

**General European conditions for contracts concerning the
carriage of pushbarges by pushboats 1997**

Non compulsory recommendation (other conditions can be agreed upon).

Prepared jointly by the Association for European River Shipping and Waterways (Internationale Vereinigung für europäische Binnenschifffahrt und Wasserstraßen e.V., VBW) (Duisburg-Ruhrort) and the International Association the Rhine Ships Register (Internationale Vereniging het Rijnschepenregister, IVR)(Rotterdam).

(EUROPEAN PUSH CONDITIONS 1997)

Preface

In 1970 an initiative on the part of the Internationale Arbeitsgemeinschaft der Rheinschiffahrt e.V. succeeded in bringing about an agreement between those involved in push-shipping on "general conditions for contracts concerning the carriage of pushbarges belonging to third parties by pushboats". In 1980 an additional agreement concerning damage to third parties was added. In the Rhine area almost all parties involved in push-shipping accepted these conditions. They were signed by 121 entrepreneurs (as per 1.2.1997).

The conditions are relevant in respect of legal policy. They embody the overriding principle of river shipping law that liability can only exist in case of fault. Accordingly those involved in push-shipping have agreed, in the "general conditions" to a similar apportionment of liability in the internal relations.

With the additional agreement of 1980 the Courts were shown the direction for the assessment of liability for damage to third parties on the basis of fault. Pabst in his thesis of 1984 has shown - so far undisputed - that the liability - as in tow convoys, rests only upon the ship in the push-unit that has caused the damage.

In accordance with the concept founded on decades of practice and the prevailing legal views the liability in push-shipping should be given a unified European character. Therefore the Association for European River Shipping and Waterways e.V. together with the International Association the Rhine Ships Register has drafted "General European conditions for contracts concerning the carriage of pushbarges by pushboats 1997". They should allow the Middle- and East European parties involved in push-shipping to accede to the agreement. The special requirements of the Dutch parties involved in push-shipping, who had their own conditions parallel to the general conditions, have been taken into consideration. In this respect the new conditions represent a legal unification.

The new conditions again conserve the principle of fault, they combine the conditions of 1970 and the additional conditions of 1980 and the general push conditions 1979 (latest text) and they clarify outstanding questions.

EUROPEAN PUSH CONDITIONS 1979

§ 1

Definitions

In these conditions the following definitions apply:

- a. Pushboat. A vessel with engine propulsion built or specially fitted to push other vessels.
- b. Pushbarge. A vessel built or specially fitted to be propelled by pushing.
- c. Push-unit. A tight combination of one or more pushboats with one or more pushbarges, whereby the barge or barges are coupled ahead of and/or alongside the pushboat or pushboats, including units of pushing and pushed vessels whose couplings allow a directed angle.
- d. Pushboat entrepreneur. The owner of a pushboat or a party operating a pushboat owned by a third party.
- e. A pushbarge entrepreneur. The owner of a pushbarge or a party operating a pushbarge owned by a third party.
- f. Carriage. Movement of pushbarges by pushboats including shifting, mooring or unmooring at the berth or loading or discharging station and including taking a pushbarge into the push-unit and subsequently separating same from the push-unit, also by transfer of a pushbarge to another pushboat.
- g. Damage. Property damage, loss of time and all other damage immediately caused by the occurrence causing damage.

§2

Damage to the pushbarges during the carriage by pushboats.

1. The pushboat entrepreneur is liable for damage to the pushbarge caused by his fault or the fault of the crew of the pushboat, as long as the pushbarge during the carriage is in the actual power (care) of the crew of the pushboat. This includes damage negligently caused to the pushbarge through unseaworthiness or insufficient equipment of the pushboat.
2. For damage to the barge having occurred after the pushboat has left, the pushboat entrepreneur is only liable if the pushbarge has not been properly moored by fault of the crew of the pushboat, resulting in the damage.
3. For damage to the pushbarge having occurred after transfer of the pushbarge to another pushboat entrepreneur, the previous pushboat entrepreneur is not liable.

§ 3

Damage to the pushboat and other vessels of the push-unit, caused by one of the pushbarges in the unit

The pushbarge entrepreneur is liable for damage caused by unseaworthiness or insufficient equipment of his pushbarge to the other vessels in the push-unit, negligently caused during the carriage.

§ 4

Partial fault

If the damage to a vessel of the pushing unit has been caused by fault of both the pushboat entrepreneur and the pushbarge entrepreneur, both are liable in conformity with their share in the fault.

§ 5

Burden of proof

1. The pushboat entrepreneur must prove that the damage to the carried pushbarges is not due to his fault or the fault of the crew of the pushboat. This includes damage through unseaworthiness or insufficient equipment of the pushboat (vide § 2 sub 1).
2. The burden of proof that the claimed damage to the pushbarge was not present when it was taken into the push-unit rests upon the pushbarge entrepreneur (vide § 2 sub 1).
3. If damage to the pushbarge has occurred after the pushboat has left, the pushbarge entrepreneur must prove both the damage and the fault of the pushboat entrepreneur. However the pushboat entrepreneur must prove that the pushbarge was properly moored or properly handed over to another pushboat entrepreneur (vide § 2 sub 1).
4. If damage is caused to other ships of the push-unit through unseaworthiness or insufficient equipment of one of the pushbarges in the unit, the entrepreneur of same must prove that the unseaworthiness or the insufficient equipment was not his fault (vide § 3).

§ 6

Notification

Once the Master of the pushboat during the carriage becomes aware of damage to a pushbarge or unseaworthiness or insufficient equipment of same, he must inform the pushbarge entrepreneur at once.

§ 7

Small damages

1. Claims for compensation of damage and for loss of time in the relation between the pushboat entrepreneur and the pushbarge entrepreneur is always excluded if both the property damage (excluding survey expenses, shifting to the shipyard, etc.) and the claim for loss of use are both below DM 6.000,--.
2. Except in case of small damages as sub 1, damage can be claimed to the full extent.

§ 8

Cargo damage

The pushbarge entrepreneur must safeguard the pushboat entrepreneur and the crew of the pushboat from claims for damage to or loss of the cargo or the cargo contribution in general average, having occurred due to fault of the crew.

The crew will not be safeguarded if it has acted on purpose or recklessly, knowing that the damage would probably occur.

§ 9

Dangerous goods

Liability for damage caused by dangerous goods will be governed by the applicable law in each case.

§ 10

Damage to persons

Liability for damage to persons (personal injury, smart money, and so on) will be governed by the applicable law in each case.

§ 11

Duty to insure

The pushboat entrepreneur and the pushbarge entrepreneur are obliged to properly insure their liabilities. They can require each other to provide evidence for the existence of the insurance by production of documentary proof.

§ 12

Damage to third parties

In case of damage to third parties (for instance damage to ships not belonging to the push-unit, caused by either collision or other faulty behaviour of the crew of the pushboat or by unseaworthiness or insufficient equipment of one of the vessels of the push-unit), in the internal relation between the pushboat entrepreneur and the pushbarge entrepreneur, the party is liable on whose side the damage was caused by fault. To that extent he must safeguard the other party or parties from liability vis-a-vis third parties.

§ 13

Supervision over pushbarges before or after carriage

If the pushboat entrepreneur or a party appointed by the pushboat entrepreneur takes upon himself the supervision over a pushbarge before or after the carriage of same, in particular in case of loading or in case of discharging or after having properly moored the barge, he will only be liable in case of intent or grossly negligent neglect of duty.

§ 14

Limitation of liability

For all claims in respect of these conditions the liability of the pushboat entrepreneur/pushbarge entrepreneur is limited in accordance with the applicable law. This limitation of liability, insofar as applicable, is also available for the crew of the pushboat.

§ 15

Competent Court

Disputes about claims arising in respect of these conditions will be decided on the basis of these conditions by the competent Court.

§ 16

Application of the conditions

These conditions apply when they have been agreed upon between the pushboat entrepreneur and the pushbarge entrepreneur. They are not applicable to damage to third parties (§ 12) even when the damaged vessels are operated by one of the parties to the contract.

§ 17

Authentic text

These conditions have been issued in the English, German, French and Dutch language as decided by the Committee for Rivershipping Law of the Association for European Rivershipping and Waterways e.V. and the Legal Committee of the International Association the Rhine Ships Register on 1st March 1997.

In case of doubt the German text, in connection with the explanations, will prevail.

§ 18

Filing

These conditions have been filed at the Association for European Rivershipping and Waterways e.V. and the International Association the Rhine Ships Register.

Duisburg-Ruhrort/Rotterdam, 22 May 1997

EXPLANATIONS CONCERNING THE EUROPEAN PUSH CONDITIONS 1997

The particulars of the conditions are explained as follows.

To § 1: Definitions

It appeared to be useful to define certain concepts.

To § 1a) and 1b): Pushboat and pushbarge.

The definition of these concepts is in accordance with § 1.01 of the Rhinshipping Police Regulations.

"Pushboats" include motorvessels and tugs which have been specially fitted to push other vessels. "Pushbarges" can also be towbarges, ro ro vessels and other ships with cargo holds, to be moved by pushing. Not included are floating equipment and pontoons.

To § 1c). Push-unit:

"Push-units" also include motorships built or especially fitted for pushing (so-called push motorships) with "pushbarges" coupled ahead or alongside. Colloquially such units are also called "coupled units". More than one pushboat can form part of one push-unit.

To § 1d). Pushboat entrepreneur:

"Pushboat entrepreneurs" are not only the owners of pushboats but also entrepreneurs who operate for instance chartered pushboats belonging to third parties and either command same or operate same with their own personnel. According to the German Rivershipping Act the latter are considered as "Ausrüster" - vide § 2 sub 1 of the Shipping Act.

To § 1e). Pushbarge entrepreneur:

"Pushbarge entrepreneurs" as well are not only the owners of pushbarges, but also entrepreneurs who operate for instance chartered pushbarges owned by other parties.

To § 1f). Carriage:

The "carriage" of pushbarges is - as previously - limited to the time during which the barge forms part of the push-unit, therefore the time during which the pushbarge is in the actual power (care) of the crew of the pushboat.

The "carriage" includes taking the barge into the unit, in particular coupling, the entire movement of the barge along longer or shorter stretches, including shifting berth and uncoupling and mooring the barge at the proper berth and loading or discharging place and transferring the barge into the care of another pushboat.

There is no "carriage" when a pushbarge is moved at its berth for the purpose of reaching another barge to be carried in accordance with the contract. In such cases damage to third parties as per § 12 of the general conditions applies.

To § 1g): Damage

Damage includes all types of damage, in addition to property damage therefore also loss of time and all damage immediately caused by the occurrence, for instance costs of towing or pushing to the shipyard and survey expenses.

To § 2: Damage to pushbarges during carriage by pushboats.

To § 2 sub 1:

1. Subject of the liability

This deals with the liability of the pushboat entrepreneur for damage caused to pushbarges belonging to third parties carried in the push-unit, during their being part of the push-unit.

It includes all damage not already present at the time of taking the pushbarge into the unit. In case of liability for fault as per item 2 of these explanations to § 2 sub 1 it also includes the damage to the pushbarge having occurred due to the pushbarge not being seaworthy or not properly equipped, when it was taken into the push-unit. The latter is applicable for instance when a bollard is no longer functional as it has been torn loose and is torn off during the voyage, so that the push-unit disintegrates, as a result of which the pushbarge suffers other damage. The pushbarge entrepreneur can require compensation of such "other damage" as well as damage to the pushbarge due to for instance another unseaworthy pushbarge in the unit sinking, as this also involves damage having occurred to the pushbarge only whilst belonging to the push-unit.

If the pushboat is not seaworthy or not properly equipped and this has caused damage to the pushbarge, the pushboat owner will be liable for same. This is hereby made clear.

2. Fault liability

Liability of the pushboat entrepreneur is however only possible insofar as the damage to the lighter is due to his fault or the fault of the crew of the pushboat.

For instance there is fault on the part of the pushboat entrepreneur if the pushboat is not seaworthy and this is the cause for the damage to the barge. Fault of the crew of the pushboat occurs for instance if when coupling the unit together and during the voyage, it has disregarded the rules of the Rhine Shipping Police Regulations or other Rhine- of Donau Navigation Rules and this has caused the damage to the pushbarge. There is also fault of the crew if a pushbarge is taken into the unit which is recognizably, that is quite visibly, or in case of application of proper care noticeably, unseaworthy or insufficiently equipped.

To § 2 sub 2 and 3:

It makes no legal difference whether the damage to the pushbarge occurs during the voyage or during the other time while the barge is in the power (care) of the crew of the push-unit.

The legal situation is to be appreciated similarly if for instance a pushbarge gets adrift after the pushboat has left, because the pushbarge has not been properly moored. A pushbarge is not properly moored when it is for instance not properly anchored or not properly lighted or not properly moored outside the fairway. In such cases the pushboat entrepreneur is liable due to fault of the crew.

On the other hand the liability of the pushboat entrepreneur is no longer involved once the pushbarge has passed into the power (care) of another pushboat entrepreneur and the damage to the pushbarge has only occurred at that stage.

To § 3. Damage to the pushboat and other vessels of the push-unit, caused by one of the carried pushbarges.

1. Subject of the liability

The liability of the pushbarge entrepreneurs is dealt with for damage caused to other vessels of the push-unit (boat plus barges) during the "carriage", whilst the barge is part of the push-unit.

Although the general conditions only apply in the relation between the pushboat entrepreneur and the pushbarge entrepreneur, i.e. the parties to the contract, it may be assumed that as the general conditions are applied by more and in the future probably all parties involved in push-shipping, the owners of all vessels belonging to the unit are parties to the contract.

Insofar as certain pushboat or pushbarge entrepreneurs do not apply the general conditions, it is recommended to make proper arrangements before formation of the unit. Even when in particular cases no special agreement in accordance with these general conditions has been made, the liability does not only exist vis-a-vis the pushboat of a contractual party, but also on the basis of the general legal provisions of liability for fault vis-a-vis the vessels of third parties in the push-unit.

The pushbarge entrepreneur as well is only liable for damage not yet having occurred when the pushbarge was taken into the unit.

2. Fault liability

As the general conditions are on the basis that liability only exists in case of fault, this is clearly expressed.

Fault of the pushbarge entrepreneur can only exist if insufficient seaworthiness or insufficient equipment of the pushbarge has caused damage to the other vessels of the push-unit.

The pushbarge entrepreneur has to take responsibility for this cause of damage. Insufficient equipment exists for instance in respect of the pushboat when a bollard is no longer in proper condition (vide item 1 of these explanations to § 2 sub 1).

To § 4:

In case of fault of more than one party it is in accordance with the principle of fault liability that each party is liable in accordance with his share in the fault.

To § 5. Burden of proof

To § 5 sub 1:

The pushboat entrepreneur must prove that the damage to the carried pushbarge is not due to his fault or that of the crew of the pushboat. This duty of the pushboat entrepreneur to exonerate himself is in accordance with general contractual principles. The basis is that the pushbarge is in the care of the crew of the pushboat.

The pushboat entrepreneur must also prove that unseaworthiness or insufficient equipment of the pushboat having caused damage to the barge during the carriage are not due to his fault or that of the crew of the pushboat. The duty of the pushboat entrepreneur to exonerate himself is in accordance with general contractual principles. The basis is that the pushboat entrepreneur must supply a seaworthy and properly equipped pushboat.

To § 5 sub 2:

The pushbarge entrepreneur must prove that the claims concerns a damage that did not yet exist when the barge was taken into the push-unit.

This apportionment of proof as well is in accordance with general contractual principles. It is however clearly expressed. It was not realized however that it is difficult for the pushbarge entrepreneur to provide the evidence, when it concerns damage which for instance is not immediately visible, and in view of the fact that the pushbarge will often not be under his direct supervision over longer periods. There were however no grounds on which to burden the pushboat entrepreneur with this proof. It is difficult for him as well to ascertain damage and he

must be able to assume that the pushbarges given to him for carriage are not damaged. This however does not release the pushboat entrepreneur from the burden of proof that the crew has inspected the pushbarge with the degree of care allowed by the circumstances in each case in respect of seaworthiness and proper equipment and has not observed externally recognizable deficiencies.

To § 5 sub 3:

Carriage includes proper mooring of the pushbarge after carriage. The responsibility of the pushboat entrepreneur therefore includes this aspect. When for instance a pushbarge, not having been properly moored, comes adrift after the pushboat has left, the pushboat entrepreneur will be liable for fault on the part of the crew of the pushboat. It appeared however reasonable to burden the pushbarge entrepreneur with the proof that the crew of the pushboat by its fault in mooring the barge caused the damage. The pushboat entrepreneur however has the burden of proof that the pushbarge was properly moored and made fast in accordance with the Shipping Police Rules, or properly transferred to another pushboat.

To § 5 sub 4:

The pushbarge entrepreneur must prove that the unseaworthiness or insufficient equipment of the pushbarge having caused damage to the other vessels of the push-unit, are not due to his fault. This exoneration is on the basis of general contractual principles.

To § 6: Notification

The notification is important so that the pushbarge entrepreneur can act accordingly. Therefore the duty of the Master of the pushboat to notify has been expressly introduced. In any case the pushboat entrepreneur should in his own interest take all possible steps to clarify the situation and to collect evidence. Action to collect evidence is therefore up to the interested pushboat entrepreneur and/or the interested pushbarge entrepreneur.

To § 7: Small damages

In case of small damages claims for compensation are waived for the purpose of simplicity, in particular to avoid relatively excessive expenses.

In case of small damages under DM 6,000.-- a claim for loss of time can be considerable and eventually exceed the amount of DM 6,000.--, for instance in case of damage to the expensive pushboat. Therefor both the amount of the damage to property and the amount of the loss of time claim are relevant.

The parties involved may have the property damage and the loss of time determined mutually. In cases not involving small damages, property damage and loss of time may be claimed to their full extent.

To § 8: Cargo damage

Although the owner of a cargo is usually not one of the parties to the general conditions of those involved in push-shipping, the internal relation between the parties to the contract requires a clear arrangement.

According to general legal principles the pushbarge entrepreneur is only liable for cargo damages caused by fault. As a matter of legal policy and in accordance with international agreements on liability it appeared reasonable to exclude liability of the pushboat entrepreneur for faults en behaviour of the pushboat. This of course does not apply if the crew of the pushboat has caused the damage to the cargo on purpose or recklessly, knowing that the damage would probably occur.

The exoneration of liability includes not only nautical faults of the crew of the pushboat, but also commercial faults of the pushboat entrepreneur. The pushbarge entrepreneur must carry his own risk of liability or exclude his liability (by the conditions of his bills of lading) or cover his risk of liability by means of a carriers' insurance.

To § 9: Dangerous goods

To § 10: Personal injures

It would have been beyond the scope of these general conditions to make special rules on these subjects. Therefore it has only been pointed out that the applicable law should govern each particular case.

To § 11: Duty to insure

It appeared to be sensible to introduce a duty to insure. That implies the mutual duty to supply information. Same should only be given however at the request of one of the parties to the contract.

To § 12: Damage to third parties

For damage caused by the push-unit to third parties outside the push-unit (for instance damage to other ships caused by collision by fault or other faulty behaviour of a push-unit) the same liability principles apply as have been established for the liability within the push-unit. Those involved in push-shipping thereby assume that the Courts will apply the principle of fault, which includes that (also) in case of push-units the liability will only rest upon the ship that has caused the damage. In case vessels belonging to a push-unit are found to be liable notwithstanding the principle of fault, who are not at fault in respect of the occurrence, it is agreed that such ships of the push-unit should be safeguarded from liability vis-a-vis third parties.

To § 13: Supervision over pushbarges before and after carriage

This aspect does not belong to the actual push-carriage. However it occurs in practice that a pushboat entrepreneur accepts the supervision of a pushbarge after or before the carriage, in particular during loading and discharging. In such cases the pushboat entrepreneur will in principle only be liable in case of intent or grossly negligent non-performance. Other arrangements must be expressly agreed upon in the contract concerning the supervision.

To § 14: Limitation of liability

Clearly the principle of limitation of liability is adhered to also in respect of the push-navigation. This is in accordance with the Convention of Strassbourg of 4th November 1988 concerning the limitation of liability in river shipping (CLNI). With the extension of the limitation of liability in favour of the crew a contribution is made to further development of river shipping law.

Generally each case will be governed by the legal rules and regulations in accordance with the applicable law. This was considered to be self-evident also in respect of among others the time bar, which has therefore not been especially mentioned.

§ 15: Competent Court

No special arrangements are made regarding the competent Court. Reference is however made to the competence of the Rhine Shipping Courts in accordance with § 34 bis of the Mannheimer Akte. In addition the law of the EU has to be taken into consideration.

§ 16: Application of the conditions

The conditions are not automatically applicable. They must be expressly agreed upon, for instance by way of an order confirmation or by forwarding or accepting the text of these conditions.

It is clearly pointed out that the general conditions can only concern the contractual relations within the push-unit, and are therefore not applicable to damage to third parties, as the relation to third parties cannot be governed by the contract. As a result the push conditions will not apply even when damage has been caused to a vessel outside the push-unit, which happens to be operated by one of the parties to the contract.

It appeared to be necessary to clearly refer to § 12 of the general conditions in this context to clarify that the - also as a matter of legal policy - important principles of liability in the internal relation are applicable in all cases. Reference is made to the explanations to § 12.

To § 17: Authentic text

The original text was drafted in the German language. It will be translated in the English, French and Dutch language. In view of the legal harmonization translation in other languages is recommended.

In case of questions about the interpretation the German text will prevail in connection with the explanations, also in the German language.

To § 18: Filing

The original text has been filed at the Association for European River Shipping and Rivers e.V. and the International Association of the Rhine Ships Register. Copies can be obtained from both associations.

Signed Dr Pabst for VBE and
T.K. van den Heuvel-Hacksteiner, LL. M., for IVR