Joint Statement of Common Objectives on the Development of a New International Cargo Liability Instrument

A. Introduction

The National Industrial Transportation League (NITL) and the World Shipping Council (WSC) have agreed to pursue a common set of positions with respect to a new cargo liability regime for international ocean transport. Both parties agree to advocate these positions during the CMI and UNCITRAL processes, and in order to support the development, ratification and implementation of an international instrument that embraces these provisions, to advocate these positions before the appropriate Executive Branch departments of the United States government and the Congress. It is understood that this is a package representing mutual concessions and that neither party will support a proposal that is inconsistent with the agreed provisions set forth below without obtaining the other party's prior agreement. The parties recognize that a final cargo liability instrument will include provisions addressing other issues in addition to the common set of positions set forth herein and agree to work together and with other interested parties in developing such other provisions. The parties further agree that the provisions set forth in the MLA Text represent their agreement on the issues addressed, except as they have otherwise agreed in this Statement.

References to "MLA Text" refer to the September 24, 1999 U.S. Senate "Staff Working Draft" proposed by the U.S. Maritime Law Association;

references to "CMI draft" refer to the May 31, 2001 draft submitted to the CMI ISC by its drafting group.

B. Common Objectives

1. Error in Navigation - The basic liability scheme should be a fault based regime as in the Hague Visby Rules. The list of exemptions should continue as in the MLA Text Section 9(c), including the elimination of the exemption for errors in navigation or management of the vessel. The burden of proof provision in MLA Text Section 9(d)(2] should be adopted in conjunction with the elimination of the error of navigation exemption.

2. Package/Unit Limitation - The Hague-Visby liability limits and the Special Rule for Consolidated Goods should be incorporated into the Instrument and govern all trades as per MLA Section 9(h)(1) and (2). The liability limit should be "unbreakable" in all cases, except as provided in CMI Draft Article 6.8. The parties agree that the Hague-Visby limits should be subject to a procedure that would allow adjustment of the limits according to the following terms: (a) the limits would not be subject to adjustment for a period of seven years from the time the Instrument entered into force or were last adjusted; (b) a majority of parties to the Instrument must forward a proposal for an adjustment for consideration by all the parties; (c) a vote of 2/3 of the parties to

the Instrument would be needed to adjust the limit; (d) the limit in effect could not be increased or decreased by more than 21% in any single adjustment, and in total, not more than 100% cumulatively above the initial limits; and (e) any adjustment would be effective one year from the date of the vote approving the adjustment.

3. Burden of Proof - The burden of proof and liability of shipper and carrier in situations of dual fault should be governed by language similar to MLA Text Section 9(e).

4. Shipper's Load and Count Clauses - The validity of such clauses should be recognized by adoption of the language in MLA Text Sections 7(e), (f) and (g), provided such language is clarified so that qualifying statements do not lose their effect (1) simply because a container is damaged, or (2) because the container seal was broken, when the seal breakage was for the purpose of inspection, was properly witnessed, and the container was resealed.

5. "Network" Basis for Inland Liability - The Instrument should be mandatorily and exclusively applicable to the contracting carrier and other parties performing the duties of the carrier under the contract of carriage as provided for in CMI Draft Articles 6.3.3 and 6.10; provided that the mandatorily applicable substantive liability terms (e.g., liability limits, presumptions, burdens of proof,

exemptions from liability) applicable to inland activities, (e.g., truck and rail) should apply in the circumstances set forth in CMI Draft Section 4.4. The parties agree that the scope of different mandatorily applicable laws should, in the interest of promoting a uniform liability regime, be as narrow as can be practicably achieved. The parties agree to the period of responsibility as provided for in CMI Draft Articles 4.1.2 and 4.1.3.

6. Performing Parties - The Instrument should not provide a right to sue a party performing the obligations of the carrier (see CMI Draft Articles 6.3.2(a)(i) and (ii). The right of suit for cargo claims should be solely against the carrier issuing the contract of carriage. Agreement to a higher liability limit or greater responsibilities by the contracting carrier should not be binding on a performing party, unless the performing party agrees to such higher limit or responsibility.

7. Deviation - The concept of unreasonable deviation should only apply with respect to the routing of an oceangoing vessel and an unreasonable deviation will lead to a loss of the liability limit only in cases covered by CMI Draft Section 6.8.

8. Delay - Damages may be recovered for actual physical damage to cargo resulting from delay; provided that such damages would be available under the Instrument only if the contracting carrier

agreed in writing to delivery by a date certain. In any case, damages would be subject to the Package/Unit limit (point B. 2 above). A contracting carrier and a shipper may explicitly agree to consequential**,** liquidated or other damages in a contract of carriage.

9. Forum Selection - The approach adopted in MLA Text Section 7(i)(2) should be adopted in the Instrument but only with respect to the conditions in Sections 7(i)(2)(B), (C) and (E). With respect to subsection (E), this would permit either litigation or arbitration, depending upon which is specified in a contract of carriage or other agreement, and only in the specific location as specified in such agreement. The parties to an "Ocean Transportation Contract" (as defined below) could contract out of the forum selection provision as per MLA Text Section 7(j); provided that a contractual forum selection would also be binding on nonparties (e.g., a consignee) if the parties to the contract expressly agree to extend the forum selection provision to nonparties and if the nonparty is provided written notice of such agreement (which could be done either through the transport document/bill of lading or by other written or electronic notification).

10. Shipper's Agent functions - The Instrument should recognize that the carrier may act as an agent of the shipper, rather than as a carrier, to make certain arrangements with other contractors (e.g.,

truckers, warehousemen) for the shipper's account (see e.g., CMI Draft Article 4.2). In such event, the carrier's duties should be defined by an agreement of shipper and carrier and by the law otherwise applicable to the arrangement.

11. Freedom of Contract - Shipper and Carrier may agree in an Ocean Transportation Contract to cargo liability terms which deviate from the duties, rights, obligations and liabilities and other provisions under the Instrument. Such agreed terms may provide greater or lesser duties, rights, obligations and liabilities than those under the Instrument. An Ocean Transportation Contract means a written contract, other than a bill of lading or a receipt, between one or more shippers and one or more carriers in which the shipper or shippers makes a commitment to provide a certain volume or portion of cargo over a fixed time period, and the carrier commits to a certain rate or rate schedule and a service level. The Ocean Transportation Contract shall be binding on the parties thereto (shipper and carrier) and any other person (e.g., consignee, holder) who consents to be bound thereby, except as provided in Paragraph 9.

The parties agree that section 14 of the MLA text is not appropriate for inclusion in a new cargo liability regime.

12. Misstatement of Shipper - The parties agree to substitute the word "materially" for "fraudulently" in MLA Text section 9(h)(5).

C. Support for International Convention

1. The NITL and WSC agree that efforts to establish a new cargo liability regime for international ocean cargoes should be addressed through the CMI and UNCITRAL process, subject to the following conditions:

2. The NITL and WSC shall advocate the positions set forth herein in good faith before CMI and UNCITRAL.

3. Upon completion of an UNCITRAL instrument consistent with the principles set forth herein, the NITL and WSC shall use best and timely efforts to have the U.S. government ratify the Instrument and/or adopt implementing legislation consistent with the principles set forth herein.

4. The parties' agreement is based on the assumption that the CMI/UNCITRAL process will produce an international Instrument for ratification by member countries in a reasonable period of time. Specifically, the parties assume that the CMI should forward a draft convention to UNCITRAL by the end of the first quarter of 2002, and that the countries negotiating the UNCITRAL instrument should have the Instrument available for signature by

member nations by the end of 2004. If these events do not occur within these time frames, the parties agree to meet and consult on what appropriate steps should be taken. If those consultations do not produce agreement within three months, both parties shall be free to pursue or oppose cargo liability law changes as they deem most appropriate.

The National Industrial Transportation League	World Shipping Council
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Edward M. Emmett, President	Christopher Koch, President

September 25, 2001