement cost of the asset at the relevant date in the tariff currency is then the aggregate of the sums determined as in sub-paragraph (iv) of this paragraph.

(vi) Unpaid instalments at date of delivery to be treated as payments made on delivery.

(b) Calculations of the allowance for replacing fixed assets shall be made by reference to the replacement cost of the assets as determined in accordance with the procedures outlined in sub-paragraph (a) of this paragraph.

(c) When an asset is employed in the trade for part of a financial year then calculations of the allowance for replacing fixed assets shall be made on a daily basis having regard to the number of days that the asset was employed in the trade.

(d)/...

(d) In order that allowance shall be made for payments on account of new tonnage prior to the delivery of the ship from the builder, the first cost of the ship both in computing the replacement allowance and the value of the capital employed shall include interest at the rate of 11% per annum on any payments on account, such interest running from the date of payment on account of the ship up to the date on which the ship is delivered from the builders.

6. Notwithstanding the provisions of this Agreement the Government give the Conference the liberty;

(a) in respect of rates of freight from Europe to the Republic:

(i) to increase, at any time, the rate of freight generally on all commodities, or increase the rate of freight on any commodity or group of commodities, in either case excluding such items of essential plant and raw material as may be mutually agreed upon between the Government and the Conference; and

(ii) to reduce, at any time, with the concurrence of the Government, the rate of freight on any commodity or group of commodities; and

(b) in respect of rates of freight from the Republic to Europe:

(i) after ascertaining the views of the Government respecting/...

specting the rates of freight, to continue their established practice of negotiating directly with shippers or shipper associations and determining mutually acceptable rates of freight on a contract basis where this is considered desirable in respect of any commodity, provided the conveyance of such commodity is made the subject of a period agreement and the contract rate of freight does not exceed the Conference's appropriate tariff rate; and

- (ii) to adjust the rates of freight on exports from the Republic of such products as are from time to time subject to competition.

7. In September/October of each year the Government and the Conference will assess the anticipated revenue requirements for the 12 month period to commence on the following 1st January, in accordance with the following procedures:

- (a) The Conference will submit to the independent accountants audited operational results for each successive period of 12 months made up to a date to be agreed.
- (b) On the basis of such returns the independent accountants will report the cumulative surplus or deficit earned from the inception of this Agreement.
- (c) The Conference will then submit to the independent accountants a forecast of their results for the ensuing

12 month period commencing on 1st January next allowing for changes in the level of freight rates, costs, cargo volumes and other relevant factors. The independent accountants will examine and report upon such forecasts.

- (d) The Government and the Conference will then confer and come to a decision by 15th October, each year, as to the overall freight adjustment to be applied for the ensuing 12 month period commencing 1st January.
- (e) The principles governing the production, control and monitoring of the accounting and statistical information to be submitted by the Conference for the purposes of this Section in respect of the cellular service will be set out in separate accounting instructions and schedules to be agreed upon between the Government and the Conference. The forms and detailed procedures involved in collecting the information required will be decided from time to time by the Joint Accountants in consultation with the Government and the Conference. The Government and the Conference accept that the principles underlying the Accounting Schedules may be reviewed by them if the Joint Accountants feel that the information produced is inadequate for their purposes.

8. The Government and the Conference will operate the provisions of paragraph 6 of this Section in such manner as will give the Conference over the initial period of the Agreement as defined, the return on capital calculated in the manner set out in paragraph 4(c) of this Section. Notwithstanding the provisions of paragraph 4(d), however, it is realised and accepted that owing to the varying circumstances of the trade the actual return earned in any year may exceed or fall short of the agreed return. In view of the heavy capital commitments undertaken by the Conference in introducing the new service, however, the Government undertakes that it will not require the Conference to accept a return of more than $2\frac{1}{2}\%$ below the agreed return in any period of twelve months unless otherwise agreed between the Government and the Conference.

9. The Government and the Conference agree that:

(a) subject to the provisions of sub-paragraphs (b) to (f) of this paragraph, the overall freight adjustment called for by the application of the provisions of this Section shall be accepted and given effect to accordingly by adjusting the general level of freight rates between the Republic and Europe, either by a uniform percentage adjustment applied overall to rates of freight on cargoes moving southbound and northbound which shall be the aim, or, if the Government and Conference in consultation so determine, by different overall freight adjustments applied to southbound and northbound/...

northbound cargoes;

- (b) subject to the provisions of paragraph 6 of this Section, the Conference shall have freedom to achieve the overall percentage adjustment applicable to southbound cargoes by applying differential freight adjustments to individual commodities;
- (c) the Government shall be free to decide that different percentage northbound freight rate adjustments shall apply to individual commodities provided the overall percentage freight rate adjustment in respect of northbound general cargo resulting from the implementation of the provisions of Section 5 and of this Section of the Agreement is achieved;
- (d) any percentage adjustment in the freight rates on both northbound and southbound cargoes resulting from a periodic review of freight rates undertaken in terms of Section 5 and 6 of this Agreement shall not ipso facto apply to the rates on all commodities, on the understanding that any lower adjustments in the rates in respect of any particular commodities will have to be accommodated by means of higher adjustments in the rates on other commodities;
- (e) the exercise by the Government of the freedom referred to in sub-paragraph 9(c) of this Section shall not detract from the liberty of the Conference to negotiate

contract/...

contract rates pursuant to paragraph 6(b)(i) and (ii) of this Section;

(f) before exercising, in respect of any classes of commodities which are subject to northbound contract rates, the freedom conferred upon it in terms of the provisions of paragraph 9(c) of this Section, the Government shall afford the Conference an opportunity to submit any views which it may wish to express in this regard.

10. The Government and the Conference confirm that it is their intention that any surplus or deficit arising during the period of validity of the Ocean Freight Agreement dated 22nd August, 1966, should be cleared before its termination, but they also recognise that some marginal surplus or deficit may remain which shall be carried forward to this Agreement.
11. The Government agrees that, after accounting under this Agreement for any surplus or deficit referred to in paragraph 10 of this Section the Conference shall be entitled to recover under the Agreement also costs incurred prior to 1st January, 1977 in the development and setting up of the new services and techniques described in Sections 3 and 4 of the Agreement, provided such costs have not already been recovered either specifically, or as general administration expenses, under the Ocean Freight Agreement dated 22nd August, 1966.

12. The development costs referred to in paragraph 11 of this Section fall into three main categories;
- (a) The travelling, hotel and other costs incurred by the various Conference personnel and Teams involved in the development of the new service.
 - (b) Special project costs, such as tank testing and the development of specialised fruit containers and of methods of carrying perishables.
 - (c) The Staff and related costs incurred by each Line prior to 1st January, 1977 in the setting up and development of the systems required to operate the new services, but not the costs incurred in the purchase of capital equipment (such as Computers) which should be amortised on the customarily accepted basis and set against revenue after 1st January, 1977.
13. Costs of the nature described in paragraph 12 of this Section incurred prior to 1st January, 1977 shall be submitted by the Conference to the joint accountants for verification that:-
- (i) they have not in whole or in part been already recovered under the Ocean Freight Agreement dated 22nd August, 1966;
 - (ii) the staff costs bear an appropriate relationship to the time spent on the development work; and

(iii)/...

(iii) where the cost of development work has involved more than one trade, including the South African trade, the amount allocated to the South African trade is fair and reasonable.

14. Having established the appropriate sums for development costs to be recovered, the Government and the Conference agree that the total of these sums shall be divided into six equal portions and one portion shall be added to the expenses applicable to each of the first six years of this Agreement together with interest at the rate of 11% per annum on the expenditure incurred during each year of development of the service until such date as the expenditure is recovered.
15. In particular with regard to landside operations, a continuous investigation may be conducted by the Government into the costs and the degree of efficiency of these services, and the charges levied for these services shall be the subject of periodic negotiation between the Government and the Conference.

SECTION 7/...

SECTION 7

SUPPORT FOR THE SERVICE

A. Action to encourage shippers to use the service

1. In view of the vast capital outlay involved in the provision of a service of cellular containerhips supported by a supplementary service of roll-on/roll-off ships, the Government and the Conference recognise the need for the service to be supported to the fullest possible extent, to which end it is accepted that they will use their best endeavours individually and/or collectively to -
 - (a) encourage and persuade importers and exporters of general cargo to ship exclusively in vessels operated by the Conference;
 - (b) discourage and dissuade importers and exporters of general cargo from using any service afforded by an operator who is not a member of the Conference.
2. The Government and the Conference agree to take such measures as are considered appropriate for dealing with any occurrence which undermines, or threatens to undermine, the efficient and economic operation of the shipping services provided by the Conference.
3. The Government and the Conference agree that either of
them/...

them would support the action taken by the other in pursuance of sub-paragraphs A.1(a) and (b) of this Section.

4. The provisions of this Section shall apply to perishable cargo only to the extent that it is relevant for the purposes of paragraph A.2 of Section 4 of this Agreement.

B. Government Cargo

1. The Government agrees that all goods, materials, supplies and equipment, and everything of every description required to be shipped from Europe and destined for the Republic for the use of its State Departments (including the South African Railways and Harbours and the Provincial Administrations) and from the Republic to Europe, shall be shipped in vessels operated by the Conference; provided that the Government shall, in each and every calendar year during the period of validity of this Agreement, have the right if it so desires, to ship from Europe to the Republic by Government vessels, and/or vessels chartered by the Government, such cargo up to 12,5 per cent of the total tonnage shipped during the preceding calendar year from Europe and destined for the Republic for the use of its State Departments (including the South African Railways and Harbours and the Provincial Administrations).

2. The Government agrees to arrange for the insertion,

in/...

in all tenders, orders and contracts, issued for the supply of goods and materials required to be imported for Government account as defined in paragraph B.1 of this Section, of appropriate conditions providing for the observance by the suppliers and all concerned of the procedures outlined in paragraph B.1 of this Section.

3. However, such appropriate conditions shall not include any provision specifying shipment by any particular shipping line or vessel, nor shall they specify that if shipment is not effected in any particular ship, an explanation shall be given therefor, unless such action is necessitated by strategic considerations or serious balance of payments difficulties.
4. The Conference undertakes to convey all cargo tendered to them under the provisions of paragraph B.1 of this Section in accordance with the terms and conditions set forth in this Agreement.
5. The Conference shall use its best endeavours to provide facilities for the conveyance of Government cargo, as defined in paragraph B.1 of this Section, within 28 days after notice has been given that the cargo is available for shipment. If, however, circumstances beyond the control of the Conference should arise which would make it impracticable for the Conference to provide the necessary facilities for the shipment of such cargo within the aforementioned period of 28 days,

the/...

the Government shall be free to make alternative arrangements if the cargo is urgently required by the consignees in the Republic.

C. Efficient Operation of the Service

The Conference recognises and accepts that it has a responsibility to conduct its operations efficiently and, having regard to the interest of shippers, generally to operate its services as economically as possible and to maximise the utilisation of its ships and equipment.

SECTION 8/...

SECTION 8

EXCEPTIONAL OR CHANGED CIRCUMSTANCES

1. The Government, the Board and the Conference recognise that the reciprocal rights and obligations recorded in this Agreement are being accepted by each of the parties in good faith at a time when there are great uncertainties in international financial and economic conditions, as well as uncertainties regarding the impact which the shipping services to be provided by the Conference in terms of this Agreement may have on the viability of the trade transactions of the users of these services.

2. The Government, the Board and the Conference agree, therefore, that this Agreement shall apply, without amendment, during the initial period as defined in Section 2 of the Agreement except that, if at any time within this initial period, unforeseen developments and circumstances should occur as a direct result of the uncertain conditions mentioned in paragraph 1 of this Section which substantially impair the ability of any one of them to carry out any of the obligations they have accepted in terms of this Agreement, they will meet immediately in order to decide what mutually acceptable measures should be taken in their common interest, having due regard to the obligations accepted by each towards the other in terms of the Agreement.

3. Each of the parties agrees to give careful and sympathetic consideration/...

consideration to any representations in this connection which one party may submit to the other.

4. It is mutually agreed that, after the expiry of the initial period as defined in Section 2 of this Agreement, the Government, the Board or the Conference shall each have the right to submit to the other parties representations concerning any matter in regard to which changed circumstances may have arisen, with a view to the introduction of adjustments in this Agreement by mutual agreement. In the event of any party finding itself unable to meet the wishes of either of the other parties to the full extent which the party making the representations considers to be vital to its interests, such latter party shall, notwithstanding the provisions relating to the fifteen (15) year period of validity of this Agreement, have the right to give to the other parties written notice of its intention to withdraw from this Agreement on a date twelve (12) calendar months after the date of such written notice and such withdrawal from the Agreement by such party shall not entitle any party to the Agreement to any special compensation from the side of any other party.

5. The Government and the Board agree that the Conference shall not be held liable for, or be under any liability in respect of, or for the consequence of force majeure within the meaning of this Agreement, and that any party shall, without any claim on the part of the other parties, be

entitled/...

SECTION 10

PERIOD OF AGREEMENT

The Government, the Board and the Conference agree that this Agreement shall be legally effective as from 1st January, 1977 and, without prejudice to paragraph 1 of Section 6 of the Agreement, shall remain in force until 31st December, 1991, subject always to the provisions of Section 8.

SECTION 11

SIGNATURE OF THIS AGREEMENT

IN WITNESS whereof the parties to this Agreement have hereunto set their hands on the Fifteenth day of June, in the year One Thousand Nine Hundred and Seventy-seven.

SIGNED for and on behalf of the Government of the Republic of South Africa by the Honourable JAN CHRISTIAAN HEUNIS in his capacity as Minister of Economic Affairs.

Signed: J.C. HEUNIS

SIGNED for and on behalf of the Perishable Products Export Control Board by DANIËL JACOBUS JOUBERT, Esq., in his capacity as Chairman.

Signed: D.J. JOUBERT

SIGNED for and on behalf of the Conference by ALBERT EDWARD LEMON, Esq., in his capacity as Chairman.

Signed: A.E. LEMON

AS WITNESSES to all the above signatures:-

(1) Signed: G.J.J.F. STEYN

(2) Signed: J.C. NICHOL

Memorandum of Understanding

between

The Government of the Republic of South Africa

and

The Europe Southern Africa Conference Lines

Operative

from 1st January 1992 to 31st December 1996

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EUROPE SOUTHERN AFRICA CONFERENCECONFERENCE CONSTITUTIONINDEX

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EUROPE SOUTHERN AFRICA CONFERENCECONSTITUTION1. MEMBERSHIP (as at August 1994)

1.1 The following Lines (hereinafter referred to as "Members") serve the trade between Europe and Southern Africa:-

CMB Transport N.V.

CGM SUD

Consortium Hispania Lines

Deutsche Afrika-Linien GmbH & Co

Ellerman & Bucknall Steamship Co. Ltd

Ellerman Harrison Container Line Ltd

Ellerman Lines Plc

Thos & Jas Harrison Ltd

Lloyd Triestino di Navigazione S.p.A.

Namibia Shipping Lines (Pty) Ltd

Navinter - Empresa Mocambicana de Navegacao Internacional

Nedlloyd Lijnen B.V.

P & O Containers Ltd

Royal Swazi National Shipping Corporation Ltd

South African Lines Ltd

South African Marine Corporation Ltd

Springbok Shipping Company Ltd

Transatlantic Southern Africa Services AB

Wilh. Wilhelmsen

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- 1.2. The Members shall be entitled to operate liner services for the carriage of cargo between Europe and Southern Africa and vice versa. The various rights and entitlements are defined in separate Conference Agreements within the Conference.

Members undertake not to interest themselves in any traffic within the whole sphere of the Conference (as defined under Section 4) other than that to which their Conference Agreement specifically entitles them.

- 1.3. Application for Membership of the Conference from bona fide National Lines and other independent commercial organisations should be made in writing to the Conference Chairman. A decision on such applications will be made as speedily as possible following consultation with the Members' Principals and in any case not later than six months after the receipt of the application.

Applicants will be expected to satisfy the Members on the following points, inter alia:-

- (a) their intentions in the Trade,
 - (b) their ability to operate and sustain regular and efficient services,
 - (c) their ownership of suitable tonnage or their space/slot charter arrangements made in accordance with existing Conference Agreements.
 - (d) their ability and willingness to abide by Conference rules
- 1.4. On admission to the Conference, a Member shall pay to the Conference a deposit equal to a proportion of the estimated annual expenditure of the Conference Secretariat, such sum to be determined by the Members from time to time. This deposit is refundable on withdrawal, suspension or expulsion from the Conference and then and only after all expenses due from that Member have been settled.
- 1.5. For as long as any Member is not operating a regular liner service in the trade between Southern Africa and Europe entirely with their own or chartered vessels the other Members operating regular services in the trade between Southern Africa and Europe may carry cargo for that Member on the basis outlined in a separate Operating Agreement.
- 1.6. Without prejudice to National Legislation or to any valid Conference Agreement within the Conference it is understood that the Members will enjoy without exception the same privileges as any new Member, and shall have access to all cargo moving Northbound and Southbound and shall not be placed in a less favourable position than a new Member by which it is more advantageous for a Shipper or Consignee to ship by the new Member than by any other Member.
- 1.7. In the event of opposition in the trade by any other Line or vessel not recognised by the Europe Southern Africa Conference at any time mutual steps shall be taken by the Members for the protection of their collective interests.
- 1.8. The individual members' Conference and/or operating agreement(s) shall determine whether or not their Conference rights may be transferable. If the rights are thereby deemed not to be transferable this clause shall equally bind a liquidator of any member whether liquidation be voluntary or compulsory. The word 'transferable' in this case is used in its widest sense and precludes any joint venture or arrangement for the exercise of

- 5 -

such rights between the members or any person or company.

- 1.9. Members shall not enter into space-charter, agency or other arrangements in the sphere of the Conference (which sphere is defined under Section 4) with any non-Conference Lines competing with any of the other Members in the sphere of the Conference, nor employ Agents acting for such non-Conference Line unless prior specific Conference approval has been granted. Such specific Conference approval should not be withheld unreasonably.
- 1.10. If as a result of the United Nations Convention on a Code of Conduct for Liner Conferences being effective or otherwise, National Lines are accorded Conference Membership and subsequently claim and are afforded a trade share to reflect their status as National Lines, Members agree to contribute to the extent required (but at least pro rata) and their trade share in force at the time will be reduced accordingly.
- 1.11. The Members shall be at liberty to suspend their obligations in the event of War, Hostilities or warlike operations occurring between any Nations, in the sphere of the Conference.
- 1.12.1. Each Member shall sign a Conference Membership Agreement. Such Agreement shall remain in force after its initial validity period, subject to termination upon twelve months notice in writing being given by either party at any time.
- 1.12.2. The Conference may summarily suspend or expel a Member for significant failure to abide by the terms and conditions of their Conference Agreement. No suspension or expulsion shall become effective until a statement in writing for the reasons therefore has been given and until any outstanding dispute has been settled as provided for under Clause 1.15.
- 1.13. The Members undertake that their Freight Agents shall be allowed commission only in respect of cargo emanating within a reasonable vicinity from the town in which the Agent is domiciled: they also undertake to obtain from their Freight Agents an undertaking not to pass on to Shippers the benefit of their commission or any part thereof.
- 1.14. The Members agree to be governed by the following Clause, or any amendment to it which may be agreed upon by the Membership:

In view of the difficulty or impossibility of determining the damages which may result from breach or violation of any of the rules, regulations or schedules of Tariffs of the Conference, it is expressly agreed that:

- (a) where the breach or violation is a non-observance of the rates of freight agreed by the Conference, the resultant damages shall be and hereby are liquidated as a sum equal to four times the freight monies and other compensation which the offending Member shall receive or would have received had the applicable Tariffs for transportation of cargo involved been applied, provided, however, that the penalty provided in this subsection shall not be imposed where the offending Parties shall establish that the breach or violation was made in good faith and unintentionally; and
- (b) where breach or violation is any other non-observance of any of the rules or regulations of the Conference, the resultant damages shall be and hereby are liquidated at the sum of 1,800 pounds (Sterling) for the first offence, 3,600 pounds (Sterling) for the second offence and 5,400 pounds (Sterling) for the third or subsequent offence; and

- 6 -

- (c) the damages provided for in (a) and (b) above shall be paid by the offending Parties to the Conference Secretariat and shall be credited to the injured parties; and
- (d) to secure the payment of any damages or of any judgment which may be entered in any Arbitration proceedings under Clause 1.15.2 each of the Members agree to maintain a deposit in the sum of Five thousand pound (Sterling) or any equivalent bank guarantee in a bank to be agreed on by the Members and to instruct the said bank that on the instruction of the Chairman for the time being of the Conference this sum or such part of the sum as may be requested shall be paid to the secretary of the Conference for the time being. The Chairman will only issue such instruction to the said bank after receipt of the decision of the Arbitrators as appointed under Clause 1.15.2 Such sum guarantee or bond may otherwise be withdrawn only on withdrawal, suspension or expulsion of the Member concerned from the Conference and only after all claims arising for which the said sum or other guarantee is security have been settled.

- 1.15.1. Any dispute arising between the Members shall be governed by English Law.
- 1.15.2. Any dispute requiring Arbitration shall be submitted to Arbitration in London, in accordance with the Arbitration Act, 1950, and any subsequent modification thereto, one Arbitrator to be named by the Party claiming Arbitration and the other by the Party against whom Arbitration is claimed.

2. OBJECTIVES

- 2.1. To supply for importers and exporters in the Conference trading area, the full range of services associated with the maritime transport of liner cargo, including efficient economic and regular shipping services, in return for stable rates and charges.
- 2.2. Harmoniously to secure the attainment by the Members of the various objectives of the Conference, by scrupulous adherence to their particular Agreements, fulfilment of their commitments and through complete observance of all the established rules and principles of the Conference.

3. ADMINISTRATION AND VOTING PROCEDURES

- 3.1. Each Member shall be entitled to a single and equal vote which may be exercised in person or by proxy.
- 3.2.1. Unanimity Rule
Matters of major principle such as, but not exclusively:-
 - i) Admission of a new Member to the Conference
 - ii) Alteration of the rights of an existing Member.
 - iii) Alteration to the sphere of the Conference.
 - iv) Conference contracts and arrangements with Governments, etc.
 - v) Alteration to the list of matters requiring unanimity shall be decided by unanimous vote, it being understood that any Member who finds

- 7 -

himself in a minority of one will not exercise a veto but will be expected to fall into line with the rest of his colleagues. No Member is allowed to abstain from voting on a matter that requires a unanimous decision.

3.2.2. Majority Rule

All Matters not specified under 3.2.1. above, including those concerning freight policy, shall be decided by the vote of the majority, provided this majority is at least 75%.

If a Member Line abstains from Voting on a matter requiring a majority decision, then that Member Line should not be regarded as contributing to the number on which the majority is determined. A Member Line wishing to abstain from voting must declare its position either in person at a meeting of the Lines, or by telex or letter if the matter is being dealt with by correspondence.

3.3. In an emergency, i.e. when an immediate decision is needed on a matter that requires a majority agreement, and time does not permit waiting for the agreement of all Members or even of the majority of Members, a Chairman's Committee will be established ad hoc consisting of the Conference Chairman and three Principals of Members (comprising one British, one Continental and one South African) whom the Conference Chairman at his absolute discretion will select as appropriate persons for the purpose. This Committee will be empowered to act as they consider in the best interests of the Conference and all Members will support that action.

3.4. The Conference shall maintain an office in the United Kingdom and a Regional Office in South Africa. Both shall be staffed appropriately to perform the functions required by the Members.

3.5. A Committee of the Principals of the Members shall meet when necessary to consider Conference policy matters.

3.6. The Members shall appoint a person of their choice to act as Conference Chairman for the time being.

3.7. Technical and other committees to consider specific subjects shall be appointed by the Members if and when required.

3.8. Members shall be responsible for paying all the expenses of the Secretariat, in agreed proportions, and shall promptly settle accounts which shall be rendered quarterly in arrears.

3.9. The Conference does not operate pooling, berthing or sailing agreements covering all Members. The Members may however operate freight pools and/or sailing schedules in the various sectors of the trade through consortia or other mutually agreed arrangements.

4. TRADING SPHERE AND TRADE SECTORS

4.1. The Conference sphere shall be defined as extending from Kunene River to Chinde (both inclusive) in Southern Africa, and four European Sectors as defined in 4.2. below, and vice versa.

4.2. The four European Sectors shall be defined as follows:-

4.2.1. North Continent:

Comprising all North Sea Ports in Germany, Netherlands and Belgium; all

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Atlantic and Channel ports in France; all ports in Spain north of the northern border of Portugal and all ports in Portugal.

4.2.2. United Kingdom:

Comprising all ports in the United Kingdom of Great Britain and Northern Ireland; also all ports in Eire.

4.2.3. Scandinavia, Finland and Baltic:

Comprising all ports in Norway, Sweden, Finland, Estonia, Latvia, Lithuania, Poland, Baltic Sea ports of Germany and Russia, respectively, and Denmark.

4.2.4. Mediterranean:

Comprising Spanish ports south of the southern border of Portugal, Gibraltar, all European Mediterranean Ports.

5. TARIFFS

- 5.1. Members undertake to maintain the Conference rates of freight, Tariff terms and conditions as determined by the Conference from time to time and to observe the Conference practice that all rates of freight are applicable to the carriage of cargo from the port of shipment to the port of discharge, also that no through rates of freight are to be quoted from or to any inland points in Southern Africa or from or to any inland points in Europe except as may be provided by the Conference.
- 5.2. Members will not enter into any Contracts with Shippers/Receivers without the approval of the Conference. All terms and conditions of such Agreements must be disclosed to and approved by the Conference.
- 5.3. Members undertake that no rebate, return, allowances or reward to Shippers, Merchants, Shipping Agents, Forwarding Agents or others shall be made nor that any action direct or indirect shall be taken which would be equivalent to or would result in a reduction of the Tariff rates of freight for any reason whatsoever, otherwise than might be mutually agreed by the Members.
- 5.4. As part of the self-policing machinery of the Conference, the Secretariat shall maintain details for special freight rate quotations necessitated from time to time by market forces.
- 5.5. Members undertake that no "Shipped" Bills of Lading shall be issued unless the cargo concerned is already on board the vessel.

6. CONSULTATION

- 6.1. The Conference shall abide by the relevant International Regulations and/or Conventions applicable to Liner Conferences. In order to ensure good relations with shippers and importers in the trade, it is the intention also to maintain the established consultation procedures with the Governments, as well as the European Shippers' Council and other Trade Associations, as and when the necessity arises.
- 6.2. Consultations leading to the implementation of General Rate Increase, Surcharges and Promotional Freight Rates are undertaken in accordance with 6.1. above.

Europe Southern Africa Conference
London 18th October 1988

UNITED NATIONS: FINAL ACT OF CONFERENCE OF PLENIPOTENTIARIES ON
A CODE OF CONDUCT FOR LINER CONFERENCES*

[Done at Geneva, April 6, 1974]

Introductory Note**

Adoption of the Convention on a Code of Conduct for Liner Conferences culminates an historic effort by the international community to regulate commercial relationships. The event is all the more noteworthy inasmuch as it reflects government venture into an area where private commercial interests have operated almost without restriction; the United States has been alone in subjecting the activities of liner conferences to substantial government control over the past half century.

A liner conference is, essentially, a carrier cartel in a given trade whose primary purpose is rate-fixing. Economic pressure to use conference carrier services exclusively is applied on shippers through conference loyalty arrangements providing for lower rates or rebates to "loyal" shippers. Liner conferences carry the vast majority of the world's ocean-borne general cargo -- that is, container and break-bulk cargoes, but not bulk cargoes such as iron ore, petroleum, or agricultural products like wheat. Fundamental elements of liner conference service, including determination of conference membership, the nature of service to be provided, and level of rates, have until now been settled by the conferences themselves or their members virtually free of governmental review. The new Code rules, however, will guarantee membership to flag lines of the countries at either end of a trade served and reserve a portion of cargo (share of trade) to these lines, permit third-flag carrier membership in limited circumstances, subject rates to certain broad standards and control increases, and provide an elaborate mechanism for international settlement of disputes arising from application of the Code. The Code thus represents for nearly all countries of the world movement from laissez-faire to a most extensive regulation imaginable, in a single jump.

The developing countries were the moving force behind the Code. They have viewed liner conferences, in most cases dominated in their trades by European shipping lines, as instruments of exploitation by the developed Western nations. Their attention focused in particular on freight rates, which they had little ability to affect, and the character of service provided by conferences, which they felt was unresponsive to essential national interests. Because many have depended upon marketing of very few products for export earnings, freight cost and adequacy of service could assume a critical importance. To achieve a measure of control over costs and service, national flag carrier promotion was seen as the answer. The primary significance of the Code arises in this context; it must be viewed essentially as a protectionist instrument for national flag fleets in order to be understood.

Pressure for a complete set of internationally-agreed rules to govern liner conferences first surfaced in 1971 at UNCTAD shipping meetings. In response to this threat of international regulation, European and Japanese shipowners, through the Committee of European National Shipowners Association (CENSA), adopted a code of practice for liner conferences to be implemented by the conferences on a voluntary basis. While the CENSA code opened up some of the secrecy of conference decision-making and codified shipper rights of consultation, conferences remained the final decision-makers on critical questions such as level of freight rates and admission of members.

*[Reproduced from U.N.C.T.A.D. Document TD/CODE/11/Rev. 1 of May 9, 1974. The text of the Convention appears at I.L.M. page 917. The Resolutions adopted by the Conference appear at page 947.]

**[The Introductory Note was prepared for International Legal Materials by Franklin K. Willis of the Office of the Legal Adviser, Department of State, member of the U.S. Delegation to the Geneva Conference on a Code of Conduct for Liner Conferences.]

The developing countries were hardly convinced that a code of self-ligation could convert former cabals into open associations of right-thinking gentlemen. In the spring of 1972, at UNCTAD III, the developing countries tabled a draft Code of Conduct and voted through a resolution commending that the UN General Assembly convene a diplomatic conference in 1973 to adopt a convention on a code for liner conferences. In November the General Assembly approved the conference, and three weeks later a preparatory committee commenced proceedings. It held two sessions, in January and June, and referred its work to the diplomatic conference, which met in November. Following a three-month adjournment, the diplomatic conference concluded work in its resumed session in March-April, 1974.

The Code is much more than a purely protectionist measure for national flag carriers of liner cargo. From the point of view of the developing countries, there are a host of ills in the existing secretive conference system it is designed to combat. The Code spells out rules, for example, on conference self-policing machinery to deal with malpractices of members, and requires disinterested third party review in the event of a dispute between a conference and a member about a given practice. It defines the rights of shippers in their relationships with conferences. It requires that all tariffs and related conditions be made available to the public. It guarantees shippers a right of consultation with conferences on all important matters, and governments are given a limited right of participation in these consultations. It regulates, under broad guidelines, the nature, amount and frequency of freight rate increases and special surcharges, and the provision of regular service by conference members. Disputes between private parties relating to application of Code rules, if not otherwise settled by them, must be submitted to an international panel of conciliators for a recommended decision.

Nonetheless, the provisions of the Code on conference membership and trade-sharing as solutions to the problems of rates and service are at once its most critical element and the most controversial. With respect to membership, a national flag carrier of the trade served must be admitted to membership if it has the ability to provide regular service. Admission of cross-traders is subject to the viability of service by these national flag carriers, and otherwise subject to conference discretion which is only minimally confined by broadly-stated standards. Read together with Code provisions on trade-sharing, national flag carriers of any country whose trade is served may claim an absolute right under the Code to carry up to 40% of the trade involved, and, in conjunction with the carriers of the country at the other end of the trade, may claim control of at least 80% and up to 100% of the cargo moving between the two. This protectionist element of the Code, emphasizing market allocation and, necessarily, attendant economic controls to implement it, with a corresponding diminishment of the role of competition and commercial judgment, was the primary reason that certain major maritime nations failed to support the Code on the final vote for adoption.*

The success of the Code, ultimately, in establishing rules of general international application to govern liner conferences will depend upon the degree of acceptability that can be developed for the shift in emphasis from laissez-faire to extensive control. This, in turn, depends upon whether the conference membership and trade-sharing system envisaged in the Code can be made workable, and upon the willingness of countries to withdraw from present relationships which prohibit discrimination in the right to pick up and discharge cargo. The Code was opened for signature on July 1, and will enter into force when at least 24 countries have accepted it whose combined liner tonnage amounts to at least 25% of the world's total.

*The vote was 72 to 7, with 5 abstentions. Denmark, Finland, Norway, Sweden, Switzerland, the United Kingdom and the United States cast negative votes. The Netherlands, Canada, Greece, Italy, and New Zealand abstained.

MEMORANDUM OF AGREEMENT

between

*THE PERISHABLE PRODUCTS EXPORT
CONTROL BOARD*

and

THE EUROPE SOUTHERN AFRICA CONFERENCE

Operative

from 1 January 1992 to 31 December 2001

AGREEMENT

ENTERED INTO BETWEEN :

PERISHABLE PRODUCTS EXPORT CONTROL BOARD

in its capacity as Representative of the Industries engaged in the export of Perishable Products as defined in Act 9 of 1983.

(The Board)

AND:

THE EUROPE SOUTHERN AFRICA CONFERENCE

in its capacity as Representative of the Shipping Lines who constitute the membership of the Conference.

(The Conference)

WHEREAS:

The previous Agreement between the Parties expired on 31 December, 1991 and the Parties desire to commit themselves to one another in terms hereof for a further period of not less than ten years with the option to extend further dependant on the equipment and other requirements prevailing at that time.


AND WHEREAS:

The Parties overall intention in entering into the Agreement is to give preference to one another as opposed to exclusivity yet nevertheless in so doing to ensure defined minimum support levels for the duration of the contract period.

Now therefore the Parties record the following Agreement :

1. GENERAL

- 1.1 *The Conference shall mean those Lines that are at the relevant time, Members of the Europe Southern Africa Conference (The Conference) and which are at the date hereof:*



CMB Transport nv
Compagnie Generale Maritime
Consortium Hispania Lines
Deutsche Afrika-Linien GmbH & Co
Ellerman & Bucknall Steamship Co Limited (Managers: Ellerman Lines Plc)
Ellerman Harrison Container Line Limited
Ellerman Lines Plc
Thos. & Jas. Harrison Limited
Lloyd Triestino di Navigazione SpA
Namibia Shipping Lines (Pty) Limited
Navinter-Empresa Mocambicana de Navegacao Internacional
Nedlloyd Lijnen B.V.
P&O Containers Limited
Royal Swazi National Shipping Corporation Limited
South African Lines Limited
South African Marine Corporation Limited
Springbok Shipping Co Limited
Transatlantic Southern Africa Services A.B.

1.2 *The industries as represented herein by the Board include all members of organisations engaged in the export of perishable products. The industries shall regardless of any amendment or repeal of statute which may affect the status or power of the Board to represent either all or any one of them, be bound by the terms of this Agreement for the duration. To the extent that any exporter enjoying the benefits of this Agreement is not a member of organised industry, such exporter shall similarly be bound by the terms of this Agreement.*

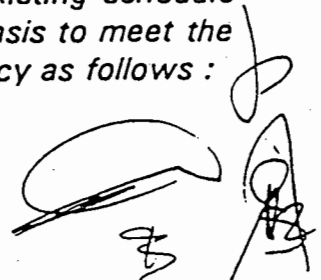
2. PERIOD

This Agreement shall commence on 1 January, 1992 and endure thereafter for a minimum period of ten years terminating on 31 December, 2001 unless renegotiated by virtue of a reciprocal option hereby granted in favour of both Parties.

2.1 *Either Party shall be entitled on one year's notice given to the other to call for a review of any of the provisions of this agreement save that such notice shall not be given prior to the expiry of the initial four years of the contract.*

3. SERVICE

The Conference will provide a service in line with the existing schedule arrangements to the destinations and on a port rotation basis to meet the most susceptible product needs, transit times and frequency as follows :



3.1 Europe, Northwest Continent and United Kingdom

The Conference will provide seven vessels of the present type and size and, subject to commercial factors, intend to provide a seven day service. In 1992, for the first six months, an 8 day frequency will be provided, thereafter 9 days for the remainder of the year.

The Conference shall use its best endeavours to ensure a transit time of not more than 15 days from the last load port to the first discharge port.

3.2 Mediterranean

The Conference intends upgrading its existing service and improving the frequency. For 1992 a twice monthly service will be introduced providing increased capacity.

4. COMMITMENT

The Parties hereto make the following reciprocal commitments:

4.1 *The various industries represented by the Board will supply volumes of their respective products to fill the following numbers of containers per sailing to Europe, Northwest Continent and the United Kingdom:*

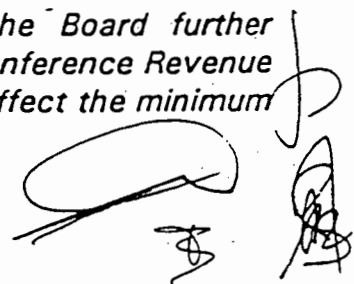
- | | | | |
|-----|--------------------------|----------------|---------------------------------|
| (a) | <i>Deciduous</i> | <i>300 TEU</i> | <i>(commencing week 3 up to</i> |
| (b) | <i>Citrus</i> | <i>300 TEU</i> | <i>and including week 21)</i> |
| (c) | <i>Sub-Tropical</i> | <i>100 TEU</i> | |
| (d) | <i>Other Perishables</i> | <i>100 TEU</i> | |

Subject to the availability of that product.

4.2 *These volumes in the case of each category could be seasonally adjusted as necessary by mutual agreement. In the event of the products available being in excess of the vessel's capacity, the sub-tropicals and other perishables will whenever possible and in consultation with the industry/industries concerned receive preference over citrus and deciduous.*

4.3 *The Board undertakes that it will, subject to the agreed rates, prefer the Conference as opposed to any other Carrier for volumes other than citrus and deciduous, exceeding the minimum requirements set out herein.*

4.4 *In allocating the available space per sailing the Board further undertakes wherever possible to maximise the Conference Revenue on the understanding that this will not materially affect the minimum commitment of citrus and deciduous.*



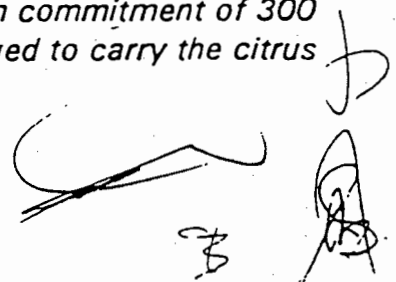
- 4.5 *In consideration of the foregoing commitments by the Board, the Conference undertakes and intends to provide sufficient insulated port hole containers to the agreed specification which will cover the Board's indicated requirements. The Board's requirement for vessels and containers are more fully set out in the annexure hereto marked "B".*
- 4.6 *Insofar as service to the Mediterranean ports is concerned, the Conference undertakes to place at the disposal of the Board the full Reefer capacity of the vessels engaged in the service and the Board will endeavour, in consultation with the various exporters, to maximise the use of the available space.*

5. FREIGHT RATES

The freight rates will be established with reference to the 1991 agreed freight rates and shall be adjusted annually within the following parameters:

- 5.1 *For the duration of the first five years of the contract the rates will not fall below the 1991 rates.*
- 5.2 *The base rates (1991) year one for each commodity shall be subject to an annual increase of 3% subject to upper and lower limits within 10% as illustrated in the graph annexed hereto marked "A".*
- 5.3 *The normal tariff currency adjustment factor and bunker surcharge to apply to all products.*
- 5.4 *Annual negotiations with the Representatives of respectively Citrus, Deciduous, Sub-Tropical, Frozen Vegetables and other perishable products will be conducted and rates revised as provided for in 5.2 above.*
- 5.5 *With the express exception of citrus shipped in the third period (mid June to end February) freight rates will not be less than the Conference's actual direct costs.*
- 5.6 *The formula referred to in 5.2 above shall not apply to citrus shipped in the third period (mid June to end February) and the appropriate rate will be negotiated taking into account the Conference's direct costs and market rates for refrigerated vessels.*

Should however prior agreement not be reached, during this period citrus will not be obliged to meet their minimum commitment of 300 TEU per sailing nor will the Conference be obliged to carry the citrus cargo during that period.

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6. LAW & JURISDICTION

6.1 Arbitration

In the event of any dispute or difference between the Parties to this Agreement in respect of the interpretation, meaning or effect thereof, such dispute or difference shall be submitted to arbitration in Cape Town in accordance with the provisions of the Arbitration Act, No 42 of 1965, of the Republic of South Africa.

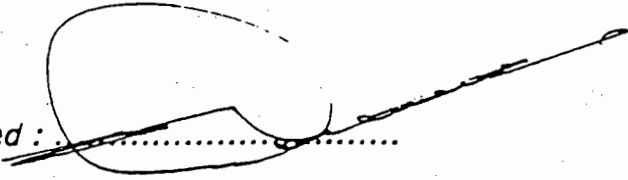
6.2 Jurisdiction

All questions arising under, or in connection with this Agreement shall be determined under, and in accordance with the Law of the Republic of South Africa.

IN WITNESS whereof the Parties to this Agreement have hereto set their hands

on the 8th day of DECEMBER, 1992

SIGNED for and on behalf of the Perishable Products Export Control Board by Dr Stephanus Jacobus Janse van Rensburg in his capacity as Chairman.

Signed : 

SIGNED for and on behalf of the Conference by Mr Anthony Zell Farr in his capacity as local Chairman.

Signed : 

AS WITNESSES to all the above signatures :

(1) Signed :

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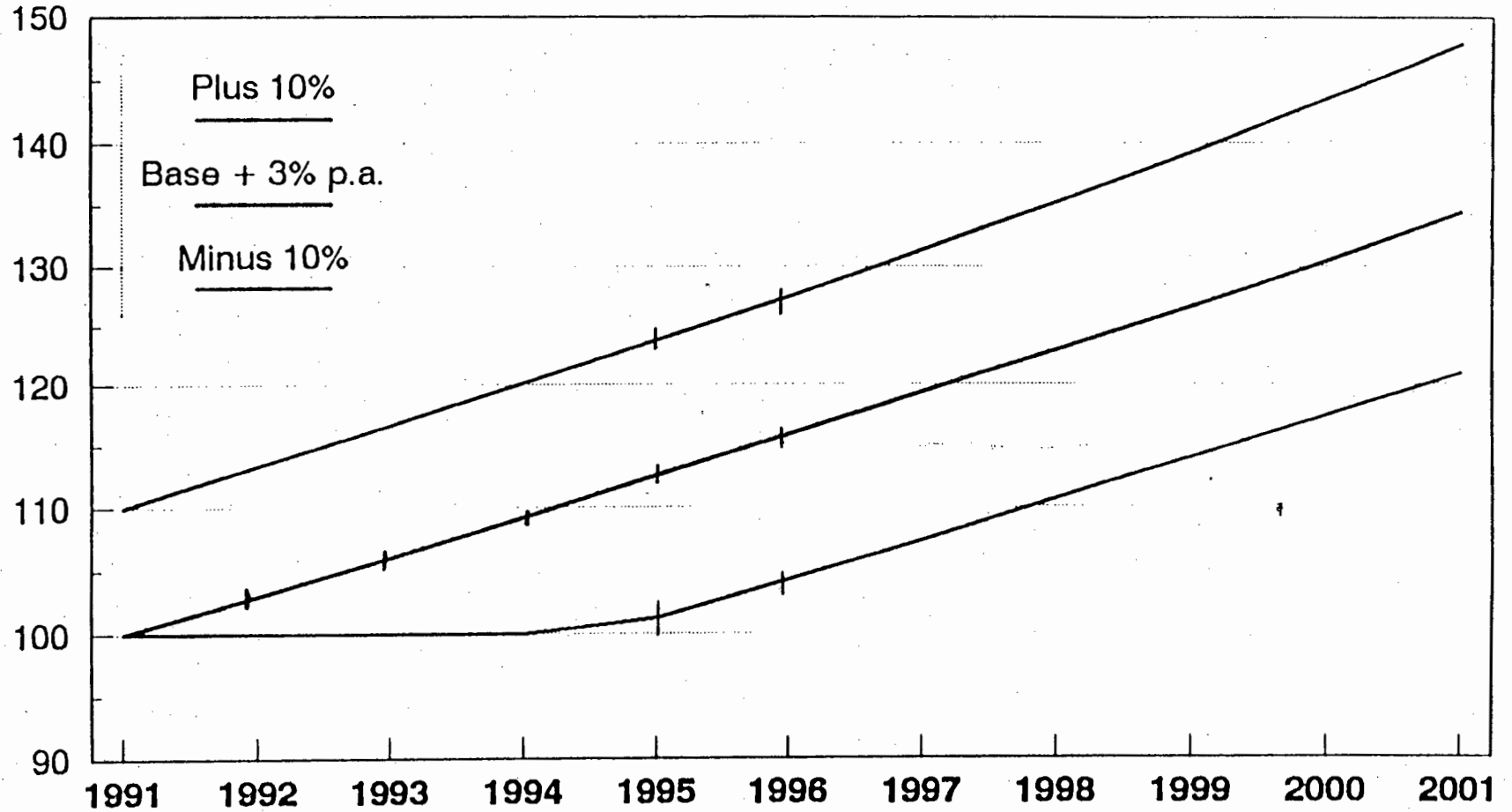
(2) Signed :

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Basis of 3 Percent Escalation per annum Allowing for Plus / Minus 10%

Base : 1991 = 100



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**MINIMUM REQUIREMENTS FOR CONTAINER VESSELS AND
EQUIPMENT FOR THE EXPORT OF
PERISHABLE PRODUCTS**

1. INTRODUCTION

The requirements listed below are basically a summary of the most important design and approved specifications of the vessels and equipment already in use. It therefore does not alter or change any specifications stipulated by other national or international authority. The requirements in this document forms part of the Agreement between SAECS and the Board.

2. BASIC REQUIREMENTS

All vessels, refrigeration equipment, containers, clip-on-units, control and recording systems must comply to the specifications of a recognised international classification society such as Lloyds.

3. REQUIREMENTS FOR VESSELS

3.1 Air distribution systems

3.1.1 Temperature maintenance: *Cold air must be delivered at the specified temperature to each and every container containing perishable cargo or requiring temperature control. A maximum of $\pm 0,5^{\circ}\text{C}$ deviation from the specified temperature is permissible in delivery air at the entry port hole of each container.*

3.1.2 Air circulation rate based on the empty volume of the container shall not be less than:

Chilled produce: 60 complete air changes/hour.

Frozen produce : 30 complete air changes/hour.

3.1.3 Fresh air supply must be adjustable within the range from no intake at all (0%) to a maximum of one complete air renewal every two hours (100%) based on the empty volume of the container. The fresh air must be introduced before the cooler to ensure that cooled air is introduced into the cargo space. The CO_2 sampling point to be fitted to the return duct. Fresh air inlet and outlet arrangement must not allow any cross-tainting.

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3.1.4 *Taint barriers must be in a sound condition to avoid any cross-tainting between different compartments.*

3.1.5 *Under deck air temperatures. Difference in air temperature between inside and outside of container not to exceed 12°C for chilled cargo.*

3.1.6 *Relative humidity (RH) of the cooling air to be maintained at the design specification of 85 ± 5%.*

3.2 Refrigeration system

Under tropical conditions, with an ambient air temperature of +40°C, RH of 55% and sea water temperature of 32°C the refrigeration plant will be capable of maintaining all air delivery temperatures within ±0,5°C from the specified temperature in all chilled containers at all times. It must also be capable of maintaining the air return temperatures within ±0,5°C from the specified temperature in all deepfreeze containers.

3.2.1 *With the whole plant operating, to fulfil the following two functions at the same time:*

- * *to maintain a return air temperature of -20°C in deep freeze containers.*
- * *to cool down the return air to within 1°C from the specified carrying temperature in fruit containers shipped at the carrying temperature within 12 hours after shipment.*

3.2.2 *With one refrigeration unit as stand by:*

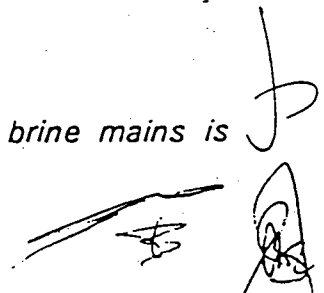
to maintain -0,5°C in all fruit containers and -20°C in deep freeze containers

3.3 Automatic control system

The control systems shall include the following equipment:

- * *Brine temperature control*
- * *Liquid expansion to evaporators*
- * *Thermostatic control of delivery air temperature for air coolers and hold conditioners*

The brine temperature in the four delivery brine mains is

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controlled by electronic controllers which control the capacity of the compressors. The controllers to cover the range from +20°C to -40°C.

3.4 Instrumentation

A datalogger is installed to monitor, measure and record each individual container return air temperature, each air cooler delivery air temperature, temperatures from the refrigerating machinery and alarms for high/low temperatures, gas pressures and failures of running compressors and pumps. Both the upper and lower temperature alarms must be printed. A manually operated monitor is required with a sensor in each return air duct to analyse and indicate the CO₂ content.

Electronic data loggers to be installed on each container vessel. Information to be supplied promptly to the Board.

All temperatures must be recorded at least every 4 hours until conditions have settled and every 8 hours thereafter for the remaining duration of the voyage.

All temperature logs must be returned as soon as possible to the Board for scrutiny.

3.5 Calibration

Temperature control and recording equipment must be calibrated on a regular basis. If the equipment is self calibrating, the accuracy of such equipment must be verified prior to every voyage. If equipment is not self calibrating, all temperature sensors must be calibrated in ice at least once every year.

3.6 Hold insulation

All insulation must be kept clean, dry and intact at all times. This includes insulation in bulkheads, air ducts and hatch covers.

3.7 Cleanliness

All equipment and materials such as cooling coils, ducting, air intake pipes and air couplings must be kept clean at all times to avoid micro cross contamination.

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3.8 Air couplings

All air couplings (stirling valves) must always be in a good state of repair, must seal tightly to the container and must be in the extended (coupled) position at all times except during loading and discharge of the containers.

4. REQUIREMENTS FOR CONTAINERS

4.1 Minimum internal dimensions

4.1.1 20 feet (6m) ducted container - Reefer container

Length	5750 mm
Width	2260 mm
Height	2215 mm
Door height	2215 mm
Door width	2260 mm

4.1.2 20 feet (6m) ducted container - Fruit container

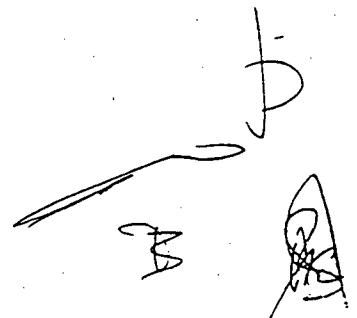
Length	5770 mm
Width	2300 mm
Height	2215 mm
Door height	2215 mm
Door width	2300 mm

4.1.3 20 feet (6m) ducted "Combi" container

Length	5770 mm
Width	2300 mm
Height	2215 mm
Door height	2215 mm
Door width	2300 mm

4.2 Uniformity of shape

The internal and external uniform shape of the container must remain as new without bulges.



4.3 Construction

4.3.1 Floor

A floor consisting of T-section construction, of a minimum height of 40 mm, must be provided. The floor must be able to withstand the stresses caused by a forklift truck manoeuvring a pallet into place.

The space between the T-sections not to exceed 50 mm at any place.

Original form and designed load bearing strength must be maintained at all times.

4.3.2 Door battens

Battens, 12 mm deep shall be provided on the doors. They are to be vertically disposed, be pitched at 200 mm and be stopped not more than 75 mm from the top and bottom door seals. the width of their top surface shall be not less than 25 mm.

4.3.3 Door seals

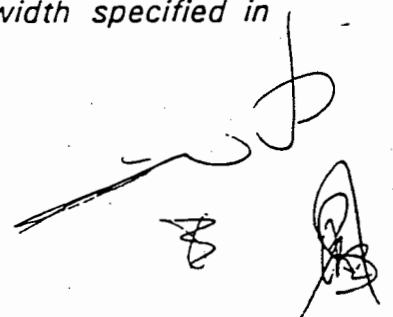
Door seals must be intact and provide an air tight seal at all times.

4.3.4 Air delivery opening shall be 70 mm deep for the full internal width of the container. The top edge of the slot to be not more than 100 mm above the top surface of the floor. It must allow for unobstructed air flow.

4.3.5 Air return opening should not be less than 70 mm deep, for the full internal width of the container, It must allow for unobstructed air flow.

4.3.6 Cargo loading protection

Provision must be made for adequate protection to the side walls for the full internal length of the container. This protection shall not reduce the internal width specified in section 4.1.



5. INSULATION

5.1 Heat leakage

The maximum heat leakage values specified as follows may not be exceeded at any time. The heat leakage of the roof shall be equivalent to 75 mm of material of a thermal conductivity not exceeding 0.024 Kcal/ m²/h/°C.

Container type	Max heat leakage Kcal.h. °C
20' fruit container	40
20' reefer container	23
20' "combi" container	23

5.2 Air leakage

The maximum air leakage shall not exceed 8.5 cu meters/hr at 25 mm swg internal pressure.

5.3 Insulation integrity

The insulation shall at all times be dry (contain no moisture), intact (no separation) and be without any holes or cracks. When such insulation is bonded to the walls, roof or floor such bonding shall at all times retain its integrity.

6. REFRIGERATION REQUIREMENTS FOR INTEGRAL CONTAINERS AND CLIP-ON-UNITS

6.1 Refrigeration

Refrigeration requirements for integral refrigerated containers and clip-on-units (COU's) also apply to the requirements for container vessels as specified in par. 3.

6.2 Relative Humidity

The evaporator surface must give a maximum temperature difference of 5°C between the mean container temperature and the mean evaporating temperature when the cargo is in equilibrium at 0°C and the ambient temperature + 38°C to retain a relative humidity between 85% to 95%.

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6.3 Defrosting

Defrosting must be automatic and may be initiated by a differential air pressure switch or a timer switch and must include a manual override switch.

6.4 Minimum air circulation rate

Minimum rate of air circulation with frost-free coils to be as specified in par. 3.1.2. against a static pressure difference across the empty container of 30 mm swg at sea level and 15°C. The fan is to circulate at least 75% of the specified rate of air circulation at the point where defrosting is initiated. Extreme uniformity in temperature is required within each container. The temperature variation within the container when cooled to carrying temperature, should not exceed plus or minus 0,5°C.

6.5 Air temperature control

Air delivery temperatures to the container must be controlled within the range -25°C to +20°C when operating in any ambient temperatures between -10°C and 38°C.

The temperature of the air entering the container is to be controlled to plus or minus 0,5°C in the range -5°C to +20°C for chilled cargo.

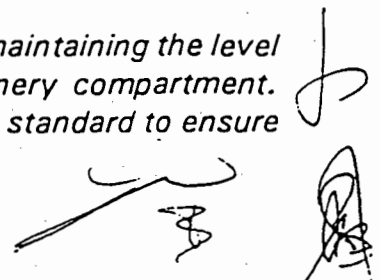
In order to meet the requirements of delivery air temperature control in chill mode, it is essential that the compressor runs continuously and capacity control must therefore be fitted. Capacity control is therefore likely to be either by hot gas by-pass, suction throttling or with cylinder unloading.

In the event of failure of the electronic controller provision must be made to prevent air delivery temperature falling below 1°C of the specified optimum carrying temperature for the specific product as stated in the temperature instruction letter to the Master of the vessel and outlined in the General Loading and Carrying conditions compiled by the Board.

For deep frozen cargo the temperature is controlled on return air at a maximum of -25 plus or minus 1°C.

If the delivery air controller is used for frozen temperatures, an upper limit safety device is required.

Electronic control equipment must be capable of maintaining the level of accuracy stated when located in the machinery compartment. Resistance thermometers to be of the appropriate standard to ensure



minimum errors in the range -2°C to +2°C.

6.6 Fresh air ventilation

The rate of fresh air ventilation to be as specified in paragraph 3.1.3.

6.7 Temperature recording

Requirements as per paragraph 3.4 also apply.

6.7.1 Chilled cargo

The sensing elements of the temperature recorder and control must in the case of chilled cargo be positioned in the air delivery. An external test facility must be provided.

Temperature recording equipment must monitor the temperature of the air entering the container and must be accurate to plus or minus 0,25°C over the range of -5°C to +20°C. A facility must be provided for remote monitoring of temperatures at a control point.

6.7.2 Deep Frozen cargo

The sensing elements of the temperature recorder and control should preferably be positioned in the air return.


The temperature recording equipment must record the air return with an accuracy of 0,5°C in the range -5°C to -30°C.

7. SANITARY ASPECTS

All containers shall be designed and built to allow easy internal cleaning.

8. CERTIFICATION

A certificate of approval of performance and safety is required for both the container and the refrigeration plant from a recognised classification society.

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EUROPE SOUTHERN AFRICA CONFERENCE

CONFERENCE CONSTITUTION

MEMORANDUM OF UNDERSTANDING ENTERED INTO BETWEEN

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA through its Department of Transport (hereinafter referred to as "the Department"), represented herein by PETER JOHANNES WELGEMOED in his capacity as Minister of Transport and of Posts and Telecommunications

AND

THE EUROPE SOUTHERN AFRICA CONFERENCE LINES (hereinafter referred to as "the Conference") represented herein by ANTHONY ZELL FARR in his capacity as Local Conference Chairman.

PREAMBLE

WHEREAS the Department and the Conference wish to reach consensus in regard to the requirements of the seaborne trade between South Africa and Europe;

AND WHEREAS the Conference has agreed to provide regular scheduled liner services;

AND WHEREAS the Department is satisfied with the proposals of the Conference regarding the provision of a regular scheduled liner service, NOW, THEREFORE, the Department and the Conference (hereinafter referred to as "the Contracting Parties") agree as follows:

2./.....

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ARTICLE 1

DEFINITIONS:

In this Memorandum of Understanding, unless inconsistent with the context -

"Board" means the Perishable Products Export Control Board established in terms of the Perishable Products Export Control Act, 1926 (Act No. 53 of 1926);

"Conference" means those shipping lines that are at the relevant time members of the Europe Southern Africa Conference as well as shipping lines that subsequent to the signing of this Memorandum of Understanding become members of the Europe Southern Africa Conference;

"force majeure" means any cause, happening or event not within the control of the Government and the Conference including (without prejudice to the generality of the foregoing) an act of God, fire, storm, tempest, perils or accidents of the seas and rivers, war risks and warlike or other hostile acts (whether any war or hostilities are actually declared or not), acts of piracy, restraints of governments (whether de facto or de jure), rulers or peoples or governmental or statutory Acts, orders, rules, regulations or requisitions, revolution, insurrection, riots, civil commotion, strikes, lockouts and labour disputes;

"general cargo" means all cargo except such perishable cargo as is defined below;

"Government" means the Government of the Republic of South Africa;

"perishable cargo" means cargo consisting of perishable products as defined in the Perishable Products Export Control Act, 1983 (Act No. 9 of 1983), as amended, of the Parliament of the Republic of South Africa.

ARTICLE 2

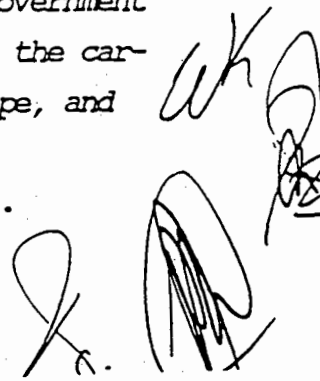
MEMBERS OF THE EUROPE SOUTHERN AFRICA CONFERENCE

2.1 The following shipping lines are at the signing of this Agreement members of the Europe Southern Africa Conference:

CMB Transport NV
Compagnie Generale Maritime
Consortium Hispania Lines
Deutsche Afrika Linien GmbH & Co.
Ellerman & Bucknall Steamship Co. Ltd (Managers: Ellerman Lines Plc)
Ellerman Harrison Container Line Ltd
Ellerman Lines Plc
Thos. & Jas. Harrison Ltd
Jadranska Slobodna Plovidba
Lloyd Triestino di Navigazione SpA
Ignazio Messina & C.S.p.A.
Navale Delmas International (N.D.I.)
Navinter Empresa Mocambicana de Navegacao Internacional
Nedlloyd Lijnen BV
P & O Containers Ltd
Royal Swazi National Shipping Corporation Ltd
South African Lines Ltd
South African Marine Corporation Ltd
Springbok Shipping Co. Ltd
Transatlantic Southern Africa Services AB
Wilh. Wilhelmsen

2.2 Other shipping lines, may, with the concurrence of the Government and the Conference, subsequently become participants in the carriage of the seaborne traffic between the Republic and Europe, and

4./.....



such shipping lines shall, by means of their formal notification to the Government and through the Conference, undertake to adhere to the terms and conditions laid down in this Memorandum of Understanding.

ARTICLE 3

THE SERVICE TO BE PROVIDED

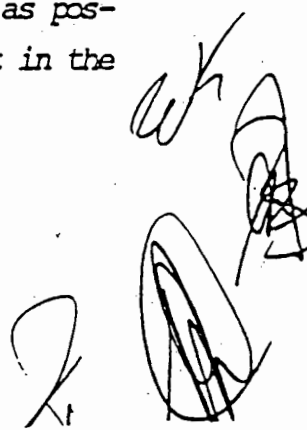
- 3.1 The Conference agrees to offer liner shipping services to meet the requirements of the seaborne trade between South Africa and Europe, connecting the main ports of Europe and Scandinavia, as appropriate, with the ports in South Africa, by means of fully cellular container ships and a complementary service and/or other adequate capacity as may be deemed necessary to meet the trade's requirements to and from the North-West Continent, the Mediterranean and the United Kingdom with effect from 1 January 1992.
- 3.2 Where conditions permit, the service will include one or more Scandinavian ports at the Conference's discretion.

ARTICLE 4

RESPONSIBILITIES OF THE CONFERENCE

The Conference accepts that its members have a responsibility to conduct their operations efficiently and, having regard to the interests of shippers generally, to operate the service as economically as possible and to maximise the utilisation of ships and equipment in the interests of both shippers and the Lines' shareholders.

5./.....



ARTICLE 5

FREQUENCY OF SCHEDULED LINER SERVICES

The Conference agrees to provide regular scheduled liner services, with frequencies regulated to meet the volume and type of cargo flows. There shall be consultation between the Conference and the Government in the event of any major structural change to the Conference service and/or significant change to the level of space offered.

ARTICLE 6

TYPES OF CARGO

The Conference intends to meet the requirements of the seaborne trade between Southern Africa and Europe and to cater for containerised general cargo and perishable cargo in its cellular services, while the complementary service will deal with cargoes otherwise unitised or loose in break-bulk form.

ARTICLE 7

FINANCIAL ARRANGEMENTS

7.1 The Government and the Conference agree not to enter into financial arrangements as embodied in the Agreement between the Government, the Board and the Conference (Ocean Freight Agreement) which expires on 31 December 1991. Ocean Freight rates shall be determined by open market forces. All accounting requirements under the Ocean Freight Agreement shall therefore fall away once the final results for the period to 31 December 1991 have been audited.

6./.....



7.2 At all times this Memorandum of Understanding is subject to the recognition that the Conference has an overriding requirement to secure an adequate return on its investment in the trade and that changes in the pattern of service and cargoes accepted may therefore be made at any time, after the Government has been consulted and after due notice has been given, to meet this requirement.

ARTICLE 8

RECOGNITION FOR THE CONFERENCE

8.1 The Government agrees that all goods, materials, supplies and equipment, and everything of every description required to be shipped from Europe and destined for the Republic for the use of its Government departments (including the provincial administrations), and from the Republic of South Africa to Europe, shall be shipped in vessels operated by the Conference. To this end, the Government agrees to arrange for the insertion of suitable clauses in all tenders and contracts issued for the supply of goods and materials required to be imported or exported for Government account. The Government will use its best endeavours to encourage parastatals and privatised subsidiaries to give preference to the Conference service at market rates of freight. The Government further agrees that, provided Ocean Freight rates are market related, it will encourage all exporters and importers to support the Conference.

8.2 The Conference shall use its best endeavours to provide facilities for the carriage of Government cargo within 30 days after notice has been given that the cargo is available for shipment. If, however, circumstances beyond the control of the Conference should

arise which would make it impracticable for the Conference to provide the necessary facilities for the shipment of such cargo within the aforementioned period of 30 days, the Government shall be free to make alternative arrangements if the cargo is urgently required by the consignees in the Republic of South Africa.

ARTICLE 9

PERISHABLE CARGOES

A separate agreement shall be entered into between the Board and the Conference concerning the carriage of perishable cargoes.

ARTICLE 10

EAST LONDON

As it is the intention of the above-mentioned shipping lines to operate their services with vessels of the current size, East London will be served as currently and full decentralisation benefits received by the lines will continue. It is recognised that in practice equalisation will progressively be removed. (See Article 5)

ARTICLE 11

EXCEPTIONAL OR CHANGED CIRCUMSTANCES

The Government and the Conference recognise that this Memorandum of Understanding is being accepted by each of the parties in good faith.

8./.....



years till 31 December 1996 and shall be subject to annual review. Either party has the right, however, to request a meeting to discuss any aspects thereof within that period.

ARTICLE 14

FORCE MAJEURE

The Government agrees that the Conference shall not be held liable for, or be under any liability in respect of, or for the consequence of any force majeure within the meaning of this Agreement, and that any party shall, without any claim on the part of the other parties, be entitled to suspend its obligations under this Agreement to the extent which may be rendered necessary by any force majeure.

ARTICLE 15

TOTALITY OF AGREEMENT

The Memorandum of Understanding constitutes the entire agreement between the Contracting Parties with regard to the matters dealt with in the Memorandum of Understanding and no representations, terms, conditions, warranties or material evidence (express or implied) not contained therein shall be binding on the Contracting Parties.

ARTICLE 16

In the event of any dispute or difference between the parties to this Agreement in respect of the interpretation, meaning or effect thereof,

10./.....



In the event of any unforeseen developments or circumstances that should occur, which substantially impair the ability of either party to carry out any of the obligations in the terms of this Memorandum of Understanding, they will meet immediately in order to decide what mutually acceptable measures shall be taken.

ARTICLE 12

AMENDMENT OF MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding may be amended by written agreement between the Contracting Parties. No amendment shall be of any force or effect unless reduced to writing and signed by the duly authorised representatives of both parties.

ARTICLE 13

DURATION OF MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding shall be valid for a period of five

9./.....



such dispute or difference shall be submitted to arbitration in accordance with the provisions of the Arbitration Act, 1965 (Act No. 66 of 1965), of the Parliament of the Republic of South Africa.

ARTICLE 17

APPLICATION OF LAWS

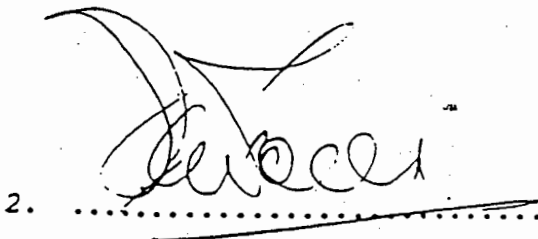
The laws of the Republic of South Africa and the states to which the above-mentioned shipping lines belong shall within their territories apply in respect of all matters not regulated by this Memorandum of Understanding.

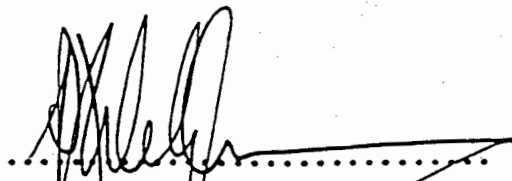
IN WITNESS whereof the parties to this Memorandum of Understanding, acting through their duly authorised representatives, have signed and sealed this Memorandum in duplicate in the English language.

DONE AT CAPE TOWN THIS THE TWENTY-SEVENTH DAY OF DECEMBER 1991

AS WITNESS:

1. 

2. 




FOR AND ON BEHALF OF THE
GOVERNMENT OF THE REPUBLIC
OF SOUTH AFRICA

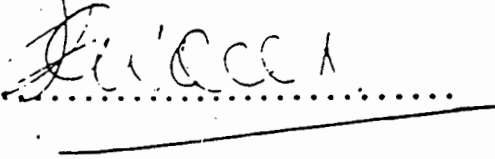
11/.....




DONE AT CAPE TOWN THIS THE TWENTY-SEVENTH DAY OF DECEMBER 1991

AS WITNESS:

1. .....

2. .....

.....

FOR AND ON BEHALF OF THE
EUROPE SOUTHERN AFRICA
CONFERENCE LINES



United Nations Conference on Trade and Development

TD/CODE/-/Rev.1

9 May 1974

Original: ENGLISH

UNITED NATIONS CONFERENCE OF PLENIPOTENTIARIES ON
A CODE OF CONDUCT FOR LINER CONFERENCES *

FINAL ACT AND ANNEXES

CONTENTS

FINAL ACT OF THE UNITED NATIONS CONFERENCE OF PLENIPOTENTIARIES ON A CODE OF CONDUCT FOR LINER CONFERENCES, HELD AT THE UNITED NATIONS OFFICE AT GENEVA, FROM 12 NOVEMBER TO 15 DECEMBER 1973 AND FROM 11 MARCH TO 6 APRIL 1974

ANNEX I - CONVENTION ON A CODE OF CONDUCT FOR LINER CONFERENCES

Objectives and principles

Chapter

- I Definitions
- II Relations among member lines
- III Relations with shippers
- IV Freight rates
- V Other matters
- VI Provisions and machinery for settlement of disputes
 - A. General provisions
 - B. International mandatory conciliation
 - C. Institutional machinery
- VII Final clauses

Annex - Model Rules of Procedure for international mandatory conciliation

ANNEX II - RESOLUTIONS ADOPTED BY THE CONFERENCE

- 1 - Completion of the work of the Conference
- 2 - Non-conference lines
- 3 - Local conciliation

*[The States whose representatives signed the Final Act appear at I.L.M. page 917. The Convention was opened for signature on July 1, 1974. As of July 17, 1974, no signatories were reported.]

CT OF THE UNITED NATIONS CONFERENCE OF PLENIPOTENTIARIES ON A CODE OF CONDUCT
ER CONFERENCES, HELD AT THE UNITED NATIONS OFFICE AT GENEVA, FROM 12 NOVEMBER
ECEMBER 1973 AND FROM 11 MARCH TO 6 APRIL 1974

! GENEVA, ON 6 APRIL 1974

ne General Assembly of the United Nations, by resolution 3035 (XXVII) of
ember 1972, requested the Secretary-General of the United Nations to convene,
ly as possible in 1973, under the auspices of the United Nations Conference on
and Development, a conference of plenipotentiaries to consider and adopt a
tion or any other multilateral legally binding instrument on a code of conduct
ner conferences.

The United Nations Conference of Plenipotentiaries on a Code of Conduct for Liner
ferences was convened at the United Nations Office at Geneva. The first part of
ference was held from 12 November to 15 December 1973 and the second part from
rch to 6 April 1974.

The Governments of the following 79 States Members of UNCTAD participated in
parts of the Conference:

ia	France	Madagascar	Spain
atina	Gabon—	Malaysia	Sri Lanka
-ralia	German Democratic Republic	Mexico	Sudan
ladesh	Germany, Federal Republic of	Morocco	Sweden
ium	Ghana	Netherlands	Switzerland
via	Greece	New Zealand	Syrian Arab Republic
il	Guatemala	Nicaragua	Thailand
garia—	Honduras—	Nigeria	Trinidad and Tobago
ndi	Hungary	Norway	Tunisia
ada	India	Pakistan	Turkey
e	Indonesia	Panama	Ukrainian Soviet Socialist Republic
na	Iraq	Peru	Union of Soviet Socialist Republics
mbia	Italy	Philippines	United Arab Emirates
a	Ivory Coast	Poland	United Kingdom of Great Britain and Northern Ireland
hoslovakia	Jamaica	Republic of Korea	United States of America
ocratic Yemen	Japan	Republic of Viet-Nam	Uruguay
erk	Khmer Republic —	Romania	Venezuela
ador	Liberia	Saudi Arabia	Yugoslavia
et	Libyan Arab Republic	Senegal	Zaire
Salvador		Singapore	
and			

The Governments of the following four States members of UNCTAD participated in the first part of the Conference:

Afghanistan
Costa Rica
Ethiopia
Uganda

The Governments of the following nine States members of UNCTAD participated in the second part of the Conference:

Bhutan	Kenya
Chad	Kuwait
Guinea	United Republic of Cameroon
Guyana	United Republic of Tanzania
Iran	

The Government of the following State member of UNCTAD was represented by an observer at both parts of the Conference:

Austria

The Governments of the following States members of UNCTAD were represented by observers at only the first part of the Conference:

Iran
Kuwait

The Economic Commission for Africa was represented at the first part of the conference.

A representative of the following Specialized Agency participated in both parts of the Conference:

International Monetary Fund

A representative of the following Specialized Agency participated only in the first part of the Conference:

Food and Agriculture Organization of the United Nations

The following intergovernmental organizations participated in both parts of the conference as observers:

Commonwealth Secretariat
East African Community
European Economic Community
Organisation for Economic Co-operation and Development
Organization of African Unity
Organization of American States

The following non-governmental organizations were represented by observers at both parts of the Conference:

Baltic and International Maritime Conference

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Resolves that:

1. Nothing in that Convention shall be construed so as to deny shippers an option in the choice between conference shipping lines and non-conference shipping lines subject to any loyalty arrangements where they exist;
2. Non-conference shipping lines competing with a conference should adhere to the principle of fair competition on a commercial basis;
3. In the interest of sound development of liner shipping service, non-conference shipping lines should not be prevented from operating as long as they comply with the requirements of paragraph 2 above.

9th plenary meeting
6 April 1974

3. Local conciliation

The United Nations Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences,

Bearing in mind the importance of the consultation provisions and the dispute settlement procedures provided in the Convention on a Code of Conduct for Liner Conferences,

Noting that proposals were made to provide in the Code for submitting some disputes to local conciliation,

1. Requests the first Review Conference to be convened in accordance with article 52 of the Convention to give priority consideration to the subject of local conciliation, taking into account the views expressed by the Contracting Parties to the Convention on whether or not the absence of local conciliation has hampered the effective settlement of disputes and, if so, which subjects should be considered appropriate for local conciliation and what procedures should be applied for resolving such disputes.
2. Agrees that in preparing for the Review Conference the depositary shall seek the views of all States entitled to attend the Review Conference, which should be required to take into account the views expressed by appropriate authorities, liner conferences and shippers' organizations.

9th plenary meeting
6 April 1974

Council of European and Japanese National Shipowners' Associations
 International Air Transport Association
 International Chamber of Commerce
 International Federation of Forwarding Agents' Associations
 International Shipowners' Association
 National Shippers' Councils of Europe - Plenary

The following non-governmental organizations were represented by observers at the second part of the Conference:

International Association of Ports and Harbours
 International Cargo Handling Co-ordination Association

The Conference, at its first part, elected Mr. C.P. Srivastava (India) as President of the Conference. On his assumption of the office of Secretary-General of Inter-Governmental Maritime Consultative Organization on 1 January 1974 the Conference, at its second part, decided that Mr. Srivastava should continue to preside, independent President of the Conference.

The Conference, at its first part, elected the following Vice-Presidents of the Conference:

Mr. I. Averin (USSR)
 Mr. B.O. Awokoya (Nigeria)
 Mr. G. Breuer (Federal Republic of Germany)
 Mr. P. Daza (Chile)
 Mr. J. de Groot (Netherlands)
 Mr. S. Kembukuswa ne Nlaza (Zaire)
 Mr. G. Negash (Ethiopia)
 Mr. R.J. Polaschek (New Zealand)
 Mr. M. Reed (Norway)
 Mr. R.E. Reynolds (Canada)
 Mr. J. Ružička (Czechoslovakia)
 Mr. M. Sharmuganathan (Sri Lanka)
 Mr. H. Umar (Indonesia)
 Mr. H.S. Walker (Jamaica)

The Conference, at its second part, elected Mr. K.M. McQueen (United Kingdom of Great Britain and Northern Ireland) to replace Mr. M. Reed (Norway), who was not present at the second part of the Conference.

The Conference elected Mr. E.J. Antoun (United States of America) as Rapporteur.

The following committees were established by the Conference:

General Committee

Chairman: The President of the Conference

Members: The President, Vice-Presidents and Rapporteur of the Conference and the Chairmen of the Main Committees.

First Main Committee

Chairman: Mr. D. Popov (Bulgaria)

Vice-Chairman-cum-Rapporteur: Mr. H. Ben Salem (Tunisia)

Second Main Committee

Chairman: Mr. Y.K. Quartey (Ghana)

Vice-Chairman-cum-Rapporteur: Mr. T. Tscherning (Sweden)

Third Main Committee

Chairman: Mr. F. Castillo Nájera (Mexico)

Vice-Chairman-cum-Rapporteur: Mr. M. Husain (Pakistan)

Credentials Committee

Chairman: Mr. B. Brum (Uruguay)

Members: China, Greece, Japan, Nicaragua, Senegal, Union of Soviet Socialist Republics, United Republic of Tanzania, United States of America, Uruguay.

1. The Secretary-General of the United Nations was represented by M. Pérez-Guerrero, Secretary-General of UNCTAD. Mr. W.R. Malinowski, Director, Division for Invisibles of the secretariat of UNCTAD, served as Director-in-charge of the Conference, and Mr. M.T. Adébanjo, Secretary of the Trade and Development Board, served as Secretary of the Conference.

2. The Conference had before it, as a basis for its work, the reports of the Preparatory Committee of the Conference on its first and second sessions (TD/CODE/1 and TD/CODE/2 and Corr.1-3). At its second part, the Conference also had before it the report of the Conference on its first part (TD/CODE/7).

3. The Conference also had before it three notes prepared by the UNCTAD secretariat: "Glossary of terms used in the draft code of conduct for liner conferences" (TD/CODE/L.2); "Glossary of terms used in the proposed text of a code of conduct for liner conferences" (TD/CODE/L.3); and "Transitional arrangements for the Code: final clauses" (TD/CODE/L.4). At its second part, the Conference also had before it a document prepared by the UNCTAD secretariat entitled "Texts for a code of conduct for liner conferences, with changes suggested by the UNCTAD secretariat" (TD/CODE/L.15 and Add.1).

4. On the basis of its deliberations, as summarized in the reports of the Conference on its first and second parts (TD/CODE/7 and TD/CODE/10), the Conference prepared and decided to open for signature the Convention on a Code of Conduct for Liner Conferences, which is annexed to this Final Act (annex I).

5. The resolutions adopted by the Conference are reproduced in annex II.

IN WITNESS WHEREOF the undersigned representatives have signed this Final Act on behalf of their respective States. */

Geneva, this sixth day of April, one thousand nine hundred and seventy-four, in triplicate in the Chinese, English, French, Russian and Spanish languages, each being equally authentic. The original of the Final Act shall be deposited in the archives of the United Nations Secretariat.

C.P. Srivastava, President of the Conference

W.R. Malinowski, Director-in-charge of the Conference

M.T. Adebanjo, Secretary of the Conference

*/ The States whose representatives signed the Final Act are: Algeria; Argentina; Australia; Bangladesh; Belgium; Bhutan; Bolivia; Brazil; Bulgaria; Canada; Chile; China; Colombia; Cuba; Czechoslovakia; Democratic Republic of Congo; Denmark; Ecuador; Egypt; Finland; France; Gabon; German Democratic Republic; Greece; Guinea; Honduras; Hungary; India; Indonesia; Iran; Iraq; Italy; Ivory Coast; Jamaica; Japan; Kenya; Kuwait; Liberia; Libyan Arab Republic; Madagascar; Malaysia; Mexico; Morocco; Netherlands; New Zealand; Nicaragua; Nigeria; Norway; Pakistan; Panama; Peru; Philippines; Poland; Republic of Korea; Republic of the Congo; Romania; Senegal; Singapore; Spain; Sri Lanka; Sudan; Sweden; Switzerland; Thailand; Trinidad and Tobago; Tunisia; Turkey; Ukrainian Soviet Socialist Republic; Union of Soviet Socialist Republics; United Arab Emirates; United Kingdom of Great Britain and Northern Ireland; United Republic of Cameroon; United Republic of Tanzania; United States of America; Uruguay; Venezuela; Yugoslavia; Zaire.

ANNEX I

CONVENTION ON A CODE OF CONDUCT FOR LINER CONFERENCES

OBJECTIVES AND PRINCIPLES

The Contracting Parties to the present Convention,

DESIRING to improve the liner conference system,

RECOGNIZING the need for a universally acceptable code of conduct for liner conferences,

TAKING into account the special needs and problems of the developing countries with respect to the activities of liner conferences serving their foreign trade,

AGREEING to reflect in the Code the following fundamental objectives and basic principles:

(a) the objective to facilitate the orderly expansion of world sea-borne trade;

- (b) the objective to stimulate the development of regular and efficient liner services adequate to the requirements of the trade concerned;
- (c) the objective to ensure a balance of interests between suppliers and users of liner shipping services;
- (d) the principle that conference practices should not involve any discrimination against the shipowners, shippers or the foreign trade of any country;
- (e) the principle that conferences hold meaningful consultations with shippers organizations, shippers' representatives and shippers on matters of common interest, with, upon request, the participation of appropriate authorities;
- (f) the principle that conferences should make available to interested parties pertinent information about their activities which are relevant to those parties and should publish meaningful information on their activities,

HAVE AGREED as follows:

PART ONE

CHAPTER I: DEFINITIONS

Conference or conference

A group of two or more vessel-operating carriers which provides international liner services for the carriage of cargo on a particular route or routes within specified geographical limits and which has an agreement or arrangement, whatever its nature, within the framework of which they operate under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services.

National shipping line

A national shipping line of any given country is a vessel-operating carrier which has its head office of management and its effective control in that country and is recognized as such by an appropriate authority of that country or under the law of that country.

Lines belonging to and operated by a joint venture involving two or more countries and in whose equity the national interests, public and/or private, of those countries have a substantial share and whose head office of management and whose effective control is in one of those countries can be recognized as a national line by the appropriate authorities of those countries.

Third-country shipping line

A vessel-operating carrier in its operations between two countries of which it is not a national shipping line.

Shipper

A person or entity who has entered into, or who demonstrates an intention to enter into, a contractual or other arrangement with a conference or shipping line for the shipment of goods in which he has a beneficial interest.

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organization

association or equivalent body which promotes, represents and protects the interests of shippers and, if those authorities so desire, is recognized in that capacity by the appropriate authority or authorities of the country whose shippers it represents.

carried by the conference

cargo transported by shipping lines members of a conference in accordance with the conference agreement.

competent authority

either a government or a body designated by a government or by national authorities to perform any of the functions ascribed to such authority by the provisions of this Code.

promotional freight rate

rate instituted for promoting the carriage of non-traditional exports of the country concerned.

preferential freight rate

preferential freight rate, other than a promotional freight rate, which may be negotiated between the parties concerned.

CHAPTER II: RELATIONS AMONG MEMBER LINES

Article 1

Membership

Any national shipping line shall have the right to be a full member of a conference which serves the foreign trade of its country, subject to the criteria set out in Article 1(2). Shipping lines which are not national lines in any trade of a conference shall have the right to become full members of that conference, subject to the criteria set out in Article 1(2) and (3) and to the provisions regarding the share of trade as set out in Article 2 as regards third-country shipping lines.

A shipping line applying for membership of a conference shall furnish evidence of its capability and intention, which may include the use of chartered tonnage, provided the criteria of this paragraph are met, to operate a regular, adequate and efficient service on a long-term basis as defined in the conference agreement within the framework of the conference, shall undertake to abide by all the terms and conditions of the conference agreement, and shall deposit a financial guarantee to cover any outstanding financial obligation in the event of subsequent withdrawal, suspension or expulsion from membership, if so required under the conference agreement.

In considering an application for membership by a shipping line which is not a national line in any trade of the conference concerned, in addition to the provisions of Article 1(2), the following criteria, inter alia, should be taken into account:

- (a) the existing volume of the trade on the route or routes served by the conference and prospects for its growth;

- (b) the adequacy of shipping space for the existing and prospective volume of trade on the route or routes served by the conference;
- (c) the probable effect of admission of the shipping line to the conference on the efficiency and quality of the conference service;
- (d) the current participation of the shipping line in trade on the same route or routes outside the framework of a conference; and
- (e) the current participation of the shipping line on the same route or routes within the framework of another conference.

The above criteria shall not be applied so as to subvert the implementation of the provisions relating to participation in trade set out in Article 2.

An application for admission or readmission to membership shall be promptly decided upon and the decision communicated by a conference to an applicant promptly, in no case later than six months from the date of application. When a shipping line is refused admission or readmission the conference shall, at the same time, give writing the grounds for such refusal.

When considering applications for admission, a conference shall take into account the views put forward by shippers and shippers' organizations of the countries whose trade is carried by the conference, as well as the views of appropriate authorities if they so request.

In addition to the criteria for admission set out in Article 1(2), a shipping line applying for readmission shall also give evidence of having fulfilled its obligations in accordance with Article 4(1) and (4). The conference may give special scrutiny to the circumstances under which the line left the conference.

Article 2

Participation in trade

- 1) Any shipping line admitted to membership of a conference shall have sailing and loading rights in the trades covered by that conference.
- 2) When a conference operates a pool, all shipping lines members of the conference serving the trade covered by the pool shall have the right to participate in the pool or that trade.
- 3) For the purpose of determining the share of trade which member lines shall have the right to acquire, the national shipping lines of each country, irrespective of the number of lines, shall be regarded as a single group of shipping lines for that country.
- 4) When determining a share of trade within a pool of individual member lines and/or groups of national shipping lines in accordance with Article 2(2), the following principles regarding their right of participation in the trade carried by the conference shall be observed, unless otherwise mutually agreed:
 - (a) The group of national shipping lines of each of two countries the foreign trade between which is carried by the conference shall have equal rights to participate in the freight and volume of traffic generated by their mutual foreign trade and carried by the conference;

) Third-country shipping lines, if any, shall have the right to acquire a significant part, such as 20 per cent, in the freight and volume of traffic generated by that trade. *Vague.*

), for any one of the countries whose trade is carried by a conference, there national shipping lines participating in the carriage of that trade, the share trade to which national shipping lines of that country would be entitled under e 2(4) shall be distributed among the individual member lines participating in ade in proportion to their respective shares.

If the national shipping lines of one country decide not to carry their full of the trade, that portion of their share of the trade which they do not carry be distributed among the individual member lines participating in the trade in proportion to their respective shares.

If the national shipping lines of the countries concerned do not participate in trade between those countries covered by a conference, the shares of trade carried e conference between those countries shall be allocated between the participating or lines of third countries by commercial negotiations between those lines.

The national shipping lines of a region, members of a conference, at one end of trade covered by the conference, may redistribute among themselves by mutual agreement the shares in trades allocated to them, in accordance with Article 2(4) to inclusive.

Subject to the provisions of Article 2(4) to (8) inclusive regarding shares of e among individual shipping lines or groups of shipping lines, pooling or trade- ring agreements shall be reviewed by the conference periodically, at intervals be stipulated in those agreements and in accordance with criteria to be specified the conference agreement.

) The application of the present Article shall commence as soon as possible after ry into force of the present Convention and shall be completed within a transition od which in no case shall be longer than two years, taking into account the fic situation in each of the trades concerned.

) Shipping lines members of a conference shall be entitled to operate chartered ps to fulfil their conference obligations.

) The criteria for sharing and the revision of shares as set out in Article 2(1) (11) inclusive shall apply when, in the absence of a pool, there exists berthing, ling and/or any other form of cargo allocation agreement.

) Where no pooling, berthing, sailing or other trade participation agreements exist a conference, either group of national shipping lines, members of the conference, require that pooling arrangements be introduced, in respect of the trade between ir countries carried by the conference, in conformity with the provisions of icle 2(4); or alternatively they may require that the sailings be so adjusted as provide an opportunity to those lines to enjoy substantially the same rights to ticipate in the trade between those two countries carried by the conference as they ld have enjoyed under the provisions of Article 2(4). Any such request shall be sidered and decided by the conference. If there is no agreement to institute such pool or adjustment of sailings among the members of the conference, the groups of ional shipping lines of the countries at both ends of the trade shall have a ority vote in deciding to establish such a pool or adjustment of sailings. The ter shall be decided upon within a period not exceeding six months from the receipt the request.

4) In the event of a disagreement between the national shipping lines of the countries either end whose trade is served by the conference with regard to whether or not pooling shall be introduced, they may require that within the conference sailings be adjusted as to provide an opportunity to these lines to enjoy substantially the same rights to participate in the trade between those two countries carried by the conference as they would have enjoyed under the provisions of Article 2(4). In the event that there are no national shipping lines in one of the countries whose trade is served by the conference, the national shipping line or lines of the other country may make the same request. The conference shall use its best endeavours to meet this request. If, however, this request is not met, the appropriate authorities of the countries at both ends of the trade may take up the matter if they so wish and make their views known to the parties concerned for their consideration. If no agreement is reached, the dispute shall be dealt with in accordance with the procedures established in this Code.

15) Other shipping lines, members of a conference, may also request that pooling or pooling agreements be introduced, and the request shall be considered by the conference in accordance with the relevant provisions of this Code.

16) A conference shall provide for appropriate measures in any conference pooling agreement to cover cases where the cargo has been shut out by a member line for any reason excepting late presentation by the shipper. Such agreement shall provide that a vessel with unbooked space, capable of being used, be allowed to lift the cargo, even in excess of the pool share of the line in the trade, if otherwise the cargo would be shut out and delayed beyond a period set by the conference.

17) The provisions of Article 2(1) to (16) inclusive concern all goods regardless of their origin, their destination or the use for which they are intended, with the exception of military equipment for national defence purposes.

Article 3

Decision-making procedures

The decision-making procedures embodied in a conference agreement shall be based on the principle of equality of all the full member lines; these procedures shall ensure that the voting rules do not hinder the proper work of the conference and the service of the trade and shall define the matters on which decisions will be made by unanimity. However, a decision cannot be taken in respect of matters defined in a conference agreement relating to the trade between two countries without the consent of the national shipping lines of those two countries.

Article 4

Sanctions

(1) A shipping line member of a conference shall be entitled, subject to the provisions regarding withdrawal which are embodied in pool schemes and/or cargo-sharing arrangements, to secure its release, without penalty, from the terms of the conference agreement after giving three months' notice, unless the conference agreement provides for a different time period, although it shall be required to fulfil its obligations as a member of the conference up to the date of its release.

(2) A conference may, upon notice to be specified in the conference agreement, suspend or expel a member for significant failure to abide by the terms and conditions of the conference agreement.

expulsion or suspension shall become effective until a statement in writing reasons therefor has been given and until any dispute has been settled as d in chapter VI.

on withdrawal or expulsion, the line concerned shall be required to pay its of the outstanding financial obligations of the conference, up to the date of withdrawal or expulsion. In cases of withdrawal, suspension or expulsion, the shall not be relieved of its own financial obligations under the conference ment or of any of its obligations towards shippers.

Article 5

Self-policing

conference shall adopt and keep up to date an illustrative list, which shall comprehensive as possible, of practices which are regarded as malpractices breaches of the conference agreement and shall provide effective self-policing ery to deal with them, with specific provisions requiring:

- (a) the fixing of penalties or a range of penalties for malpractices or breaches, to be commensurate with their seriousness;
- (b) the examination and impartial review of an adjudication of complaints, and/or decisions taken on complaints, against malpractices or breaches, by a person or body unconnected with any of the shipping lines members of the conference or their affiliates, on request by the conference or any other party concerned;
- (c) the reporting, on request, on the action taken in connexion with complaints against malpractices and/or breaches, and on a basis of anonymity for the parties concerned, to the appropriate authorities of the countries whose trade is served by the conference and of the countries whose shipping lines are members of the conference.

Shipping lines and conferences are entitled to the full co-operation of shippers shippers' organizations in the endeavour to combat malpractices and breaches.

Article 6

Conference agreements

All conference agreements, pooling, berthing and sailing rights agreements and documents or other documents directly related to, and which affect, such agreements shall be made available on request to the appropriate authorities of the countries whose trade is served by the conference and of the countries whose shipping lines members of the conference.

CHAPTER III: RELATIONS WITH SHIPPERS

Article 7

Loyalty arrangements

The shipping lines members of a conference are entitled to institute and maintain loyalty arrangements with shippers, the form and terms of which are matters for consultation between the conference and shippers' organizations or representatives of

ers. These loyalty arrangements shall provide safeguards making explicit the rights of shippers and conference members. These arrangements shall be based on the present system or any other system which is also lawful.

Whatever loyalty arrangements are made, the freight rate applicable to loyal members shall be determined within a fixed range of percentages of the freight rate applicable to other shippers. Where a change in the differential causes an increase in the rates charged to shippers, the change can be implemented only after 150 days' notice to those shippers or according to regional practice and/or agreement. Disputes in connexion with a change of the differential shall be settled as provided in the loyalty agreement.

The terms of loyalty arrangements shall provide safeguards making explicit the rights and obligations of shippers and of shipping lines members of the conference in accordance with the following provisions, inter alia:

(a) The shipper shall be bound in respect of cargo whose shipment is controlled by him or his affiliated or subsidiary company or his forwarding agent in accordance with the contract of sale of the goods concerned, provided that the shipper shall not, by evasion, subterfuge, or intermediary, attempt to divert cargo in violation of his loyalty commitment.

(b) Where there is a loyalty contract, the extent of actual or liquidated damages and/or penalty shall be specified in the contract. The member lines of the conference may, however, decide to assess lower liquidated damages or to waive the claim to liquidated damages. In any event, the liquidated damages under the contract to be paid by the shipper shall not exceed the freight charges on the particular shipment, computed at the rate provided under the contract.

(c) The shipper shall be entitled to resume full loyalty status, subject to the fulfilment of conditions established by the conference which shall be specified in the loyalty arrangement.

(d) The loyalty arrangement shall set out:

(i) a list of cargo, which may include bulk cargo shipped without mark or count, which is specifically excluded from the scope of the loyalty arrangement;

(ii) a definition of the circumstances in which cargo other than cargo covered by (i) above is considered to be excluded from the scope of the loyalty arrangement;

(iii) the method of settlement of disputes arising under the loyalty arrangement;

(iv) provision for termination of the loyalty arrangement on request by either a shipper or a conference without penalty, after expiry of a stipulated period of notice, such notice to be given in writing; and

(v) the terms for granting dispensation. ?

(4) If there is a dispute between a conference and a shippers' organization or representatives of shippers and/or shippers about the form or terms of a proposed loyalty arrangement, either party may refer the matter for resolution under appropriate procedures as set out in this Code.

Article 8

Dispensation - a licence to do what is normally prohibited

Conferences shall provide, within the terms of the loyalty arrangements, that requests by shippers for dispensation shall be examined and a decision given quickly if requested, the reasons given in writing where dispensation is withheld. If a conference fail to confirm, within a period specified in the loyalty arrangement, sufficient space to accommodate a shipper's cargo within a period also specified in the loyalty arrangement, the shipper shall have the right, without being prejudiced, to utilize any vessel for the cargo in question.

In ports where conference services are arranged subject to the availability of a specified minimum of cargo (i.e. on inducement), but either the shipping line does not call, despite due notice by shippers, or the shipping line does not reply within agreed time to the notice given by shippers, shippers shall automatically have the right, without prejudicing their loyalty status, to use any available vessel for the carriage of their cargo.

Article 9

Availability of tariffs and related conditions and/or regulations

Tariffs, related conditions, regulations, and any amendments thereto shall be made available on request to shippers, shippers' organizations and other parties concerned at reasonable cost, and they shall be available for examination at offices of shipping lines and their agents. They shall spell out all conditions concerning application of freight rates and the carriage of any cargo covered by them.

Article 10

Annual reports

Conferences shall provide annually to shippers' organizations, or to representatives of shippers, reports on their activities designed to provide general information of interest to them, including relevant information about consultations held with shippers and shippers' organizations, action taken regarding complaints, changes in membership, and significant changes in service, tariffs and conditions of carriage. Such annual reports shall be submitted, on request, to the appropriate authorities of the countries whose trade is served by the conference concerned.

Article 11

Consultation machinery

There shall be consultations on matters of common interest between a conference, shippers' organizations, representatives of shippers and, where practicable, governments, which may be designated for that purpose by the appropriate authority if so desired. These consultations shall take place whenever requested by any of the above-mentioned parties. Appropriate authorities shall have the right, upon request, to participate fully in the consultations, but this does not mean that they shall have a decision-making role.

The following matters, inter alia, may be the subject of consultation:

- (a) changes in general tariff conditions and related regulations;

- (b) changes in the general level of tariff rates and rates for major commodities;
 - (c) promotional and/or special freight rates;
 - (d) imposition of, and related changes in, surcharges;
 - (e) loyalty arrangements, their establishment or changes in their form and general conditions;
 - (f) changes in the tariff classification of ports;
 - (g) procedure for the supply of necessary information by shippers concerning the expected volume and nature of their cargoes; and
 - (h) presentation of cargo for shipment and the requirements regarding notice of cargo availability.
- (3) To the extent that they fall within the scope of activity of a conference, the following matters may also be the subject of consultation:
- (a) operation of cargo inspection services;
 - (b) changes in the pattern of service;
 - (c) effects of the introduction of new technology in the carriage of cargo, in particular unitization, with consequent reduction of conventional service or loss of direct services; and
 - (d) adequacy and quality of shipping services, including the impact of pooling, berthing or sailing arrangements on the availability of shipping services and freight rates at which shipping services are provided; changes in the areas served and in the regularity of calls by conference vessels.
- (4) Consultations shall be held before final decisions are taken, unless otherwise provided in this Code. Advance notice shall be given of the intention to take decisions on matters referred to in Article 11 (2) and (3). Where this is impossible, urgent decisions may be taken pending the holding of consultations.
- (5) Consultations shall begin without undue delay and in any event within a maximum period specified in the conference agreement or, in the absence of such a provision in the agreement, not later than 50 days after receipt of the proposal for consultations, unless different periods of time are provided in this Code.
- (6) When holding consultations, the parties shall use their best efforts to provide relevant information, to hold timely discussions and to clarify matters for the purpose of seeking solutions of the issues concerned. The parties involved shall take account of each other's views and problems and strive to reach agreement consistent with their commercial viability.

CHAPTER IV: FREIGHT RATES

Article 12

Criteria for freight-rate determination

In arriving at a decision on questions of tariff policy in all cases mentioned in this Code, the following points shall, unless otherwise provided, be taken into account:

- (a) Freight rates shall be fixed at as low a level as is feasible from the commercial point of view and shall permit a reasonable profit for shipowners;
- (b) The cost of operations of conferences shall, as a rule, be evaluated for the round voyage of ships, with the outward and inward directions considered as a single whole. Where applicable, the outward and inward voyage should be considered separately. The freight rates should take into account, among other factors, the nature of cargoes, the interrelation between weight and cargo measurement, as well as the value of cargoes;
- (c) In fixing promotional freight rates and/or special freight rates for specific goods, the conditions of trade for these goods of the countries served by the conference, particularly of developing and land-locked countries, shall be taken into account.

Article 13

Conference tariffs and classification of tariff rates

list of goods on which duty is payable.

- (1) Conference tariffs shall not unfairly differentiate between shippers similarly situated. Shipping lines members of a conference shall adhere strictly to the rates, rules and terms shown in the tariffs and other currently valid published documents of the conference and to any special arrangements permitted under this Code.
- (2) Conference tariffs should be drawn up simply and clearly, containing as few classes/categories as possible, depending on the particular requirements of a trade, specifying a freight rate for each commodity and, where appropriate, for each class/category; they should also indicate, wherever practicable, in order to facilitate statistical compilation and analysis, the corresponding appropriate code number of the item in accordance with the Standard International Trade Classification, the Brussels Tariff Nomenclature or any other nomenclature that may be internationally adopted; the classification of commodities in the tariffs should, as far as practicable, be prepared in co-operation with shippers organizations and other national and international organizations concerned.

Article 14

General freight-rate increases

- (1) A conference shall give notice of not less than 150 days, or according to regional practice and/or agreement, to shippers' organizations or representatives of shippers and/or shippers and, where so required, to appropriate authorities of the countries whose trade is served by the conference, of its intention to effect a general increase in freight rates, an indication of its extent, the date of effect and the reasons supporting the proposed increase.
- (2) At the request of any of the parties prescribed for this purpose in this Code, to be made within an agreed period of time after the receipt of the notice, consultations shall commence, in accordance with the relevant provisions of this Code, within a stipulated period not exceeding 30 days or as previously agreed between the parties concerned; the consultations shall be held in respect of the bases and amounts of the proposed increase and the date from which it is to be given effect.
- (3) A conference, in an effort to expedite consultations, may, or upon the request of any of the parties prescribed in this Code as entitled to participate in consultations

on general freight-rate increases shall, where practicable, reasonably before the consultations, submit to the participating parties a report from independent accountants of repute, including, where the requesting parties accept it as one of the bases of consultations, an aggregated analysis of data regarding relevant costs and revenues which in the opinion of the conference necessitate an increase in freight rates.

(4) If agreement is reached as a result of the consultations, the freight-rate increase shall take effect from the date indicated in the notice served in accordance with Article 14 (1), unless a later date is agreed upon between the parties concerned.

(5) If no agreement is reached within 30 days of the giving of notice in accordance with Article 14 (1), and subject to procedures prescribed in this Code, the matter shall be submitted immediately to international mandatory conciliation, in accordance with chapter VI. The recommendation of the conciliators, if accepted by the parties concerned, shall be binding upon them and shall be implemented, subject to the provisions of Article 14 (9), with effect from the date mentioned in the conciliators' recommendation.

(6) Subject to the provisions of Article 14 (9), a general freight-rate increase may be implemented by a conference pending the conciliators' recommendation. When making their recommendation, the conciliators should take into account the extent of the above-mentioned increase made by the conference and the period for which it has been in force. In the event that the conference rejects the recommendation of the conciliators, shippers and/or shippers' organizations shall have the right to consider themselves not bound, after appropriate notice, by any arrangement or other contract with that conference which may prevent them from using non-conference shipping lines. Where a loyalty arrangement exists, shippers and/or shippers' organizations shall give notice within a period of 30 days to the effect that they no longer consider themselves bound by that arrangement, which notice shall apply from the date mentioned therein, and a period of not less than 30 days and not more than 90 days shall be provided in the loyalty arrangement for this purpose.

(7) A deferred rebate which is due to the shipper and which has already been accumulated by the conference shall not be withheld by, or forfeited to, the conference as a result of action by the shipper under Article 14 (6).

(8) If the trade of a country carried by shipping lines members of a conference on a particular route consists largely of one or few basic commodities, any increase in the freight rate on one or more of those commodities shall be treated as a general freight-rate increase, and the appropriate provisions of this Code shall apply.

(9) Conferences should institute any general freight-rate increase effective in accordance with this Code for a period of a stated minimum duration, subject always to the rules regarding surcharges and regarding adjustment in freight rates consequent upon fluctuations in foreign exchange rates. The period over which a general freight-rate increase is to apply is an appropriate matter to be considered during consultations conducted in accordance with Article 14 (2), but unless otherwise agreed between the parties concerned during the consultations, the minimum period of time between the date when one general freight-rate increase becomes effective and the date of notice for the next general freight-rate increase given in accordance with Article 14 (1) shall not be less than 10 months.

Article 15

Promotional freight rates

(1) Promotional freight rates for non-traditional exports should be instituted by conferences.

(2) All necessary and reasonable information justifying the need for a promotional freight rate shall be submitted to a conference by the shippers, shippers' organizations or representatives of shippers concerned.

(3) Special procedures shall be instituted providing for a decision within 30 days from the date of receipt of that information, unless mutually agreed otherwise, on applications for promotional freight rates. A clear distinction shall be made between these and general procedures for considering the possibility of reducing freight rates for other commodities or of exempting them from increases.

(4) Information regarding the procedures for considering applications for promotional freight rates shall be made available by the conference to shippers and/or shippers' organizations and, on request, to the governments and/or other appropriate authorities of the countries whose trade is served by the conference.

(5) A promotional freight rate shall be established normally for a period of 12 months, unless otherwise mutually agreed between the parties concerned. Prior to the expiry of the period, the promotional freight rate shall be reviewed, on request by the shipper and/or shippers' organization concerned, when it shall be a matter for the shipper and/or shippers' organization, at the request of the conference, to show that the continuation of the rate is justified beyond the initial period.

(6) When examining a request for a promotional freight rate, the conference may take into account that, while the rate should promote the export of the non-traditional product for which it is sought, it is not likely to create substantial competitive distortions in the export of a similar product from another country served by the conference.

(7) Promotional freight rates are not excluded from the imposition of a surcharge or a currency adjustment factor in accordance with Articles 16 and 17.

(8) Each shipping line member of a conference serving the relevant ports of a conference trade shall accept, and not unreasonably refuse, a fair share of cargo for which a promotional freight rate has been established by the conference.

Article 16

Surcharges

(1) Surcharges imposed by a conference to cover sudden or extraordinary increases in costs or losses of revenue shall be regarded as temporary. They shall be reduced in accordance with improvements in the situation or circumstances which they were imposed to meet and shall be cancelled, subject to Article 16 (6), as soon as the situation or circumstances which prompted their imposition cease to prevail. This shall be indicated at the moment of their imposition, together, as far as possible, with a description of the change in the situation or circumstances which will bring about their increase, reduction or cancellation.

(2) Surcharges imposed on cargo moving to or from a particular port shall likewise be regarded as temporary and likewise shall be increased, reduced or cancelled, subject to Article 16 (6), when the situation in that port changes.

(3) Before any surcharge is imposed, whether general or covering only a specific port, notice should be given and there shall be consultation, upon request, in accordance with the procedures of this Code, between the conference concerned and other parties directly affected by the surcharge and prescribed in this Code as entitled to participate

in such consultations, save in those exceptional circumstances which warrant immediate imposition of the surcharge. In cases where a surcharge has been imposed without consultation, consultations, upon request, shall be held as soon as possible thereafter. Prior to such consultations, conferences shall furnish data which in their opinion justify the imposition of the surcharge.

(4) Unless the parties agree otherwise, within a period of 15 days after the receipt of a notice given in accordance with Article 16 (3), if there is no agreement on the question of the surcharge between the parties concerned referred to in that article, the relevant provisions for settlement of disputes provided in this Code shall prevail. Unless the parties concerned agree otherwise, the surcharge may, however, be imposed pending resolution of the dispute, if the dispute still remains unresolved at the end of a period of 30 days after the receipt of the above-mentioned notice.

(5) In the event of a surcharge being imposed in exceptional circumstances without prior consultation as provided in Article 16 (3), if no agreement is reached through subsequent consultations, the relevant provisions for settlement of disputes provided in this Code shall prevail.

(6) Financial loss incurred by the shipping lines members of a conference as a result of any delay on account of consultations and/or other proceedings for resolving disputes regarding imposition of surcharges in accordance with the provisions of this Code, as compared to the date from which the surcharge was to be imposed in terms of the notice given in accordance with Article 16 (3), may be compensated by an equivalent prolongation of the surcharge before its removal. Conversely, for any surcharge imposed by the conference and subsequently determined and agreed to be unjustified or excessive as a result of consultations or other procedures prescribed in this Code, the amounts so collected or the excess thereof as determined hereinabove, unless otherwise agreed, shall be refunded to the parties concerned, if claimed by them, within a period of 30 days of such claim.

Article 17

Currency changes

(1) Exchange rate changes, including formal devaluation or revaluation, which lead to changes in the aggregate operational costs and/or revenues of the shipping lines members of a conference relating to their operations within the conference provide a valid reason for the introduction of a currency adjustment factor or for a change in the freight rates. The adjustment or change shall be such that in the aggregate the member lines concerned neither gain nor lose, as far as possible, as a result of the adjustment or change. The adjustment or change may take the form of currency surcharges or discounts or of increases or decreases in the freight rates.

(2) Such adjustments or changes shall be subject to notice, which should be arranged in accordance with regional practice, where such practice exists, and there shall be consultations in accordance with the provisions of this Code between the conference concerned and the other parties directly affected and prescribed in this Code as entitled to participate in consultations, save in those exceptional circumstances which warrant immediate imposition of the currency adjustment factor or freight-rate change. In the event that this has been done without prior consultations, consultations shall be held as soon as possible thereafter. The consultations should be on the application, size and date of implementation, of the currency adjustment factor or freight-rate change, and the same procedures shall be followed for this purpose as are prescribed in Article 16 (4) and (5) in respect of surcharges. Such consultations should take place and be completed within a period not exceeding 15 days from the date

when the intention to apply a currency surcharge or to effect a freight-rate change is announced.

(3) If no agreement is reached within 15 days through consultations, the relevant provisions for settlement of disputes provided in this Code shall prevail.

(4) The provisions of Article 16 (6) shall apply, adapted as necessary, to currency adjustment factors and freight-rate changes dealt with in the present Article.

CHAPTER V: OTHER MATTERS

Article 18

Fighting ships

Members of a conference shall not use fighting ships in the conference trade for the purpose of excluding, preventing or reducing competition by driving a shipping line not a member of the conference out of the said trade.

Article 19

Adequacy of service

(1) Conferences should take necessary and appropriate measures to ensure that their member lines provide regular, adequate and efficient service of the required frequency on the routes they serve and shall arrange such services so as to avoid as far as possible bunching and gapping of sailings. Conferences should also take into consideration any special measures necessary in arranging services to handle seasonal variations in cargo volumes.

(2) Conferences and other parties prescribed in this Code as entitled to participate in consultations, including appropriate authorities if they so desire, should keep under review, and should maintain close co-operation regarding, the demand for shipping space, the adequacy and suitability of service, and in particular the possibilities for rationalization and for increasing the efficiency of services. Benefits identified as accruing from rationalization of services shall be fairly reflected in the level of freight rates.

(3) In respect of any port for which conference services are supplied only subject to the availability of a specified minimum of cargo, that minimum shall be specified in the tariff. Shippers should give adequate notice of the availability of such cargo.

? list or scale of charges.

Article 20

Head office of a conference

A conference shall as a rule establish its head office in a country whose trade is served by that conference, unless agreed otherwise by the shipping lines members of that conference.

Article 21

Representation

Conferences shall establish local representation in all countries served, except that where there are practical reasons to the contrary the representation may be on a regional basis. The names and addresses of representatives shall be readily available, and these representatives shall ensure that the views of shippers and conferences are

made rapidly known to each other with a view to expediting prompt decisions. When a conference considers it suitable, it shall provide for adequate delegation of powers of decision to its representatives.

Article 22

Contents of conference agreements, trade participation agreements and loyalty arrangements

Conference agreements, trade participation agreements and loyalty arrangements shall conform to the applicable requirements of this Code and may include such other provisions as may be agreed which are not inconsistent with this Code.

PART TWO

CHAPTER VI: PROVISIONS AND MACHINERY FOR SETTLEMENT OF DISPUTES

A. General provisions

Article 23

(1) The provisions of this chapter shall apply whenever there is a dispute relating to the application or operation of the provisions of this Code between the following parties:

- (a) a conference and a shipping line;
- (b) the shipping lines members of a conference;
- (c) a conference or a shipping line member thereof and a shippers' organization or representatives of shippers or shippers; and
- (d) two or more conferences.

For the purposes of this chapter the term "party" means the original parties to the dispute as well as third parties which have joined the proceedings in accordance with (a) of Article 34.

(2) Disputes between shipping lines of the same flag, as well as those between organizations belonging to the same country, shall be settled within the framework of the national jurisdiction of that country, unless this creates serious difficulties in the fulfilment of the provisions of this Code.

(3) The parties to a dispute shall first attempt to settle it by an exchange of views or direct negotiations with the intention of finding a mutually satisfactory solution.

(4) Disputes between the parties referred to in Article 23(1) relating to:

- (a) refusal of admission of a national shipping line to a conference serving the foreign trade of the country of that shipping line;
- (b) refusal of admission of a third-country shipping line to a conference;
- (c) expulsion from a conference;
- (d) inconsistency of a conference agreement with this Code;
- (e) a general freight-rate increase;

- (f) surcharges;
- (g) changes in freight rates or the imposition of a currency adjustment factor due to exchange rate changes;
- (h) participation in trade; and
- (i) the form and terms of proposed loyalty arrangements

which have not been resolved through an exchange of views or direct negotiations shall, at the request of any of the parties to the dispute, be referred to international mandatory conciliation in accordance with the provisions of this chapter.

Article 24

- (1) The conciliation procedure is initiated at the request of one of the parties to the dispute.
- (2) The request shall be made:
 - (a) in disputes relating to membership of conferences: not later than 60 days from the date of receipt by the applicant of the conference decision, including the reasons therefor, in accordance with Articles 1(4) and 4(3);
 - (b) in disputes relating to general freight-rate increases: not later than the date of expiry of the period of notice specified in Article 14(1);
 - (c) in disputes relating to surcharges: not later than the date of expiry of the 30-day period specified in Article 16(4) or, where no notice has been given, not later than 15 days from the date when the surcharge was put into effect; and
 - (d) in disputes relating to changes in freight rates or the imposition of a currency adjustment factor due to exchange rate changes: not later than five days after the date of expiry of the period specified in Article 17(3).
- (3) The provisions of Article 24(2) shall not apply to a dispute which is referred to international mandatory conciliation in accordance with Article 25(3).
- (4) Requests for conciliation in disputes other than those referred to in Article 24(2) may be made at any time.
- (5) The time-limits specified in Article 24(2) may be extended by agreement between the parties.
- (6) A request for conciliation shall be considered to have been duly made if it is proved that the request has been sent to the other party by registered letter, telegram or teleprinter or has been served on it within the time-limits specified in Article 24(2) or (5).
- (7) Where no request has been made within the time-limits specified in Article 24(2) or (5), the decision of the conference shall be final and no proceedings under this chapter may be brought by any party to the dispute to challenge that decision.

Article 25

- (1) Where the parties have agreed that disputes referred to in Article 25(4) (a), (b), (c), (d), (h), and (i) shall be resolved through procedures other than those

established in that Article, or agree on procedures to resolve a particular dispute that has arisen between them, such disputes shall, at the request of any of the parties to the dispute, be resolved as provided for in their agreement.

(2) The provisions of Article 25(1) apply also to the disputes referred to in Article 23(4) (e), (f), and (g), unless national legislation, rules or regulations prevent shippers from having this freedom of choice.

(3) Where conciliation proceedings have been initiated, such proceedings shall have precedence over remedies available under national law. If a party seeks remedies under national law in respect of a dispute to which this chapter applies without invoking the procedures provided for in this chapter, then, upon the request of a respondent to those proceedings, they shall be stayed and the dispute shall be referred to the procedures defined in this chapter by the court or other authority where the national remedies are sought.

Article 26

(1) The Contracting Parties shall confer upon conferences and shippers' organizations such capacity as is necessary for the application of the provisions of this chapter. In particular:

- (a) a conference or a shipper's organization may institute proceedings as a party or be named as a party to proceedings in its collective capacity;
- (b) any notification to a conference or shippers' organization in its collective capacity shall also constitute a notification to each member of such conference or shippers' organization;
- (c) a notification to a conference or shippers' organization shall be transmitted to the address of the head office of the conference or shippers' organization. Each conference or shippers' organization shall register the address of its head office with the Registrar appointed in accordance with Article 46(1). In the event that a conference or a shippers' organization fails to register or has no head office, a notification to any member in the name of the conference or shippers' organization shall be deemed to be a notification to such conference or organization.

(2) Acceptance or rejection by a conference or shippers' organization of a recommendation by conciliators shall be deemed to be acceptance or rejection of such a recommendation by each member thereof.

Article 27

Unless the parties agree otherwise, the conciliators may decide to make a recommendation on the basis of written submissions without oral proceedings.

B. International mandatory conciliation

Article 28

In international mandatory conciliation the appropriate authorities of a Contracting Party shall, if they so request, participate in the conciliation proceedings in support of a party being a national of that Contracting Party, or in support of a party having a dispute arising in the context of the foreign trade of that Contracting Party. The appropriate authority may alternatively act as an observer in such conciliation proceedings.

Article 29

- 1) In international mandatory conciliation the proceedings shall be held in the place unanimously agreed to by the parties or, failing such agreement, in the place decided upon by the conciliators.
- 2) In determining the place of conciliation proceedings the parties and the conciliators shall take into account, inter alia, countries which are closely connected with the dispute, bearing in mind the country of the shipping line concerned and, especially when the dispute is related to cargo, the country where the cargo originates.

Article 30

- (1) For the purposes of this chapter an International Panel of Conciliators shall be established, consisting of experts of high repute or experience in the fields of law, economics of sea transport, or foreign trade and finance, as determined by the Contracting Parties selecting them, who shall serve in an independent capacity.
- (2) Each Contracting Party may at any time nominate members of the Panel up to a total of 12, and shall communicate their names to the Registrar. The nominations shall be for periods of six years each and may be renewed. In the event of the death, incapacity or resignation of a member of the Panel, the Contracting Party which nominated such person shall nominate a replacement for the remainder of his term of office. A nomination takes effect from the date on which the communication of the nomination is received by the Registrar.
- (3) The Registrar shall maintain the Panel list and shall regularly inform the Contracting Parties of the composition of the Panel.

Article 31

- (1) The purpose of conciliation is to reach an amicable settlement of the dispute through recommendations formulated by independent conciliators.
- (2) The conciliators shall identify and clarify the issues in dispute, seek for this purpose any information from the parties, and, on the basis thereof, submit to the parties a recommendation for the settlement of the dispute.
- (3) The parties shall co-operate in good faith with the conciliators in order to enable them to carry out their functions.
- (4) Subject to the provisions of Article 25(2), the parties to the dispute may at any time during the conciliation proceedings decide in agreement to have recourse to a different procedure for the settlement of their dispute. The parties to a dispute which has been made subject to proceedings other than those provided for in this chapter may decide by mutual agreement to have recourse to international mandatory conciliation.

Article 32

- (1) The conciliation proceedings shall be conducted either by one conciliator or by an uneven number of conciliators agreed upon or designated by the parties.
- (2) Where the parties cannot agree on the number or the appointment of the conciliators as provided in Article 32(1), the conciliation proceedings shall be

conducted by three conciliators, one appointed by each party in the statement(s) of claim and reply respectively, and the third by the two conciliators thus appointed, who shall act as chairman.

(3) If the reply does not name a conciliator to be appointed in cases where Article 32(2) would apply, the second conciliator shall, within 30 days following the receipt of the statement of claim, be chosen by lot by the conciliator appointed in the statement of claim from among the members of the Panel nominated by the Contracting Party or Parties of which the respondent(s) is(are) a national(s).

(4) Where the conciliators appointed in accordance with Article 32(2) or (3) cannot agree on the appointment of the third conciliator within 15 days following the date of the appointment of the second conciliator, he shall, within the following 5 days be chosen by lot by the appointed conciliators. Prior to the drawing by lot:

- (a) no member of the Panel of conciliators having the same nationality as either of the two appointed conciliators shall be eligible for selection by lot;
- (b) each of the two appointed conciliators may exclude from the list of the Panel of conciliators an equal number of them subject to the requirement that at least 30 members of the Panel shall remain eligible for selection by lot.

Article 33

(1) Where several parties request conciliation with the same respondent in respect of the same issue, or of issues which are closely connected, that respondent may request the consolidation of those cases.

(2) The request for consolidation shall be considered and decided upon by majority vote by the chairmen of the conciliators so far chosen. If such request is allowed, the chairmen will designate the conciliators to consider the consolidated cases from among the conciliators so far appointed or chosen, provided that an uneven number of conciliators is chosen and that the conciliator first appointed by each party shall be one of the conciliators considering the consolidated case.

Article 34

Any party, other than an appropriate authority referred to in Article 28, if conciliation has been initiated, may join in the proceedings:

either

(a) as a party, in case of a direct economic interest,

or

(b) as a supporting party to one of the original parties, in case of an indirect economic interest,

unless either of the original parties objects to such joinder.

Article 35

(1) The recommendations of the conciliators shall be made in accordance with the provisions of this Code,

(2) When the Code is silent upon any point, the conciliators shall apply the law which the parties agree at the time the conciliation proceedings commence or thereafter, but not later than the time of submission of evidence to the conciliators. Failing such agreement, the law which in the opinion of the conciliators is most closely connected with the dispute shall be applicable.

(3) The conciliators shall not decide ex aequo et bono upon the dispute unless the parties so agree after the dispute has arisen.

(4) The conciliators shall not bring a finding of non liquet on the ground of obscurity of the law. *not proven*

(5) The conciliators may recommend those remedies and reliefs which are provided in the law applicable to the dispute.

Article 36

The recommendations of the conciliators shall include reasons.

Article 37

(1) Unless the parties have agreed before, during or after the conciliation procedure that the recommendation of the conciliators shall be binding, the recommendation shall become binding by acceptance by the parties. A recommendation which has been accepted by some parties to a dispute shall be binding as between those parties only.

(2) Acceptance of the recommendation must be communicated by the parties to the conciliators at an address specified by them, not later than 30 days after receipt of the notification of the recommendation; otherwise, it shall be considered that the recommendation has not been accepted.

(3) Any party which does not accept the recommendation shall notify the conciliators and the other parties, within 30 days following the period specified in Article 37(2), of its grounds for rejection of the recommendation, comprehensively and in writing.

(4) When the recommendation has been accepted by parties, the conciliators shall immediately draw up and sign a record of settlement, at which time the recommendation shall become binding upon those parties. If the recommendation has not been accepted by all parties, the conciliators shall draw up a report with respect to those parties rejecting the recommendation, noting the dispute and the failure of those parties to settle the dispute.

(5) A recommendation which has become binding upon the parties shall be implemented by them immediately or at such later time as is specified in the recommendation.

(6) Any party may make its acceptance conditional upon acceptance by all or any of the other parties to the dispute.

Article 38

(1) A recommendation shall constitute a final determination of a dispute as between the parties which accept it, except to the extent that the recommendation is not recognized and enforced in accordance with the provisions of Article 39.

(2) "Recommendation" includes an interpretation, clarification or revision of the recommendation made by the conciliators before the recommendation has been accepted.

Article 39

(1) Each Contracting Party shall recognize a recommendation as binding between the parties which have accepted it and shall, subject to the provisions of Article 39(2) and (3), enforce, at the request of any such party, all obligations imposed by the recommendation as if it were a final judgement of a court of that Contracting Party.

(2) A recommendation shall not be recognized and enforced at the request of a party referred to in Article 39(1) only if the court or other competent authority of the country where recognition and enforcement is sought is satisfied that:

- (a) any party which accepted the recommendation was, under the law applicable to it, under some legal incapacity at the time of acceptance;
- (b) fraud or coercion has been used in the making of the recommendation;
- (c) the recommendation is contrary to public policy (ordre public) in the country of enforcement; or
- (d) the composition of the conciliators, or the conciliation procedure, was not in accordance with the provisions of this Code.

(3) Any part of the recommendation shall not be enforced and recognized if the court or other competent authority is satisfied that such part comes within any of the subparagraphs of article 39(2) and can be separated from other parts of the recommendation. If such part cannot be separated, the entire recommendation shall not be enforced and recognized.

Article 40

(1) Where the recommendation has been accepted by all the parties, the recommendation and the reasons therefor may be published with the consent of all the parties.

(2) Where the recommendation has been rejected by one or more of the parties but has been accepted by one or more of the parties:

- (a) the party or parties rejecting the recommendation shall publish its or their grounds for rejection, given pursuant to Article 37(3), and may at the same time publish the recommendation and the reasons therefor;
- (b) a party which has accepted the recommendation may publish the recommendation and the reasons therefor; it may also publish the grounds for rejection given by any other party unless such other party has already published its rejection and the grounds therefor in accordance with Article 40(2) (a).

(3) Where the recommendation has not been accepted by any of the parties, each party may publish the recommendation and the reasons therefor and also its own rejection and the grounds therefor.

Article 41

(1) Documents and statements containing factual information supplied by any party to the conciliators shall be made public unless that party or a majority of the conciliators agrees otherwise.

2) Such documents and statements supplied by a party may be tendered by that party in support of its case in subsequent proceedings arising from the same dispute and between the same parties.

Article 42

Where the recommendation has not become binding upon the parties, no views expressed or reasons given by the conciliators, or concessions or offers made by the parties for the purpose of the conciliation procedure, shall affect the legal rights and obligations of any of the parties.

Article 43

(1) (a) The costs of the conciliators and all costs of the administration of the conciliation proceedings shall be borne equally by the parties to the proceedings, unless they agree otherwise.

(b) When the conciliation proceedings have been initiated, the conciliators shall be entitled to require an advance or security for the costs referred to in Article 43(1) (a).

(2) Each party shall bear all expenses it incurs in connexion with the proceedings, unless the parties agree otherwise.

(5) Notwithstanding the provisions of Article 43(1) and (2), the conciliators may, having decided unanimously that a party has brought a claim vexatiously or frivolously, assess against that party any or all of the costs of other parties to the proceedings. Such decision shall be final and binding on all the parties.

Article 44

(1) Failure of a party to appear or to present its case at any stage of the proceedings shall not be deemed an admission of the other party's assertions. In that event, the other party may, at its choice, request the conciliators to close the proceedings or to deal with the questions presented to them and submit a recommendation in accordance with the provisions for making recommendations set out in this Code.

(2) Before closing the proceedings, the conciliators shall grant the party failing to appear or to present its case a period of grace, not exceeding 10 days, unless they are satisfied that the party does not intend to appear or to present its case.

(3) Failure to observe procedural time limits laid down in this Code or determined by the conciliators, in particular time limits relating to the submission of statements or information, shall be considered a failure to appear in the proceedings.

(4) Where the proceedings have been closed owing to one party's failure to appear or to present its case, the conciliators shall draw up a report noting that party's failure.

Article 45

(1) The conciliators shall follow the procedures stipulated in this Code.

(2) The Rules of Procedure annexed to the present Convention shall be considered as Model Rules for the guidance of conciliators. The conciliators may, by mutual consent, use, supplement or amend the rules contained in the Annex or formulate their own rules

of procedure to the extent that such supplementary, amended or other rules are not inconsistent with the provisions of this Code.

(3) If the parties agree that it may be in the interest of achieving an expeditious and inexpensive solution of the conciliation proceedings, they may mutually agree to rules of procedure which are not inconsistent with the provisions of this Code.

(4) The conciliators shall formulate their recommendation by consensus or failing that shall decide by majority vote.

(5) The conciliation proceedings shall finish and the recommendation of the conciliators shall be delivered not later than six months from the date on which the conciliators are appointed, except in the cases referred to in Article 23(4) (e), (f) and (g), for which the time limits in Articles 14(1) and 16(4) shall be valid. The period of six months may be extended by agreement of the parties.

C. Institutional machinery

Article 46

(1) Six months before the entry into force of the present Convention, the Secretary-General of the United Nations shall, subject to the approval of the General Assembly of the United Nations, and taking into account the views expressed by the Contracting Parties, appoint a Registrar, who may be assisted by such additional staff as may be necessary for the performance of the functions listed in Article 46(2). Administrative services for the Registrar and his assistants shall be provided by the United Nations Office at Geneva.

(2) The Registrar shall perform the following functions in consultation with the Contracting Parties as appropriate:

- (a) maintain the list of conciliators of the International Panel of Conciliators and regularly inform the Contracting Parties of the composition of the Panel;
- (b) provide the names and addresses of the conciliators to the parties concerned on request;
- (c) receive and maintain copies of request for conciliation, replies, recommendations, acceptances, or rejections, including reasons therefor;
- (d) furnish on request, and at their cost, copies of recommendations and reasons for rejection to the shippers' organizations, conferences and governments, subject to the provisions of Article 40;
- (e) make available information of a non-confidential nature on completed conciliation cases, and without attribution to the parties concerned, for the purposes of preparation of material for the Review Conference referred to in Article 52; and
- (f) such other functions as are prescribed for the Registrar in Articles 26(1) (d) and 30(2) and (3).

CHAPTER VII: FINAL CLAUSES

Article 47

Implementation

(1) Each Contracting Party shall take such legislative or other measures as may be necessary to implement the present Convention.

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- (2) Each Contracting Party shall communicate to the Secretary-General of the United Nations, who shall be the depositary, the text of the legislative or other measures which it has taken in order to implement the present Convention.

Article 48

Signature, ratification, acceptance, approval and accession

- (1) The present Convention shall remain open for signature as from 1 July 1974 until and including 30 June 1975 at United Nations Headquarters and shall thereafter remain open for accession.
- (2) All States a/ are entitled to become Contracting Parties to the present Convention by:
- (a) signature subject to and followed by ratification, acceptance or approval; or
 - (b) signature without reservation as to ratification, acceptance or approval; or
 - (c) accession.
- (3) Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to this effect with the depositary.

Article 49

Entry into force

- (1) The present Convention shall enter into force six months after the date on which not less than 24 States, the combined tonnage of which amounts to at least 25 per cent of world tonnage, have become Contracting Parties to it in accordance with Article 48. For the purpose of the present Article the tonnage shall be deemed to be that contained in Lloyd's Register of Shipping, Statistical Tables 1973, table 2 "World Fleets - Analysis by Principal Types", in respect of general cargo (including passenger/cargo) ships and container (fully cellular) ships, exclusive of the United States reserve fleet and the American and Canadian Great Lakes Fleets. b/
- (2) For each State which thereafter ratifies, accepts, approves or accedes to it, the present Convention shall come into force six months after deposit by such State of the appropriate instrument.

a/ At its 9th plenary meeting on 6 April 1974, the Conference adopted the following understanding recommended by its Third Main Committee:

"In accordance with its terms, the present Convention will be open to participation by all States, and the Secretary-General of the United Nations will act as depositary. It is the understanding of the Conference that the Secretary-General, in discharging his functions as depositary of a convention or other multilateral legally binding instrument with an "All-States" clause, will follow the practice of the General Assembly of the United Nations in implementing such a clause and, whenever advisable, will request the opinion of the General Assembly before receiving a signature or an instrument of ratification, acceptance, approval or accession."

b/ The tonnage requirements for the purposes of Article 49(1) are set out in the report of the United Nations Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences on the second part of its session (TD/CODE/10), annex I.

(3) Any State which becomes a Contracting Party to the present Convention after the entry into force of an amendment shall, failing an expression of a different intention by that State:

- (a) be considered as a Party to the present Convention as amended; and
- (b) be considered as a Party to the unamended Convention in relation to any Party to the present Convention not bound by the amendment.

Article 50

Denunciation

(1) The present Convention may be denounced by any Contracting Party at any time after the expiration of a period of two years from the date on which the Convention has entered into force.

(2) Denunciation shall be notified to the depositary in writing, and shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after the date of receipt by the depositary.

Article 51

Amendments

(1) Any Contracting Party may propose one or more amendments to the present Convention by communicating the amendments to the depositary. The depositary shall circulate such amendments among the Contracting Parties, for their acceptance, and among States entitled to become Contracting Parties to the present Convention which are not Contracting Parties, for their information.

(2) Each proposed amendment circulated in accordance with Article 51(1) shall be deemed to have been accepted if no Contracting Party communicates an objection thereto to the depositary within 12 months following the date of its circulation by the depositary. If a Contracting Party communicates an objection to the proposed amendment, such amendment shall not be considered as accepted and shall not be put into effect.

(3) If no objection has been communicated, the amendment shall enter into force for all Contracting Parties six months after the expiry date of the period of 12 months referred to in Article 51(2).

Article 52

Review conferences

(1) A Review Conference shall be convened by the depositary five years from the date on which the present Convention comes into force to review the working of the Convention with particular reference to its implementation, and to consider and adopt appropriate amendments.

(2) The depositary shall, four years from the date on which the present Convention comes into force, seek the views of all States entitled to attend the Review Conference and shall, on the basis of the views received, prepare and circulate a draft agenda as well as amendments proposed for consideration by the Conference.

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-) Further review conferences shall be similarly convened every five years, or at any time after the first Review Conference, at the request of one-third of the Contracting Parties to the present Convention, unless the first Review Conference decides otherwise.
- 4) Notwithstanding the provisions of Article 52(1), if the present Convention has not entered into force five years from the date of the adoption of the Final Act of the United Nations Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences, a Review Conference shall, at the request of one-third of the States entitled to become Contracting Parties to the present Convention, be convened by the Secretary-General of the United Nations, subject to the approval of the General Assembly, in order to review the provisions of the Convention and its Annex and to consider and adopt appropriate amendments.

Article 53

Functions of the depositary

- (1) The depositary shall notify the signatory and acceding States of:
- (a) signatures, ratifications, acceptances, approvals and accessions in accordance with Article 48;
 - (b) the date on which the present Convention enters into force in accordance with Article 49;
 - (c) denunciations of the present Convention in accordance with Article 50;
 - (d) reservations to the present Convention and the withdrawal of reservations;
 - (e) the text of the legislative or other measures which each Contracting Party has taken in order to implement the present Convention in accordance with Article 47;
 - (f) proposed amendments and objections to proposed amendments in accordance with Article 51; and
 - (g) entry into force of amendments in accordance with Article 51(3).
- (2) The depositary shall also undertake such actions as are necessary under Article 52.

Article 54

Authentic texts - Deposit

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, will be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, having been duly authorized to this effect by their respective governments, have signed the present Convention, on the dates appearing opposite their signatures.

ANNEX TO THE CONVENTION ON A CODE OF CONDUCT FOR LINER CONFERENCES

Model Rules of Procedure for International
Mandatory Conciliation

Rule 1

- (1) Any party wishing to institute conciliation proceedings under the Code shall address a request to that effect in writing, accompanied by a statement of claim to the other party, and copied to the Registrar.
- (2) The statement of claim shall:
- (a) designate precisely each party to the dispute and state the address of each;
 - (b) contain a summary statement of pertinent facts, the issues in dispute and the claimant's proposal for the settlement of the dispute;
 - (c) state whether an oral hearing is desired and, if so, and to the extent then known, the names and addresses of persons to give evidence, including experts' evidence, for the claimant;
 - (d) be accompanied by such supporting documentation and relevant agreements and arrangements entered into by the parties as the claimant may consider necessary at the time of making the claim;
 - (e) indicate the number of conciliators required, any proposal concerning the appointment of conciliators, or the name of the conciliator appointed by the claimant in accordance with Article 52(2); and
 - (f) contain proposals, if any, regarding rules of procedure.
- (3) The statement of claim shall be dated and shall be signed by the party.

Rule 2

- (1) If the respondent decides to reply to the claim, he shall, within 30 days following the date of his receipt of the statement of claim, transmit a reply to the other party and copied to the Registrar.
- (2) The reply shall:
- (a) contain a summary statement of pertinent facts opposed to the contentions in the statement of claim, the respondent's proposal, if any, for the settlement of the dispute and any remedy claimed by him with a view to the settlement of the dispute;
 - (b) state whether an oral hearing is desired and, if so, and to the extent then known, the names and addresses of persons to give evidence, including experts' evidence, for the respondent;
 - (c) be accompanied by such supporting documentation and relevant agreements and arrangements entered into by the parties as the respondent may consider necessary at the time of making the reply;
 - (d) indicate the number of conciliators required, any proposal concerning the appointment of conciliators, or the name of the conciliator appointed by the respondent.

the respondent in accordance with Article 32(2); and

(e) contain proposals, if any, regarding rules of procedure.

(3) The reply shall be dated and shall be signed by the party.

Rule 3

(1) Any person or other interest desiring to participate in conciliation proceedings under Article 34 shall transmit a written request to the parties to the dispute, with a copy to the Registrar.

(2) If participation in accordance with (a) of Article 34 is desired, the request shall set forth the grounds therefor, including the information required under Rule 1(2)(a), (b) and (d).

(3) If participation in accordance with (b) of Article 34 is desired, the request shall state the grounds therefor and which of the original parties would be supported.

(4) Any objection to a request for joinder by such a party shall be sent by the objecting party, with a copy to the other party, within seven days of receipt of the request.

(5) In the event that two or more proceedings are consolidated, subsequent requests for third-party participation shall be transmitted to all parties concerned, each of which may object in accordance with the present Rule.

Rule 4

By agreement between the parties to a dispute, on motion by either party, and after affording the parties an opportunity of being heard, the conciliators may order the consolidation or separation of all or any claims then pending between the same parties.

Rule 5

(1) Any party may challenge a conciliator where circumstances exist that cause justifiable doubts as to his independence.

(2) Notice of challenge, stating reasons therefor, should be made prior to the date of the closing of the proceedings, before the conciliators have rendered their recommendation. Any such challenge shall be heard promptly and shall be determined by majority vote of the conciliators in the first instance, as a preliminary point, in cases where more than one conciliator has been appointed. The decision in such cases shall be final.

(3) A conciliator who has died, resigned, become incapacitated or disqualified shall be replaced promptly.

(4) Proceedings interrupted in this way shall continue from the point where they were interrupted, unless it is agreed by the parties or ordered by the conciliators that a review or re-hearing of any oral testimony take place.

Rule 6

The conciliators shall be judges of their own jurisdiction and/or competence within the provisions of the Code.

Rule 7

- (1) The conciliators shall receive and consider all written statements, documents, affidavits, publications or any other evidence, including oral evidence, which may be submitted to them by or on behalf of any of the parties, and shall give such weight thereto as in their judgment such evidence merits.
- (2) (a) Each party may submit to the conciliators any material it considers relevant, and at the time of such submission shall deliver certified copies to any other party to the proceedings, which party shall be given a reasonable opportunity to reply thereto.
- (b) The conciliators shall be the sole judges of the relevance and materiality of the evidence submitted to them by the parties.
- (c) The conciliators may ask the parties to produce such additional evidence as they may deem necessary to an understanding and determination of the dispute, provided that, if such additional evidence is produced, the other parties to the proceedings shall have a reasonable opportunity to comment thereon.

Rule 8

- (1) Whenever a period of days for the doing of any act is provided for in the Code or in these Rules, the day from which the period begins to run shall not be counted, and the last day of the period shall be counted, except where that last day is a Saturday, Sunday or a public holiday at the place of conciliation, in which case the last day shall be the next business day.
- (2) When the time provided for is less than seven days, intermediate Saturdays, Sundays and public holidays shall be excluded from the computation.

Rule 9

Subject to the provisions relating to procedural time limits in the Code, the conciliators may, on a motion by one of the parties or pursuant to agreement between them, extend any such time limit which has been fixed by the conciliators.

Rule 10

- (1) The conciliators shall fix the order of business and, unless otherwise agreed, the date and hour of each session.
- (2) Unless the parties otherwise agree, the proceedings shall take place in private.
- (3) The conciliators shall specifically inquire of all the parties whether they have any further evidence to submit before declaring the proceedings closed, and a noting thereof shall be recorded.

Rule 11

- (1) Conciliators' recommendations shall be in writing and shall include:
 - (a) the precise designation and address of each party;
 - (b) a description of the method of appointing conciliators, including their names;

- (c) the dates and place of the conciliation proceedings;
- (d) a summary of the conciliation proceedings, as the conciliators deem appropriate;
- (e) a summary statement of the facts found by the conciliators;
- (f) a summary of the submissions of the parties;
- (g) pronouncements on the issues in dispute, together with the reasons therefor;
- (h) the signatures of the conciliators and the date of each signature; and
- (i) an address for the communication of the acceptance or rejection of the recommendation.

Rule 12

The recommendation shall, so far as possible, contain a pronouncement on costs in accordance with the provisions of the Code. If the recommendation does not contain a full pronouncement on costs, the conciliators shall, as soon as possible after the recommendation, and in any event not later than 60 days thereafter, make a pronouncement in writing regarding costs as provided in the Code.

Rule 13

Conciliators' recommendations shall also take into account previous and similar cases whenever this would facilitate a more uniform implementation of the Code and observance of conciliators' recommendations.

ANNEX II

RESOLUTIONS ADOPTED BY THE CONFERENCE

1. Completion of the work of the Conference

[For the text of this resolution, adopted by the Conference at its 6th plenary meeting, on 15 December 1973, upon the adjournment of the Conference, see the report of the Conference on the first part of its session (TD/CODE/7), annex I.]










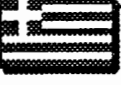



















2. Non-conference lines

The United Nations Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences;

Having prepared the Convention on a Code of Conduct for Liner Conferences with a view to improving the liner conference system,

Bearing in mind that the Convention is applicable to liner conferences and their external relations,

OECD Member Countries (and date of joining)

	Austria (1961)		Australia (1971)		Belgium (1961)
	Canada (1961)		Czech Republic (1995)		Denmark (1961)
	Finland (1969)		France (1961)		Germany (1961)
	Greece (1961)		Hungary (1996)		Iceland (1961)
	Ireland (1961)		Italy (1961)		Japan (1964)
	Korea (1996)		Luxemburg (1961)		Mexico (1994)
	New Zealand (1973)		The Netherlands (1961)		Norway (1961)
	Poland (1996)		Portugal (1961)		Spain (1961)
	Sweden (1961)		Switzerland (1961)		Turkey (1961)
	United Kingdom (1961)		United States (1961)		



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Last update 31.10.96