Notes to the General Conditions for the carriage of goods by inland waterway ('BV 2016')

INTRODUCTION

0.1 Why were the BV 2016 drawn up?

Agreements on the transport of goods by inland waterway still regularly refer to the BV 1991, which are now outdated.
To facilitate the inland navigation market and make it more accessible for new parties, representatives of shippers, brokers and carriers have drawn up a new set of general conditions that:

- Are balanced and thus accepted by an overwhelming majority of parties involved in the inland navigation market;
- In combination with a form, provide a complete framework for a contract of .carriage;
- Are not steering on the most important aspects in daily practice - including the commercial conditions - but instead offer concrete choices;
- Help ensure that important matters are not forgotten;
- Provide a solution for the settlement of incidents;
- Are broadly applicable (national and international);
- Are in line with current practice;
- Are explained (in this document).

0.2 Scope

- Contracts for the carriage of goods by inland waterway; [1]
- Focus on an agreement with the actual inland carrier, but also:
  - Applicable throughout the contracting chain for the carriage of goods by inland waterway;
  - Applicable as a final provision in inland navigation framework agreements, such as year contracts: 'for the remainder, the BV 2016 apply, subject to the following choices: ….';
- Suitable for international transport, so based on the CMNI convention;
- Handle all issues that regularly occur in current practice.

0.3 The BV 2016 project

Following the conclusion of the Temporary Decree on loading and discharging 2011 (*Tijdelijk besluiten laden en lossen 2011*), this framework was drawn up by the BBU (now called Koninklijke BLN Schuttevaer), CBRB and EVO. After consulting with practitioners and other stakeholders, as well undergoing legal testing, the conditions were filed at the court registry of the Court of Rotterdam and consultations are being held with Stichting Vervoeradres on having the BV 2016 managed by this foundation.

0.4 Structure of the BV 2016 and the Charter

The BV 2016 have the character of 'general conditions' and moreover refer to the Charter form ('Model') - which has no prescribed format - in which the specific aspects of the voyage, including the choices agreed by the parties, are recorded. The completed Model is the Charter.

[1] The scope of the BV 1991 is different, namely a number of forms of charter of a specific ship. A choice was made in the BV 2016 for all contracts of carriage (whether or not charter) as these are most common in practice.

The structuring of the provisions in the BV 2016 follows the sequence of contracting, implementation and settlement. These are preceded by two formal articles (Definitions and Charter conditions) and are followed by a number of articles with a legal basis.

The sequence in the Model is identical to that of the BV 2016, except that the process cycle is followed twice: first all the matters that are included in (practically) every Charter, then the incidental matters (the 'optional' part) and finally the resolution of disputes, insurance of the Carrier and signing.

In order to give the BV 2016 specific meaning, it has been decided to not take over text from the CMNI or applicable Dutch law, except when required for the purpose of readability. These notes will, where necessary, further explain the relationship with the aforementioned convention and statutory law.

It has been decided to include all codes, etc., handled in the performance of the Contract of Carriage in the Charter. Not only will that provide clarity at an early stage, it will also prevent the complications related to having to complete forms during implementation of the Contract of Carriage.

Even though the dated nature of the BV 1991 was one of the reasons for drawing up the BV 2016, the latter cannot be regarded as the direct successor to the BV 1991. In other words, the BV 2016 do not form the 'most recent version' of the BV 1991. If a choice is made for the BV 2016, while formerly the BV 1991 were used, the parties must confirm this in writing.

0.5 The title

It is reflected in the title of the BV 2016 that it concerns all agreements on the carriage of goods by inland waterway. Thus (1) not only agreements with the actual carrier (chartering), but also (2) between shippers and charter offices, and (3) between charter offices.

The Contract of Carriage can comprise the charter of a specific ship, but it need not. Alignment on this point has been sought with the CMNI, which also applies irrespective of the specific qualification of the contract of carriage. That the model contract accompanying the conditions is referred to as ‘Charter’ does not necessarily mean therefore that a charter is involved, as such must be reflected by the contents of the agreement. The choice for this designation was motivated by the opinion of practitioners in the development of the model and conditions, namely that any written contract regarding the carriage of goods by inland waterway – whether or not involving a charter – tends in practice to be referred to as a ‘charter’ and that deviation from this practice could lead to confusion.

NOTES TO CONTENTS

Artikel 1 : Definitions

The BV 2016 follows the definitions in the CMNI, whereby a number of supplementary terms are defined in Article 1.2.

The definitions of Loading and Discharging Place and Loading and Discharging Site comply with those provided in the Temporary Decree on loading and discharging (2011).

The definition of Model expresses that no format has been prescribed for the charter form, making it possible to leave out optional Fields ('If ….') that do not apply. And thanks to the digital form, a more compact structure is possible. All in all: the content is defining, not the form.
The BV 2016 state in each case which Party is responsible for completing or leaving out optional Fields.

The definition of Demurrage Time is derived from the Dutch Civil Code (Book 8 Article 931, Paragraph 3) and has the character of the maximum permitted demurrage time, which should not be confused with the demurrage time on which the payment of demurrage charges is based.

The definition of Force Majeure is derived from Article 16.1 of the CMNI.
While Force Majeure, according to the definition, is not limited to an 'act of God', case law in the area of road transport shows that an appeal to Force Majeure must meet high standards:
' if he can show that he has under the given circumstances taken all reasonable measures that may be expected of a diligent carrier - including any auxiliary persons whose services he makes use in the

performance of the agreement - in order to prevent the loss….' [2]
Proof of Force Majeure must be provided by the party appealing to those circumstances.

The definition of Contract of Carriage provides scope for the application of the BV 2016 to verbal agreements.

The defined terms are provided with a leading capital letter. For example: 'ship' refers to a ship in a general sense while 'Ship' denotes the ship made available for implementation of the Contract of Carriage.

Artikel 2 : Provisions regarding the Contract of Carriage and the Charter

Appendix 1 of these notes provides a list of the countries that have signed and ratified the CMNI, as applicable on November 2015.

By opting for Dutch law (Article 2.1), Book 8 Article 889, Paragraph 1 Dutch Civil Code makes it possible to also apply the provisions of the CMNI to transport between Dutch ports. This possibility is exercised in Article 2.2., which incidentally provides a broader formulation: also in case of national transport within other states (whether or not party to the CMNI). It must in that case be determined, however, whether Dutch law and the agreed applicability of the CMNI is compatible with the legal system of that state.

The following hierarchy between the various regulations applies: [3]

- The CMNI.
- Mandatory Dutch law regarding matters that are not regulated in the CMNI.
- The choices and provisions agreed in the Contract of Carriage that deviate from the BV 2016.
- The BV 2016 [4].
- Non-mandatory ('regulatory') Dutch law regarding matters that are regulated neither in the CMNI, the Contract of Carriage, nor the BV 2016.

Article 2.3 means that the contractual parties are free to agree as they wish, but that their agreements must be included in the Charter.
It is up to the contractual parties to ensure that supplementary and replacement provisions are not contradictory (intrinsically, with the other provisions of the BV 2016, with the CMNI and with mandatory Dutch law). The parties themselves must ensure that the complexity of provisions is coherent.

Article 2.4 is often referred to as the Salvatorian clause (Salvator is the Latin word for saviour).

Article 2.6 essentially includes a so-called ‘entire agreement clause’. This article determines that the Charter and the BV 2016 jointly form the entire agreement and that any agreements that are made earlier, but that are not worded in either of the documents, have lost effect. The absolute effect that an entire agreement clause has in Anglo-Saxon law is slightly nuanced when applying Dutch law, as in this case. In any event, documents that do not form part of the agreement may be relevant to the interpretation of provisions of the Charter or the BV 2016.

The terms 'Contract of Carriage' and 'Charter' must not be confused with the terms 'Transport Document', 'consignment note' or 'bill of lading'.

Written
It is advised to record the Contract of Carriage in Writing (the Charter), which extends to any format, provided the information is accessible so as to be usable for subsequent reference (see Article 1(8) of the CMNI).
It is also advised to have the Charter signed by both parties, whether by pen on a paper Charter, or in any other, e.g., electronic, manner.

[2] Dutch Supreme Court 17/04/98 Oegema/Amev re loss of load under CMR (S&S 1998, 75: Oegema/AMEV). No court decisions have been found that provide a further interpretation of the term Force Majeure for inland shipping.

[3] This applies to both transport for which the CMNI convention is compulsory (international and loading or discharging place in a contracting state) and for domestic transport if the parties have opted for application of the CMNI convention.

[4] It has been ensured that the BV 2016 is not in conflict with the CMNI or with any applicable mandatory Dutch law.

If the Transport has been entrusted to an Actual Carrier, any expansion of the 'carrier's liability' agreed by the Shipper and the Carrier only applies to the Actual Carrier if he has expressly agreed to such in Writing (see Article 4.4 of the CMNI). That agreement is thus of vital importance to the 'paper' Carrier.

The previous two paragraphs apply mutatis mutandis to any later agreed supplements to the Contract of Carriage or any changes thereto.

Article 11(3) of the CMNI states: '*The transport document shall be prima facie evidence, save proof to the contrary, of the conclusion and content of the contract of carriage … .*'. If the Transport Document with respect to the 'conclusion or content of the Contract of Carriage' is in conflict with the signed Charter, the Charter can serve as proof to the contrary as referred to in the CMNI. Whether that proof to the contrary is decisive, however, will have to be determined from case to case on the basis of the factual circumstances. The written recording of the agreements made, as advised in the previous three paragraphs, is no doubt important in determining the factual circumstances.

Artikel 3 : Shipper and Carrier

The CMNI defines the shipper as any person by whom or in whose name or on whose behalf a contract of carriage has been concluded with a carrier.
In case of mediation by a broker, the broker does not conclude the Contract of Carriage in his own name. The Shipper will thus remain ordering party and will be stated as such in the Charter.[5]
The reverse applies in case of cargo takeover: a trader who markets a ship cargo does so in his own name and is thus the Shipper. Entering the name of the cargo interest in the Charter has no formal meaning in that case and can best be left out to prevent misunderstandings.
As intermediate variants occur in practice, it will have to be determined per case which of the parties involved should be regarded as Shipper.

The CMNI defines the carrier as any party by whom or in whose name or on whose behalf a contract of carriage has been concluded with a shipper. The Carrier is thus not necessarily the actual carrier.

Artikel 4 : Specification of the goods

Articles 4.1 to 4.4 offer a further detailing of Article 6(2) of the CMNI.

Artikel 5 : Agreed requirements made of the ship

Articles 5.1 to 5.6 provide concrete agreements that can be tested when the ship arrives at the Loading Site. Agreement on 'approx. [nnnn] tons' without further specification[6] is not advised as the various responsibilities are unclear, which could give rise to discussion on conclusion of the loading: too few Goods loaded, hold capacity too small, bulk density of Goods too low, etc.[7]

It is advised when recording a cleanness that extends beyond the loading standards prescribed by the CDNI, to use the terminology of this convention, namely 'swept condition', 'vacuum cleaned', or 'washed condition', supplemented with 'dry', 'odourless', etc., if applicable.

Articles 5.7 and 5.8 provide the required operational flexibility in the implementation of the Contract of Carriage, taking into account the interests of the parties and the need to secure a safe voyage.

Artikel 6 : The Ship made available for performance of the Contract of Carriage

Application of Article 6.1 will be determinative for the character of the agreement between the Shipper and the Carrier. If the Charter specifies a specific ship, the Contract of Carriage will also be qualified as a (voyage) charter. The supplementary law provided in Book 8 Dutch Civil Code contains several provisions that only apply in case of charter, including on the loss of the Ship.

[5] A cargo broker can sign the Charter on behalf of the Shipper if so authorised by the latter. In that case, a brief reference makes the situation clear to the Carrier.

[6] The BV 2016 assumes plus or minus 2.5% (see Articles 5.8 and 16.2 paragraph 4).

[7] One of the causes of such discussions is that the capacity of the hold is not included in the tonnage certificate of an inland vessel. Another cause is that the bulk density can be influenced by the manner of loading.

The other paragraphs of this article concern fulfilment of the requirements by the provided ship.

Article 6.3 concerns the suitability of the Ship as stated in Article 3.3 of the CMNI (suitable for the taking of cargo, navigation and provided with the necessary equipment, crew and permits).

Article 3.3 of the CMNI does not provide for a compulsory inspection by the Shipper of the points referred to in that article.

Under the terms of the CDNI convention[8], the Ship will on commencement of loading be deemed to have been made available with the required cleanness. From that moment on, it is up to the Shipper to prove that the actual cleanness did not meet the set requirements.

An inspection by the Shipper to determine before the commencement of loading whether the Ship meets the set statutory or contractual requirements can prevent problems, but does not release the Carrier from his responsibility to meet those agreed and statutory requirements. This also applies if an inspection by the Shipper is compulsory under the terms of a quality system, such as GMP+.

Artikel 7 : Loading and Discharging Place, Loading and Discharging Site and order times

Articles 7.2, 7.3 and 7.4 (Loading and Discharging Site)[9]
The accessibility of the Loading and Discharging Place falls under the risk of the Carrier.
If the Loading or Discharging Site is stated in the Charter (and not changed), that risk extends to the Loading or Discharging Site. After all, the Carrier has in that case agreed in advance to the Site(s).

If the Loading or Discharging Site is later designated or changed by the Shipper, the risks within the Loading or Discharging Site, respectively, will fall to the Shipper: the accessibility of these sites for the Ship, loss of time owing to the scheduled unavailability of locks and bridges, (un)foreseen obstacles or restrictions, etc. This is viewed in all reasonableness taking into account what is normal within the relevant Loading or Discharging Site.

Article 7.5
The intended information may, for example, concern the dimensions and draught of the Ship (which is relevant for accessibility) and the time at which the Loading or Discharging Site must be designated in order to prevent the Ship from being delayed.

Article 7.6
The loss of time is thus for the account of the Shipper. It is also possible that the Demurrage Time is exceeded as a result.
Other costs do not qualify for compensation. After all, once the final Loading or Discharging Site is designated, the Carrier will determine its accessibility, and he will request instructions if he learns that the Site is not accessible. So he will not proceed with the Ship until it can go no further.

Article 7.7
Any delay caused by the Carrier is for his own account.

Article 7.8
This article concerns the navigational safety at the Loading and Discharging Site. It does not fully correspond with the Dutch Civil Code (Book 8 Article 926 paragraph 2) as the accessibility and (potential) obstructions are handled in different provisions in the BV 2016.

Article 7.9 (holder of the bill of lading designates Discharging Site)
If the holder of the bill of lading designates the Discharging Site, (1) he becomes a party to the Contract of Carriage, and (2) the provisions regarding designation no longer apply to the Shipper, but to the holder instead.
If no bill of lading has been issued, but a consignment note instead, the Shipper retains the right to designate the Discharging Site.

[8] CDNI, Annex 2, Article 7.02(3)

[9] Insofar as the Contract of Carriage does not concern the charter of a specific Ship, Articles 7.2, 7.3 and 7.4 deviate from Book 8 Article 925 Dutch Civil Code (the Carrier designates the Loading and Discharging Site, except in case of time or voyage charter). It has been decided to reflect current practice as best as possible.

Artikel 8 : Port rules

This article regulates the responsibilities of the parties as regards the provision of and compliance with the Port Rules.

Port regulations also ensue from the nautical management of the Loading or Discharging Site. Regulations regarding (occupational) health, safety and the environment, as well as security, may concern, for example, the implementation of ISPS at the Loading or Discharging Site.

Supplementary agreements between the parties may include: 'the wearing of safety shoes, helmet and buoyancy jacket is compulsory on shore and on the deck', agreements on the transfer of cars, etc.

Artikel 9 : Operational planning

The operational planning enables the parties to perform the work as efficiently as possible so that everyone involved knows what is going to happen when.

'Operational' expresses that this is separate from contractual matters such as notification, loading and discharging time and demurrage time. That does not mean that operational planning is free of obligation, however. If, for example, a sudden serious delay is not communicated to the other party, he could incur losses that may possibly have been prevented or limited if he had been informed on time. This loss is thus not the result of the delay, but instead of the failure of one party to timely inform the other party and to request instructions, if appropriate.

Artikel 10 : Termination of the Charter; acceptance of the voyage

This article takes the place of the Dutch Civil Code (Book 8 Article 908), with as most important deviations:

- The scale of the loss is fixed for a number of well-defined situations (Articles 10.1 and 10.2);
- Article 10.5: A notification period has been added in case of partial loading as 'commence of the voyage' at the initiative of the Carrier could be very prejudicial to the Shipper[10], the disadvantage of which he can try to limit as much as possible during the notification period.
  In practice, the Carrier sets the decision-making period and the Shipper can choose between 'discharging the loaded Goods' and 'commencing the voyage with a partial cargo'.

'Due to the actions of the Shipper', as a factor such as low water could be the reason why fewer Goods were loaded than agreed.

While the intended time of commence of the voyage cannot precede the expiry of the Demurrage Time, the Carrier may of course provide notification thereof before expiry of the Demurrage Time.

Article 10.5 is a safety net: it is of course preferable for the parties to make supplementary agreements on an ad hoc basis in order to deal with the situation.

Article 10.8 letter a: Fixed part of the termination fee
During the preparation of the BV 2016, several market parties indicated - irrespective of the time spent at the Loading Site - a preference for a fixed termination fee: for them, clarity in advance outweighs 'haggling' about the calculation of the resulting costs.
Other market parties said that such a fixed fee would not be adequate for the situations that they encounter.
Determining a fixed fee is inherently an arbitrary choice and no further study was therefore performed, but instead reference was sought from external sources, in this case: the German TRG dated 25/06/98, § 415 (2). The TRG makes use of slightly different definitions, which incidentally are more disadvantageous to the Carrier. It was decided not to tinker with these definitions as the fixed fee also serves to cover the consequences of missing a scheduled return voyage, which generally cannot be calculated.
If the prescribed fixed fee is not appropriate to the intended voyage, it is advised to agree on a tailor-made fixed fee and record this in the Charter.

[10] See also the Explanatory Memory to Book 8 of the Dutch Civil Code: MvT 14 049, Parl. Gesch 8, p. 414

Exceeding the Demurrage Time during discharging does not provide grounds for termination or dissolution. The Dutch Civil Code (Book 8 Article 932.1) provides for compensation. Discharging the Goods elsewhere for the account of the Shipper is thus not an option.

Artikel 11 : Loading and discharging
The division of tasks, rights and responsibilities with regard to the loading and discharging are laid down in this article.

Article 11.1 (loading)
Article 6.4 of the CMNI reads: '*Subject to the obligations to be borne by the carrier, the shipper shall load and stow the goods and secure them in accordance with inland navigation practice unless the contract of carriage specifies otherwise'*.
And Article 3.5 of the CMNI reads: *'Except as provided by the obligations incumbent on the shipper, the carrier shall ensure that the loading, stowage and securing of the goods do not affect the safety of the vessel*'.

It follows from these CMNI articles that both parties have responsibilities during loading and that these responsibilities exist side-by-side.[11]

Article 11.1 and 11.2 (discharging)
As the obligations regarding discharging are not included in the CMNI, this is regulated in the BV 2016, in analogy to the loading.

While the Consignee is not a party to the Contract of Carriage at the time of conclusion, as soon as the Consignee requests delivery of the Goods he becomes a party to the Contract of Carriage and is obliged to unload the Goods. He is also liable for any loss incurred by the Carrier as a result.[12]
If the Consignee does not request delivery of the Goods (or commences with discharging), the Carrier is advised to inform the Shipper as soon as possible and request instructions.

Article 11.4 (instructions)
Circumstances arise during the loading and discharging whereby one party, in order to fulfil its obligations, requires the other party to perform one or more actions. To this end, this article formulates three rights to the giving of instructions:

- Sub 1 is based on Article 3.5 of the CMNI. A similar provision is included in the Dutch Civil Code (Book 8 Article 912 paragraph 2, second sentence).
- Sub 2 may include positioning the ship under the loading or discharging system, or the opening of the hatches.
- Examples falling under sub 3 include closing the hatches if it starts raining.

Articles 11.5 and 11.6 (duty of care Carrier in compliance with inland shipping practices)
The regulations of the CMNI allow the existence of - not negligible - periods of time during which the Goods are present in the Ship, but the responsibility of the Carrier for those Goods is not specified. As those time periods have been paid for (in the freight, the fixed freight sum, or the demurrage charge) it makes sense to define the obligations of the Carrier during those time periods in the BV 2016. This is handled in detail in Appendix 2.

Artikel 12 : Loading and discharging time, demurrage charge and demurrage time

The Demurrage Time is pursuant to the Dutch Civil Code (Book 8 Article 931.4) is fixed at 96 hours: '*four successive days* '), whereby *'… or a different number, if such is reasonable or customary at the landing place*' has been left out to prevent possible discussion on the interpretation thereof.

[11] See ECLI:NL:RBROT:2014:6975.

[12] See ECLI:NL:GHDHA:2016:439.

If the agreed arrangement on the loading and discharging time contains provisions regarding compensation after expiry of the Demurrage Time, that stated in the arrangement will apply.
The parties can also agree on a different Demurrage Time.

Article 12.3 is in accordance with the Dutch Civil Code (Book 8 Article 932.1).

Artikel 13 : Preparing the voyage

Articles 13.1 and 13.2 detail the rights and responsibilities of the Carrier with respect to the navigational aspects of the voyage.

Article 13.2 together with Article 13.5 concern the proper preparation of the voyage by the Carrier ('professional'). That includes taking into account obstructions and (abnormal) restrictions on the Approach/Navigational Route [13] as well as informing the Shipper - before concluding the Contract of Carriage - of a real risk thereof. Examples thereof include high water, ice or industrial action by waterway authority personnel. In case of a real risk of obstruction or abnormal restrictions, the Carrier and Shipper will then jointly be aware of the risks that they take on concluding the Contract of Carriage and can in that context make supplementary agreements (Article 13.4) and spread the risks.

If the Shipper is aware (or should be aware) of (a real risk of) an obstruction or abnormal restriction, he must share this information during the contract negotiations (Article 13.3). And he must do so in Writing, for if problems later arise it will be difficult to prove that he has taken the necessary care if all he provided was a casual comment during the contract negotiations!
The professionalism of the Shipper is measured according to what may be expected of the specific Shipper. That may differ significantly from case to case. Just think of freight brokers, logistics departments of large shippers and shippers who only incidentally have to ship a cargo. But also the knowledge of any broker engaged by the Shipper will also be taken into account.

Artikel 14 : Obstructions and abnormal restrictions to unhindered navigation

Articles 14.1 and 14.2 with respect to place and site
The definition of Obstacle makes a distinction between the Access Route and the Navigational Route, which in turn are defined as the route to the Loading Place and from there to the Discharging Site, respectively. The responsibilities of the Carrier and the Shipper as laid down in Articles 13.1 and 13.2 also take this distinction into account.
But if the Loading or Discharging Site is not stated in the Charter (Article 13.5), those responsibilities only extend to the border of the Loading or Discharging Site, respectively, and the Shipper is responsible for the accessibility of the Loading and Discharging Site (Article 7.3).

Article 14.2 with respect to 'Approach/Navigational Route'
This article concerns the situation in which the ship that is used to perform the Charter is confronted with an obstacle while en route to the Loading or Discharging Site. But this article also concerns the situation that an obstacle arises on the Navigational Route, while the ship being used to perform the Charter is at or still underway to the Loading Site.

Article 14.2 with respect to 'in reasonableness'
The sole fact that, for example, the ship used for performance of the Charter is confronted by an obstacle on its way to the Discharging Place does not mean that the ship cannot reach that place. After all, that may well be possible by taking a detour, but it must in terms of time and additional costs be a reasonable alternative compared with the travel time and carriage charge applicable without the obstruction.

The same applies if the ship used for performance of the Contract of Carriage encounters an obstacle on its way to the Loading Place. Moreover, the use of another available ship that can reach the Loading Place may also be a feasible and reasonable alternative.

Articles 14.2 up to and including 14.5 regarding 'becomes known'
So it does not concern the time when the Obstacle occurs, but the time at which it becomes known. What first comes to mind are maritime shipping messages published by waterway authorities in an easily accessible manner, e.g. on www.vaarweginformatie.nl .The time at which this site shows a new

[13] An obstruction to or delay in the voyage to the following Loading Place falls under the scope of the contract of carriage for the next voyage.

message to subscribers is then determinative. Messages in the media, e.g., on (planned) industrial action, can also be determinative.

Article 14.3 (restriction of the right of termination)
This article stipulates that termination of the Charter on grounds of an Obstacle must be proportionate to the nature and seriousness of said Obstacle. Think, for example, of the expected duration of the Obstacle.
It also follows from this article that a party who has acted negligently during preparation may not terminate the Charter.

Article 14.3 (compensation)
The Shipper determines the elapsed loading time and, possibly, demurrage time after the Obstacle becomes known. If the Shipper terminates the Charter, he will owe demurrage charges for the to-be-established loading time that has elapsed between the obstacle becoming known and the time of termination. That also applies to the loading time that has not yet elapsed after the obstacle became known, on condition, however, that the Shipper exercises his right of termination. If the Carrier terminates the Charter during that period, however, he loses his right to compensation as his actions have made the presence at the Loading Site pointless.

Article 14.3 (safety net)
This article is a safety net as nothing prevents the parties from making ad hoc agreements in this situation ('let's see how things develop'), also as regards compensation.

Article 14.4 (after commencement of loading)
After the commencement of loading, there are so many situations thinkable that no other provision than 'together, in partnership' is possible.

Article 14.5 (one party is negligent)
This article concerns situations in which the consequences of the Obstacle could have been avoided or limited if the defaulting party had complied with its Duty of Care.

No provision has been included for the situation that both parties have failed to comply with their Duty of Care, also as that would lead to questions such as 'who was most negligent?'.

Article 14.6 (limitation of liability)
Also depending on the circumstances of the case, discussion may arise on whether loss resulting from a failure to comply with the provisions of Article 13.2 qualifies as loss due to delay or as another form of loss not governed by the liability regime of the CMNI. In order to prevent this discussion, the liability of the Carrier is limited to the carriage charge, which will therefore only be relevant if this limitation of liability does not already ensue from Article 20(3) of the CMNI. If the reverse applies, it would therefore be logical to also award this limitation to the Shipper.

Artikel 15 : Low water

Articles 15.1 and 15.2 detail the rights and responsibilities of the Carrier with respect to the navigational aspects of the voyage ('care').

A ship can, in case of low water, take on less load than normal. In practice, the financial consequences thereof are processed:

- in the carriage charge (Article 16.2);
- in the fixed freight sum (Article 16.3);
- as a low water surcharge (Articles 15.3 and 15.4).

The times stated in paragraph 3 of Articles 15.3 and 15.4 are often used for short voyages or downstream passage on, e.g. the Rhine, Moselle, Saar and Neckar. The Parties are, of course, allowed to agree on different times. Different formulations occur in practice, such as:
- 'On passage of water level gauge x or 'directly after passage of waterway y';
- 'Lowest reading of water level gauge x between commencement of loading and arrival in the discharging harbour or lock z';
- Combinations of water level gauges;;
- Etc.

It is up to the parties to agree what, in their opinion, is applicable under the given circumstances. BV 2016 does not hinder their commercial relationship.

Artikel 16 : Finance

According current practise the freight sum is calculated based on the loaded or unloaded weight. The parties can choose between the two.

Also, a so-called 'approx. clause' of 2.5% is included; a generally undescribed but nevertheless often applied clause.

Article 16.4 (port charges, shipping levies and quayside fees)
This article reflects current practice. In case of a voyage along German waterways (excluding the Rhine), it is generally opted to exclude the shipping levies imposed by the waterway authorities from the freight rate or fixed freight sum. That explains why the option is given. Quayside fees (rent for use of the quay) are never for the account of the Carrier.

Article 16.6 (the invoicing Party)
This article facilitates the practice, which is still customary in inland shipping, that not the Carrier but the Shipper or its contractual party draws up the invoices. Although the authors of the BV 2016 have adopted a neutral attitude towards invoicing agreements, such as 'self-billing' or 'reversed billing', they do point out that these practices have since become subject to VAT administration rules. Reference is made, in particular, to European Directive 2010/45/EU (Article 12, 16(b), 224 and 225), Article 35 of the Dutch Turnover Act (*Wet op de Omzetbelasting*) and the Decree on turnover tax, administrative, invoicing and other obligations (*Besluit omzetbelasting administratieve-, facturerings- en andere verplichtingen*) of 06/12/14 (see in particular Articles 3.2.3 and 3.3.5). These prescribe the obligation to draw up the invoice in the name of the relevant service provider, which implicitly prohibits credit invoicing.

Article 16.7 sub 3 (Interest)
Directive 2011/7/EU of the European Parliament and the Council of 23 February 2011 on combating late payment in commercial transactions (OJ L48/1) has been implemented in the Dutch Civil Code (Book 6 Articles 119a and 120). In case of 'trade agreements':

- The term of payment is 30 days, unless agreed otherwise; longer is possible on condition that such is not grossly unfair to the creditor.
- The interest is equal to the refinancing interest set by the European Central Bank in its most recent basic refinancing operation before the first calendar day of the six months concerned [14], increased with eight percentage points.

While the parties can deviate from this, such may not lead to unfair clauses and practices (the waiver of penalty interest and collection costs is specifically referred to).

Collection costs
No articles of the BV 2016 are dedicated to judicial and extrajudicial collection costs. Without any further regulations being prescribed, 'collection costs' are determined according to the graduated scale in the Extrajudicial costs compensation decree (*Besluit voor buitengerechtelijke incassokosten*) and the provisions of Article 6:96, paragraph 2 sub c, 4 and 5 Dutch Civil Code. This arrangement is fair to all parties involved.

Artikel 17 : Loss and liability

Article 17.1 sub 1 (loss resulting from the agreed requirements made of the Ship, hold and tanks)
This paragraph links up with Article 18(1)(c) of the CMNI as regards the agreed transport on deck or in open holds. As regards loss resulting directly from requirements by the Shipper of the ship, a link is established with Article 18(1) (a) of the CMNI.
The Carrier has the duty of care for the Goods in the Ship within the agreed frameworks regarding hold, tanks, hatches, cover, deck cargo, etc. If, for example, 'open hold' has been agreed and it starts raining, the Shipper may not complain about moisture absorption by the Goods in the Ship. But if the ship is scheduled to depart from Amsterdam to Lemmer with wind N 8, the Carrier should at least have called the Shipper to enquire whether it is sensible to proceed, never mind the nautical risks that the Carrier runs as a result.

[14] For the current interest, see www.dbn.nl

Article 17.1(2) (limitation of liability of the Carrier)
This paragraph facilitates that the method provided by the CMNI for the calculation of the loss, the maximum liability limits and the lapse of rights to limitation of the liability also apply to situations that are not regulated by the CMNI, but are regulated by the BV 2016.

Article 17.2(1) (damage to the Ship caused by the Goods)
Article 913 paragraph 1 Dutch Civil Code provides that the Shipper is liable for any losses incurred by the Carrier as a result of the Goods in the Ship. In the situation under 1, however, it is not the Shipper but the Carrier who is liable for the damage to the Ship caused by the Goods.

Article 17.2(2) (reasonably to be expected wear and tear)
The Carrier is expected to budget in the agreed freight charge any wear and tear that - in view of the type of cargo - may reasonably be expected[15].

Article 17.3 (directly settle loss on site)
This article lays down an obligation of best endeavours to immediately settle the loss on site with the causing party, if it involves undisputed very limited damage.
It is hereby advised to consult with the insurance company in advance, as no further recourse to the insurance policy is possible if it should later appear that the loss is significantly larger than initially thought.

Article 17.4 (increase or limitation of liability)
According to this article, the increase or limitation of liability of the Carrier as provided for by the CMNI does not automatically apply, unless expressly stipulated.

Damage to the Goods caused by loading, stowing, securing or discharging by the Carrier
If the Carrier performs the loading, receipt will not take place in the Ship, but (in most cases) 'on the loading quay'. This means that the liability of the Carrier for damage or loss of the Goods during loading is governed by the CMNI. But take note: the time of receipt must be determined from case to case on the basis of the factual circumstances.

The above paragraph applies correspondingly if the Carrier takes care of discharging.

If the Shipper loads the Goods and subsequently the Carrier stows or secures these, he has already taken receipt of the Goods and his liability for stowing and securing is governed by the CMNI.

If the Shipper loads the Goods and the Carrier subsequently stows or secured these, it is not inconceivable that the Shipper is still loading while the Carrier has already started stowing or securing. If any loss arises in that case, the liability will have to be determined from case to case on the basis of the factual circumstances. The liability of the Carrier will in any event be governed by the CMNI convention if the loss arises as a result of and during the stowing and/or securing the Goods or if the loss arises later, during the voyage, as a result of the manner in which the Carrier has stowed or secured the Goods. After all, in both cases it must be assumed that the Carrier had already accepted the Goods at the time that the loss arises.

It does not occur in practice that the Carrier loads and the Shipper subsequently stows and secures the Goods.

Other loss or liability
Any loss or liability arising outside the Contract of Carriage will have to be handled according to the law applicable to that case[16]. Examples include incidents on the transhipment site and a 'collision' with the loading or discharging quay. These incidents are not covered by the BV 2016.

Artikel 18 : Right of retention

For this article, alignment was sought with the General Conditions of road transport 2002 (*Algemene Vervoercondities 2002 voor het wegvervoer*) as drawn up for both the cargo interests and hauliers. The article expands upon the statutory right of retention that falls to inland shipping carriers under Dutch law. The statutory right of retention is limited to retention of the cargo to acquire payment of the carriage charge for that send cargo.

[15] See: MvT 14 049, Parl. Gesch. 8, p 423

[16] See also Article 4 of Regulation EC 864/2007

Articles 18.2 and 18.3
The right of retention also extends to older outstanding claims connected to prior contracts of carriage between the parties. With respect to the Consignee, Article 18.3 stipulates the condition that he must also have had an interest in the older claims: he must also have been the Consignee in the preceding transport transactions. If that was not the case, the Carrier can exercise his right of retention against the Shipper (this also applies within the context of the Shipper's right to give instructions), but the Consignee retains his right to demand delivery. This prevents the Consignee from becoming the victim of a conflict between the Shipper and the Carrier to which he was not part in..

Article 18.4
This concerns a situation in which the Carrier has reason to doubt the authority of the Shipper. Fact is that this will not readily occur in practice, as the sole circumstance that the Shipper has the Goods at his disposal will generally mean that he is authorised to offer the Goods for transport. This article does not concern the right of disposition, therefore, but instead any doubt arising if, for example, the Shipper goes bankrupt before the Goods are shipped.
Regardless, the Carrier need not in advance doubt the authority of the Shipper; no duty of inspection applies.

Article 18.5
This article strives to prevent the Carrier from exercising this right in case of claims other than the payment of the freight sum and accompanying reimbursements, such as compensation for losses. After all, payment should in that case not be enforced in this manner, but the conflict should instead be resolved in mutual consultation or by a court of law.
Also in a more general sense, the Parties should be reluctant in exercising their right of retention in case of disputed claims as the unjustified retention of cargo can lead to significant claims for damages.

No right of pledge
The BV 2016 does not provide for a right of pledge. The right of pledge, as a limited right to ownership, does not belong in a contract of carriage. As a real right, the right of pledge – unlike a right of retention – cannot be subjected to a reasonableness test to ensure that third parties are not disproportionately disadvantaged by the exercising of a right of pledge. Moreover, a right of pledge can only fall to a limited number of service providers, namely those who contract directly with the owner of the cargo. That could lead to a skewed relationship between the various parties in the transport chain.

Artikel 19 : Insurance

Article 19.1
This article confirms – in line with current practice – that the Carrier is not responsible for insuring the Goods against damage or loss. This is also in step with current legislation.

Article 19.2 (duty of insurance)
The duty of insurance of the Carrier is limited to the liability stated in this article. No duty of insurance therefore applies with respect to the remaining liability of the Carrier, in the same way as no duty of insurance is imposed on the Shipper and the Consignee.

Liability for loss not directly related to the Contract of Carriage (e.g., incidents at the transhipment site and 'collision' with the loading or discharging quay) fall outside the scope of the BV 2016 and thus any duty of insurance in this respect.

Article 19.2 and 19.3 (proof of cover)
The Shipper can on concluding the Contract of Carriage only ascertains whether the Carrier is adequately insured by being in possession of proof of cover. The Shipper may also request that proof of insurance be provided before concluding the Contract of Carriage, e.g., to prevent delay.
In case of a following assignment from the same Shipper within the term of the insurance, the proof of cover has already (namely on the occasion of an earlier voyage) been provided to the Shipper and therefore need not be provided again. It is advised to make clear agreements on this in order to prevent misunderstandings.

Article 19.2 (if transport is entrusted to Actual Carrier)
The duty of insurance of the Carrier as provided for in this article also applies if the Carrier and trust the transport to an Actual Carrier.

The parties are free to agree otherwise, for example: '*The Carrier (1) will* exercise due diligence to *ensure that the Ship is adequately insured against liability for damage to, loss of and delay in the*

delivery of the Goods and (2) will as soon as soon as possible after concluding the Contract of Carriage provide the Shipper with relevant proof of cover'. The Parties are then required to include this in the Charter. And Article 19.3 (default in fulfilment of this obligation) can remain applicable.

Artikel 20 : Further conditions

Article 20.2 (liability of auxiliary persons)
The purpose of this article is to provide protection to auxiliary persons of the parties to the Contract of Carriage. The article offers these auxiliary persons the protection that their principals would enjoy if they were held liable by the other party. This prevents the parties from bypassing the other contractual party in order to gain a higher compensation outside the Contract of Carriage.
This provision is often referred to as the Himalaya clause, named after an English court case about an accident suffered by a passenger when boarding the SS Himalaya.

Article 20.3 (assignment)
This article prohibits the Parties from assigning their claims on one another to third parties. The thought behind this is that the Parties have a (commercial) interest in satisfactorily resolving disputes. Third parties who 'buy' those claims do not have such an interest and will therefore be more inclined to take legal actions which is not desirable.
This article does not concern insurers, as they are subrogated by law to their insured.
Collection agencies are also not covered by this article, as they collect claims on behalf of their client (by power of attorney).

Article 20.4 (choice of forum for resolution of disputes)
This article designates the court in Rotterdam as the competent court. This choice is motivated by the specific knowledge and experience of this court in the area of transport law. TAMARA arbitration (faster, cheaper) can be agreed as an alternative.
See for more information: www.tamara-arbitration.nl.

Article 20.5 (supplementary services)
This article provides for the agreement of supplementary services. The parties should note that these services often do not fall under the (mandatory) functioning of the CMNI or the provisions of Book 8 of the Dutch Civil Code. Such supplementary services therefore require supplementary conditions that regulate the rights, obligations and liabilities of the parties.

Not yet discussed substantive points of the Charter

The fact that the parties have agreed to apply the BV 2016 must be explicitly stated in the Charter (see the model under Fields 1 and 2). Moreover, the BV 2016 must be made available to both parties, e.g., by:

- Being enclosed as an appendix to the Charter.
- Being sent on request, whether or not electronically.
- Being made available on the Internet by means of a (hyper) link in the Charter.

The Model contains several phrases that also occur in the BV 2016. Case law has shown that this is very desirable, if not necessary. This concern (see the Model):

- The reference to the CMNI and Dutch law (text under the Fields 1 and 2);
- Choice of forum for resolving disputes (the sentence in Field 21, up to 'unless');
- Insurance (the sentence in field 22, up to 'unless').

In the Model under the Fields 1 and 2 is the applicability all other (general) conditions excluded. It is generally advised not to deviate from this. This recommendation also applies to a Charter, in which other general conditions are declared applicable as standard in (e.g., the footnote of) the (electronic) stationery. [17] If simultaneous use is made of various sets of conditions, a hierarchy must at least be determined to resolve possible contradictions and, moreover, it must be laid down which conditions apply to which activities.

[17] See further Dutch Civil Code 6, Title 4, Section 3.

CONTRACTING CHAIN

Often, different commercial conditions will apply within a contracting chain. While that is normal in commercial practice, it could lead to extra risks for the intermediate parties. It is advised to be alert to this.

CONTRACTS OF CARRIAGE FOR A LONGER TERM

Conditions of carriage for a single voyage do not handle a number of matters, which may arise in case of contracts of carriage for a longer term. This concern (not exhaustive):

- Term of the agreement
- Total tonnage
- Planning
- Time periods for preliminary advice/ordering
- Gas oil clause

Appendix 1

Signing, ratification and coming into force of the CMNI

Budapest Convention on the Contract for the Carriage or Goods by Inland Waterway (CMNI)

Participants	Signature	Ratification	Entry into Force
Belgium	22 June 2001	5 August 2008	1 December 2008
Bulgaria	22 June 2001	19 April 2006	1 August 2006
Croatia	22 June 2001	7 December 2004	1 April 2005
Czech Republic	22 June 2001	14 November 2005	1 March 2006
France	22 June 2001	11 May 2007	1 September 2007
Germany	22 June 2001	10 July 2007	1 November 2007
Hungary	22 June 2001	7 May 2002	1 April 2005
Luxembourg	6 September 2001	25 March 2004	1 April 2005
Moldova	21 December 2001	21 April 2008	1 August 2008
Netherlands	22 June 2001	20 June 2006	1 October 2006
Poland	20 June 2002		
Portugal	22 June 2001		
Romania	31 July 2001	3 April 2004	1 April 2005
Russian Federation		11 April 2007	1 August 2007
Serbia		21 July 2010	1 November 2010
Slovakia	22 June 2001	27 November 2007	1 March 2008
Switzerland	22 June 2001	13 May 2004	1 April 2005
Ukraine	20 June 2002		

In accordance with its Article 34(1), the Convention entered into force on 1 April 2005.

Source (from 01/10/15): http://www.unece.org/trans/main/sc3/sc3_cmni_legalinst.html

Appendix 2

Articles 11.5 and 11.6 (reasonable care in compliance with inland shipping practices)

Time period during loading
While the CMNI assumes that receipts takes place on board of the Ship, the 'moment of receipt' is not defined. These moments will therefore have to be determined from case to case on the basis of the factual circumstances. This concerns the time period from which the Carrier has sufficient 'power' over the Goods in order to accept his obligations pursuant to the CMNI. And that can differ for bulk goods, liquids, containers, big bags and general goods.

Time period during discharging
Article 10.2 of the CMNI states the following regarding the 'time of delivery': '*.the placing of the goods at the disposal of the consignee […..] shall be considered a delivery'.*
This should not be confused with the 'time of announcement', opening of the hatches[18], etc. Here too, it is assumed that delivery takes place on board of the ship, but facts, circumstances and agreements may prove otherwise. After all, it will not always be clear in advance at what time the goods are actually at the disposal of the Consignee

Conclusion
The regulations of the CMNI may lead to some time lapses and actions passing between the commencement of loading and receipt, as well as between delivery and the conclusion of discharging. That raises questions about the (care) obligations of the Carrier for the Goods in the Ship during those periods. The BV 2016 describes this as *'the observance of reasonable care as is customary in inland shipping*'.

Appendix 3 of these notes provide a schematic representation of the situation that Shipper loads, stores and secures, while the Consignee unloads. The notes to Article 17 discuss the situations in which the Carrier performs one or more of these tasks.

Examples
Examples of 'reasonable care' include:
- as regards the suitability of the Ship: keeping the Ship afloat, the hatches accessible and the hold watertight;
- as regards the acts and omissions of the Carrier: not spraying any water into the hold.

It was asked on several occasions during the consultations whether Articles 10.5 and 10.6 mean that the Carrier must (amongst other things) keep a 'rain watch'. The answer is no! The Carrier must of course be accessible and available to open and close the hatches on the instruction of the Shipper or the Consignee.

Limited liability
Article 17.2 determines that if the Carrier defaults in the fulfilment of his obligations as referred to in Articles 11.5 and 11.6, his liability - except in case of intent or recklessness - will be limited in the same way as during the time period governed by the CMNI (from the time of receipt for transport up to the time of delivery).

Burden of proof
Proof of damage to or loss of the Goods in the Ship must always be provided by the Shipper or the Consignee.

Also, the Shipper or the Consignee will have to prove that the Carrier has defaulted in fulfilling his obligations as referred to in Articles 11.5 and 11.6. Here therefore, no reversed burden of proof applies such as in Article 16.1 of the CMNI, which (inter alia) concerns damage to or loss of the Goods in the Ship arising from the time of receipt until the time of delivery.

[18] As the hatches are, pursuant to Article 11.4 paragraphs 2 and 3 opened on the instruction of the Shipper or the Consignee.

Appendix 3

Task and liability of the Carrier re the Goods in the ship if the Shipper loads, stows and the Consignee discharges