IV. INTERNATIONAL LEGISLATION ON SHIPPING

1. Note by the Secretary-General: comments by Governments and international organizations on the draft Convention on the Carriage of Goods by Sea (A/CN.9/109)*

CONTENTS

Introduction

1. At its fourth session (29 March-20 April 1971) the United Nations Commission on International Trade Law decided to examine the rules governing the responsibility of ocean carriers for cargo. The relevant resolution of the Commission at that session stated that:

> "The rules and practices concerning bills of lading, including those rules contained in the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the Brussels Convention 1924) and in the Protocol to amend that Convention (the Brussels Protocol 1968), should be examined with a view to revising and amplifying the rules as appropriate, and that a new international convention may if appropriate be prepared for adoption under the auspices of the United Nations."[1]

2. To carry out this programme of work, the Commission at that session established a new Working Group on International Legislation on Shipping. This Working Group thereafter commenced to carry out its programme of work and, at its eighth session (10-21 February 1975), completed its mandate and approved the text of a new draft convention entitled "Draft convention on the carriage of goods by sea".[2]

3. In accordance with a decision of the Commission taken at its seventh session (13-17 May 1974), the text of this draft convention was transmitted to Governments and interested international organizations for their comments.

4. All comments received by the Secretariat as at 27 January 1976 are reproduced herein. The text of

* 29 January 1976.

** Comments by the UNCTAD secretariat are contained in documents TD/B/C.4/ISL/19 and Supplements 1 and 2. Comments by the UNCTAD Working Group on International Shipping Legislation are contained in documents TD/B/C.4/148 and TD/B/C.4/ISL/21.

[1] *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17*; UNCITRAL Yearbook, Vol. II: 1971, part two, II, A.

[2] A/CN.9/105, annex; UNCITRAL Yearbook, Vol. VI: 1975, part two, IV, 4.

the draft convention is also reproduced herein preceding the comments.

5. An analysis of these comments prepared by the Secretariat is contained in document A/CN.9/110.*

I. Text of the draft Convention on the Carriage of Goods by Sea

PART I. GENERAL PROVISIONS

Article 1. Definitions

In this Convention:

1. "Carrier" or "contracting carrier" means any person by whom or in whose name a contract for carriage of goods by sea has been concluded with the shipper.

2. "Actual carrier" means any person to whom the contracting carrier has entrusted the performance of all or part of the carriage of goods.

3. "Consignee" means the person entitled to take delivery of the goods.

4. "Goods" means any kind of goods, including live animals; where the goods are consolidated in a container, pallet or similar article of transport or where they are packed, "goods" includes such article of transport or packaging if supplied by the shipper.

5. "Contract of carriage" means a contract whereby the carrier agrees with the shipper to carry by sea against payment of freight, specified goods from one port to another where the goods are to be delivered.

6. "Bill of lading" means a document which evidences a contract for the carriage of goods by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.

Article 2. Scope of application

1. The provisions of this Convention shall be applicable to all contracts for carriage of goods by sea between ports in two different States, if:

(*a*) The port of loading as provided for in the contract of carriage is located in a Contracting State, or

(*b*) The port of discharge as provided for in the contract of carriage is located in a Contracting State, or

(*c*) One of the optional ports of discharge provided for in the contract of carriage is the actual port of discharge and such port is located in a Contracting State, or

(*d*) The bill of lading or other document evidencing the contract of carriage is issued in a Contracting State, or

(*e*) The bill of lading or other document evidencing the contract of carriage provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract.

2. The provisions of paragraph 1 of this article are applicable without regard to the nationality of the ship, the carrier, the shipper, the consignee or any other interested person.

3. A Contracting State may also apply, by its national legislation, the rules of this Convention to domestic carriage.

4. The provisions of this Convention shall not be applicable to charter-parties. However, where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention shall apply to such a bill of lading where it governs the relation between the carrier and the holder of the bill of lading.

Article 3. Interpretation of the Convention

In the interpretation and application of the provisions of this Convention regard shall be had to its international character and to the need to promote uniformity.

PART II. LIABILITY OF THE CARRIER

Article 4. Period of responsibility

1. "Carriage of goods" covers the period during which the goods are in the charge of the carrier at the port of loading, during the carriage and at the port of discharge.

2. For the purpose of paragraph 1 of this article, the carrier shall be deemed to be in charge of the goods from the time the carrier has taken over the goods until the time the carrier has delivered the goods:

(*a*) By handing over the goods to the consignee; or

(*b*) In cases when the consignee does not receive the goods, by placing them at the disposal of the consignee in accordance with the contract or with the law or with the usage of the particular trade, applicable at the port of discharge; or

(*c*) By handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over.

3. In the provisions of paragraphs 1 and 2 of this article, reference to the carrier or to the consignee shall mean, in addition to the carrier or the consignee, the servants, the agents or other persons acting pursuant to the instructions, respectively, of the carrier or the consignee.

Article 5. General rules

1. The carrier shall be liable for loss, damage or expense resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

2. Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage within the time expressly

* Reproduced in this volume, part two, IV, 3, *infra*; these comments often refer to certain international transport conventions. A list of these conventions and documentary references is set out in paragraph 6 of document A/CN.9/110.

agreed upon in writing or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case.

3. The person entitled to make a claim for the loss of goods may treat the goods as lost when they have not been delivered as required by article 4 within 60 days following the expiry of the time for delivery according to paragraph 2 of this article.

4. In case of fire, the carrier shall be liable, provided the claimant proves that the fire arose due to fault or negligence on the part of the carrier, his servants or agents.

5. With respct to live animals, the carrier shall be relieved of his liability where the loss, damage or delay in delivery results from any special risks inherent in that kind of carriage. When the carrier proves that he has complied with any special instructions given him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it shall be presumed that the loss, damage or delay in delivery was so caused unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or negligence on the part of the carrier, his servants or agents.

6. The carrier shall not be liable for loss, damage or delay in delivery resulting from measures to save life and from reasonable measures to save property at sea.

7. Where fault or negligence on the part of the carrier, his servants or agents, concurs with another cause to produce loss, damage or delay in delivery the carrier shall be liable only for that portion of the loss, damage or delay in delivery attributable to such fault or negligence, provided that the carrier bears the burden of proving the amount of loss, damage or delay in delivery not attributable thereto.

Article 6. Limits of liability

Alternative A

1. The liability of the carrier according to the provisions of article 5 shall be limited to an amount equivalent to (. . .) francs per kilo of gross weight of the goods lost, damaged or delayed.

Alternative B

1. (*a*) The liability of the carrier for loss of or damage to goods according to the provisions of article 5 shall be limited to an amount equivalent to (. . .) francs per kilo of gross weight of the goods lost or damaged.

(*b*) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed [double] the freight.

(*c*) In no case shall the aggregate liability of the carrier, under both subparagraphs (*a*) and (*b*) of this paragraph, exceed the limitation which would be established under subparagraph (*a*) of this paragraph for total loss of the goods with respect to which such liability was incurred.

Alternative C

1. The liability of the carrier according to the provisions of article 5 shall be limited to an amount equivalent to (. . .) francs per package or other shipping unit or (. . .) francs per kilo of gross weight of the goods lost, damaged or delayed, whichever is the higher.

2. For the purpose of calculating which amount is the higher in accordance with paragraph 1 of this article, the following rules shall apply:

(*a*) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading as packed in such article or transport shall be deemed packages or shipping units. Except as aforesaid the goods in such article of transport shall be deemed one shipping unit.

(*b*) In cases where the article of transport itself has been lost or damaged, that article of transport shall, when not owned or otherwise supplied by the carrier, be considered one separate shipping unit.

Alternative D

1. (*a*) The liability of the carrier for loss of or damage to goods according to the provisions of article 5 shall be limited to an amount equivalent to (. . .) francs per package or other shipping unit or (. . .) francs per kilo of gross weight of the goods lost or damaged, whichever is the higher.

(*b*) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed:

variation X: [double] the freight;

variation Y: an amount equivalent to (x-y)[a] francs per package or other shipping unit or (x-y) francs per kilo of gross weight of the goods delayed, whichever is the higher.

(*c*) In no case shall the aggregate liability of the carrier, under both subparagraphs (*a*) and (*b*) of this paragraph, exceed the limitation which would be established under subparagraph (*a*) of this paragraph for total loss of the goods with respect to which such liability was incurred.

2. For the purpose of calculating which amount is the higher in accordance with paragraph 1 of this article, the following rules shall apply:

(*a*) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading as packed in such article of transport shall be deemed packages or shipping units. Except as aforesaid the goods in such article of transport shall be deemed one shipping unit.

(*b*) In cases where the article of transport itself has been lost or damaged, that article of transport shall, when not owned or otherwise supplied by the carrier, be considered one separate shipping unit.

Alternative E

1. (*a*) The liability of the carrier for loss of or damage to goods according to the provisions of arti-

[a] It is assumed that the (x-y) will represent lower limitations on liability than those established under subparagraph 1 (*a*).

cle 5 shall be limited to an amount equivalent to (. . .) francs per package or other shipping unit or (. . .) francs per kilo of gross weight of the goods lost or damaged, whichever is the higher.

(*b*) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed [double] the freight.

(*c*) In no case shall the aggregate liability of the carrier, under both subparagraphs (*a*) and (*b*) of this paragraph, exceed the limitation which would be established under subparagraph (*a*) of this paragraph for total loss of the goods with respect to which such liability was incurred.

2. Where a container, pallet or similar article of transport is used to consolidate goods, limitation based on the package or other shipping unit shall not be applicable.

The following paragraphs apply to all alternatives:

A franc means a unit consisting of 65.5 milligrams of gold or millesimal fineness 900.

The amount referred to in paragraph 1 of this article shall be converted into the national currency of the State of the court or arbitration tribunal seized of the case on the basis of the official value of that currency by reference to the unit defined in the preceding paragraph of this article on the date of the judgement or arbitration award. If there is no such official value, the competent authority of the State concerned shall determine what shall be considered as the official value for the purposes of this Convention.

Article 7. Actions in tort

1. The defences and limits of liability provided for in this Convention shall apply in any action against the carrier in respect of loss of or damage to the goods covered by the contract of carriage, as well as of delay in delivery, whether the action be founded in contract or in tort.

2. If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

3. The aggregate of the amounts recoverable from the carrier and any persons referred to in the preceding paragraph shall not exceed the limits of liability provided for in this Convention.

Article 8. Loss of right to limit liability

The carrier shall not be entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the damage resulted from an act or omission of the carrier, done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result. Nor shall any of the servants or agents of the carrier be entitled to the benefit of such limitation of liability with respect to damage resulting from an act or omission of such servants or agents, done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

Article 9. Deck cargo

1. The carrier shall be entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper, with the usage of the particular trade or with statutory rules or regulations.

2. If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier shall insert in the bill of lading or other document evidencing the contract of carriage a statement to that effect. In the absence of such a statement the carrier shall have the burden of proving that an agreement for carriage on deck has been entered into; however, the carrier shall not be entitled to invoke such an agreement against a third party who has acquired a bill of lading in good faith.

3. Where the goods have been carried on deck contrary to the provisions of paragraph 1 of this article, the carrier shall be liable for loss of or damage to the goods, as well as for delay in delivery, which results solely from the carriage on deck, in accordance with the provisions of articles 6 and 8. The same shall apply when the carrier, in accordance with paragraph 2 of this article, is not entitled to invoke an agreement for carriage on deck against a third party who has acquired a bill of lading in good faith.

4. Carriage of goods on deck contrary to express agreement for the carriage under deck shall be deemed to be an act or omission of the carrier within the meaning of article 8.

Article 10. Liability of contracting carrier and actual carrier

1. Where the contracting carrier has entrusted the performance of the carriage or part thereof to an actual carrier, the contracting carrier shall nevertheless remain responsible for the entire carriage according to the provisions of this Convention. The contracting carrier shall, in relation to the carriage performed by the actual carrier, be responsible for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment.

2. The actual carrier also shall be responsible, according to the provisions of this Convention, for the carriage performed by him. The provisions of paragraphs 2 and 3 of article 7 and of the second sentence of article 8 shall apply if an action is brought against a servant or agent of the actual carrier.

3. Any special agreement under which the contracting carrier assumes obligations not imposed by this Convention or any waiver of rights conferred by this Convention shall affect the actual carrier only if agreed by him expressly and in writing.

4. Where and to the extent that both the contracting carrier and the actual carrier are liable, their liability shall be joint and several.

5. The aggregate of the amounts recoverable from the contracting carrier, the actual carrier and their servants and agents shall not exceed the limits provided for in this Convention.

6. Nothing in this article shall prejudice any right of recourse as between the contracting carrier and the actual carrier.

Article 11. Through carriage

1. Where a contract of carriage provides that the contracting carrier shall perform only part of the carriage covered by the contract, and that the rest of the carriage shall be performed by a person other than the contracting carrier, the responsibility of the contracting carrier and of the actual carrier shall be determined in accordance with the provisions of article 10.

2. However, the contracting carrier may exonerate himself from liability for loss, damage or delay in delivery caused by events occurring while the goods are in the charge of the actual carrier, provided that the burden of proving that any such loss, damage or delay in delivery was so caused, shall rest upon the contracting carrier.

Part III. Liability of the shipper

Article 12. General rule

The shipper shall not be liable for loss or damage sustained by the carrier, the actual carrier or by the ship unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents.

Article 13. Special rules on dangerous goods

1. When the shipper hands dangerous goods to the carrier, he shall inform the carrier of the nature of the goods and indicate, if necessary, the character of the danger and the precautions to be taken. The shipper shall, whenever possible, mark or label in a suitable manner such goods as dangerous.

2. Dangerous goods may at any time be unloaded, destroyed or rendered innocuous by the carrier, as the circumstances may require, without payment of compensation by him where they have been taken in charge by him without knowledge of their nature and character. Where dangerous goods are shipped without the carrier having knowledge of their nature or character, the shipper shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

3. Nevertheless, if such dangerous goods, shipped with knowledge of their nature and character, become a danger to the ship or cargo, they may in like manner be unloaded, destroyed or rendered innocuous by the carrier, as the circumstances may require, without payment of compensation by him except with respect to general average, if any.

Part IV. Transport documents

Article 14. Issue of bill of lading

1. When the goods are received in the charge of the contracting carrier or the actual carrier, the contracting carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things the particulars referred to in article 15.

2. The bill of lading may be signed by a person having authority from the contracting carrier. A bill of lading signed by the master of the ship carrying the goods shall be deemed to have been signed on behalf of the contracting carrier.

Article 15. Contents of bill of lading

1. The bill of lading shall set forth among other things the following particulars:

(*a*) The general nature of the goods, the leading marks necessary for identification of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;

(*b*) The apparent condition of the goods;

(*c*) The name and principal place of business of the carrier;

(*d*) The name of the shipper;

(*e*) The consignee if named by the shipper;

(*f*) The port of loading under the contract of carriage and the date on which the goods were taken over by the carrier at the port of loading;

(*g*) The port of discharge under the contract of carriage;

(*h*) The number of originals of the bill of lading;

(*i*) The place of issuance of the bill of lading;

(*j*) The signature of the carrier or a person acting on his behalf; the signature may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if the law of the country where the bill of lading is issued so permits;

(*k*) The freight to the extent payable by the consignee or other indication that freight is payable by him; and

(*l*) The statement referred to in paragraph 3 of article 23.

2. After the goods are loaded on board, if the shipper so demands, the carrier shall issue to the shipper a "shipped" bill of lading which, in addition to the particulars required under paragraph 1 of this article, shall state that the goods are on board a named ship or ships, and the date or dates of loading. If the carrier has previously issued to the shipper a bill of lading or other document of title with respect to any of such goods, on request of the carrier, the shipper shall surrender such document in exchange for the "shipped" bill of lading. The carrier may amend any previously issued document in order to meet the shipper's demand for a "shipped" bill of lading if, as amended, such document includes all the information required to be contained in a "shipped" bill of lading.

3. The absence in the bill of lading of one or more particulars referred to in this article shall not affect the validity of the bill of lading.

Article 16. Bills of lading: reservations and evidentiary effect

1. If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier or other person issuing the bill of lading on his behalf knows or has reasonable grounds to suspect do not accurately represent the goods actually taken over or, where a "shipped" bill of lading is issued, loaded, or if he had no reasonable means of checking

such particulars, the carrier or such other person shall make special note of these grounds or inaccuracies, or of the absence of reasonable means of checking.

2. When the carrier or other person issuing the bill of lading on his behalf fails to note on the bill of lading the apparent condition of the goods, he is deemed to have noted on the bill of lading that the goods were in apparent good condition.

3. Except for particulars in respect of which and to the extent to which a reservation permitted under paragraph 1 of this article has been entered:

(*a*) The bill of lading shall be *prima facie* evidence of the taking over or, where a "shipped" bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading; and

(*b*) Proof to the contrary by the carrier shall not be admissible when the bill of lading has been transferred to a third party, including any consignee, who in good faith has acted in reliance on the description of the goods therein.

4. A bill of lading which does not, as provided in paragraph 1, subparagraph (*k*) of article 15, set forth the freight or otherwise indicate that freight shall be payable by the consignee, shall be *prima facie* evidence that no freight is payable by the consignee. However, proof to the contrary by the carrier shall not be admissible when the bill of lading has been transferred to a third party, including any consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication.

Article 17. Guarantees by the shipper

1. The shipper shall be deemed to have guaranteed to the carrier the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading. The shipper shall indemnify the carrier against all loss, damage or expense resulting from inaccuracies of such particulars. The shipper shall remain liable even if the bill of lading has been transferred by him. The right of the carrier to such indemnity shall in no way limit his liability under the contract of carriage to any person other than the shipper.

2. Any letter of guarantee or agreement by which the shipper undertakes to indemnify the carrier against loss, damage or expense resulting from the issuance of the bill of lading by the carrier, or a person acting on his behalf, without entering a reservation relating to particulars furnished by the shipper for insertion in the bill of lading, or to the apparent condition of the goods, shall be void and of no effect as against any third party, including any consignee, to whom the bill of lading has been transferred.

3. Such letter of guarantee or agreement shall be valid as against the shipper unless the carrier or the person acting on his behalf, by omitting the reservation referred to in paragraph 2 of this article, intends to defraud a third party, including any consignee, who acts in reliance on the description of the goods in the bill of lading. If in such a case, the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier shall have no right of indemnity from the shipper pursuant to paragraph 1 of this article.

4. In the case referred to in paragraph 3 of this article the carrier shall be liable, without the benefit of the limitation of liability provided for in this Convention, for any loss, damage or expense incurred by a third party, including a consignee, who has acted in reliance on the description of the goods in the bill of lading issued.[b]

Article 18. Documents other than bills of lading

When a carrier issues a document other than a bill of lading to evidence a contract of carriage, such a document shall be *prima facie* evidence of the taking over by the carrier of the goods as therein described.

PART V. CLAIMS AND ACTIONS

Article 19. Notice of loss, damage or delay

1. Unless notice of loss or damage, specifying the general nature of such loss or damage, be given in writing by the consignee to the carrier not later than at the time the goods are handed over to the consignee, such handing over shall be *prima facie* evidence of the delivery of the goods by the carrier in good condition and as described in the document of transport, if any.

2. Where the loss or damage is not apparent, the notice in writing must be given within 10 days after the completion of delivery, excluding that day.

3. The notice in writing need not be given if the state of the goods has at the time of their delivery been the subject of joint survey or inspection.

4. In the case of any actual or apprehended loss or damage the carrier and the consignee shall give all reasonable facilities to each other for inspecting and tallying the goods.

5. No compensation shall be payable for delay in delivery unless a notice has been given in writing to the carrier within 21 days from the time that the goods were handed over to the consignee.

6. If the goods have been delivered by an actual carrier, any notice given under this article to the actual carrier shall have the same effect as if it had been given to the contracting carrier.

Article 20. Limitation of actions

1. The carrier shall be discharged from all liability whatsoever relating to carriage under this Convention unless legal or arbitral proceedings are initiated within [one year] [two years]:

(*a*) In the case of partial loss of or damage to the goods, or delay, from the last day on which the carrier has delivered any of the goods covered by the contract;

(*b*) In all other cases, from the ninetieth day after the time the carrier has taken over the goods or, if he has not done so, the time the contract was made.

2. The day on which the period of limitation begins to run shall not be included in the period.

[b] In regard to drafting changes that may be necessary, see A/CN.9/105, sect. B, foot-note 17; UNCITRAL Yearbook, Vol. VI: 1975, part two, IV, 3.

3. The period of limitation may be extended by a declaration of the carrier or by agreement of the parties after the cause of action has arisen. The declaration or agreement shall be in writing.

4. The provisions of paragraphs 1, 2 and 3 of this article shall apply correspondingly to any liability of the actual carrier or of any servants or agents of the carrier or the actual carrier.

5. An action for indemnity against a third person may be brought even after the expiration of the period of limitation provided for in the preceding paragraphs if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall not be less than ninety days commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself.

Article 21. Jurisdiction

1. In a legal proceeding arising out of the contract of carriage the plaintiff, at his option, may bring an action in a contracting State within whose territory is situated:

(*a*) The principal place of business or, in the absence thereof, the ordinary residence of the defendant; or

(*b*) The place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(*c*) The port of loading; or

(*d*) The port of discharge; or

(*e*) A place designated in the contract of carriage.

2. (*a*) Notwithstanding the preceding provisions of this article, an action may be brought before the courts of any port in a contracting State at which the carrying vessel may have been legally arrested in accordance with the applicable law of that State. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph 1 of this article for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action;

(*b*) All questions relating to the sufficiency or otherwise of the security shall be determined by the court at the place of the arrest.

3. No legal proceedings arising out of the contract of carriage may be brought in a place not specified in paragraphs 1 and 2 of this article. The provisions which precede do not constitute an obstacle to the jurisdiction of the contracting States for provisional or protective measures.

4. (*a*) Where an action has been brought before a court competent under paragraphs 1 and 2 of this article or where judgement has been delivered by such a court, no new action shall be started between the same parties on the same grounds unless the judgement of the court before which the first action was brought is not enforceable in the country in which the new proceedings are brought;

(*b*) For the purpose of this article the institution of measures with a view to obtaining enforcement of a judgement shall not be considered as the starting of a new action;

(*c*) For the purpose of this article the removal of an action to a different court within the same country shall not be considered as the starting of a new action.

5. Notwithstanding the provisions of the preceding paragraphs, an agreement made by the parties after a claim under the contract of carriage has arisen, which designates the place where the claimant may bring an action, shall be effective.

Article 22. Arbitration

1. Subject to the rules of this article, parties may provide by agreement that any dispute that may arise under a contract of carriage shall be referred to arbitration.

2. The arbitration proceedings shall, at the option of the plaintiff, be instituted at one of the following places:

(*a*) A place in a State within whose territory is situated

(i) The port of loading or the port of discharge, or

(ii) The principal place of business of the defendant or, in the absence thereof, the ordinary residence of the defendant, or

(iii) The place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(*b*) Any other place designated in the arbitration clause or agreement.

3. The arbitrator or arbitration tribunal shall apply the rules of this Convention.

4. The provisions of paragraphs 2 and 3 of this article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

5. Nothing in this article shall affect the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage has arisen.

PART VI. DEROGATIONS FROM THE CONVENTION

Article 23. Contractual stipulations

1. Any stipulation of the contract of carriage or contained in a bill of lading or any other document evidencing the contract of carriage shall be null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation shall not affect the validity of the other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of the goods in favour of the carrier, or any similar clause, shall be null and void.

2. Notwithstanding the provisions of paragraph 1 of this article, a carrier may increase his responsibilities and obligations under this Convention.

3. When a bill of lading or any other document evidencing the contract of carriage is issued, it shall

contain a statement that the carriage is subject to the provisions of this Convention which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee.

4. Where the claimant in respect of the goods has incurred loss as a result of a stipulation which is null and void by virtue of the present article, or as a result of the omission of the statement referred to in the preceding paragraph, the carrier shall pay compensation to the extent required in order to give the claimant full compensation in accordance with the provisions of this Convention for any loss of or damage to the goods as well as for delay in delivery. The carrier shall, in addition, pay compensation for costs incurred by the claimant for the purpose of exercising his right, provided that costs incurred in the action where the foregoing provision is invoked shall be determined in accordance with the law of the court seized of the case.

Article 24. General average

Nothing in this Convention shall prevent the application of provisions in the contract of carriage or national law regarding general average. However, the rules of this Convention relating to the liability of the carrier for loss of or damage to the goods shall govern the liability of the carrier to indemnify the consignee in respect of any contribution to general average.

Article 25. Other conventions

1. This Convention shall not modify the rights or duties of the carrier, the actual carrier and their servants and agents, provided for in international conventions or national law relating to the limitation of liability of owners of seagoing ships.

2. No liability shall arise under the provisions of this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(*a*) Under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of 28 January 1964 or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or

(*b*) By virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions.

II. Comments by Governments

AFGHANISTAN

[*Original: English*]

The Government of Afghanistan has studied the draft convention on the carriage of goods by sea, and believes that such a convention will facilitate the regulation of the international trade and would contribute to its further expansion.

AUSTRALIA

[*Original: English*]

1. The Australian Government continues to support the object of the convention, namely the revision of the Hague Rules, 1924, although there are some aspects of the draft which cause concern. Australia's final attitude would depend upon those matters presently causing concern being resolved before the convention proceeded to a diplomatic conference.

2. Australia considers that the provisions relating to liability in article 5 of the draft convention are fundamental in determining an over-all attitude to the draft convention. Article 5 in conjunction with the monetary level set in article 6 will have significant economic consequences to shipper, carrier and insurance interests. Australia is presently invstigating what those economic consequences may be and therefore has no firm view on article 5. However, it is hoped that a firm attitude to the draft convention will have been formulated by the ninth session in 1976.

3. It is Australia's view that the draft convention should apply to the sea leg of a multimodal movement of cargo. As presently drafted the convention may be interpreted to apply solely to conventional port to port carriage, thereby excluding carriage under a "through bill of lading" or under any contract of carriage covering another mode of carriage in addition to a sea carriage.

4. There are some minor drafting ambiguities which could exacerbate the inevitable interpretative litigation that would follow implementation of the convention. However, it is considered that these could be rectified at the ninth session of UNCITRAL or at a diplomatic conference.

AUSTRIA

[*Original: English*]

GENERAL

In relation to the Brussels Convention of 1924 on the Unification of Certain Rules relating to Bills of Lading, as amended by the Brussels Protocol of 1968, the draft represents a very great advance with respect to both form and content. Generally speaking, it may therefore be considered a welcome step forward. Its general pattern corresponds to that of conventions on the carriage of goods by other means of transport, either already existing or in the process of being drafted.

Article 5

Paragraph 1 construes the carrier's liability as liability for fault with reversed *onus probandi*. There is no objection to that. Paragraph 4, on the other hand, stipulates that the *onus probandi* shall not be reversed for damage caused by a fire on board ship. But precisely in the case of fire, the claimant will rarely be in a position to prove what caused the fire. This is a question concerning events on board the carrier's ship which are entirely under the carrier's control. Hence paragraph 4 should be deleted, which would make paragraph 1 applicable to damage caused by fires as well.

Article 6

Alternative B is preferable. It would be a hardship for the carrier to be liable for delay up to the same limit as he is for loss or damage of the goods. If the limitation is based alternatively on shipping units or weight, this only leads to unnecessary difficulties: the liability limit will then largely depend on the quantity of goods placed in one package. Recent conventions on international goods carriage by other means of transport invariably

stipulate that the weight of the goods lost, damaged or delayed is to be the only criterion.

As regards the question whether the carrier's liability for delay should not exceed the freight or double the freight, there are precedents for both provisions. Hence either solution is acceptable.

Article 8

It follows from this article that the carrier can claim limited liability where he himself has committed a gross fault (except where his behaviour was definitely wanton and reckless) or even where the people for whom he is normally liable act with malicious intent. This is in keeping with the rules laid down in other conventions relating to the law of the sea, but it is unfair to the person entitled to the goods. The carrier should be liable without limitation whenever the damage has been caused by gross negligence—either by himself or by his servants or agents. Similarly, these servants or agents for their part should be liable without limitation for any damage they cause by gross negligence.

Article 20

As the period of limitation may, under paragraph 1 (*b*), start to run as early as the ninetieth day after the conclusion of the contract, and the contract may have been made long before carriage actually starts, two years is preferable.

The second sentence of paragraph 5 gives rise to some doubts, since the rule it lays down for the period of limitation in actions for indemnity against a third person—in fact, any and all such actions—may be inconsistent with obligations undertaken by a State by virtue of some other international agreement. The second sentence should therefore be deleted. But since, without the second sentence, the first sentence states no more than a truism, it would be advisable to omit paragraph 5 altogether.

Article 21

In some countries difficulties with regard to judicial procedure may arise from the application of paragraph 2, which states that though *forum arresti* is the general rule, this may be avoided if the defendant furnishes adequate security.

Generally speaking, it is not helpful if an agreement specifies rules on jurisdiction but fails to make provision for the recognition and enforcement of the judgements delivered by the courts in the contracting States that are competent by virtue of the agreement. The defendant may have assets in a contracting State whose courts lack jurisdiction by virtue of paragraph 1, and the plaintiff will not be able to touch these assets because the judgement issued by the court competent under paragraph 1 is not enforceable in that contracting State, and a new action in that State is ruled out by the convention. It is therefore worth considering whether article 21 should not perhaps be complemented by provisions on the recognition and enforcement of judgements.

Article 25

The end of subparagraph (*b*) of paragraph 2 calls for comparisons between national law and two international conventions in order to determine which of them is more favourable to the person entitled to the goods. In some cases it will be almost impossible to answer this question. It should therefore suffice to lay down that the operator of a nuclear installation shall be liable in accordance with applicable national law. As past experience shows, this liability will always be stricter, as far as its general nature and limits, if any, are concerned, than is the carrier's liability under the present draft convention. Hence the qualification in subparagraph (*b*) of paragraph 2 should be omitted.

BELGIUM

[*Original: French*]

A. GENERAL COMMENTS

The Belgian Government and the Belgian maritime authorities take a generally favourable view of the texts drafted by the UNCITRAL Working Group.

The Belgian Government is happy to note that an area of agreement has been found among delegations from different continents whose legal systems and philosophical or moral ideas are often very different from one another. It sees this as an encouraging sign for the implementation of other projects which are as ambitious in scope as the Convention on the Carriage of Goods by Sea.

It also welcomes the results achieved by the UNCITRAL Working Group.

The sought-after balance between the interests of the carriers and those of the owners of cargoes, including persons who dispatch, ship or take delivery of goods on the latter's behalf, may be regarded as on the way to achievement. Actual practice will confirm the merits of this undertaking.

At the theoretical level at least, both with regard to their drafting and presentation and with regard to their substance, most of the provisions constitute a clear improvement over the texts of the 1924 Brussels Convention. The Belgian Government therefore hopes that the forthcoming Convention, elaborated in a broader framework, will prove as successful as the Convention which it is designed to replace and will have the same duration.

B. SPECIFIC COMMENTS

The Belgian Government does not feel that there is any need for it to submit, as part of these comments, any drafting proposals with regard to such provisions as the definition of the actual carrier and related articles or to article 2, paragraph 4. The Belgian delegation will make such proposals at a later stage.

The articles of the draft do not call forth any substantive comments, except for the ones which follow.

Article 5

1. The Belgian Government regrets the omission from article 5 of the clause relieving the carrier of liability for errors in navigation committed by the captain, members of the crew or persons servicing the ship.

By this term it means errors in navigation in the strict sense, thus excluding the commercial management of the ship.

It remains convinced that the omission of such a clause will not benefit any of the parties to the contract of carriage.

The main purpose of such a clause is to avoid disputes as to whether the operation of the ship had caused damage to goods, with the resulting protracted and costly legal claims. Another purpose is to keep down the cost of insurance and ensure that it can be directly and readily controlled by the shippers.

Lastly, the working conditions on board the ship are sometimes such that it would be unreasonable to make the carrier liable for acts committed in the course of their work by the persons responsible for the navigation of the ship.

2. Article 5, paragraph 4, contains a liability clause with regard to fire which departs from the general rule. The solution which it offers is acceptable but could also give rise to litigation.

The Belgian Government had preferred a more radical and clear-cut solution, i.e. the adoption of a clause providing for relief from liability in the case of fire as well.

3. The Belgian Government also regrets that in incorporating into the draft the principle of liability for delay—which it regards as a substantial improvement in the liability rules—it was thought necessary to depart from the wording of the 1924 Convention, which holds the carrier liable for any loss or damage to goods and not, as article 5, paragraph 1, of the draft puts it, for loss, damage or expense resulting from loss or damage.

This version not only departs from the wording of the Convention which the draft is designed to replace but also differs from the provisions of other international conventions on carriage.

In order to bring the draft into line with a legal view and doctrine firmly established on the basis of the wording of the 1924 Convention, we should revert to the language of that Convention.

Article 5, paragraph 1, would thus begin as follows:

> "The carrier shall be liable for any loss or damage to the goods and for any harm resulting from delay in delivery if the occurrence which caused the loss, damage or harm took place . . . (etc.)".

Article 6

At this stage, the Belgian Government does not wish to endorse any of the alternatives proposed under article 6.

However, it notes that those concerned with sea transport would not be opposed to a simpler formula than the dual method of computation (unit and weight) which was provided for in the Protocol to Amend the 1924 Convention and adopted in 1968. At the same time, this simple formula is acceptable only on condition that the limits of liability are not substantially extended as a result.

The Belgian Government also recognizes the urgent need to find some other means of determining the basic reference currency.

It can support the system of special drawing rights, which has been accepted by the International Monetary Fund and has been proposed in the International Civil Aviation Organization (ICAO).

Article 16

The provision at the end of paragraph 1, which requires a carrier wishing to enter a reservation to make special note of his grounds or of the inaccuracies or absence of reasonable means of checking, is contrary to a commercial practice which has never given rise to any serious difficulties. If adopted, it could complicate the process of completing documents or delay the shipment of the goods.

Article 21

We have two comments on this article.

1. As a result of paragraph 1 (*b*), the legal proceeding might be removed from the place where the contract was made, which might be contrary to the interests of the parties to the dispute.

Since in practice the carrier will seek to avoid placing himself under the jurisdiction of a court which is distant from his area of business or from the place where the contract was made, he will take care to conclude contracts in respect of which he will be able to defend his interests effectively, which will not be the case when he acts on behalf of the shippers through an agency.

Thus, the reference to an "agency" will impede, to the detriment of the shippers, negotiations for the conclusion of a contract of carriage on the spot.

A recent convention (the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea) contains a more acceptable formula in article 17.

The same comment applies to article 22, paragraph 2 (*d*) (iii).

2. The second sentence of paragraph 2 (*a*) is not acceptable because in its application it might conflict with the 1952 Brussels Convention for the Unification of Certain Rules concerning the Arrest of Seagoing Ships, which Belgium has ratified (see article 7 of this Convention).

Under certain circumstances, this Convention gives the court of the State in which the ship was arrested jurisdiction to decide on the substance of the case. If the plaintiff has the arrest made in order to safeguard his interests, he does not have the option of removing the action, at the request of the defendant, to the jurisdiction of another court.

We therefore propose that the sentence should be deleted.

Article 24

This article should be worded in such a way that the application of rule D of the York-Antwerp Rules is not affected by the provisions of the Convention under consideration.

BYELORUSSIAN SOVIET SOCIALIST REPUBLIC

[*Original: Russian*]

The draft convention on the carriage of goods by sea prepared by the United Nations Commission on International Trade Law contains a number of provisions which give rise to doubts and require clarification. As far as the name of the convention is concerned, it should be noted that the proposed formula is too broad. As can be seen from the text of the convention, it deals with

a number of the main questions relating to the contract for carriage of goods by sea but not with all of them. It would seem advisable to take that fact into account when the draft is finalized.

Article 1

1. It seems inadvisable to include in paragraph 4, which defines the term "goods", a provision to the effect that "goods" include "live animals".

2. In the definition of the term "contract of carriage" in paragraph 5, it should be stipulated that the contract must be drawn up in writing.

Article 2

The words "unless such holder is a charterer" should be added at the end of paragraph 4, which deals with the application of the convention.

Article 4

The last part of paragraph 1, beginning with the words "at the port of loading", can be deleted, since the period during which the goods are in the charge of the carrier is in fact defined in paragraph 2 of this article.

Article 5

1. There seems no purpose in including paragraph 5 in the article since paragraph 1 presumably establishes, on the basis of the general principle, that the carrier is without fault and therefore relieved of any liability where damage has resulted from the "special risks" inherent in the carriage of live animals.

2. Paragraph 6, which relieves the carrier of any liability for loss, damage or delay in delivery resulting from measures to save life and from reasonable measures to save property at sea, requires some clarification. In particular, the criterion of "reasonableness" may in the present instance have an adverse effect on compliance by the masters of cargo vessels with the traditional laws of navigation, including the provision of assistance to ships in distress.

Article 6

Alternative D, variation X—"the freight"—is to be preferred for future consideration of this article, which establishes the limits of liability.

Article 8

The words "or recklessly and with knowledge that such damage would probably result" at the end of the first sentence should be deleted, since it would be extremely difficult to prove the existence of such subjective circumstances.

Article 9

1. It would be desirable to make paragraph 1 more specific by referring to the applicable rules or regulations of the legislation of a particular country, such as "the country of the port of loading".

2. It would probably be advisable to make certain drafting changes in paragraph 3 and, in particular, to formulate more clearly its main provision to the effect that articles 6 and 8 apply where goods have been unlawfully carried on deck and there has been loss, damage or delay in delivery which results solely from the carriage on deck.

3. The notation in the bill of lading that goods have been carried on deck is an important element both in the relationship between the shipper and the consignee and in that between the carrier and the owner of the goods. It would therefore be advisable to include such a provision at the beginning of article 9 or in article 15.

Article 11

It would seem advisable for paragraph 1 to include a provision which defines more specifically the situations envisaged in articles 10 and 11 by stating that those articles refer to cases in which the contract contains a special clause and that the carrier is performing only the stipulated part of the carriage.

Article 16

A provision should be included at the end of paragraph 1 to the effect that, under specified conditions, the carrier is entitled to enter in the bill of lading an appropriate reservation with regard to those particulars concerning the goods which he had grounds for questioning or which he was unable to check.

Article 17

1. Paragraph 3 can probably be deleted since the questions dealt with in it can be resolved in accordance with the provisions of national law.

2. Paragraph 4 can also be omitted since article 8 already makes provision for resolving the questions with which it deals.

Article 19

1. In paragraph 2, just as in paragraphs 1 and 5, the time used in calculating the period within which the consignee must give notice in writing to the carrier should be made uniform by specifying the time when "the goods are handed over to the consignee".

2. It would be advisable for paragraph 6 to include a provision to the effect that the notice to the carrier would also be regarded as valid in relation to an actual carrier who has performed part of the carriage.

Article 20

Paragraph 3 should be worded in the same manner as article 22, paragraph 2, of the 1974 Convention on the Limitation Period in the International Sale of Goods, which reads as follows: "The debtor may at any time during the running of the limitation period extend the period by a declaration in writing to the creditor. This declaration may be renewed."

Article 21

There seems no purpose in including this article in the text of the convention since the problem of jurisdiction with which it deals is too complex and is outside the scope of the convention. The problem should obviously be left to be dealt with in accordance with the provisions of national law. An alternative might be to provide that the rule concerning jurisdiction contained in paragraph 1 (*a*), (*b*), (*c*) and (*d*) is to apply in cases where the competent court is not specified in the contract of carriage itself.

Article 22

The inclusion of this article in the draft is of questionable value since it might result in failure to make use—in relation to contracts for carriage of goods by sea—of the widely recognized procedure of arbitration, which has a number of advantages in comparison with judicial proceedings, particularly in that it is more efficient, simpler and much less expensive.

CANADA

[*Original: English*]

I. GENERAL COMMENTARY ON THE DRAFT TEXT

Although the quality of the drafting makes it difficult to obtain a complete understanding of the legal and commercial implications of the proposed Convention, there appears to be a significant departure from the existing Hague Rules.[1] The legal system of liability which the draft attempts to establish is close to the general law of contract but it goes some way towards recognizing the necessity to protect the consignee, who is not normally a party to the conclusion of the contract of carriage. To this end, the draft more or less proposes a legal system which recognizes the concept of the holder in due course of a negotiable instrument of commerce, while simultaneously regulating in some degree the outlines of the over-all relationship between the parties to a contract of carriage.

It is apparent that the drafters have attempted to cover every foreseeable situation. In so doing, not only have they, in many instances, stipulated in a manner apparently inconsistent with what Canada would understand to be the over-all intent of the Convention, but they may have lost some of the perspective of the purpose of a convention on the carriage of goods by sea. It is the Canadian opinion that a convention would be desirable to the extent that it established a uniform international understanding of the relationship between the parties to a contract of carriage and protected those who do not have the opportunity knowingly to agree to the terms of the contract, but who are affected by it. The Canadian commentary on the draft Convention flows from the basic premise that:

Where the contract is one of adhesion, or where the consignee or other receiver of the goods was not a party to the concluding of the contract of carriage, a convention is needed to make the terms and conditions of such a contract fair and reasonable for those "innocent" parties while, at the same time, striking an equitable balance between the parties to the contract.

In the light of this basic premise a number of others have been evolved and it is upon these that a detailed commentary on the draft is subsequently formulated.

It is the Canadian opinion that the proposed Convention should, as its name implies, apply only to the carriage of goods by sea and, in particular, to those international aspects of maritime carriage which are properly subject to harmonization through an international convention for the carriage of goods by sea.

First premise

> In the interests of uniformity in its application, the Convention should provide only for those matters which are not properly the exclusive concern of the domestic law of contracting States.

Under this premise, the relationship between the carrier and pilot, stevedore or shiprepairer, for example, would be matters of national law.

The vicarious liability flowing from the relationship between the carrier and master, for example, is of a quite different nature, however. While the legal arrangements of such a relationship should be matters of national law, the Convention would apply to the servants and agents of both the carrier and the shipper.

Second premise

> The rights and liabilities of the carrier under the Convention in relation to a contract of carriage should extend to his servants and agents.

It is well known that, in international maritime transport, there is no formal document known as a contract of carriage as it exists in other transport modes. The argument as to whether or not a bill of lading is a contract of carriage, continues. Some consideration has been given to the practicability of suggesting that perhaps a convention on the carriage of goods by sea should be brought into line with other transport modes by providing for the terms and conditions of a contract of carriage but it was concluded that, on balance, such a proposal is unlikely to command universal support at the present time.

Third premise

> The Convention should apply strictly to the performance of a contract of carriage by sea. It should codify some mandatory elements of the relationship between the parties to a contract of carriage, namely, the carrier and the shipper, and especially their rights and liabilities, while protecting the right of the consignee or other person authorized by him to take delivery of the goods in the same condition as when they were shipped. The contract of carriage, concluded on the basis of good faith, should not be allowed to alter or overrule any of these rights and liabilities: thus, the Convention should be binding upon the parties and there should be no opportunity for opting out.

In Canadian legislation, the Carriage of Goods by Water Act provides, *inter alia,* that the Hague Rules shall apply to outward cargoes only. In the interests of uniformity and to encourage the adoption of the new Convention by as many States as possible:

Fourth premise

> The Convention should apply to the carriage of all goods by sea. The Convention should apply to cargoes outwards and inwards, but not to domestic carriage unless it is determined by each State individually that the application of the Convention to such carriage is in its public interest.

As a measure of the good faith aspects of the contract of carriage, the carrier and the shipper should have certain fundamental duties, respectively as follows:

[1] International Convention for the Unification of Certain Rules of Law relating to Bills of Lading. Brussels, 25 August 1924.

Fifth premise

The carrier should have a duty to provide and maintain a vehicle of transport suitable to the nature of the goods to be carried. During the period of his responsibility for the goods, the carrier should have a duty to care for the goods as if they were his own.

Sixth premise

The shipper should have a duty to inform the carrier of the true nature of the goods to be carried, of any special vice inherent in them and of any special characteristics of the goods which might bear upon the manner in which they would be loaded, handled, stowed, cared for and discharged.

On the understanding, expressed in the first and third premises that the Convention would apply only to matters which are not properly the exclusive concern of the domestic law of contracting States, and strictly to the carriage of goods by sea, Canada supports the apparent intent of the draft that the Convention should apply to the whole period of responsibility of the carrier.

Seventh premise

The period of the carrier's responsibility for the goods should be limited to and extend from the time when the goods come under his control to the time when he relinquishes control over the goods by handing them over to the consignee or other authorized person.

With respect to carrier liability, none of the five draft alternatives proposed concerning its quantification provide, at the same time, a satisfactory solution to uncertainties of gold as a monetary unit of measure, nor to the various court decisions as to the meaning of a "package" nor to liability relating to a "unit of weight". Canada has given consideration to relating the quantum of carrier liability to the insured value of the cargo or to a mandatory declared value on a bill of lading. It was found, however, that to do so, might require the shipper to reveal information to the carrier which, for commercial reasons, he may wish to keep confidential. Consideration was also given to the idea that the quantum of liability of the carrier for goods of undeclared value while they are in his control might be limited in direct relation to the amount paid as freight, in accordance with a formula to be determined. This suggestion is itself not wholly free of difficulty and may lead to some inequities, but it appears to be at the least worthy of further analysis and examination of its application in practice.

The role and purpose of a bill of lading continues to be argued at a time when consideration is being given to the further development of through bills of lading in multimodal transport and even to the possible demise of the bill of lading as it has been known for many years. The transmission of information respecting goods by means of EDP or ADP and the wide use of documentary credits seem to point the way towards the emergence of an entirely new régime of transport documentation. In the meantime, however, it appears essential to continue to recognize the importance and significance of the bill of lading.

Eighth premise

The Convention should recognize a bill of lading as the document of transport which would serve, in the absence of a formal contract of carriage, as a document of title, a receipt for goods shipped and as evidence of a contract of carriage. The issue of a bill of lading by the carrier would constitute an undertaking by him to deliver the goods to the person named therein or to the endorsee thereof or to the person entitled to take delivery of the goods.

The term "bill of lading" would, of course, need to be so defined as to give effect to this eighth premise.

It is consistent with the first, third and fourth premises and with the purpose and intent of the others that the ninth and final premise be:

Ninth premise

The Convention should not apply to multimodal carriage but strictly to the carriage of goods by sea, determined by the period of responsibility of the carrier as provided in the Convention.

II. CLAUSE BY CLAUSE COMMENTARY ON THE DRAFT TEXT

(*Note*: The numbering of the paragraphs of the draft has been followed in this commentary.)

Article 1. Definitions

Paragraph 1

Except, possibly, in some time charters where the carrier is not known, the Hague Rules definition of "carrier" is not perceived to have given rise to difficulty or uncertainty. The definition of "carrier" in the UNCITRAL draft is considered an improvement because it identifies the carrier in terms of his contractual arrangement with the shipper and as a party to the contract of carriage. It would, however, be inconsistent with the premises, previously expressed, to agree to the inclusion of the term "contracting carrier" with that of "carrier". The drafters themselves seem to have been uncertain as to the exact relationship between the carrier and the contracting carrier and no practical usefulness can be seen in the inclusion of the term "contracting carrier" with that of "carrier", nor can any advantage be seen in the interchangeability of these terms. The exporter (shipper) must always know with whom he has contracted for the carriage of goods and nothing should prevent him from contracting directly with the actual carrier nor from his right of action against him. The inclusion of the term "contracting carrier" with that of "carrier" as well as its introduction into the Convention places these rights in some doubt and may necessitate an examination of the traditional principal-agent relationships and of existing agency agreements because more responsibilities would fall to the ship's agent if the term was retained. Moreover, shippers might be compelled to always deal through freight forwarders rather than directly with the carrier if the term "contracting carrier" was retained. Freight forwarders are said to be used less in Canada than in some other developed countries and this is the situation preferred by Canadian shippers. Article 1 (1) should, therefore, be worded as follows:

"1. Carrier means any person by whom, or in whose name, a contract of carriage is made with a shipper."

Paragraph 2

Many of the arguments put forward with respect to the term "contracting carrier" apply to the inclusion of the term "actual carrier". While acknowledging the practice whereby a carrier will delegate some of his authority to a third party, this practice is perhaps best left to national law, since it is neither general nor uniform and it would not be desirable to incorporate this practice in an international legal instrument. Where the carrier intends, at the time he enters into a contract of carriage, to delegate some of his authority to a third party, such intent should be referred to in the contract of carriage. The inclusion of the terms "actual carrier" and "contracting carrier" would make unnecessarily rigid what are now flexible commercial practices and lead to higher shipper's costs. They should be left to a convention dealing with multimodal transport. Article 1 (2) should, therefore, be deleted.

Paragraph 3

The definition of "consignee" does not make clear if it means in fact any person in a position to surrender the bill of lading and the phrase "to take delivery of the goods" needs clarification as to the time when such delivery was to occur. The following wording is suggested:

"3. Consignee means the person named in a bill of lading or the endorsee thereof or the person entitled to take delivery of the goods."

Paragraph 4

The existing definition of "goods" in the Hague Rules is inadequate and the new definition is preferred. There is no objection to the inclusion of live animals provided the carrier is required to exercise due care in their carriage. Passenger luggage should be excluded from the definitions since these "goods" are covered in the Athens Convention.[2] There is, however, an important need for clarification as to the meaning of the phrase "article of transport". Packaging is an important cost consideration of the shipper. The purpose of packaging is to protect the goods, and freight costs include the cost of transporting the packaging along with the goods. Carrier interest is centred upon the security which the packaging provides the goods in terms of his responsibility for their handling and stowage. If the shipper were to supply such sophisticated articles of transport as containers (which is rarely the case in Canada for a number of reasons, including the cost of back-haul) there would undoubtedly be damage claims in respect of them against the carrier, and the carrier, in his turn, would protect himself by higher liability insurance which would be reflected in higher freight rates. It may be noted that damage claims against the carrier in respect of such locally reusable and marketable articles of transport as bags and pallets are not unknown in some countries and the likelihood of this practice spreading is considered to be high. We would suggest the following wording which would delete reference to the supply of such articles of transport by the shipper:

"4. Goods means anything to be carried under a contract of carriage, excluding passenger luggage, and where the goods are consolidated in a container, pallet or similar article of transport, such article of transport."

Paragraph 5

With some minor amendments, the definition of "contract of carriage" in the draft is preferred over the Hague Rules definition for its simplicity. With amendments, the text would read as follows (the use of the word "water" in place of "sea" should be noted as being a Canadian preference):

"5. Contract of carriage means a contract evidenced by a bill of lading whereby a carrier agrees with a shipper to carry goods by water, against payment of freight, from one place to another."

Paragraph 6

With a few minor drafting changes, the definition of "bill of lading" would meet practical requirements. The suggested wording which follows would assist in differentiating between a bill of lading and a contract of carriage, as defined:

"6. Bill of lading means a document of title, receipt for goods and a document which evidences the contract of carriage."

Article 2. Scope of application

In accordance with the premises, previously expressed, there should be a clear distinction between those matters which should fall under national law (such as the relationship between the carrier and pilot, wharfinger, warehouseman or stevedore) and those which might properly be a matter for uniform application in all States being a party to the Convention. Accordingly, Canada is opposed to a broadening of the scope of application into areas of national jurisdiction.

Paragraph 1

The opening words to paragraph 1 of article 2 might be drafted as follows:

"1. This Convention shall apply to all contracts of carriage by water between places in two different States if:"

In this article, wherever it appears, the word "port" should read "place".

Subparagraph (*c*) of paragraph 1 is considered redundant in light of subparagraph (*b*).

Inasmuch as the bill of lading, as defined, would be the document which evidences the contract of carriage, the Convention should give primacy to it, and, such other documents of transport as mates' receipts, dock receipts and booking notes should not be permitted to rebut the terms and conditions of the bill of lading. Accordingly, the phrase " or other document evidencing the contract of carriage" should be deleted from subparagraphs (*d*) and (*e*). Moreover, subparagraph (*e*) should be drafted as follows:

"(*e*) The bill of lading provides that this Convention or the legislation of any State giving effect to it is to govern the contract of carriage."

Paragraph 2

This paragraph is unnecessary and its inclusion is potentially dangerous. If the nationality of the ship has

[2] Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974.

no bearing upon the applicability of the provisions of paragraph 1 of article 2, it ought not to have any bearing upon the application of any of the other provisions of the Convention.

Paragraph 3

Acceptable.

Paragraph 4

It is unknown for the charterer and the consignee to be one and the same person. The shipper has frequently been placed in a number of conflict of interest situations by being, in addition to the shipper, the charterer and the consignee. Apart from observing these practices and noting that the term "charter-party" is not defined, there are no comments on this paragraph, beyond referring back to the basic premise of this commentary.

Article 3. Interpretation of the Convention

The wording for this article had been drawn from article 7 of the Convention on the Limitation Period in the International Sale of Goods and similar wording is to be found in article 15 of the Convention providing a Uniform Law on the Form of an International Will and Canada has no objection to the inclusion of this article.

Article 4. Period of responsibility

As previously expressed, Canada is opposed to any broadening of the Convention into areas of national jurisdiction and would not wish to see this article applied so as to prejudice the application of domestic law to matters which are exclusively domestic.

This article does not define adequately for commercial purposes the time at which the carrier took control of the goods although the article appears to be quite clear as to the handing over of the goods. The importance of this article was also considered in terms of conditions of sale (i.e. FOB, CIF, FAS) but it was decided that to mix conditions of sale with conditions of carriage might well confuse the passage of property with the passage of responsibility.

There would appear to be no opportunity in article 4 whereby the carrier might revise his period of responsibility in his favour or in favour of the shipper by suitable wording in a bill of lading or contract of carriage provided that the period of responsibility was made more certain. The carrier ought not to be allowed to vary his period of responsibility. On these grounds, there is no objection to the exclusion of article 7 of the Hague Rules.

Paragraph 1

From a legal viewpoint, perhaps the word "charge" may be the best in the circumstances, but possibly "control" would better reflect operational realities.

Paragraph 2

The expression "taken over" is not a proper expression for a legal text as it has no defined legal meaning. The opening words of paragraph 2 should be redrafted as follows:

"2. For the purposes of paragraph 1 of this article, a carrier shall be deemed to be in control of the goods from the time he takes possession of the goods until he has delivered the goods:"

There is no objection to subparagraph (*a*) but it is defeated by subparagraph (*b*) which might allow the stipulation of any provision with respect to the delivery to the consignee. The Convention should be more specific on the question of delivery to the consignee. It may also be advisable to include a provision relating to notices. To paragraph 2 should be added the expression: "this paragraph applies *mutatis mutandis* to the receipt of the goods by the carrier".

Paragraph 3

This paragraph should be redrafted as follows:

"3. In paragraphs 1 and 2 of this article, reference to the carrier or the consignee shall include the servant or agent or the carrier or consignee, respectively."

Article 5. General rules

As previously noted, there is no objection to the inclusion of live animals in the general definition of "goods", provided that the carrier be required to provide a proper ship and to exercise proper care for the goods (the "due diligence" clauses of the Hague Rules having been dropped from the UNCITRAL draft) and a suitable expression of these caveats should be included under this article.

Paragraph 1

Although there is no objection to the drafting of this paragraph, the use of the words "loss", "damage" and "expense" therein is somewhat at varince with their use under Canadian law. There should be uniform meaning given these words throughout the Convention and so as to remove confusion between physical and financial loss.

Paragraph 2

It is unclear from the present wording of this paragraph if the drafters intended to provide for frustration in the contract of carriage in a manner similar to frustration in charter-parties. Moreover, the paragraph would benefit from an exception provision where the whereabouts of the goods are known. In any case, paragraphs 1 and 2 should be redrafted as follows:

"1. The carrier shall be liable for loss of or damage to the goods as well as expense arising from such loss or damage if such loss or damage occurred while the goods were in his control as defined in article 4 unless the carrier proves that he took all measures reasonably necessary to avoid the occurrence and its consequences.

"2. The carrier shall be liable for delay in delivery of the goods as well as expense arising from such delay unless the carrier proves that he took all measures reasonably necessary to avoid the delay.

"3. For the purposes of paragraph 2 of this article, delay in delivery occurs when the goods have not been delivered at the place of discharge in accordance with the provisions of the contract of carriage within the time specified therein."

Paragraph 3

Acceptable.

Paragraph 4

This paragraph should be redrafted as follows:

"4. In case of damage, loss or delay caused by fire, the carrier shall be liable, provided the claimant proves that the fire arose due to fault or negligence on the part of the carrier, his servants or agents."

Paragraph 5

This paragraph should be deleted since there is now no reason specifically to cover live animals.

Paragraph 6

Apart from the diffiuctly of deciding what is "reasonable", this paragraph is acceptable.

Paragraph 7

The word "concurs" might be replaced by "contributes".

Article 6. Limits of liability

As presently worded, it would be difficult for a carrier fully to grasp the scope of his liability at the time of making a contract of carriage. Canadian contract law makes the contracting parties liable to make good the damages a prudent person could reasonably foresee at the time of making the contract as a necessary consequence of a breach of it.

None of the five alternatives proposed in this article fully resolve the difficulty of determining the quantum of liability of the carrier. Other possibilities, such as using the insured value of the goods or their declared value were considered but both of them would require disclosure by the shipper of information which he might wish, for commercial reasons, to remain confidential. The carrier's liability should be limited and such limitation should apply to loss of or damage to the goods as well as to delay. There seem to be a number of advantages to relating the carrier's limitation of liability to a function (multiple or fraction) of the freight but there is a lack of data and information as to its potential effect.

Article 7. Actions in tort

Paragraph 1

It may be noted that thre are more than two classes of action. If it is the intention of the drafters to apply the defences and limits to all classes of action, the expression "or in tort" should read "or otherwise".

Paragraph 2

It is not clear if the "servant or agent" referred to means the parties covered in paragraph 3 of article 4 and the reason why the same wording was not used is not understood. Read in conjunction with article 4, the intention of the drafters would appear to be to deem the goods in the control of the carrier as soon as they are "handled" by a person employed by him.

Paragraph 3

Acceptable.

Article 8. Loss of right to limit liability

There is a good deal of confusion and uncertainty in this article. It is noted that the word "damage" is used alone whereas the words "loss", "damage" and "expense" are used in paragraph 1 of article 5. Noting further that the whole of the second sentence is devoted to agents and servants, it would appear that the word "carrier" in the first sentence was not intended to include servants and agents. Accordingly, this article might be redrafted to provide that both the carrier and his servants would lose the benefit of the limitation of liability as provided in the first sentence and the second sentence might be deleted, ending the article at the first word "result".

Article 9. Deck cargo

Paragraph 1

To begin with, this paragraph should at least be drafted positively:

"1. Goods may be carried on deck in accordance with the contract of carriage, with the usage of the particular trade or with statutory rules or statutory regulations."

Secondly, the expression "statutory rules or statutory regulations" might be expressed by "statutory provisions". Furthermore, when this paragraph is read in conjunction with paragraph 3, it could be that there would be no liability for loss, damage or expense when the goods are carried on deck in accordance with this paragraph. Finally, even when redrafted as suggested, there may still be an opportunity for a carrier to agree with one shipper that his cargo be carried under deck for a premium while agreeing with a second shipper that his cargo be carried on deck at an apparent discount and for a carrier to give preferential treatment to a large shipper for under-deck space.

Paragraph 2

It is uncertain what the drafters mean by the word "statement" but it is assumed that such statements would not include printed clauses. The enforceability against third parties of statements in a document not a bill of lading is not clear. In the interests of clarity, reference to such other documents might be deleted.

Paragraph 3

The drafting in this paragraph is awkward. It is assumed the intention of the drafters was that the limit of liability remains unchanged except where goods are carried on deck contrary to an express agreement.

Paragraph 4

This paragraph could be considered unnecessary as any action by the carrier to deliberately breach a contract of carriage should be deemed to be an act to which article 8 would apply.

Article 10. Liability of contracting carrier and actual carrier

Inasmuch as the premises suggest that there be no reference in an international convention on the carriage of goods by water to third parties to whom the carrier, by means of national contract law, may choose to delegate some of his authority under a contract of carriage, this article might be deleted. Even if there be no reference to actual carriers as opposed to contracting carriers, it may still be appropriate to provide that the carrier shall always be personally liable notwithstanding that he may not have personally performed the contract.

If, however, reference to actual carriers as opposed to contracting carriers is retained, then this article does

have the advantage of simplifying the recourse of the claimant who will know of at least one person who would be primarily liable to make good his loss. The provisions of this article would greatly simplify the settlement of claims as the contracting carrier would be apt to settle quickly with the claimant and the indemnity that the contracting carrier may be in a position to obtain from the actual carrier will probably also be as easily determined in view of the direct contractual relationship in each case between the claimant and the party liable.

Article 11. Through carriage

The retention of this article would be inconsistent with the premises previously expressed, if in fact it applies to multimodal transport. At the eighth session of the UNCITRAL Working Group on International Legislation on Shipping there was some confusion and misunderstanding of this article and its inclusion in the present draft was supported by a very narrow vote. In any case, this article, to all intents and purposes, is in clear conflict with the provisions of article 10 and could create very serious problems relating to, for example, jurisdiction and the enforcement of judgements against actual carriers. No purpose seems to be served by the retention of this article as the situation envisaged could be otherwise arranged — by a first agreement to carry from point A to point B, then a subsequent agreement to carry from point B to point C for which latter carriage the original carrier would act only as agent and he would not be the contracting carrier.

Article 12. General rule

This article might be redrafted as follows:

"Neither the shipper nor his servants or agents shall be liable for loss of or damage to the goods nor for expense arising from such loss or damage unless such loss or damage was caused by the fault or neglect of the shipper, his servants, or agents."

At the UNCITRAL Working Group's eighth session, there was discussion on the practicability of providing further for the liability of the shipper. Canada is opposed to the development of such a concept in this Convention provided that the sixth premise relating to the fundamental duties of the shipper is provided for (possibly para. 1 of article 17 already does this).

Article 13. Special rules on dangerous goods

To begin with, the expression "dangerous goods" should be defined by reference to the International Convention for the Safety of Life at Sea.[3]

Paragraph 1

This paragraph raises questions about the use of the expression "if necessary" and "whenever possible". As to the first, it is uncertain if it is related to the character of the danger, or the experience of the shipper or the experience of the carrier or the custom of the trade. The second expression is best deleted. In consonance with the sixth premise, this paragraph might be redrafted along the following lines:

"1. The shipper shall, before the goods come under the control of the carrier, inform the carrier of the nature of the dangerous goods to be carried and of any special characteristics of the dangerous goods which might bear upon the manner in which they would be loaded, handled, stowed, cared for and discharged, as provided in article 4."

Paragraph 2

This paragraph might be redrafted as follows:

"2. The carrier may at any time unload, destroy or render innocuous, as the circumstances require, any dangerous goods under his control which have become a danger to life or property whether or not the carrier had knowledge of the nature or character of such dangerous goods."

Paragraph 3

This paragraph should be redrafted to provide that where the carrier or his servants unload, destroy or render innocuous dangerous goods shipped in accordance with paragraph 1, he does so without liability, but where the dangerous goods are unloaded, destroyed or rendered innocuous by reason of the failure of the carrier or of his servants to take the precautions indicated by the shipper, or by reason of an act or omission as provided in article 8, he shall be liable in accordance with article 5.

Article 14. Issue of bill of lading

Paragraph 1

This paragraph might be redrafted as follows:

"1. When the carrier takes control of the goods as provided in article 4, he shall issue to the shipper on demand a bill of lading showing among other things, the particulars referred to in article 15."

Paragraph 2

The present wording of this paragraph is ambiguous and the first sentence could be deleted as it is covered in subparagraph (*f*) of paragraph 1 of article 15. The second sentence could become a new paragraph 2 if it were redrafted as follows:

"2. A bill of lading signed by the master of the ship carrying the goods shall be deemed to have been issued on behalf of the carrier."

Article 15. Contents of bill of lading

Paragraph 1, subparagraph (f)

The question is raised of the propriety of inserting the date on the bill of lading (see subpara. (*f*) of para. 1). The bill of lading could become a self-serving document. The shipper would not be too concerned with the date indicated in the bill of lading but the consignee could be prejudiced if the carrier has indicated a date which is later than the actual date where the goods were taken under his control, thus losing the benefit of the Convention for the period not covered as a consequence of the date indicated on the bill of lading. The question of when the goods are taken under the control of the carrier should be left as a question of fact.

Article 16. Bills of lading: reservations and evidentiary effect

The effect of this whole article appears to provide a penalty for failure to comply with the provisions of subparagraphs (*b*) and (*k*) of paragraph 1 of article 15 but the drafting does not assist in deciding if these sanctions are sufficient.

[3] Signed at London, 17 June 1960.

Paragraph 1

As a general comment to this paragraph, it is unclear what the sanctions are vis-à-vis the carrier for failure to comply with the provisions of this paragraph.

Paragraphs 2, 3 and 4

The remaining paragraphs of this article would be acceptable if the article also provided that the issue of a bill of lading by the carrier constituted an undertaking by him to deliver the goods as specified therein.

Article 17. Guarantees by the shipper

Paragraph 1

This paragraph, when read in conjunction with paragraph 1 of article 16 where an obligation to check is imposed, could lead to some confusion. The intent of this paragraph seems to be to govern the relationship between the carrier and the shipper, whereas in paragraph 1 of article 16, the relationship between the holder of a bill of lading and the carrier is envisaged.

Paragraphs 2, 3 and 4

Canada favours deleting paragraphs 2, 3 and 4. Bills of lading should either reflect the state of the goods or not. Letters of indemnity are contentious and in most cases would be invalid as against public order being documents that *prima facie* are designed to mislead the subsequent holders of the bill of lading as to the condition of the goods as evidenced by the bill of lading.

Article 18. Documents other than bills of lading

The inclusion of this article would create considerable uncertainty as to the validity of the "other documents" envisaged and their status vis-à-vis the Convention. Other documents, such as those envisaged by this article, could be issued well in advance of the time when the carrier takes control of the goods. In any case, the matter appears to be adequately dealt with in paragraph 3 of article 23 and perhaps article 18 is unnecessary.

Article 19. Notice of loss, damage or delay

Paragraph 1

This paragraph might be redrafted using the wording preferred for article 4, as follows:

> "1. Unless notice of loss or damage specifying the general nature of such loss or damage is given by the consignee or such other person authorized to receive the goods, to the carrier, his servants or agents at the time when the carrier, his servants or agents deliver the goods as provided in paragraph 2 of article 4, such delivery shall be *prima facie* evidence of the condition of the goods as described in the bill of lading."

Paragraphs 2, 3, 4, 5 and 6

Paragraphs 2, 3, 4 and 5 are acceptable but, in the interests of consistency, paragraph 6 should be deleted.

Article 20. Limitation of action

Paragraph 1

It has not been possible to obtain consensus on the time period, but the majority in Canada seem to favour one year while recognizing that the tendency in some modern legislation is to extend the period when an action may be taken.

The word "initiated" should be replaced with "instituted".

With respect to subparagraphs (*a*) and (*b*) of this paragraph, the drafting of paragraph 6 of article 3 of the Hague Rules is preferred. It is recognized, however, that subparagraph (*b*) of this paragraph probably covers a new type or class of action in relation to the failure by the carrier to perform the contract by not even taking control of the goods. It may also probably relate to the earlier articles of the convention which envisage situations where the contract of carriage can be altogether frustrated for various reasons.

Paragraph 4

Paragraph 4 of this article should be deleted in the interests of consistency.

Article 21. Jurisdiction

Paragraph 1

This paragraph will greatly facilitate recourse by the claimant as it will probably settle many jurisdictional disputes raised in connexion with applications to serve outside of the jurisdiction before various national courts.

Paragraph 2 (a)

The opening phrase of this subparagraph should be redrafted in order to make it clear that an action may be brought before any court in contracting State that may have legally arrested the vessel concerned in lieu of the expression "courts of any port in a contracting State". National courts are not always set up with limited geographical jurisdictions within their country. A good example of this may be seen in a comparison of the jurisdiction of the Federal Court of Canada with that of the civil courts of the Province of Quebec, the latter being set up in districts within the Province and the former having national jurisdiction.

Paragraph 3

The object or scope of the provisional or protective measures mentioned in the last sentence of this paragraph is not clear. There is no objection to this paragraph, however, as it seems to tend to protect claimants who wish to secure their claims in a jurisdiction other than those mentioned in paragraph 1. This paragraph may, however, be inconsistent with the object of paragraph 4 which is to eliminate vexatious proceedings or abuse of the process of law against a carrier by multiple arrests in several jurisdictions.

Paragraph 4

This paragraph, as previously noted, has as its purpose the prevention of vexatious actions, but where sufficient security cannot be found in any one jurisdiction, the claimant may be in difficulty.

Article in general

Generally, with respect to this article, paragraphs 1, 2 and 3 are considered to be proper provisions for inclusion in the Convention but paragraph 4 and 5 get very much involved in questions of national law. Moreover, the provisions of paragraph 5 may often be impossible to apply in view of the jurisdiction *ratione materiae* and *ratione personae* of the tribunals that can-

not be altered by convention of the parties. Accordingly, paragraphs 4 and 5 should be deleted.

Article 22. Arbitration

There is no fundamental objection to the inclusion of this article nor to its terms. There should, however, be additional provisions dealing with the interrelation of court actions and arbitration proceedings between the same parties. In other words, does recourse to a court action constitute an absolute waiver of arbitration proceedings? A further question is the obtaining of security by recourse to the courts prior to arbitration.

Article 23. Contractual stipulations

Paragraph 1

The last sentence of this paragraph should be deleted. It is dangerous to specify one case which could qualify the very broad terms of the prior provisions of this paragraph.

Paragraph 2

Provided the benefits to the carrier as a result of this paragraph extend no further than to give him an economic or commercial opportunity, there would be no objection to it.

Paragraph 3

Acceptable.

Paragraph 4

This paragraph seems to be the sanction for failure to comply with the provisions of paragraphs 2 and 3. The scope of the costs referred to in this paragraph described as legal costs is not clear. It is difficult to understand why the provisions for compensation as to legal costs are qualified by the expression "shall be determined in accordance with the law of the court seized of the case". In fact, many national courts do not allow legal costs to be recovered and it would seem therefore that the provisions of this whole article could be to a great extent annihilated before such national courts. If the intention of the drafters was the integral application of the principle of *restitutio in integrum*, then this paragraph should be redrafted and this intent indicated in more direct language. Furthermore, this paragrah seems to give the carrier an opportunity of deliberately inserting a clause in a bill of lading knowing it to be null and void in order to force an action by the consignee. Moreover, this paragraph appears to impinge upon an area of national law in attempting to negate the prerogative of the national courts seized of the case to determine or award costs in actions. On balance, it might be advisable to delete this paragraph altogether.

Article 24. General average

In the Canadian view, a convention on the carriage of goods by sea is not the proper place in which to give to general average a prominence greater than that which it has occupied in private law. Among other things, this is what article 24 would do. As presently drafted, this article is not sufficient to protect a cargo owner's contribution in general average whenever loss of or damage to his cargo did not occur but it does limit the amount which a carrier would indemnify a consignee while doing no more for the consignee than suggesting that the carrier may have a responsibility to indemnify him.

The present Hague Rules go only as far as not preventing the insertion in a bill of lading of a provision regarding general average and, part from noting that standard clauses found in bills of lading are drafted primarily by carrier interests, there have been no practical or legal difficulties in Canada with the present wording of the Hague Rules. The second sentence is inconsistent with this view.

Article 25. Other conventions

Paragraph 1

Canada opposes reference in this paragraph to overriding provisions of other conventions that would subordinate this Convention to them.

Paragraph 2

Acceptable.

CZECHOSLOVAKIA

[*Original: English*]

In general, the new draft convention on the carriage of goods by sea as prepared by the UNCITRAL Working Group on International Shipping Legislation may be considered as a positive step forward in fulfilment of the task given to UNCITRAL in consequence of the resolution of the Working Group of UNCTAD on International Shipping Legislation of 25 February 1971. It is appreciated that the UNCITRAL Working Group has taken into consideration when preparing the draft convention the lines for the revision of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed at Brussels on 25 August 1924 as mentioned in the resolution of the Working Group of UNCTAD.[1]

The draft convention may therefore be used as a basis of further consideration by appropriate bodies such as a plenary session of UNCITRAL and the Working Group of UNCTAD on International Shipping Legislation in accordance with the agenda of the next meetings concerned.

It has been noted that there are some alternatives contained in the draft and that several parts of the text are in square brackets that should be removed at a later stage of the consideration of the draft. However, some principles recommended by the resolution of the Working Group of UNCTAD on International Shipping Legislation to be reflected in the new draft, e.g. extension of the period of carrier's liability for the period during which the goods are in the charge of the carrier or his servants, agents or other persons acting pursuant to the instructions of the carrier (article 4 of the draft), seem to have been complied with. Besides, the attempt to solve the problem of contracting and actual carriers is worth while considering further.

Without intending to go into details at this stage the following remarks are considered appropriate to be made now:

Article 1

A definition of the words "carriage by sea" should be given covering carriage on canals and other inland waterways accessible to sea-going vessels as well.

[1] See document TD/B/C.4/86, annex I. The resolution is reproduced in annex II to the report of the UNCITRAL Working Group on its first session, A/CN.9/55; UNCITRAL Yearbook, Vol. II: 1971, part two, III.

Article 2

In paragraph 2, line 2, "actual carrier" should be added in the enumeration after "the carrier" as "carrier" should mean in accordance with the definition given in article 1, paragraph 1 "carrier" or "contracting carrier" only.

Article 5

The burden of proof lying on the claimant in paragraph 4 seems to be extremely difficult, if not practically impossible, to discharge; besides, it is contrary to the principle contained in paragrah 1, so that a further consideration of both principles is necessary with the aim of bringing them into coincidence.

Article 6

The number of alternatives for limits of liability of the carrier appears to be sufficient as a basis for considering them at a later stage. In any case, however, the draft convention should regulate problems connected with carriage of goods in containers, pallets or similar articles of transport, in particular the question of liability of the carrier in such cases.

Article 9

The liability of the carrier for goods carried on deck in accordance with paragraph 1 and 2, i.e. in accordance with an agreement with the shipper, with the usage of the particular trade or with statutory rules or regulations, should not differ from the carrier's liability for goods carried under deck. If it is foreseen to regulate the carrier's liability with some exceptions, e.g. as the sole consequence of carriage on deck, it should be formulated in clear words.

Article 10

In paragraph 3 an obligation of the contracting carrier should be laid down to ensure with the actual carrier that the latter assumes obligations in the same extent at least as they have been assumed by the contracting carrier.

The principle of joint and several liability of the contracting carrier and the actual carrier is worth considering providing for in the draft convention in cases where it is not possible to ascertain in which part of the carriage, performed either by the contracting or the actual carrier, the loss of or damage to the goods or the delay occurred.

Article 11

The relation between paragraph 2 of this article and paragraph 1 of article 10 should be reconsidered.

Article 15

Among particulars set forth in the draft convention as regards the contents of the bill of lading reference to goods in containers, pallets or similar articles of transport should not be omitted.

The above-mentioned remarks cannot be considered as final and covering all problems connected with the draft convention that will be suject to further consideration at a later stage of dealing with draft convention in appropriate forums.

DENMARK

[*Original: English*]

The Danish Government is of the opinion that the draft as a result of carefully elaborated compromises could form an acceptable basis for further deliberations.

The Danish Government is of the view that it is of the greatest importance that a new convention be acceptable to as many States as possible and thus become a global solution of the questions concerning carriage of goods by sea which would entirely replace the 1924 Convention.[1]

Article 5

It is on this assumption that the Danish Government as a preliminary view can accept the compromise solution concerning the provisions on the carrier's liability in article 5 although it would like to express some concern because of the heavier burden placed on the carriers.

Article 6

Among the different systems proposed in article 6 concerning the system of limitation of liability Denmark would prefer alternative A as the most simple system. Further the Danish Government is of the opinion that the limitation amount should not be expressed in gold francs but in Special Drawing Rights as defined by the IMF.

The Danish Government reserves its position with regard to other details of the draft convention.

FIJI

[*Original: English*]

Article 6

Paragraph 1, alternatives A-E

Alternative A is the most appropriate and the unit of weight (or measurement) should be that on which freight is charged. Unless this criterion is applied disputes could easily arise.

Paragraph 2

Conversion of franc to national currency should be based upon the rate prevailing at the time of the loss—this being the value at that time. Subsequent delays in bringing arbitration may result in an appreciable variation in such values. Moreover, it is suggested that owing to fluctuations in the price of gold there should here be reference to special drawing rights as a more stable system instead of using the gold francs.

Article 15

Paragraph 1 (f)

Add "and place" after "date".

Article 19

Paragraphs 1 and 2

Article 19 paragraph 1 appears to clash with paragraph 2. It should be made more clear that notice in writing of damage or loss must be given within 10 days

[1] International Convention for the Unification of Certain Rules relating to Bills of Lading. Brussels, 25 August 1924.

of acceptance of the goods by the consignee. It is very important that the carrier's responsibility continue until acceptance by the consignee other than in the special case mentioned and in that case the consignee must authorize the Ports Authority Fiji or other person to act on its behalf to accept delivery of the goods and thus liability for them from the carrier.

FINLAND

[*Original: English*]

A. GENERAL OBSERVATIONS

The Finnish authorities, after having studied the draft convention on the carriage of goods by sea adopted by the UNCITRAL Working Group on International Legislation on Shipping, find the draft to be a considerable improvement to the international legislation in the field of shipping. The structure of the draft convention as well as most of the provisions in it are acceptable to Finland, and therefore the draft will form a good basis for further deliberations.

The Working Group has chosen the form of a new convention. Finland is fully in agreement with this. It is, however, stressed that it would be unsatisfactory if the convention on the carriage of goods by sea would exist as a parellel convention to the old Hague Rules.[1] Every measure should therefore be taken to make the new convention acceptable to as many States as possible so that the new convention would replace the Hague Rules.[1] In this respect Finland considers the compromise solutions found in the draft of great value.

B. OBSERVATIONS ON SOME PARTICULAR POINTS

Scope of application of the new draft convention

Article 1, paragraph 5 and article 4, paragraph 2

The scope of application of the rules governing the carriage of goods by sea will change, if the draft will eventually be accepted. First of all, widening of the scope of application will take place in so far as the draft also includes cases when no bill of lading is used (article 1, para. 5). Secondly, the period of responsibility of the carrier is longer than before, starting from the moment when he has taken over the goods and ending when he has delivered them (article 4, para. 2). The Finnish authorities consider both of these to be useful modifications.

Liability of the carrier

Article 5

The most important change in the draft compared with the existing rules concerns the liability of the carrier. It seems likely that the merits of the draft convention will be judged in the light of these provisions. The draft is based on the presumption of fault on the part of the carrier, and it does not include any defence where an error in navigation is concerned (article 5, para. 1). The carrier is also liable in case of fire, if the claimant proves that there is fault or negligence on the part of the carrier (article 5, para. 4). Thus, the draft involves removing some risks from the consignor and placing them on the carrier, which at least from the point of view of a non-profesional consignor is advantageous. As a whole, the provisions of the draft seem to be acceptable as a compromise solution. The Finnish authorities would, however, like to express their concern in one respect because of the heavier burden laid on the carrier. In the carriage of goods by sea from one country to another, the consignor usually takes out cargo insurance for the goods. Changing the risk from the consignor to the carrier means in practice that the final risk is borne by the P and I insurance of the carrier and not by the cargo insurance as presently. This may, of course, increase the number of recourse actions by the cargo insurers against the P and I insurers but the main concern in Finland is the fact that no P and I insurance industry exists in Finland and thus a larger part of the over-all insurance premiums in the carriage of goods by sea are therefore going to be paid to foreign insurers.

Limits of liability of the carrier

Article 6

Among the different liability systems contained in article 6, Finland would prefer alternative A because of its simplicity. A limitation based on package may lead to unexpected results. As there still would be a considerable need for marine insurance, the problems relating to light, but valuable goods could be solved by way of insurance and need not be especially taken care of in the provisions on the carrier's liability. Otherwise the Finnish authorities regard the limits accepted in Brussels in 1968[2] as sufficient.

Finland would, however, like to submit for reconsideration the question of the unit of liability. In article 6, the unit is the gold franc, but taking into consideration the problems with this unit it may be worth while to study what possibilities the substitution of the special drawing right (SDR) of the International Monetary Fund for the gold franc might offer in this connexion.

Shipping of live animals

Article 1, paragraph 4 and article 5, paragraph 5

The Finnish authorities wish to reserve their position as far as the transportation of live animals is concerned. It may be useful to reconsider whether they should be included in the definition of "goods" (article 1, para. 4).

Carriage of dangerous goods

Article 13

Finland wishes to point out that according to the IMCO regulations the shipper always has to mark dangerous goods as such. This might be taken into consideration when drafting the final form of paragraph 1 of article 13.

[1] International Convention for the Unification of Certain Rules relating to Bills of Lading. Brussels, 25 August 1924.

[2] Article 2 of the Protocol to amend the International Convention for the Unification of Certain Rules relating to Bills of Lading, signed at Brussels on 25 August 1924. Brussels, 23 February 1968.

Time-limit for claims and actions

Article 19

In case of apparent loss of or damage to the cargo, the consignee has to give immediate notice to the carrier (article 19, para. 1). If the loss or damage is not apparent, the consignee has a period of 10 days to give notice of the loss of or damage to the goods (article 19, para. 2). The Finnish authorities are of the opinion that these time-limits may be insufficient, whereas the limit of 21 days in paragraph 5 of the same article seems to give enough protection to the consignee in case of delay in the delivery of the cargo.

Jurisdiction

Article 21

In article 21, jurisdiction is limited to the Contracting States only. This may cause problems especially immediately after the Convention has entered into force when the number of Contracting States is thus relatively small. It is not quite clear how an action shall be removed from one court to another under subparagraph 2 (*a*) of article 21. The Finnish authorities presume that such a removal shall not affect the time-limit for actions.

FRANCE

[*Original: French*]

Article 1

(a) *Paragraphs 1 and 2*

The wording of paragraph 1 could be simplified by taking as a model that used in the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea of 13 December 1974. It is unnecessary when defining the carrier, in paragraph 1, to refer to the concept of contracting carrier—which does not appear in the Athens Convention. At the most, in paragraph 2, concerning the definition of the actual carrier, the carrier might be called the contracting carrier (as opposed to the actual carrier). The best solution, however, would be to use only the single term carrier, as in the Athens Convention:

Paragraph 1. "Carrier" means any person by whom or in whose name a contract for carriage of goods by sea has been concluded with the shipper, whether the carriage is in fact performed by the carrier or by an actual carrier.

Paragraph 2. "Actual carrier" means any person to whom the carrier has entrusted the performance of all or part of the contract for carriage of goods.

(b) *Paragraph 3*

The definition of consignee must be amplified: it is in fact too vague, because it does not indicate by virtue of what or under what arrangement a person is entitled to take delivery of the goods. The text proposed below is modelled on elements appearing in French legislation (article 49 of decree 66-1078 of 31 December 1966 on charter-parties and maritime transport):

Paragraph 3. "Consignee" means the person entitled to take delivery of the goods by virtue of the contract of carriage; it is the person whose name is indicated in the bill of lading when the bill of lading is made out to a named person, the person who presents the bill of lading on arrival when the bill of lading is made out to bearer, and the last endorsee when the bill of lading is made out to order.

(c) *Paragraph 5*

It seems necessary to add to the definition of the contract of carriage, in which only the shipper and the carrier are mentioned. The consignee must be able to invoke a contract of carriage to which he is not a party; in the absence of a bill of lading which is the documentary evidence of the goods, the consignee could not exercise the rights of the shipper, except by availing himself, if he can, of provisions of a national legislation recognized as applicable which confer that right on him; all countries do not, however, have such provisions in their national legislation or legal machinery such as the provision in favour of a third party enabling the consignee to have the possibility of exercising the rights of the shipper. In order to avoid recourse to national legislation, it is in any case desirable, if the international Convention contains a definition of contract of carriage which establishes the rights of the shipper and of the carrier, to specify that the rights of the consignee are also established thereby; such a specification is necessary when there is no bill of lading. Moreover, it should also be specified that by virtue of the contract of carriage the carrier acquires the right to take action arising from that contract against the consignee, particularly concerning payment of freight. Accordingly, the draft definition should be supplemented as follows,

Paragraph 5. . . . By virtue of this contract, the consignee may exercise the rights of the shipper and be subject to his obligations.

Article 2

(a) *Paragraph 1*

It would be better style in French to delete the "*ou*" appearing at the end of each subparagraph, which reflects the English text, and to add the word "*soit*" before the enumeration (. . . "*lorsque, soit:*").

(b) *Paragraph 4*

The wording leads one to fear that, by means of an endorsement in favour of an authorized agent of the shipper, the provisions of the charter-party may be held to be incontestable since a bill of lading has been issued; the holder of the bill of lading must not be the shipper or one of his representatives. Accordingly, it is preferable to replace the phrase "holder of the bill of lading" by "third party holder in good faith".

Article 5

Paragraph 4

This provision relating to fire is the sole survivor of the 17 instances of immunity appearing in article 4, paragraph 2, of the 1924 Convention and deleted in the UNCITRAL draft. It is not satisfactory and constitutes a breach in the new system of liability based on general presumption of fault in regard to the carrier: it has no equivalent in other international conventions on carriage. The system proposed is quite unfavourable to the shipper who will not be able, in practical terms, to establish fault or negligence by the carrier, his servants or agents.

This provision is the outcome of a political compromise and, from a purely legal standpoint, could not be justified and should be deleted.

A more equitable compromise could be sought on the same basis by making it incumbent on the shipper to establish that the ship had appropriate means of averting the fire and that all measures had been taken to avert it and to limit its consequences. The following text might then be retained:

Paragraph 4. In case of fire the carrier shall be liable, unless he proves that the ship had appropriate means of averting it and that, when the fire occurred, he, his servants and agents took all reasonable measures to avert it or to limit its consequences, except where the claimant proves the fault or negligence of the carrier, his agents or servants.

Article 6

The dual method for the limitation of the carrier's liability based on the package or unit and on the weight, which is similar to that established by the 1968 Protocol, seems more satisfactory than the system of calculating limitation on the basis of the weight alone (alternatives A and B). In this system, it seems preferable to select a particular limitation in case of delay in delivery, calculated on the amount of the freight, rather than to calculate the limitation of liability for delay in the same way as in the case of loss or damage (alternative C). Accordingly, alternative D might be retained together with variation X; variation Y, which specifies in respect of liability for delay an amount which is distinct from liability for loss or damage but which varies according to whether it relates to limitation based on the package or the weight, and alternative E which, while retaining the dual system, specifies that the limitation of liability based on the package or unit shall not be applicable when a container or pallet is used to consolidate goods, should be set aside. On the other hand, alternative D includes the provision contained in the 1968 Protocol whereby in such a case the package or unit enumerated in the bill of lading shall be deemed packages or shipping units.

Nevertheless, if a clear majority appears to be in favour of the system of limitation calculated on the basis of weight alone, which is that utilized by the other international conventions on carriage, there would be no serious objection to agreeing to it. The dual system is preferred because it appears to give expression to the compromise established by the 1968 Protocol between the current system under the 1924 Convention calculating limitation only on the basis of the package or unit and the system of calculating on the basis of the weight alone which is used in other modes of transport. If the system of calculating on the basis of weight alone is agreed to, alternative B should be selected since it provides for a special limitation in the case of delay, calculated on the amount of the freight (double the freight).

Article 7

On a point of drafting, the "*d*" before "*un retard à la livraison*" should be deleted in the third line of the French text of paragraph 1.

Article 8

The draft specifies that limitation of liability should be set aside in the case of intentional wrongdoing or inexcusable wrongdoing by the carrier alone, if the latter acts recklessly and with knowledge that damage would probably result. The criterion of wrongdoing, which is taken from The Hague Protocol of 1955 amending the Warsaw Convention relating to carriage by air and which has tended to spread to other international conventions on carriage, does not give rise to any objection. Already, the 1968 Protocol relating to bills of lading (unlike the 1924 Convention which contains no provision on that point) provides for the case of intentional or inexcusable wrongdoing by the servant or agent alone, but only in the case where his liability is brought into question; the case of the same wrongdoing by the carrier is not covered. In this draft the same provision is included and, in addition, the same wrongdoing by the carrier himself which has the effect of setting aside the benefit of limitation of liability is retained. However, there is no provision, as in air law, to the effect that the carrier shall not be entitled to the benefit of the limitation of liability in the case of intentional or inexcusable wrongdoing by himself or his servants or agents.

In the absence of such a stipulation, which appears essential, the wrongdoing of the carrier, whether intentional or inexcusable, would be quite theoretical. Indeed, under the provisions of the draft, if such wrongdoing was established, an attempt could be made to establish the liability of a servant, or agent and the latter would be unable to invoke the benefit of limitation; on the other hand, in such a case, the carrier would be liable for the wrongdoing of his servant or agent, but could himself benefit from limitation of liability. This situation is completely unsatisfactory and it is proposed that it should be remedied by the following provision taken from air law:

After the word "carrier" add: "or his servants or agents acting within the scope of their employment".

Article 10

The article as a whole

In line with the comments made with regard to article 1 on the definition of the term "carrier", the word "contracting" should be deleted in the article and in the title of the article.

Paragraph 3

The provision in this paragraph calls for some reservations. Any agreement concluded between the shipper and the carrier imposing obligations not provided for under the Convention or increasing the liability of the carrier, must remain valid even if the carriage is performed by an actual carrier. The latter could be considered as bound, in respect of the shipper, by the contractual undertakings made by the carrier, who must inform him of them when requesting him to perform the carriage; if he should fail to do so, the actual carrier would nevertheless remain bound with respect to the shipper, but would be able to bring a claim against the carrier. The shipper has, in effect, concluded the contract of carriage with the carrier, and it would be too easy for the latter to evade fulfilling those of his contractual obligations which exceed the obligations im-

posed under the Convention by causing the carriage to be performed by an actual carrier who did not agree specifically to carry out those obligations. Such a solution, while providing the shipper with effective protection, would nevertheless be harsh on the actual carrier.

Furthermore, in the event that the actual carrier does not agree to fulfil the additional obligations assumed by the carrier, it could be expressly stipulated that the latter should remain personally bound by those obligations in respect of the shipper, and that in such a case, he may not benefit from limitation of liability.

For this purpose, the following sentence should be added to paragraph 3:

"3. ... The carrier shall nevertheless remain bound by the obligations or waivers resulting from such a special agreement, failure to fulfil which shall be considered as an act or omission of the carrier within the meaning of article 8."

Article 11

The article as a whole

The same comment as for the preceding article with regard to the deletion of the word "contracting".

Paragraph 2

The provision in paragraph 2 is totally unacceptable. By enabling the carrier to exonerate himself from liability for any damage caused during the part of the carriage performed by the actual carrier, it has the effect of totally negating the provisions of article 10, which establishes the principle of the liability of the carrier for the entire carriage when he causes part of it to be performed by an actual carrier. This rule of principle loses all significance in that it can be overridden by a contrary stipulation made by the carrier at the expense of the shipper.

This provision first appeared in the draft as an alternative and then was adopted by the Working Group at its seventh session. If the rule in article 10 is to retain its full force, it seems essential to delete paragraph 2 of this article.

Article 14

The article as a whole

The same comment as above regarding the deletion of the word "contracting".

Article 15

Paragraph 1 (k) *(drafting note)*

On a point of drafting, in subparagraph (*k*), the conjunction "and" should be deleted since it is completely redundant in a list of items.

Article 16

Paragraph 3

The words "including any consignee" in paragraph 3 appear redundant. It is of little importance whether or not this third party is the final endorser in the case of a bill of lading made out to order, or the bearer who will claim delivery of the goods in the case of a bill of lading made out to bearer. Furthermore, this reference is superfluous in the case of a bill of lading made out to a named person, since, except where it is transmitted to a banker who is a third party with a view to obtaining a documentary credit, this bill of lading is not transferable to any other person in order to take delivery of the goods, and the consignee named on the bill of lading cannot be considered a third party to the contract of carriage since he can avail himself of it and exercise the rights of the shipper; if the goods are not in the condition described on the bill of lading at the time of delivery, it is for him to make reservations and to establish the condition of the goods; in the event of proof to the contrary being brought by the carrier, it will be for him to file a claim against the shipper if the latter is the seller of the goods under the terms of the contract of sale. On the other hand, to consider the consignee who is a party to the contract of carriage as a third party because he can exercise the rights of the shipper and invoke the contract in respect of the carrier might facilitate fraud and would even have the effect of making the carrier responsible to the shipper himself if the latter was at the same time the consignee of the goods, without any possibility of proof to the contrary.

It would therefore be preferable to keep to the more conventional and restrictive wording designed to protect only third parties to a contract of carriage, as contained in article 1 of the 1968 Protocol, amending article 3, paragraph 4, of the 1924 Convention: "However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith."

Article 17

Paragraphs 2, 3 and 4

From a purely drafting point of view, the word "*de*" preceding the word "*convention*" in the first line of paragraph 2 in the French text should be deleted.

For the reasons given with regard to article 16, paragraph 3, the words "including any consignee" should be deleted in paragraphs 2, 3 and 4.

Article 19

Paragraph 1

The words "if any" at the end of paragraph 1 should be deleted, since it is impossible to speak of a "document of transport, if any". Such a document must exist; without it, no valid claim could be made with regard to the condition of the goods at the time when they were handed over to the carrier.

Article 20

Paragraph 1

It appears that the one-year period, as prescribed in the present Convention, should be retained; it has not given rise to any special difficulties. It prevents the possibility of a dispute hanging over the carrier for too long a period.

Article 23

Paragraph 1

It would be preferable to refer to "any document relating to carriage" after the reference to the bill of lading, since the use of the words "any other document evidencing the contract of carriage" as in the draft, involves duplication with the contract of carriage referred to in the first line; the words "any other document relating to carriage", on the other hand, refer to cases in which no bill of lading is issued.

Article 25

Paragraph 2

The same comment applies for article 2, paragraph 1, namely, that the word "*ou*" at the end of subparagraph (*a*) in the French text, which is taken from the English wording, should be deleted and the word "*soit*" added before the enumeration (". . . *de ce dommage, soit*: . . .").

GERMAN DEMOCRATIC REPUBLIC

[*Original: English*]

GENERAL OBSERVATIONS

Articles 4 and 10

1. The German Democratic Republic appreciates the work done by the UNCITRAL Working Group on International Legislation on Shipping since 1969 which has examined the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the Brussels Convention, 1924) and the Protocol to amend that Convention (the Brussels Protocol, 1968) with a view to revising them, and which has finally elaborated a draft Convention on the Carriage of Goods by Sea.

The German Democratic Republic welcomes the efforts reflected in the draft to harmonize international transport law and to make provision for new transport technologies in the stipulations of the draft Convention. In particular, the German Democratic Republic supports the concepts on which articles 4 and 10 are based. Article 4 containing the binding liability of the carrier from the time the goods were taken over until the time the goods were delivered covers the period when most of the damages take place in practice. Consequently, article 10 establishes the joint liability of contracting carriers and actual carriers. These stipulations should be retained and made even more precise.

2. To contribute to completing the draft Convention, the German Democratic Republic submits the following remarks:

Article 2

2.1. Article 2, paragraph 4, excludes charter-parties from the scope of application of this Convention. Therefore, the title of the Convention does not correspond to the real subject of the Convention. The German Democratic Republic would appreciate if this discrepancy would be eliminated by including charter-parties in the scope of application of the Convention in keeping with the title.

Article 6

2.2. Concerning limits of liability to a certain amount (article 6), the German Democratic Republic would prefer alternative B, completed by the container rule (alternative C, paragraph 2 (*a*)). In this article, we think it would be appropriate to formulate the last phrase of the part which applies to all alternatives as follows:

> "The amount referred to in paragraph 1 of this article shall be converted into the national currency of the State of the court or arbitration tribunal seized of the case on the basis of the official value of that currency by reference to the unit defined in the preceding paragraph of this article on the date of the judgement or arbitration award or on the date of the agreement on the party concerned."

The stipulation of the draft Convention is based on the assumption that any claim can only be enforced by recourse to law, whilst practice proves that a large number of disputes are settled by agreement of the parties concerned.

Article 8

2.3. The German Democratic Republic would consider it desirable if a general rule were included in the draft Convention to the effect that the carrier is liable for acts and omissions of his servants or agents and if, consequently, article 8 would be so modified that the carrier shall not be entitled to the benefit of the limitation of liability with respect to damage resulting from such fault mentioned in this article caused by the carrier *or his servants or agents.*

Article 9

2.4. Concerning article 9, paragraph 1, the German Democratic Republic holds that it remains unclear to which "statutory rules or regulations" reference is made. We think that this stipulation should make it clear that these statutory rules or regulations are not national ones. Therefore, the German Democratic Republic proposes to restrict article 9, paragraph 1, in such a way that the carrier shall be entitled to carry the goods on deck only by express contractual agreement. In case of container transport, article 9 should be supplemented by another paragraph saying that the carrier shall be entitled to carry containers on deck without any express contractual agreement if he provides the same legal conditions as for under deck carriage.

Article 11

2.5. The German Democratic Republic recommends the deletion of article 11, paragraph 2, as, from our legal point of view, this stipulation is contradictory to the through carriage concept. Where the carrier undertakes an obligation to an entire transport, he should also be responsible for the whole period covered by the contract.

Article 18

2.6. The German Democratic Republic holds that article 18 should be based on a premise like this:

> "When a carrier issues a document other than a bill of lading by request of the shipper, such document shall be *prima facie* evidence of the taking over by the carrier of the goods as therein described."

In order to take into account trends of international development, article 18 should be supplemented to cover the legal effects of such other documents. The German Democratic Republic proposes the following wording:

> "The carrier shall be obliged for delivering goods to the consignee as named in this document at the port of destination.
>
> "The shipper retains the right to dispose of the goods until they have reached the port of destination, unless he has transferred this right beforehand in writing and without any reserve to the consignee or

to a third person and has informed the carrier of such a transfer.

"If this document makes reference to carriage conditions, these are valid if and when they are made known or otherwise accessible."

Articles 21 and 22

2.7. The German Democratic Republic believes that it would be more correct if articles 21 and 22 proceeded from the fact that, in case of a dispute resulting from or in connexion with a carriage contract, such dispute would always be brought before that court upon which the partners agreed in the contract, or if States are parties to a treaty under international law which determines the place of venue for specific disputes, these stipulations under international law should be applicble.

Only if the parties did not conclude an agreement on a place of venue, or if the States where the parties have their residences, or in the absence thereof, their places of business, have no binding obligations under international law, should this draft Convention give the plaintiff a right of choice. It would be preferable to limit this choice to a court at the place of

The port of loading, or

The port of discharge, or

The main place of business of the carrier.

Article 2, paragraph 2, and article 5, paragraph 4

2.8. Additionally, when editing the draft Convention, it should be examined once again whether, in accordance with the definitions laid down in article 1, the specification under article 2, paragraph 2, and article 5, paragraph 4, should be supplemented by the term "actual carrier".

Federal Republic of Germany

[*Original: English*]

GENERAL REMARKS

The Federal Government welcomes the draft prepared by the Working Group of UNCITRAL as an effort to modernize and to improve the legal situation in ocean transport. The draft convention submitted to comments by the governments seems to be a valuable basis for future work. It is hoped that it might be possible to finalize a convention on the subject in the near future, justifying the hope that world-wide unification of the law on ocean transport will be achieved.

The Federal Government therefore welcomes the draft convention and suggests that UNCITRAL should provide for a diplomatic conference on this subject as soon as possible. We feel, however, that there should be some improvements on the draft, a great number of them being of a mere technical nature. Some of them, which are of major importance, are pointed out in the following remarks as to the specific articles.

The list of these comments is not understood as an exhaustive one. We reserve our position as to further amendments to be put forward at the later diplomatic conference.

REMARKS AS TO SPECIFIC ARTICLES

Article 2

Subparagraph 1 (d)

The provision should be deleted. It does not seem justified to apply the convention on the grounds of the mere fact that the bill of lading or other document evidencing the contract of carriage has been issued in a contracting State even if all other relevant elements of the contract are performed in non-contracting States. The new draft convention is based on the idea (different from that of the Hague Rules) that it applies to every contract of carriage irrespective whether a bill of lading has been issued or not. It would be contrary to that philosophy to look again to where the document happened to be issued. This could, as a reason for application at the utmost, be justified in case of a bill of lading in the proper sense of the word, but would at any rate go too far as to any other document only "evidencing the contract of carriage". We believe, however, that for these reasons not only the reference to the "other document evidencing the contract" should be deleted, but the whole provision. If a similar reference to any documents should be retained it could perhaps be acceptable to refer to documents evidencing the receipt of the goods.

Paragraph 4

It would be desirable to give a definition of the term "charter-party". This must not necessarily be done in the context of the definitions in article 1 but could be inserted in the operative article 2, paragraph 4, first sentence. The following language for the first sentence of article 2, paragraph 4 is suggested:

"The provisions of this Convention shall not be applicable to contracts by which the carrier assumes the obligation to let the carrying capacity of a distinct vessel wholly or partially for a distinct time (time-charter) or for one or several distinct voyages (voyage-charter) at the disposal of the shipper."

Article 5

Paragraph 1

The proposed change as to the present exemption of the carrier from liability for nautical fault and fire has the advantage of a better compliance with the general principles of contractual liability in civil law in general and in the law of other means of transport in particular. For the reasons pointed out already at former occasions and by other governments it should, however, be considered very carefully whether the change would not be likely to lead to an increase of over-all costs of transportation.

Higher liability of the carrier needs higher and therefore more expensive liability insurance on the part of the carrier which would necessarily again lead to higher freight rates for the shipper without him being discharged by a corresponding decrease of his cargo insurance premiums. It is doubtful whether the cargo insurer—whose services will for various reasons be needed in future as well—will recover by recourse action from the carrier or his insurer amounts which enable him to reduce his premiums according to the increase of the liability insurance costs.

In this context it may be of interest that in the Federal Republic of Germany not only the carriers' but also the shippers' associations have pleaded in favour of leaving the legal situation as it is because they do fear, in case of the proposed change in the legal allocation of risks, an increase of over-all transportation costs. It is argued that liability insurance is by its nature more costly than cargo insurance and that the shipper in principle is more interested in being indemnified by an insurer of his own than by an insurer of somebody else. Similar discussion has developed in connexion with the preparatory work for the draft convention on multimodal transport. There, in addition, some countries have, as a reason for lower liability of the carrier, invoked the fact that cargo insurance is not only the more economic form of insurance of transport risks but at the same time renders it possible to the shipper to insure in his own country which is not only of advantage for him being indemnified without complications as to problems of claiming and enforcing judgements in foreign countries but also could be of interest to some states in so far as cargo insurance can be done by their insurance industry whereas liability insurance is available only in a few maritime countries.

For these reasons the Federal Governmcnt deems it necessary to discuss very thoroughly the possible economic consequences of the proposed change because the new convention should, especially regarding the present situation of world trade, not finally lead to an increase of transportation costs. This would be contrary to the idea which lies behind the suggestion of UNCTAD to examine the Hague Rules with the view to revision in particular as to a better allocation of risks. A better allocation in our mind would not be an allocation of risks which would increase the over-all costs of the carriage lastly to be borne by the shipper. The Federal Republic of Germany is, like other exporting and importing countries, vitally interested in moderate freight rates.

The new study on marine cargo insurance, recently performed by the UNCTAD secretariat (TD/B/C.3/120) will, *inter alia,* serve as a valuable basis for the discussion of this problem.

Article 5

Paragraph 7

The provision should be deleted. The mere fact that somebody else is at fault or negligence with regard to the same damage which has been caused by the carrier himself should not exonerate the latter. It should be left to general rules of civil law to decide the relationship of claims which the shipper may have against the carrier and other persons. In the important case of collision, the pro-rata distribution provided for in article 5, paragraph 7 is already laid down in the Collision Convention of 1910.[1] In other cases it should be left to specific conventions or to national law, which might provide in these cases for a liability of the two persons joint and several.

Article 6

The Federal Republic of Germany is in favour of alternative D, variation X. This priority is based on the assumption that the limitation amount as to the weight would not be considerably higher than that provided for in the Visby Rules (i.e. 30 Poincaré francs). Alternative A, which we would, because of its simplicity, in principle prefer to D, could be chosen only in case of a much higher limitation based on weight, because the amount mentioned would not give a reasonable chance of indemnification to cargo beyond the average value of bulk cargo. We do, therefore, feel that a decision as to the system of limitation is only possible after the final decision on the amount, at least on the approximate level of the limitation based on weight. The Federal Republic of Germany would in this respect deem it sufficient to apply the figures of the Visby Rules, perhaps slightly raised. But because it seems improbable that UNCITRAL will decide at its forthcoming meeting on these figures and because it will be necessary anyway to discuss this central item at the diplomatic conference, the different alternatives should be put to the disposal of the diplomatic conference itself. We propose, therefore, that the draft should retain the various alternatives.

Paragraphs applying to all alternatives

The amounts should not be fixed in terms of Poincaré francs but in Special Drawing Rights of the IMF. A pattern is to be found in the Montreal Protocol of 1975 to the Warsaw Convention.

Article 15

Subparagraph 1 (a)

The draft provision requires that "the number of packages or pieces *and* the weight of the goods" be set forth in the bill of lading. We suggest to require, according to article 3, subparagraph 3 (*b*) of the Hague Rules, only one of the two elements, i.e. number of packages or pieces *or* weight of the goods. The draft would demand from the carrier in the frequent cases where it is reasonably impossible for him to check the weight of the goods, in particular because of the fast charging and discharging of ships, either not to insert the weight in the bill of lading or to insert a qualified special note setting out the grounds for absence of reasonable means of checking (article 16). Such a rule would not only be contrary to the normal situation at the loading port but moreover to the economic interest of the shipper. Under the present legal situation the shipper gets, within the bill of lading, mention of the weight of his goods indicated by himself, even if it is subject to a general unknown clause. This clause does not render unclean the bill of lading in the sense of banking practice as to a letter of credit. This situation might change if the bill of lading would contain either no indication as to weight at all or a qualified reservation as to that indication.

Article 21

Subparagraph 2 (a), second sentence

This provision seems not to be in compliance with the Brussels Convention of 1952 on arrest of seagoing ships.[2] In addition, removal of an action brought in one country to the jurisdiction of another country will hardly work in practice regarding the actual state of

[1] International Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels, Brussels, 23 September 1910.

[2] International Convention relating to the arrest of Seagoing Ships. Brussels, 10 May 1952.

unification of procedural law. The sentence therefore should be deleted.

HUNGARY

[Original: Russian]

The draft Convention on the Carriage of Goods by Sea prepared by the UNCITRAL Working Group on International Legislation on Shipping is, on the whole, an important advance in the unification of international trade law, particularly since, in place of the previously existing incomplete and to some extent one-sided regulation, it seeks to establish up-to-date regulation under international law which meets the current requirements of international trade and is based on a balanced compromise between the interests of the parties concerned, i.e. carriers and shippers. The draft provides a higher level of regulation than that which previously existed, reflects essential new solutions and approaches to the various questions involved and is more in keeping with other international rules concerning the carriage of goods. On the whole, therefore, we take a favourable view of the draft.

PART I

Articles 1 and 2

With regard to part I of the draft (General provisions), we consider it significant that the Convention's scope of application is defined in a clear-cut manner and is broader than was the case with the 1924 Brussels Convention.[1] We agree that the Convention, in accordance with the draft and the criteria established by it, should apply to contracts for carriage of goods and not only to bills of lading or contracts confirmed by bills of lading. We are in agreement with the broadening of the Convention's scope of application by the five alternative criteria set out in article 2, paragraph 1, since this deals with the question in an unambiguous manner and, in addition, represents an important advance towards universality.

PART II

Part II of the draft deals with questions relating to the liability of the carrier.

Article 4

In this connexion, we regard it as important that, in conformity with other international agreements on the carriage of goods, the draft defines the period of carriage as extending from the time the carrier has taken over the goods until the time he has delivered them. Thus, the draft abandons the approach taken by the Brussels Convention, which seriously affects the interests of the shipper and has long been criticized. The Brussels Convention defines the period of carriage as beginning when the goods are loaded on the ship and ending when they are discharged.

Article 5

In our opinion, it is very important that the question of the carrier's liability has been resolved on the basis of a reasonable and equitable apportionment of risk among the parties concerned. Liability, which is based on fault, is accompanied by an evidentiary procedure, which is the most suitable approach at the present time. The judicial practice of various countries will, of course, determine differently the prescribed level of prevention, as occurred in connexion with the Warsaw Convention on International Carriage by Air.[2] The Warsaw Convention deals with the question in a similar manner. The positive aspect of the limitation of liability is reflected in the fact that each alternative indicates the limit in units of weight (kilos) and fixes the amount to be paid in Poincaré francs, which, in contrast with the existing system, eliminates the role played by inflation in reducing liability.

At the same time, it would seem advisable to simplify article 5, paragraph 5. It is proposed that the first sentence should be retained and the following one deleted.

Article 6

Among the alternatives presented for article 6, we regard A and C as appropriate, since they establish a single rule on the limits of the carrier's liability in the event of loss, damage or delayed delivery. However, we consider it inadvisable to take a final position before a determination is made as to the amount which will in each alternative represent the upper limit of the required payment. At the same time, we feel that a provision concerning declaration of value should be included in the draft, as was done in the 1968 Brussels Protocol.[3]

In assessing the system of liability established in the draft, we have some difficulties because of the fact that the limits of liability are at present indicated only in the form of alternatives. If a limitation based on units is adopted, it will be necessary to indicate the contents of the container since in a given case the value of the packing units in the container might be considerable. If a limitation of liability based on kilos is adopted, however, this problem will not arise.

Article 8

It seems advisable to broaden the rule laid down in the first sentence of article 8 so as to prevent the carrier from invoking the limitation of liability under article 6 even in cases where his servants or agents committed the acts referred to in that sentence. The carrier normally acts through his servants or agents, and the solution adopted in article 8—bearing in mind also the second sentence—affords the shipper very little real protection in the event that damage occurs in the manner envisaged in this article.

Article 9

Article 9, paragraph 1, provides that goods may also be carried on deck if that is in accordance with the usage of the particular trade. It might be advisable to define the term "usage" more precisely since it could give rise to divergent interpretations in the future. (The term most often used in the literature, in discussing

[1] International Convention for the Unification of Certain Rules relating to Bills of Lading. Brussels, 25 August 1924.

[2] Convention for the Unification of Certain Rules relating to International Carriage by Air. Warsaw, 12 October 1929.

[3] Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed at Brussels on 25 August 1924. Brussels, 23 February 1968.

carriage on deck, is "binding custom".) It would seem advisable to clarify the implication of the text.

It is not quite clear how one is to interpret article 9, paragraph 3. If the correct interpretation is that the carrier is not liable for damage which results solely from carriage on deck, then the rule is one-sided and has no justification.

Articles 10 and 11

We agree with the definitions of the terms "contracting carrier" and "actual carrier" and with the manner in which the two are distinguished. We also agree with the provisions of article 10. Article 11, paragraph 2, seems to conflict with article 10, paragraph 1, and we therefore propose that it should be deleted.

PART IV

Article 17

Article 17, paragraphs 2, 3 and 4 (part IV of the draft), which deals with letters of guarantee and their legal effects, may result in controversial practice. In our opinion, the draft merely lays down the rule—operative in all law—that fraud results in invalidity, and from that standpoint the text is quite correct. However, the draft cannot preclude the claim by the shipper which is guaranteed under other international rules for the purpose of ensuring the issuance by the carrier of a so-called "clean bill of lading". It is therefore proposed that paragraphs 2, 3 and 4 should be deleted.

Article 20

With regard to the limitation of actions under article 20, paragraph 1, we favour a two-year time-limit, particularly since it is current practice to set a one-year time-limit subject to extension. Since the law of various countries differs regarding the legal nature or possibility of an extension of this time-limit and also regarding the types of extension, international practice is not uniform and presents risks for both parties. A two-year time-limit would conform to the solution adopted in the above-mentioned Warsaw Convention, and it should be borne in mind that the carriage of goods by sea is from this standpoint (geographical distance, the possibility of the filing of claims) akin to the carriage of goods by air.

JAPAN

[*Original: English*]

GENERAL OBSERVATIONS

The draft convention prepared by the UNCITRAL Working Group has introduced several new ideas in the field of international carriage of goods by sea. It is certain that the provisions based on such new ideas will make changes not only in law and practice on shipping but also in other fields relating to them; thus this draft will have a great effect on actual international trade. The Government of Japan feels that it is a difficult task to comment on this draft, taking into consideration the interests of various parties. This comment by the Government of Japan is of a tentative character and further consideration will be needed until the ninth session of UNCITRAL.

Article 1 (Definitions)

Paragraph 4

By the definition of "goods" in paragraph 4, a container, pallet or similar article of transport supplied by the shipper is included in "goods" for transport. But this definition is neither practical nor follows the commercial custom. It is desirable to delete the second sentence of this paragraph, or to modify the wording in order to indicate that "goods" includes an article of transport for multiple use if this paragraph should be retained.

In the same paragraph the phrases "or where they are packed" and "or packaging" should be deleted, because packaging materials are usually not durable, and damage to them is not necessarily damage to the goods packed by them. It seems to be sufficient to leave the matter to the decision of the court in particular cases.

Article 2 (Scope of application)

(1) The scope of application of this draft convention is wider than the Brussels Convention of 1924[1] and the Protocol of 1968.[2] Consequently, conflicts of application of the conventions among the Contracting States of one or more of these conventions will arise when these conventions have entered into force. Such conflicts should be avoided or prevented by virtue of technical provisions in the final clauses of a new convention.

(2) As some of the so-called "quantity contracts" are in their character similar to charter parties, "quantity contracts" should be treated in the same way as charter parties. It might be desirable to provide in paragraph 4 to that effect in the case of such kinds of quantity contracts.

(3) Further, it would be useful and practical to make an exception to the application of this draft convention, where the bill of lading is not issued and the shipper and the carrier expressly agreed that the convention shall not apply to the contract.

Article 5 (General rules)

Paragraph 1

(1) As a principle, the Government of Japan does not necessarily oppose the adoption of the system of carrier responsibility stated in paragraph 1 of this draft article and the abolition of the long list of exemption clauses in article 4, paragraph 2, of the Brussels Convention. However, the special character of "perils, dangers, and accidents of the sea" still exists, and damages by them have a tendency to become bigger, but techniques for preventing such damages are still in the course of developing.

Provisions like paragraph 1 will cause much more disputes and law suits on damages arising from carriage by sea, and will put heavy burdens on the carrier in litigation as well as in navigation. The most fundamental change is that to extend carrier's liability will lead to raise in freight through increase of costs of liability insurance, which is more than cargo insurance, and these

[1] International Convention for the Unification of Certain Rules of Law relating to Bills of Lading. Brussels, 25 August 1924.

[2] Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924, Brussels, 23 February 1968.

charges will be shifted upon shippers and consumers. This change will no doubt produce a great influence on present practice of carriage by sea and maritime insurance system, and ultimately consumers will have to bear the higher cost of goods, which includes unnecessary cost of liability insurance and other charges and expenses.

For this reason, such a policy adopted in the draft convention (in this respect) should be still under careful study in the next session of UNCITRAL from the viewpoint that the total cost of transportation had better be kept to a reasonably low level.

Paragraph 3

(2) In connexion with paragraph 3, it would be desirable to add a provision which makes it clear that when the claimant treated the goods as lost in accordance with this provision, he must give assistance necessary for the carrier to dispose of or sell the goods at a reasonable price or on reasonable terms.

Article 6 (Limits of liability)

Alternative B

Alternative B is preferable, since the single limitation system based on weight is simple and practical. In addition to this, with respect to valuable goods with light weight, it is desirable to adopt a system in accordance with the declared value of goods as provided in article 4, paragraph 5, of the Brussels Convention, which reads "unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading".[3]

Alternative E

Another preferable alternative is E.

Paragraphs applying to all alternatives

With respect to paragraph 3, a provision will be necessary for making clear the formula for conversion of the international standard into national currencies.

Article 9 (Deck cargo)

It would be desirable to add such a provision that where the goods are properly carried on deck pursuant to paragraph 1, the carrier shall be relieved of his liability for loss, damage or delay in delivery resulting from special risks inherent in that kind of carriage. In this case the carrier shall be required to prove that the loss, damage or delay in delivery could be attributed to such risks.

Article 12 (General rule)

In this article it would be necessary to make an additional provision to the effect that the shipper shall be liable for the loss, damage or expense suffered by the carrier as the result of the consignee's failure to take delivery of the goods within reasonable time. This is to solve the difficulties to be encountered by the carrier such as charges for storage.

[3] The relevant subparagraph of article 4, para. 5, reads as follows:

"Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with goods in an amount exceeding 100 pounds sterling per package or unit or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading."

Article 15 (Contents of bill of lading)

Paragraphs 1 and 3

There is no absolute reason for providing such a long list of items in the bill of lading as in paragraph 1. The relation between paragraphs 1 and 3 is not entirely clear.

It is sufficient to leave the matter of items in a bill of lading to commercial practice.

Article 16 (Bills of lading: reservations and evidentiary effect)

Paragraph 4

It is very difficult to justify paragraph 4. This paragraph should be deleted.

Article 17 (Guarantees by the shipper)

Paragraphs 3 and 4

Paragraphs 3 and 4 are against the long and widely established commercial practice on a "letter of indemnity", and will bring shippers to difficulties for getting export and import finance. Therefore, these paragraphs should be deleted.

Article 20 (Limitation of actions)

Paragraph 1

(1) One year is preferable as the limitation period.

(2) It would be desirable to provide that the limitation period in paragraph 1 also covers the liability for wrong delivery made by the carrier in good faith in exchange for a letter of guarantee issued by a bank.

Article 21 (Jurisdiction)

It is advisable to put a provision in this paragraph to the effect that the court shall have jurisdiction over one of the foregoing places in accordance with rules of internal law.

This amendment is intended to prevent the claimant from bringing an action in a place (e.g. Alaska) far from the place connecting with the elements of contract of carriage (e.g. New York) in the same contracting State.

Article 23 (Contractual stipulations)

Paragraphs 3 and 4

It is not necessary to make such a provision as paragraph 3.

The provision in paragraph 4 with respect to the omission of the clause referred to in paragraph 3 will not make any sense in practice. Paragraphs 3 and 4 in this respect should be deleted.

Article 24 (General average)

The second reference of the draft provision should be subject to careful review together with article 5, paragraph 1. These provision will undermine the foundation of general average since it allows the consignee to recover from the carrier the contribution to general average, where it was necessitated as the result of error in navigation.

MEXICO

[*Original: Spanish*]

Article 1

The inclusion of a legal definition of the shipper, although not strictly necessary, would be justified be-

cause article 1 of the draft Convention contains definitions of the other parties to the contract of carriage, namely the carrier and the consignee. The following definition of the shipper could be included in article 1:

" 'Shipper' means any person who in his own name or in name of another concludes with a carrier a contract for carriage of goods by sea."

Article 5, paragraph 4

The content of article 5, paragraph 4, is inappropriate and it is therefore proposed that the paragraph should be deleted. It refers to the liability of the carrier in case of fire on board the ship, but that liability is made conditional upon the proviso that "the claimant proves that the fire arose due to fault or negligence on the part of the carrier, his servants or agents".

The Government of Mexico considers that it would be going too far to place the burden of proof on the claimant, and that in practice it would be impossible to prove fault or negligence on the part of the carrier, his servants or agents, especially when the fire occurs on the high seas, when the shipper and the consignee would be unable to ascertain the causes of the fire or avoid or alleviate its consequences. Consequently, in the case of fire as for any other occurrence, the governing principle should be the general one established in article 5, paragraph 1, namely that "The carrier shall be liable for loss, damage or expense resulting from loss of or damage to the goods . . . if the occurrence which caused the loss or damage . . . took place while the goods were in his charge . . . *unless the carrier proves* that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences."

Article 6

The Working Group which drew up the draft Convention proposed for consideration by Member States five alternatives for article 6 relating to the basic issue of the limits of the liability of the carrier.

After perusing and studying each of those alternatives the Government of Mexico believes that the most suitable is alternative E, which is more complete (especially in relation to alternative A) and refers to various criteria for the quantification of the loss (weight, packages, shipping units) and to various possibilities with regard to transport, without having implications such as those resulting from alternative C with regard to the calculation of the liability deriving from alternatives C and D.

Article 15, paragraph 1

The Government of Mexico suggests that a new subparagraph (*m*) should be added to article 15, paragraph 1, indicating that when the goods are carried on deck that fact should be set forth in the bill of lading. This addition is important because the régime for deck cargo is given special treatment in the Convention, as can be seen from article 9.

Article 20, paragraph 1

Article 20, paragraph 1, suggests two periods for limitation of actions, after which the carrier shall be discharged from all liability, namely one year and two years. Although the maritime law tradition might lead to acceptance of the shorter period of one year, the Government of Mexico believes that the interests of Mexico, which does not have a large merchant marine and therefore has no special reason to limit the liability of foreign carriers, would be better protected by adoption of a two-year limitation period. The Government of Mexico accordingly suggests that the limitation period mentioned in article 20, paragraph 1, should be two years.

NETHERLANDS

[*Original: English*]

GENERAL OBSERVATIONS

With much interest the Netherlands Government has taken note of the draft convention on the carriage of goods by sea.

As a general observation, the Netherlands Government wishes to express its concern that certain major changes in the present liability régime might have a negative effect on international trade.

An extension of the liability of the carrier, which in the end would result in an increase in the cost of transportation without a corresponding reduction in cargo insurance costs, would lead to worsening the positions of both the carrier *and* the cargo owner. The Netherlands Government fears that such negative effect could result from the deletion of *inter alia* the defences of fire and error in navigation.

Moreover, the cargo owner's interest in cargo insurance should not be overlooked. The cargo owner has a direct business relationship with the cargo insurer and thus he is in a position to obtain prompt settlement of his claims and will be able to keep his insurance costs under control. The P and I insurer, being the carrier's insurer, can never offer advantages of that kind to the cargo owner.

Finally, whilst cargo insurance would still be required, a substantial extension of the liability of the carrier would put more emphasis on P and I insurance, which is concentrated in a limited number of markets traditionally dealing with this type of insurance.

Article 1

Paragraph 2

The proposed definition of "actual carrier" contains two inaccuracies. First, the contracting carrier may arrange with a third person to perform the carriage, or part thereof, and he may, in such arrangement, permit him to arrange for the actual carriage, or part thereof, to be performed by yet a different person. As the actual carrier is defined as the person to whom the contracting carrier has *entrusted* the performance of the carriage, it could be argued that, in case of the above-mentioned arrangements, there was no actual carrier, since the person who actually performed the carriage, did not himself enter into a contract with the contracting carrier. Secondly, the meaning of the word "performance" is unclear in this connexion.

As a result of the uncertainties, especially in those cases where there is a chain of consecutive time— and/or voyage charters, it will be difficult for the claimant to identify the actual carrier.

The most simple solution would be to define "actual carrier" as the *owner of the ship carrying the goods.* At present the situation is already such that in many cases the owner will be bound by a bill of lading signed by the master. If there is a demise charter, a bill of lading signed by the master binds the charterer, but not the shipowner; however under the system, where the shipowner can already be held liable, he may in such case look to the charterer for indemnity.

The system of joint and several liability of the contracting carrier and the shipowner would solve all identification problems for the claimant, since the name and principal place of business of the contracting carrier are stated in the bill of lading (article 15 (1) (*c*)) and the shipowner is easily identifiable by consulting the ship's register. Moreover even where claims for cargo damage are not secured by a maritime lien on the ship, the assets of the shipowner, particularly his ship, would give some certainty that the claim can be recovered.

Paragraph 4

Passengers' luggage should be excluded. If a bill of lading would be issued in respect of luggage, these goods lose their character of luggage. In the definition of "luggage" in the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974, article 1, paragraph 5, articles and vehicles carried under a bill of lading or other contract primarily concerned with the carriage of goods are excluded.

Paragraph 5

The Netherlands Government understands the Convention to apply also when the performance of part of the carriage in one and the same ship will be by inland waterways, provided that the stage of the carriage by inland waterways is subordinate to that by sea. Perhaps this intention should be expressed more clearly in the text.

The word "port" should be replaced by "port or place".

Article 2

Paragraph 4

In order to make it clear that the bill of lading does not govern the relation between the carrier and the charterer, the words "not being the charterer" should be added after the words "holder of the bill of lading" at the end of this paragraph.

Article 5

It should be realized that the deletion of the exceptions of "error in navigation" and "fault in the management" constitutes a major change in the allocation of risks between the cargo owner and the carrier under the Hague Rules. The deletion of the exception of fault in the management may be justifiable in view of the many disputes this exception gives rise to. This is not the case as regards exception of error in navigation. Shifting the risk in the case of error in navigation towards the shipowner may bring on an increase in total costs of transportation without an equivalent reduction in cargo insurance costs and will not induce the shipowner to act with more care towards the goods in view of his own interest in this case. For economic reasons preference is given to retaining the exception of error in navigation.

The same reasoning pleads for unreduced fire exception.

In view of the fact that in other provisions the word "expense" does not appear and that there does not seem to be any logic in the concept of "loss resulting from delay", the wording of paragraph 1 might be improved by using the formula of article 17 of the CMR convention:[1] "The carrier shall be liable for loss of or damage to the goods as well as for delay in delivery . . .".

Article 6

A provision regarding the calculation of the value of the goods should be inserted in this or in the previous article (cf. Protocol 1968, article 2 (*b*)).[2]

It is proposed that the limitation amounts be expressed in special drawing rights of the International Monetary Fund. This would circumvent the problems with regard to the gold franc, which arise from the disappearance of an official gold price, the working of the unit of account as a *numéraire* and the calculation of exchange rates in the absence of official parities.

Article 9

Paragraph 3

The apparent intention of this provision is that *in addition to* the liability in accordance with articles 6 and 8 which applies to carriage on deck in any case, there is liability for loss, damage and delay resulting solely from the carriage on deck. This intention should be expressed more clearly.

Paragraph 4

Paragraph 4 should be deleted since there is no sufficient ground to discard the principle of article 8 in this respect.

Article 10

Paragraphs 1 and 2

The following proposals are put forward in connexion with the comments made above on the definition of "actual carrier" and the proposal to define the "actual carrier" by "owner of the ship carrying the goods".

The first sentence of paragraph 1 should read:

"Where the contracting carrier is not the actual carrier, the contracting carrier shall nevertheless remain responsible for the entire carriage according to the provisions of this Convention."

In the first sentence of paragraph 2 the words "for the carriage performed by him" should be replaced by "for the carriage by his ship".

Article 11

In order to make a clear distinction between the actual carrier, the successive carrier and the contracting carrier the following is proposed:

"1. Where the contract of carriage provides that the contracting carrier shall perform only part of the voyage covered by the contract, and that the rest of

[1] Convention on the Contract for the International Carriage of Goods by Road, Geneva, 19 May 1956.

[2] Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924, Brussels, 23 February 1968.

the voyage shall be performed by a person other than the contracting carrier (the successive carrier), the responsibility of the contracting carrier and of the successive carrier shall be determined in accordance with the provisions of article 10.

2. However, the contracting carrier may exonerate himself from liability for loss, damage or delay in delivery caused by events occurring while the goods are under the charge of the successive carrier, provided that the burden of proving that any such loss, damage or delay in delivery was so caused, shall rest upon the contracting carrier.

3. The provisions of article 10 regarding the responsibility of the actual carrier shall apply correspondingly to the parts of the voyage mentioned in paragraph 1 of this article."

Article 13

The article as a whole

It is not clear which liabilities would be incurred by the actual carrier and the successive carrier, as the case may be, in case the contracting carrier does not pass on the relevant information.

Paragraph 2

The second sentence of paragraph 2 should be modified as follows:

"Where dangerous goods are shipped without the carrier having knowledge of their nature or dangerous character or of the precautions to be taken, the shipper shall be liable..." (see note on page 16 of the document setting forth the draft text).[3]

Article 16

Paragraph 1

It would be undesirable if preprinted reservations like "weight unknown" might not be considered a "special" note, since for instance in most cases the carrier has no reasonable means of checking the weight as stated.

Article 21

Paragraphs 1 and 3

In paragraphs 1 and 3 the words "legal proceeding arising out of the contract of carriage" also include disputes concerning the freight. As the convention does not deal with freight, except for article 15 (1) (*k*), these words should be replaced by: "legal proceeding arising under this Convention".

Paragraph 2

It is proposed to delete paragraph 2, as this provision deals with a number of questions on procedure, which should be left to national law.

[3] This note is as follows:

"Some representatives pointed out that paragraph 1 of article 13 imposed upon the shipper who hands dangerous goods to the carrier the obligation not only to inform the carrier of the nature of the goods and the character of the danger but also of the precautions to be taken. However, paragraph 2 of article 13 omitted any reference to 'precautions to be taken'. In the view of these representatives the second sentence of paragraph 2 should therefore be modified along the following lines: 'Where dangerous goods are shipped without the carrier having knowledge of their nature or dangerous character or of the precautions to be taken, the shipper shall be liable...'." See also A/CN.9/105, C, para. 4; UNCITRAL Yearbook, Vol. VI: 1975, part two, IV, 3.

Article 24

The second phrase creates the danger that cargo interests refuse to contribute in general average on the ground of the contention that the carrier is liable and rule D of the York-Antwerp Rules is overruled. The following solution is proposed:

"1. Nothing in this Convention shall prevent the application of provisions in the contract of carriage or national law regarding general average.

"2. The rules of this Convention relating to the liability of the carrier for loss of or damage to the goods shall govern the liability of the carrier to indemnify the consignee in respect of any contribution in general average.

"3. The provisions of the foregoing paragraph shall not affect the obligation to contribute in general average in case the carrier has no answer for the event which may give rise to the sacrifice or expenditure."

NIGER

[*Original: French*]

THE CONVENTION AS A WHOLE

It should be noted that the provisions of this convention did not give rise to any comments by the Government, which means that, on the whole, the draft convention meets with its approval.

Article 1, paragraph 4

Although there has been a shift in the meaning of the term "container" as compared with its generally accepted definition, it would have been desirable for the Working Group established by the United Nations Commission, in the event of its confirming the definition that should henceforth be the only valid one internationally, to set the rules for the invoicing of transport costs in the case of goods shipped by container. For example, the Niger continues to pay for the weight of this empty box, which may be as much as a ton or several tons, because rail and road carriers regard the container as packaging.

On this point, it is worth recalling that it has already been stated, at an ECA seminar on external trade statistics held in Addis Ababa, that international organizations have categorically decided on other occasions that the container is a means of transport and not packaging. Yet it is still customary to regard it as packaging.

Article 6

With regard to the various versions of article 6 concerning limits of the liability of the carrier, the Niger prefers the alternative which takes into account the container problem, that being an important question for an inland country.

Article 20, paragraph 1

The Niger would prefer a two-year limitation period.

NIGERIA

[*Original: English*]

Article 5

Paragraph 3

The 60-days period within which goods may be treated as lost should be extended to 90 days.

Paragraph 4

The paragraph requires a claimant to prove that the fire arose due to fault or negligence on the part of the carrier, his servant or agent. It is felt that a claimant would have difficulties in proving negligence on the part of the carrier, his servant or agent since he is not present on board during transit. It is therefore considered that it would be better if the burden of proof is on the carrier, his servant or agent to show that he has taken all reasonable care and has not been negligent in the performance of his duty.

Article 6

It is too early to decide on which alternative to support because the calculation formulae are rather intricate and may not be easily understood until fully discussed through exchange of views at a future conference. In the meantime, our position on this point is reserved.

Article 20

A two-year period of limitation in arbitral proceedings is preferred.

NORWAY

[*Original: English*]

GENERAL OBSERVATIONS

The Norwegian Government is of the opinion that the draft convention will constitute a suitable basis for the finalizing of a new international treaty on the carriage of goods by sea. The proposed provisions are in many respects an improvement compared with existing international rules in this field, and on the whole the Norwegian can support the structure of the draft convention as well as most of its provisions.

The Working Group has proposed a new convention instead of amendments to the existing Hague Rules, and the Norwegian Government supports this proposal. It would like to stress that it considers it most important that the new convention is made acceptable to as many States as possible so that it will replace already existing international rules. In this respect the draft convention is considered to represent an over-all solution which can be expected to receive wide international support as an acceptable compromise between the diverging opinions on the regulation of the matter on an international basis.

Article 6

I. The Working Group has not succeeded in finding a joint solution for the calculation of the *limit of liability*. Among different systems proposed in article 6 the Norwegian Government prefers *alternative A*. The reasons for this have already been stated in the Norwegian reply to your questionnaire of 18 July 1972 (LE 133 (5)),[1] which reply was as follows:[2]

"The Norwegian Government has for a long time considered that the provisions relating to limitation of carriers' liability in the Convention[3] article 4 (5) are unsatisfactory. The reasons for this view have been set out in an explanatory note to an amendment submitted to the first session of the 1967/68 Diplomatic Conference in Brussels, in which the Government proposed that a simple weight unit limitation system should be introduced also in the law of carriage of goods by sea. The following views were then expressed:[4]

" 'The system of limiting the carrier's liability to a certain sum "per package or unit" has proved to be unsatisfactory.

" 'The term "package or unit" is vague and ambiguous and has been interpreted differently not only by the courts in the various Contracting States, but even in the national legislations effecting the Convention. The uniformity which was aimed at has, therefore, not been achieved.

" 'Frequently, the practical solutions arrived at under the "package or unit" system appear to be arbitrary and are considered unjust in the numerous cases where the compensation offered to the cargo owners is purely nominal. The raising of the sum per package or unit will not remedy this basic flaw in the system. Thus, it is still undecided in most countries how to apply the present system to "containers".

" 'Since the Hague Rules were adopted the liability of the carrier by rail, by road and by air has become subject to a system of limitation which is more consistent with the intentions of the Rules, more easy to apply, and more satisfactory to the cargo owners.

" 'For the reasons stated it is submitted that the limitation system embodied in article 1, paragraph 5 of the Convention has outlived its usefulness and should now go. It is proposed that it be replaced by the simple weight unit limitation system already adopted in the international conventions for the carriage of goods by rail (CIM), by road (CMR) and by air (Warsaw).

" 'The limitation units, thus, should be the equivalent of a certain amount of gold per kilogram of the goods.

" 'The question of the amount of gold to be stipulated is, of course, debatable, but it seems reasonable to look to the CMR which contains the most recent solution of the problem. Article 23 of the CMR provides for 25 gold francs (each franc containing 10/31 of a gramme of gold of millesimal fineness 900) per kilogram. As, however, all other maritime conventions, including the Stockholm Drafts, have adopted the Poincaré franc, it is submited that this monetary unit be resorted to also in the Hague-Visby-Rules. The equivalent amount would then be 125 Poincaré francs.'

"During the first session of this Conference most delegations had serious objections to the proposed amendment. In an effort to reach the best compromise conceivable under the circumstances, the Norwegian delegation submitted an amendment containing in substance the combined unit/weight limitation system now embodied in the Convention, article 4 (5),

[1] A/CN.9/WG.III/WP.10/Add.1, annex I.
[2] *Ibid.*, annex II.
[3] International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Brussels, 25 August 1924.
[4] Conférence diplomatique de droit maritime, douzième session (1ère phase), Brussels 1967, p. 679.

as amended by the Brussels Protocol.[5] However, the Conference was unable to reach agreement on any of the proposed amendments relating to limits of liability, and at the second session of the Conference the Norwegian delegation maintained its original position and—together with the delegations of Finland and Sweden—submitted an amendment for a simple weight unit limitation of liability.[6] In support of the proposed amendment these delegations submitted the following views on the combined unit/weight limitation system:[7]

" 'However, a combined solution . . . would still include the present disadvantages of the package or unit limitation and would fail to establish an acceptable correspondence with the solutions adopted in the other international conventions on carriage of goods, first of all the CMR convention. In our view it is essential to reach a solution which does not create problems in modern combined transports and highly desirable to get rid of the disadvantages created by the package or unit limitation of the Hague Rules.

" 'Investigations have been made in Scandinavia into the economic consequences of changing over to the CMR solution of limitation based on weight. The investigations were based on official Scandinavian statistics concerning foreign trade as well as on the private statistics of underwriters and shipping lines, Scandinavian and others. The results indicate that the CMR limitation would be sufficient to cover practically all damage to general cargo and that the increase in price to be paid in the form of insurance would indeed be negligible. This adds to the weight of the argument that limitation should be based on weight only and should be on the same level as in the CMR convention: it should be kept in mind that the limitation rule primarily was intended to apply in case of damage to exceptionally valuable goods.

" 'When the economical problems involved are small, more attention may well be paid to the legal technical aspects. The advantages of full correspondence between the two conventions concerned are obvious. To this should be added the fact that experience over the years has shown how difficult it is for the Courts to interpret the words "package or unit" and that no international uniformity can be achieved on that basis.'

"In accordance with the views expressed in the quoted passages the Norwegian Government again submits that the limit of liability should be fixed as a certain amount of Poincaré francs per kilo of the gross weight of the goods lost or damaged. In accordance with usual practice the particular amount should perhaps be left to be discussed and decided by the future diplomatic conference, and the Government will not ask for a discussion of that question in the UNCITRAL Working Group. However, it is submitted that, in order to take care of certain problems relating to the carriage in small parcels of lightweight goods of relatively high value, there should be added a provision of the same type as that contained in the Draft Convention on Combined Transports (TCM), article 10 (3): 'The minimum gross weight of such goods shall be deemed to be . . . kilos'.

"In the opinion of the Norwegian Government such a simple system of weight limitation of liability is clearly preferable both to the unit limitation system of the Convention, article 4 (5), and to the combined unit and weight limitation system of article 4 (5) as amended by the Brussels Protocol."

II. In the draft article 6, the limitation amount is expressed in gold francs. In order to avoid the difficulties caused by the uncertainties of the price of gold, the Norwegian Government is of the opinion that the special drawing right (as defined by the International Monetary Fund) should be used as the unit of account in the new convention instead of the franc. The Norwegian Government will at a later stage put forward a proposal to this effect.

PHILIPPINES[1]

[*Original: English*]

Article 1

Paragraph 1

The term "Carrier" means not only "contracting carrier" but also "actual carrier" defined in paragraph 2; hence, it should be deleted as part of the definition only of "contracting carrier". Perhaps, it would be advisable to define "carrier" in addition to "contracting carrier" and "actual carrier". If "carrier" is to be defined, it may be defined as "A PERSON WHO, FOR COMPENSATION, AGREES TO UNDERTAKE TO CARRY GOODS BY SEA."

Paragraph 3

"Consignee" is not just any person who is "entitled to take delivery of the goods" because the definition will include taking delivery under any lawful authority, such as a sheriff by court order; but its meaning should be confined to the person designated to take delivery *under the terms of the contract or by the terms of the bill of lading* whether deliverable to a named person, to order, or to bearer.[2]

Paragraph 4

It is not advisable to use the same term in defining a term. Instead of "goods", ARTICLE OF COMMERCE OR MERCHANDISE should be used. The words "if supplied by shipper" should be deleted because whoever supplied the package seems immaterial

[5] *Op. cit.*, p. 694. Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed at Brussels on 25 August 1924. Brussels, 23 February 1968.

[6] Conférence diplomatique de droit maritime, douzième session (2ème phase), Brussels 1968, p. 192.

[7] *Op. cit.*, p. 206-7.

[1] In the case of certain comments made by the Philippine Government proposing amendments to the text of the draft convention, the full scope of the proposed amendments appears in a text of the draft convention incorporating these amendments submitted by the Philippine Government together with their comments. In these cases, the text incorporating the amendments is set forth below in the form of foot-notes. In such foot-notes, as also in the text, words in *capital letters* indicate proposed additions to the text, while words *enclosed within brackets* indicate proposed deletions.

[2] " 'Consignee' means the person WHO, UNDER THE TERMS OF THE CONTRACT OF CARRIAGE OR THE BILL OF LADING, is entitled to take delivery of the goods." (para. 3 as amended).

in order that the same shall be considered part of the article itself.[3]

Paragraph 5

The words "where the goods are to be delivered" should be deleted because carriage of goods by sea from one port to another does not necessarily involve the duty to deliver to a consignee or to someone in another port. This is true in the case of carriage of goods by a ship for purposes of mere exhibition or exposition.

"Freightage", instead of "freight" should be used if it means the price for transporting the goods or of the "freight" taken in.

Paragraph 6

"Against surrender of the document" should be deleted because if the bill of lading or its equivalent issued to the shipper or consignee is lost, the delivery of the goods to the consignee may be made by either requiring the consignee to sign a receipt acknowledging the delivery of the goods and/or the giving of a bond to secure the carrier for misdelivery. The "surrender" of the bill of lading should not be its essential characteristic, but as evidence of the contract of carriage of goods.[4]

Observations on Article 1

Should not the term "charterer" be also defined in article 1 and to state whether the term "carrier" includes a "charterer"? It is to be noted that although article 2, paragraph 4 states that the provisions of this convention shall not be applicable to charter-parties, yet the same paragraph also provides that "where a bill of lading is issued *pursuant to a charter-party,* the provisions of the Convention SHALL APPLY to such a bill of lading where it governs the relation between the carrier and the holder of the bill of lading." If the term "charterer" is also to be defined in article 2, it is proposed to harmonize its definition with the definition given, if any, in the draft on international shipping legislation. In the absence of such draft definition, it is proposed to define "charterer" as A PERSON WHO HIRES OR ACQUIRES THE USE OF A SHIP OR VESSEL OR A PORTION THEREOF TO CARRY GOODS BY SEA FROM ONE PORT TO ANOTHER IN CONSIDERATION OF PAYMENT OF FREIGHTAGE, FOR HIS ACCOUNT OR FOR THE ACCOUNT OF OTHERS.

Article 2

Paragraph 1

The word "two" should be deleted, inasmuch as the carriage of goods may involve ports in more than two States.

Article 4

Title

The word "Responsibility" in the title of article 4 should be changed to "Liability" to conform with the general title of part II under which it appears.

Article 5

Paragraph 4

Under the draft convention, the carrier will be liable only for loss due to fire if the claimant proves the fire arose due to his negligence; under the proposed amendment, he will be liable if he cannot prove that he or his agents exercised all diligence to prevent the fire. Under Philippine law, common carriers are required to exercise extraordinary diligence which means they are presumed liable unless proven otherwise.[5]

Article 6

Paragraph 1

All the alternatives in the Draft Convention in article 6 fixing the liability of the carrier to a fixed amount without any condition and without the consent of the shipper or the consignee, under Philippine jurisprudence, are *void* as against public policy. Thus, in the Philippine case of *Heacock v. Macondray and Co.* (vol. 42 Philippine Reports, p. 205), the Philippine Supreme Court held: "Three kinds of stipulations have often been made in a bill of lading: (*a*) One exempting the carrier from any and all liability for loss and damage occasioned by its own negligence; (*b*) one providing for an *unqualified limitation* of such liability to an agreed valuation; (*c*) one limiting the carrier's liability to an agreed valuation, unless the shipper declares a higher value and pays a higher rate of freight. The first and second stipulations are *invalid* as being contrary to public policy; the third is valid and enforceable." All the "alternatives" in article 6 of the draft convention fall under the second kind of stipulation above quoted, and are void under Philippine jurisprudence.

We, therefore, propose that article 6 should, instead, provide as follows:

> The liability of the carrier according to the provisions of article 5, shall be limited to an amount equivalent to (. . .) francs per kilo of gross weight of the goods lost or damaged, or, in case of delay, to an amount not exceeding [double] the freightage paid or payable, unless the shipper declares a higher value and pays a higher rate of freightage based on the declared value.

This proposed provision is in accordance with Philippine law and jurisprudence. Or, if this proposed provision is unacceptable to the Working Group, it is suggested that article IV, paragraph 5 of the Brussels Convention of 1924 be adopted, which reads:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with goods in an amount exceeding

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[3] " 'Goods' means any kind of [goods] ARTICLE OF COMMERCE OR MERCHANDISE, including live animals; where the goods are consolidated in a container, pallet, or similar article of transport or where they are packed, 'goods' includes such article of transport or packaging [if supplied by the shipper]." (para. 4 as amended).

[4] " 'Bill of lading' means a document which evidences a contract for the carriage of goods by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods [against surrender of the document] TO THE CONSIGNEE. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking." (para. 6 as amended).

[5] "In case of fire, the carrier shall be liable, [provided the claimant proves that the fire arose due to fault or negligence on the part of the carrier, his servants or agents.] UNLESS HE PROVES THAT HE, HIS SERVANTS OR AGENTS TOOK ALL NECESSARY MEASURES TO PREVENT THE FIRE." (para. 4 as amended).

100 pounds per package unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

The present Philippine Code of Commerce (art. 372) provides: "The appraisement of the goods which the carrier must pay in case of their being lost or mislaid shall be fixed in accordance with what is stated in the bill of lading, no proofs being allowed on the part of the shipper that there were among the goods declared therein articles of greater value, and money."

The present Philippine Civil Code (art. 2226) also provides: "Liquidated damages are those *agreed upon by the parties to a contract*, to be paid in case of breach thereof." A fixed or liquidated damage *imposed by law* (or by the draft convention) cannot be considered as an *agreement* of the parties.

Paragraphs applying to all alternatives

The provisions on the equivalence of one franc (or pound as the case may be), and its conversion to national currency of the State seized of the case may be retained as appearing in the draft convention.

Article 13

Paragraph 2

The words "and the precautions to be taken" should be inserted to harmonize the provision of paragraph 2 with paragraph 1.[6]

Paragraph 3

Same as above. It also suggested that the word "actual" be inserted before the word "danger", so that before the carrier may be authorized to unload, destroy, or render innocuous the goods accepted by him as dangerous, its "actual" dangerousness must be evident. The goods from the beginning are known to the carrier to be "dangerous"; hence, to authorize him to unload, destroy or render same innocuous, the same must have *subsequently* appeared to be an "actual" danger to the ship or cargo; otherwise , such a provision will give the carrier to act arbitrarily or with abuse of discretion.[7]

Article 15

Paragraph 1

Signature by facsimile, etc., if *usage* so permits, should also be recognized.[8]

Paragraph 1 (k)

The word "freight" should read "freightage" because "freight" ordinarily means the goods transported while "freightage" means the cost of transportation of the "freight".

Paragraph 1 (l)

Subparagraph (*l*) may be deleted because it is merely a repetition of paragraph 3 of article 23. If subparagraph (*l*) is deleted, proposed subparagraph (*m*) may be subparagraph (*l*).

Paragraph 1 (m)

A new subparagraph (*m*) should be added: "The invoice or estimated value of the goods". This is important so that it may conform with the proposed amendment to article 6, that the liability of the carrier, in case of total loss, shall be limited to the value stated by the shipper in the bill of lading.

Paragraph 3

While the omission of any particulars required to be stated in the bill of lading may not affect its validity, yet in order to oblige the carrier to issue a bill of lading with all the required particulars, he should be made to suffer some punishment for his omission; that is, he shall not be entitled to the benefits of limited liability in case of loss of the goods provided for in article 6.[9]

Article 16

Paragraph 4

"Freight" should read *"freightage"* for the reasons already explained in the comments on article 15.

Article 21

Paragraph 3

The last sentence of paragraph 3 should be deleted as it may give rise to conflicting orders issued by different courts of the contracting states. The court first acquiring jurisdiction of the case should have the power to issue provisional or protective measures.

Article 25

Paragraph 1

This paragraph should be deleted as being in conflict with the provisions of article 23 of this draft convention. In so far as carriage of goods by sea from one port to another in different states is concerned, the provisions of this Convention shall exclusively apply, to avoid conflict of applicable law.

Or, above paragraph 1 may be allowed to remain if the words "not in conflict with the provisions of this Convention" will be added, such that said paragraph 1 will read as follows:

> "1. This Convention shall not modify the rights or duties of the carrier, the actual carrier and their servants and agents provided for in international conventions or national law relating to the limitation of

[6] "Dangerous goods may at any time be unloaded, destroyed or rendered innocuous by the carrier, as the circumstances may require, without payment of compensation by him where they have been taken in charge by him without knowledge of their nature and character AND THE PRECAUTIONS TO BE TAKEN. Where dangerous goods are shipped without the carrier having knowledge of their nature and character AND THE PRECAUTIONS TO BE TAKEN, the shipper shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment." (para. 2 as amended).

[7] "Nevertheless, if such dangerous goods, shipped with knowledge of their nature and character AND THE PRECAUTIONS TO BE TAKEN, become [a] AN ACTUAL danger to the ship or cargo, they may in like manner be unloaded, destroyed or rendered innocuous by the carrier, as the circumstances may require, without payment of compensation by him except with respect to general average, if any." (para. 3 as amended).

[8] "The signature of the carrier or a person acting on his behalf; the signature may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if the law OR USAGE of the country where the bill of lading is issued so permits;". (para. 1 (*j*) as amended).

[9] "The absence in the bill of lading of one or more particulars referred to in this article shall not affect the validity of the bill of lading[.], BUT SHALL DEPRIVE THE CARRIER OF THE BENEFITS PROVIDED FOR IN ARTICLE 6." (para. 3 as amended).

liability of owners of sea-going ships NOT IN CONFLICT WITH THE PROVISIONS OF THIS CONVENTION."

SIERRA LEONE

[*Original: English*]

Article 1

Paragraph 1

The definition of carrier seems to cover the contracting party or his agent. If so, why is it necessary to use "agents" outside the meaning of "carrier", as for example in article 5, paragraph 1? If the definition of carrier in article 1, paragraph 1 is not intended to cover an "agent", then add "and on whose behalf" after "whom".

Article 5

Paragraph 1

See comment on article 1, paragraph 1.

Paragraph 4

Since the carrier is always invariably the owner or master of the ship, should the burden of proof of due care not be on the carrier who will have the facts surrounding the circumstances of the fire rather than it being for the claimant to prove fault or negligence? It is considered that the common law doctrine of *res ipsa loquitur* should apply here. See article 5, paragraphs 5 and 7, where the burden of proof is cast on the carrier.

Paragraph 6

This article adopts the common law concept of particular average. It remains silent on general average thus leaving the shipper or consignee without remedy under the convention in respect of a general average act done by the carrier. It is not sufficient to leave the issue of general average to provisions in individual contracts of carriage or national laws. If the convention seeks the interest of the carrier by exempting him from liability in the case of particular average, it should also consider the interest of the shipper or consignee who may not be as conversant with shipping laws as the carrier in making adequate provisions for general average.

Article 6

Alternative E is preferred.

Article 20

Paragraph 1

The limitation period under this article should be *two* years.

Article 22

Paragraph 4

It is considered that this clause should be deleted. The provisions for arbitration under the convention should apply only where the parties have remained silent on arbitration. The parties should be given freedom to determine *beforehand* how best their dispute can be arbitrated when it arises. Article 22, paragraph 5, does not affect the issue as it speaks of an arbitration agreement made *after* a dispute has arisen.

Article 23

Paragraph 1

It is considered that this article should be deleted. Individual contracts should be permitted to opt out of the provisions of the convention.

Paragraph 3

The convention should apply automatically to a bill of lading which makes no mention of the convention and which does not contain provisions contrary to those of the convention.

SWEDEN

[*Original: English*]

GENERAL OBSERVATIONS

Ever since the initiative for revision of the 1924 Convention[1] first was taken in UNCTAD and UNCITRAL the Swedish Government has followed with utmost interest the development of a new international régime governing carriage of goods by sea. It is with great satisfaction that the Swedish Government notes that the detailed examination of this question carried out within the UNCITRAL working group on international shipping legislation has resulted in a draft for a new convention which from a substantive as well as a systematic point of view is in line with modern international regulation of other modes of transport. The Swedish Government finds the rules of the draft convention in general acceptable and would welcome a new international convention based thereon.

The Swedish Government recognizes that the draft convention on many vital issues is the result of carefully elaborated compromises. Since it is of paramount importance that the convention, when adopted, will be able to gain the same amount of world-wide support as the 1924 Convention presently has, it is to be hoped that the balance thus achieved will not get lost during the coming deliberations on the draft.

SPECIFIC COMMENTS

Article 5

One of the crucial issues in the draft convention is the liability régime established in the draft, in particular in article 5. From a legal point of view these rules definitely constitute an improvement as compared with the liability régime of the 1924 Convention. The mandatory period of responsibility has been extended to cover the entire period when the goods are in the custody of the carrier, his servants or agents. Article 5 sets out a presumption of fault system with vicarious liability for the carrier in respect of his servants and agents and does not include those exemptions of th 1924 Convention which are peculiar to sea carriage. The present uncertainty as to carriers' liability for delay in delivery has been resolved in an affirmative manner. The present ambiguities concerning liability for unseaworthiness of the vessel have been removed. The ratio for the burden-of-proof rule relating to fire in article 5, paragraph 4, may be questioned. It is, however, the opinion of the

[1] International Convention for the Unification of Certain Rules relating to Bills of Lading, done at Brussels, 25 August 1924.

Swedish Government that this rule should be retained since it is an important part of the compromise solution.

The economic consequences of the proposed liability régime are — due to lack of accurate data — difficult to assess with any certainty. A significant part of compensation for cargo loss or damage which has hitherto been absorbed by marine cargo insurance will under the proposed system in the end be covered by carriers' P & I insurance. This will not make marine cargo insurance superfluous. Cargo owners will for a number of reasons continue to cover their risks by way of cargo insurance. But recourse claims by marine cargo insurers against P & I insurers will increase, something which from a purely economic point of view has its disadvantages. As a result, cargo insurance premiums can be estimated to decrease while P & I insurance premiums will increase, an increase which probably will be reflected in the freight. According to estimates made by the Swedish insurance industry it can hardly be expected that the decrease of marine insurance premiums will totally outweigh the increase of P & I premiums.

On the basis of the foregoing it seems probable that the reallocation of risks will have as a result some increase in over-all transportation costs, at least until sufficient experience of the new system has been gained by the insurance industry. However, it should be pointed out in this context that estimates relating to the possible net effect of a reallocation of risks along the lines proposed in the draft show that the increase of over-all transportation costs would not be more than 0.5 to 1 per cent of the freight. It should also be mentioned that recent studies carried out in the United States relating to United States imports and exports of liner cargo indicate that *all* costs for cargo loss or damage (costs incurred by cargo-owners, carriers and their insurers as well as administrative costs for recourse procedures) amount to less than 0.5 per cent of the value of the goods.

Having evaluated the advantages from a legal point of view of the proposed liability system as well as the possible economic disadvantages thereof and bearing in mind the desirability of getting world-wide support for the new convention the Swedish Government finds that it can support the liability system contained in the draft. There is also another important consideration to be taken into account in this context. To an increasing extent international carriage of goods is nowadays effectuated by several modes of transport. By removing the peculiarities of the legal régime at present governing carriage by sea and aligning it with the ones governing other modes of transport one will pave the way for the establishment of a uniform system for multimodal transport of cargo.

Article 6

The last-mentioned aspect is of importance also as regards the system of limitation of liability contained in article 6. Conventions governing other modes of transport use the concept of limitation per kilo with regard to loss of or damage to cargo. With regard to delay, the Warsaw Convention concerning air carriage[2] uses the same concept of kilo limitation, while the railway and road conventions use the concept of limitation related to freight.

A limitation system based on the weight of cargo lost or damaged has distinct advantages from the point of view of clarity and logic. It removes the present ambiguities concerning the "unit" concept which still gives rise to much uncertainty and litigation. In addition, it seems obvious that the limitation amount should be the same whether the goods have been packed in one large box or in 100 small boxes. For these reasons and in order to make the new convention conform to the system established for other modes of transport the Swedish Government supports alternative A and, in the second place, alternative B of draft article 6.

The limitation amount is suggested to be expressed in gold francs (so-called Poincaré francs). However, since the time when the Working Group concluded its work it has become evident that it is no longer feasible to express limitation amounts in gold units. The Swedish Government therefore proposes that the limitation amount should be expressed in Special Drawing Rights as defined by the IMF. This was the solution adopted in September 1975 at the diplomatic conference convened by ICAO for the revision of the Warsaw Convention.

Article 20

With regard to the limitation period (article 20, para. 1) the draft contains two alternatives. The Swedish Government is in principle in favour of a two-year period. Experience shows that the present one-year period often is too short for negotiations and the instituting of legal proceedings. Although the possibility of extension of the period exists (cf. para. 3) cargo-owners or their insurers sometimes have experienced difficulties in obtaining extension of the period from the carrier or his insurer. On the other hand, the very limited effect of the non-delivery of notice of loss, damage or delay (cf. article 19, para. 1) sometimes leads to abuses on the part of cargo-owners who may not inform the carrier of the claim until one of the last days of the limitation period. For these reasons the Swedish Government suggests that UNCITRAL should consider to couple a two-year period with provisions requiring that the cargo-owner, in order to retain his right of action against the carrier, must inform the carrier of his claim within a shorter period of time, when facts still can be ascertained and evidence secured.

Article 21

Article 21 relating to jurisdiction only allows proceedings to be brought in Contracting States. In particular during the time immediately following the entry into force of the Convention, this provision will produce negative effects unless the number of ratifications required for the entry into force are set at a very high number. Apart therefrom, if proceedings are brought in non-contracting States, it will be tempting for the court in question to disregard the rules of the convention if this requires the case to be abandoned even when the contract of carriage has a clear connexion with that State (e.g. the place of destination is located in that non-contracting State). For these reasons, the Swedish Government suggests that the word "contracting" be deleted in the second line of paragraphs 1, 2 (*a*) and 3 respectively.

[2] Convention for the Unification of Certain Rules relating to International Carriage by Air, done at Warsaw, 12 October 1929.

UKRAINIAN SOVIET SOCIALIST REPUBLIC

[*Original: Russian*]

The unification of the rules of international law relating to the carriage of goods by sea is one of the tasks entrusted to the United Nations Commission on International Trade Law by the General Assembly. The text of the draft Convention on the Carriage of Goods by Sea, as adopted by the UNCITRAL Working Group, is to be regarded as constituting a practical step in this direction.

It would appear that the text of the draft Convention, as well as the comments and observations thereon which are to be submitted by the Governments of States Members of the United Nations, may be used as a basis for further elaboration of the draft at future sessions of the United Nations Commission on International Trade Law. At the same time, a number of comments should be made on certain provisions of the draft.

The title of the draft Convention

The draft Convention, particularly article 2, paragraph 4, which stipulates that the provisions of the Convention shall not be applicable to charter-parties, makes it clear that the sphere of application of the Convention will be limited to some extent, in other words, that the Convention will not regulate all matters relating to the carriage of goods by sea. It would seem that this should be reflected in the title of the draft Convention. Perhaps this could be done by adding the words "on the unification of certain rules relating to" to the present title.

Article 1

In the definition of the term "contract of carriage" (para. 5), a phrase should be added to the effect that such a contract is to be concluded in writing. This would help to obviate misunderstandings which might arise in interpreting this term.

Article 5

The provision stipulating that the carrier is not liable for loss of goods resulting only from *reasonable* measures to save property at sea (para. 6) raises a number of questions from the standpoint of practical application both directly at sea and in settling specific disputes, since the criterion of "reasonableness" is inadequately defined and unclear.

Article 6

It is suggested that alternative D, variation X, should be taken as a basis for further consideration of the question of limits of liability.

Article 8

It is suggested that, in both sentences of the article, the words "or recklessly and with knowledge that such damage would probably result" should be deleted, since the term "recklessness" is in effect equivalent to the term "negligence" and the words "with knowledge that such damage would probably result" can only create various problems of interpretation.

Article 9

It would be useful to add the words "of the country of the port of loading" at the end of paragraph 1. This would help to clarify precisely which rules or regulations are to be applied.

Article 15

Paragraph 2 of this article should state that the fact of the goods being kept on deck must be reflected in the bill of lading. In case of dispute, such an entry might be of critical importance.

Article 19

The words "completion of delivery" in paragraph 2 of this article should be replaced by the words "transfer of the goods to the consignee". This would more accurately reflect the commencement of the time-limit for the consignee's notice in writing to the carrier.

Article 21

Since the problem of jurisdiction is very complex and goes beyond the scope of the draft Convention, it is suggested that this article should be deleted from the draft Convention, bearing in mind that such matters will be settled under the relevant national legislation.

Article 22

This article provides for a variety of places at which arbitration proceedings may be held, thus giving the plaintiff wide discretion in selecting a specific site. This may seriously impede arbitration proceedings for the settlement of disputes relating to the carriage of goods by sea. It would therefore be appropriate to delete this article from the draft Convention and simply include a reference to the arbitration clauses specifically included in the treaty on maritime transport.

UNION OF SOVIET SOCIALIST REPUBLICS

[*Original: Russian*]

Title of the Convention

The fact that the Convention deals not with all but only with some, although of course some of the most fundamental, questions concerning the carriage of goods by sea should be reflected in the title; its present wording is too broad.

Article 1

(*a*) The statement in paragraph 4 that "goods" includes "live animals" is superfluous, particularly if article 5, paragraph 5 (see below), is retained in one form or another, as it deals specifically with the characteristics of carriage of goods of that kind.

(*b*) Paragraph 5 should indicate that the contract of carriage is to be concluded in writing (for example, " 'contract of carriage' means a contract in writing . . .").

Article 2

At the end of the second sentence of paragraph 4 the following phrase should be added: "if he (the holder of the bill of lading) is not the charterer".

Article 4

The definition of the "period of responsibility" of the carrier ("carriage of goods") as it stands could give rise to doubts as to whether the carrier is responsible for goods taken over by him for carriage not at the "port of loading" but at some other place, or for goods

at a port of trans-shipment (allowable under articles 10 and 11), and so forth.

To avoid such doubts, the last part of the sentence, beginning with the words "at the port of loading . . .", should perhaps be deleted from paragraph 1, since basically the period of the carriage of goods, i.e., the period during which the goods are in the charge of the carrier, is defined in paragraph 2.

Article 5

(*a*) Paragraph 5 is unnecessarily complicated and indeed handly necessary at all: if damage results from "special risks" inherent in the carriage of live animals, obviously the carrier will be relieved of liability on the basis of the general principle (para. 1) because there was no fault on his part.

(*b*) The rule stated in paragraph 6 that the carrier shall not be liable for damage to goods resulting only from *reasonable* measures to save property could in practice lead to various disputes as to the criteria for determining whether measures were "reasonable" or for distinguishing between the saving of human lives, on the one hand, and the saving of property on the other, and, lastly, it could have an adverse effect on compliance by captains of ships carrying goods with the traditional rules of shipping for coming to the aid of other ships in distress at sea.

(*c*) At its forthcoming session UNCITRAL is to consider the question of whether to retain in the new Convention the existing rule of shipping legislation concerning so-called "error in navigation", and to making certain amendments to eliminate the ambiguities which have hitherto led to serious complications in applying the rule: the rule as amended could provide that "the carrier shall be relieved of liability for loss of or damage to goods or delay in delivery if he proves that they have been caused by an error in navigation".

Clearly, complete rejection of the rule would mean a considerable increase in the degree of risk for the carrier, a sharp rise in the cost of shipping, and so forth; so far, however, the economic consequences of such a redistribution of risks have not been properly studied.

Article 6

(*a*) Of the various alternatives proposed in the draft, the best basis for discussion is alternative D (with variation X: "the freight").

(*b*) It would be useful to include in article 6 (along the lines of article 4, paragraph 5, of the 1924 Brussels Convention or article 2 of the 1968 Brussels Protocol) a reservation referring to cases where the nature and cost of the goods was declared by the shipper and included in the bill of lading or other document evidencing the contract of carriage.

Article 8

Under the draft the condition for non-application of the rules on limitation of the liability of the carrier is not only an act committed by him with intent to cause damage, but also an act "done recklessly and with knowledge that damage would probably result". Basically, the word "recklessness" means the same thing as "negligence". As for the "knowledge that damage would probably result", in practice it would be extremely difficult to prove that the probability of damage was beyond the "knowledge" or foresight of the carrier. In practice this could lead to a situation where the rules for limiting the carrier's liability arising from his negligence (article 5, para. 1) would not be applicable precisely because of his negligence.

Accordingly, the words "or recklessly and with knowledge that such damage would probably result" should be deleted from article 8.

Article 9

(*a*) In paragraph 1 of this article (or in article 15) it should be provided that if goods are carried on deck that fact should be noted in the bill of lading: that provision would be important to the relationship between the carrier and the cargo owner, and also to the relationship between the shipper (seller) and consignee (buyer), particularly in connexion with insurance of the goods, settlements through banks and so forth.

(*b*) Paragraph 1 should also indicate which country's legislation is referred to (for example: "the country of the port of loading").

(*c*) The wording of paragraph 3 is not sufficiently clear; in particular, it should be redrafted so as to express more clearly the main idea of the first sentence, which, as far as can be understood, is that the provisions of article 6 (together with the provisions of article 8) are also applicable in cases where the goods are improperly carried on deck and the loss, damage or delay in delivery is exclusively a result of the fact that the goods were carried on deck.

Article 11

For a clearer indication of what situations are covered by this article and by article 10, it could be specified at the beginning of paragraph 1 of article 11 that the article refers to cases where the contract of carriage contains a *special reservation* (instead of "provides"), and that the carrier shall perform only the *specifically stipulated* part of the carriage (instead of simply "part" of the carriage).

Article 16

Paragraph 1 implies, but does not explicitly state, the right of the carrier to include in the bill of lading under certain circumstances a reservation in respect of those particulars concerning the goods the accuracy of which he had grounds to suspect or which he could not check. A clear statement should therefore be added at the end of the paragraph that under those circumstances "the carrier may *include in the bill of lading the appropriate reservation* along with special note of these grounds or inaccuracies or of the absence of reasonable means of checking".

Article 17

Paragraphs 3 and 4 of this article should be deleted, since the questions dealt with in paragraph 3 may, without prejudice to the objective of unification, be settled in conformity with the norms of national legislation, and the questions dealt with in paragraph 4 may be settled entirely satisfactorily on the basis of article 8.

Article 19

(*a*) Paragraphs 1, 2 and 5 of this article use different times for calculating the beginning of the period within

which the shipper is to give notice in writing to the carrier: in paragraphs 1 and 5 the time is "the time the goods are handed over to the consignee", and in paragraph 2 it is the time of "completion of delivery".

In view of the different meanings attributed to these concepts in the draft Convention (see article 4), it would be correct for paragraph 2 also to refer to "the time the goods are handed over to the consignee".

(*b*) Paragraph 6 should specify that notice given to the carrier shall also have effect in respect of the actual carrier who participated in the carriage.

Article 20

Paragraph 3 should be worded along the lines of article 22, paragraph 2, of the 1974 Convention on the Limitation Period which reads: "The debtor may at any time during the running of the limitation period extend the period by a declaration in writing to the creditor. This declaration may be renewed."

Article 21

Under this article there would be many jurisdictions in different countries before which action could be brought in respect of a contract of carriage, and the choice would lie exclusively with the plaintiff, which would give rise to considerable uncertainty for the other party, the defendant.

Such a provision is obviously not in accordance with the principle of the equality of the parties and the proper balancing of their rights and interests.

Moreover, such a provision would be contrary to international agreements concluded by a number of countries containing binding rules on jurisdiction over disputes between organizations of those countries, including disputes relating to the carriage of goods by sea (for example, the 1972 Convention on arbitration, already ratified by eight members of the Council for Mutual Economic Assistance).

If the specific rule in paragraph 2 relating to the arrest of vessels is retained, it will be necessary to include a very clear reservation that the rule may not be applied to State vessels.

Accordingly, and in view of the fact that the problem of jurisdiction ("limits of international competence"), which is a separate and very complex problem, goes beyond the scope of the matter which is the subject of regulation by the draft convention, it would be advisable not to include this article and to leave the problem, without prejudice to the objective of unification, to be settled in accordance with the norms of national legislation.

Alternatively, it could be provided that the rule on jurisdiction in paragraph 1 (*a*) to (*d*) is applicable where the contract of carriage does not specify the competent court.

Article 22

Several of the comments on article 21 (see above) also apply to article 22 on arbitration. Moreover, the rules in article 22 on the multiplicity of places in which arbitration proceedings could be instituted create even more scope for arbitrary selection by the plaintiff than does article 21 on jurisdiction (in respect of the actual place at which arbitration proceedings would be carried out, the form they woud take—"*ad hoc*" or institutional arbitration—and so forth).

In practice the adoption of article 22 could lead to refusal to use arbitration in respect of contracts of carriage by sea although the value of arbitration procedures is widely recognized today—within the United Nations as well as elsewhere—and, moreover, it is more efficient, simpler and involves considerably less delay and expenditure than court proceedings.

Accordingly, this article should be deleted from the draft entirely or else restricted to recognition of arbitration clauses contained in the contract of carriage by sea.

United Kingdom of Great Britain and Northern Ireland

[*Original: English*]

GENERAL

(1) The United Kingdom Government recognizes the extensive efforts which have been made by all parties to achieve a draft text which in its present form removes most of the obstacles to the conclusion of a convention.

(2) However, a number of problems do remain. Commercial circles in the United Kingdom consider that any increase in freight arising from a system which imposes a more "strict" liability is unlikely to be compensated by a corresponding fall in the price of cargo insurance. Cargo interests have recognized the validity of this observation and have indicated strongly that they would prefer their claims to be met by underwriters and not shipowners. They also regard it as essential that their insurance outgoings should be properly quantifiable and fear that this may not be possible if their premiums become effectively part of the freight.

Furthermore, it is thought that the imposition of a more "strict" liability on the carrier (in particular the removal of the defence of "nautical fault") is likely to be against the interests of nascent cargo insurance industries in developing countries. This point of view seems to be confirmed by recent UNCTAD studies on multimodal transport (TD/B/AC.15/7 of 28 August 1974) and marine cargo insurance (TD/B/C.3/120 of 9 May 1975).

(3) Attention is also drawn to the fact that the new distinction drawn in the draft text between liability for loss and damage and liability for delay will further complicate recovery actions, and create problems in settling claims, in that cargo underwriters will proceed for the former and cargo interests for the latter.

Article 1

Paragraph 4

It is thought desirable that the definition of "goods" should expressly include luggage not accompanying passengers. See also comments on article 25 below.

Paragraph 5

The words "where the goods are to be delivered" at the end of this paragraph are probably superfluous and could be deleted.

Article 2

Paragraph 1

As drafted, this paragraph will apply the convention to all contracts for the carriage of goods by sea and the only way of avoiding this will be to enter into charter parties. There will be cases—e.g. special or experimental cargoes—where this course would not be desirable. The parties should therefore be permitted to disapply the convention. This result could be achieved by the inclusion of the paragraph suggested by the drafting party at the sixth session of the Working Group (cf. A/CN.9/88 of 29 March 1974, para. 48).[1] It will be noted that this provision safeguards the special status of bills of lading as negotiable documents while allowing a sufficient degree of flexibility in special cases.

Article 4

Paragraph 2

Subparagraph (*a*) does not sufficiently cover cases (which are now frequent) where the carrier may undertake to deliver (by land or sea) outside the port of discharge and this is now important in view of the meaning of delivery assigned by article 5, paragraph 2. In such cases it is essential that the period of responsibility of the carrier under this convention should be clearly defined, to allow the parties to agree to the liability régime for the land-based transport stages of the contract and to avoid conflict or overlap with other conventions which may apply. This point could be dealt with by the addition (after the word "consignee" in subparagraph (*a*)) of the words "at the port of discharge." and then a new sentence "Where the goods are handed over to the consignee outside the port of discharge delivery shall be deemed to have taken place at the port of discharge." Subject to this, a more logical order for subparagraphs (*a*), (*b*) and (*c*) would be (*c*), (*a*) then (*b*).

Article 5

General

The one major change effected by the present text of article 5 is the removal of the defence of nautical fault which appeared in article 4 (2) (*a*) of the 1924 Rules. As intimated in earlier general comments, all commercial interests in the United Kingdom, shipowners, shippers and their respective insurers, are united in wanting the retention of the defence of nautical fault. Furthermore, the transfer of risk to the carrier entailed in the deletion of this defence will inevitably change the pattern of insurance in maritime commerce away from cargo insurance and to the disadvantage of developing countries. For these reasons it is recommended that serious consideration be given to reinstating the defence of nautical fault (in the narrow sense, excluding fault in the management of the ship): this could be done in a new paragraph following paragraph 3, on the lines of the text set out in the annex. It will be noted that the defence is available to the carrier only where he has taken all reasonable measures.

Paragraph 6

The measures envisaged by this paragraph may give rise to a claim in general average, e.g. where some of the cargo carried is jettisoned to save the rest. In such cases the carrier should continue to be liable to make a general average contribution to the cargo loss (which he would not be under this paragraph in its present form). This could be achieved by the addition of the words "except in general average and salvage", after "liable" in the first line.

Article 6

In the absence of any discussion on quantitative limits it is not possible to make a final choice of the bases of liability set out in alternatives A-E. In principle, the simplest version in A, based on weight and without separate treatment of liability for delay, is preferred.

As a matter of United Kingdom practice, when the cargo interest has paid salvage and seeks to recover from the carrier because of his fault, the claim will be subject to unit limitation. This is the case in some, but not all, legal systems. It is therefore suggested that provision be made either in article 6 or in the article dealing with general average and salvage so that cargo interests may recover in full.

Article 7

Notwithstanding the language of article 10, paragraph 2, explicit reference to the actual carrier should perhaps be made in both these articles. As a general matter of drafting, references to the actual carrier should be harmonized throughout the Convention: at present there is potential conflict between article 10, paragraph 2, and, e.g., articles 13 and 14.

Article 8

The loss of right to limit liability as provided for under article 6 relates to *loss, damage and delay* and it is thus suggested that these words be inserted in place of "damage" where it occurs in this article.

Article 13

Paragraph 1

It is submitted that the words "wherever possible" in the fourth line make for ambiguity and will cause difficulty in practice. The obligation to mark or label dangerous goods should not be qualified and thus these words should be removed. This reflects the views of cargo interests in the United Kingdom. Where, as a matter of fact, it is physically impossible to comply with this requirement the matter will fall to be determined by national law.

Article 17

Paragraph 1

The words "inaccuracies of such particulars" in the second sentence should read "inaccuracies *in* such particulars".

Article 20

General

Great concern has been expressed that the time bar in this article should not apply to claims in general aver-

[1] This paragraph is as follows:
"Where a bill of lading or similar document of title is not issued, the parties may expressly agree that the Convention shall not apply, provided that a document evidencing the contract is issued and a statement of the stipulation is endorsed on such document and signed by the shipper." (UNCITRAL Yearbook, Vol. V: 1974, part two, III, 1.)

age. The matter is dealt with in comments on article 24 (below).

Paragraph 1

Of the two alternatives, a one-year time bar is thought to be essential. It is pointed out that in the circumstances covered by subparagraph 1 (*b*) a claimant would be time-barred where a vessel was held up for a period longer than the limitation period and the goods were lost after the vessel was released.

Article 21

Paragraph 2 (a)

The words in the first sentence "an action may be brought before the courts of any port in a contracting State at which . . ." are misleading: the court's jurisdiction is rarely limited to a port area. The words "an action may be brought before the courts of a contracting State in any of whose ports" should be substituted. It is also suggested that the fora for actions under the convention should be extended by providing in this subparagraph that proceedings may be brought also in any court in a contracting State where any sister ship of the carrying vessel may have been legally arrested. This would only have effect where the arrest of the sister ship was subject to the jurisdiction of a separate court.

Article 24

This article remains unsatisfactory in a number of important respects, and the United Kingdom at the eighth session of the Working Group indicated that it would wish to return to this provision. As drafted article 5 (General rules on the liability of the carrier) does not apply to loss which is attributable to liability in general average, and it was thought necessary to introduce a provision (which now appears as article 24) applying the convention to claims in general average.

(1) Article 24 does not derogate from the terms of the convention and therefore a more appropriate place for it in the text is part II (liability of the carrier) where it should appear as part of article 5 or (preferably) as a separate article.

(2) It is important that the time-bar in article 20 should not apply to defeat a counter-claim by the cargo interest against the carrier where the former seeks an indemnity from the latter to cover liability which would otherwise be incurred to make a contribution in general average in respect of loss resulting from the carrier's fault. This situation occurs where general average adjustment is not completed until after the end of the limitation period. Similarly, article 6 should not apply to cargo claims in respect of general average contribution and salvage.

(3) The other method by which the cargo interest may resist making a general average contribution is to plead the "equitable defence" that the carrier may not profit from a wrong done by it in benefiting from a general average contribution from the cargo interest. This second method of protecting the interests of the cargo owner is not reflected in the present wording of article 24 and, by implication, may be excluded.

(4) Two other changes are required in article 24 to take account of the fact (*a*) that the "provisions in the contract of carriage or national law regarding general average" to which the convention applies relate not to the principle of general average but to the *adjustment* of general average; and (*b*) that this article should also apply to claims in salvage, where similar factors obtain.

Attached to this note is an annex setting out a revised text in place of article 24 which would meet the points made in (2), (3) and (4) above, and in the second paragraph of the comments on article 6 above.

Article 25

Paragraph 2

It is suggested that a new article 25, paragraph 2, be inserted providing that no liability shall arise under the convention where the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea applies. This convention, when it enters into force, will apply to luggage accompanying a passenger—that is, "luggage" and "cabin luggage" as defined in article 1, paragraphs 5 and 6. (In comments on article 1, para. 4, above, a specific provision is requested applying this convention to unaccompanied luggage.)

Annex

A. Suggested new article 5, paragraph 3

"Notwithstanding the provisions of paragraph 1, provided the carrier has taken all measures that could reasonably be required he shall not be liable for loss, damage or expense resulting from errors in navigation."

B. Suggested revised text of article 24

"General average and salvage

"Nothing in this Convention shall prevent the application of provisions in the contract of carriage or national law regarding the adjustment of general average.

"With the exception of articles 6 and 20 the Rules of this Convention relating to the liability of the carrier for loss of or damage to the goods shall also determine whether the consignee may recover or refuse contribution in general average or salvage."

United States of America

[*Original: English*]

The Government of the United States of America welcomes the opportunity to comment on the draft convention on the carriage of goods by sea prepared by the UNCITRAL Working Group on International Legislation on Shipping in the course of eight sessions. The success of the Working Group in reaching agreement on a text to replace the Brussels Convention of 1924[1] and the Brussels Protocol of 1968[2] by a new convention is attributable to the spirit of goodwill shown by all delegations. The Government of the United States expects that such a spirit will continue to prevail during the discussion of the draft convention at the ninth session of UNCITRAL with the result that UNCITRAL will be in a position to recommend a text to the General Assembly to serve as the basis for adoption at a diplomatic conference.

In the view of the United States the draft adopted by the Working Group represents a substantial improve-

[1] International Convention for the Unification of Certain Rules relating to Bills of Lading. Brussels, 25 August 1924.

[2] Protocol to amend the International Convention for the Unification of Certain Rules relating to Bills of Lading, signed at Brussels on 25 August 1924. Brussels, 23 February 1968.

ment over the 1924 Convention. In the main, it constitutes a satisfactory basis for further work. There are, however, a few articles which should be changed and others which are susceptible of improvement. Identification of those articles and a discussion of changes that should or might be made follow:

Article 1. Definitions

In paragraph 1 the definition of "carrier" or "contracting carrier" might make liable a person "in whose name", but without whose authority, a contract for carriage of goods had been concluded. We propose that "in whose name" be changed to "by whose authority".

The definition of "contract of carriage" in paragraph 5 would apply only to contracts for carriage "against payment of freight" and to contracts for the carriage of "special goods from one port to another where the goods are to be delivered". The application of the convention could, arguably, be avoided simply by not "specifying" the goods. The convention would also be inapplicable if the contract covered transportation beyond the discharging port, or if the goods were not "to be delivered" but to be transhipped at the discharging port. It is suggested that the words, "specified goods from one port to another where the goods are to be delivered" should be deleted.

The definition of "bill of lading" in paragraph 6 appears to exclude a straight bill of lading; that is, a non-negotiable document which need not be surrendered against delivery of the goods. We are concerned that this common form of documentation would thereby seem to be excluded from the convention. There are two alternatives for solving this problem.

The first alternative is to amend the definition of "bill of lading" to include the non-negotiable document that need not be surrendered. The amended text would read:

> " 'Bill of lading' means a document which evidences a contract for the carriage of goods by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods. *The bill of lading may include a condition to deliver only* against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such a *condition.*"

The second alternative is not to change the definition of bill of lading in article 1 but to rely on article 18 to cover the case of the straight bill of lading which, although not a bill of lading within the definition in article 1, would be a "document other than a bill of lading issued to evidence the contract of carriage". Adoption of that course would bring the straight bill of lading within the ambit of the convention and permit it to continue to serve the function now assigned to it in commercial practice. If the latter course is preferred, the decision to rely on article 18 for this purpose should be clearly reflected in the record.

Article 4

Paragraph 2 of this article establishes the time at which the responsibility of the carrier terminates. Subparagraph (*c*) specifies that such responsibility ceases when the carrier has delivered the goods by handing them "to an authority or a third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over". The draftsmen of this provision had in mind the situation in which goods are handed over to customs agents. At many ports of loading analogous situations may arise where local law or regulations impose mandatory controls or checks (e.g., the handing over to public weighers, mandatory chemical analysis or other types of physical testing, or fumigation of cargo) before loading. Article 4 should be amended to provide that in such circumstances the carrier's liability does not operate in such cases while the goods are in the charge of the intermediary. To accomplish this purpose the United States proposes that the introductory language of paragraph 2 be amended by inserting after the words "taken over the goods" the words "from the shipper or any third party, including an authority, having custody or control of the goods". The amended text would read:

> "For the purpose of paragraph 1 of this article, the carrier shall be deemed to be in charge of the goods from the time the carrier has taken over the goods *from the shipper or any third party, including an authority having custody or control of the goods, until* the time the carrier has delivered the goods:"

Article 5

We recommend that in paragraph 6 "and" in line 2 of the text should be replaced by "or".

Article 6. Limitation of liability

The United States has carefully considered the five alternatives set out by the Working Group. If, as appears to be the case, a majority of States favour alternative D, the United States would be prepared to accept that alternative with variation Y.

Article 11. Through carriage

In the United States the Harter Act establishes a strong public policy in favour of carrier liability until the time of proper delivery. A similar policy was thought to be the aim of the liability scheme established in the draft convention. Yet article 11, paragraph 2, would permit a carrier to insert a wide exculpatory clause in a bill of lading in circumstances in which the shipper would not know in advance that the contracting carrier will use additional facilities to carry the goods to the port of destination named in the bill of lading. In the view of the United States the simplest way to resolve this problem would be to delete paragraph 2.

Another alternative would be to limit the scope of paragraph 2 by amending it to require that the actual carrier be named in the contract of carriage before a contracting carrier could rely on the exoneration in paragraph 2. Although this solution would not be entirely compatible with the public policy provision in American law against contracting carrier exoneration it would at least call the attention of the shipper to the possibility that the contracting carrier might exonerate himself under article 11 and allow the shipper to consider whether in such case he would be satisfied with a remedy against the actual carrier.

Article 13. Special rules on dangerous goods

On the whole, this article seems to be satisfactory. To avoid possible ambiguity it is suggested that in both

sentences in paragraph 2 the word "dangerous" should be inserted before the phrase "nature and character". It is recalled that in reporting this article the drafting party attached a foot-note indicating that some representatives had pointed out that paragraph 1 of article 13 imposed upon the shipper who hands dangerous goods to the carrier the obligation not only to inform the carrier of the nature of the goods and the character of the danger but also of the precautions to be taken. Paragraph 2 of article 13 contains no reference to "precautions to be taken". The United States supports the views of those members of the drafting party who felt that a certain parallelism on this matter should exist between paragraphs 1 and 2. Accordingly, we would propose that the second sentence of the second paragraph of article 13 should be amended to read as follows:

> "Where dangerous goods are shipped without the carrier having knowledge of their *dangerous* nature or character *or precautions to be taken*, the shipper shall be liable . . .".

Furthermore the United States considers that the convention would be clearer if a definition of dangerous goods along the following lines were to be included:

> " 'Dangerous goods' means explosives, flammable goods, or such other goods, in any form or quantity, which are considered dangerous or hazardous to life, health or property under international agreements, the laws or regulations of the flag of the vessel or the laws or regulations of the country of the port of loading or port of discharge."

Article 15

For purposes of clarity, it is proposed that in paragraph 1 (*j*) the final clause "if the law of the country where the bill of lading is issued so permits" be amended to read "if not prohibited by the law of the country where the bill of lading is issued". The intent is to eliminate the ambiguity that might arise if the law of the country covered neither expressly authorizes or prohibits signatures of the type specified.

Further, the United States continues to support including a provision in the draft convention that specifically states the entire bill of lading may be made by computer or other electronic or automatic data-processing systems.

Article 16. Bills of lading, reservations and evidentiary effect

While this article is generally satisfactory, at least one question might arise under the present formulation of paragraph 1; that is, whether a carrier had "reasonable means of checking" the particulars on a bill of lading accompanying a sealed container. It is believed that a reasonable means of checking does not include opening and counting contents of a sealed container. The text could be clarified on this point by inserting the words "as in case of a sealed container," immediately following the word "particulars" in the second conditional clause. The proposed amended text follows:

> "If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier or other person issuing the bill of lading on his behalf knows or has reasonable grounds to suspect do not accurately represent the goods actually taken over or, where a 'shipped' bill of lading is issued, loaded, or if he had not reasonable means of checking such particulars, *as in case of a sealed container,* the carrier or such other person shall make special note of these grounds or inaccuracies, or of the absence of reasonable means of checking."

Article 17. Guarantee by the shipper

The United States is not satisfied with this article. Once it is decided to include a letter of guarantee in the convention it becomes essential to insure protection of the consignee from the danger of fraud by collusion of the shipper and the carrier. This objective is attained in various ways in different national laws, usually by remitting the question to general civil law rather than seeking to handle the matter in the context of maritime law. Paragraph 3 of article 17 as it presently stands fails to protect against such fraudulent practices, and the debate on the paragraph suggests that, in view of the complicated issues that arise, it is doubtful that international legislation can achieve full protection of the consignee from fraud. For these reasons, the United States proposes deletion of paragraph 3 of article 17.

Article 20. Limitation of actions

The United States considers that this article requires reconsideration since it was clearly not the intention of the Working Group to cover actions against the carrier for other than cargo loss or damage. The present formulation was adopted at a time when the scope of the convention was limited to bills of lading. When the scope was changed to include all contracts of carriage article 20 should have been changed to exclude non-carriage causes of action, such as those for breach of contract to carry where the issue is whether the carrier had an obligation to carry the goods. Such issues fall outside the convention and should be governed by the civil law of contract.

The United States continues to support a one-year period of limitation for cargo loss or damage as well as for delay.

Articles 20-22

The United States wishes to call attention to inconsistencies in the use of terms in these articles. For example, it is not clear whether a difference in meaning is intended between the terms "plaintiff" and "claimant". The following specific changes are proposed:

In article 21, paragraph 1 (*e*) should be amended to read *"such additional* place *as may be* designated *for that purpose* in the contract of carriage".

In article 21, paragraphs 3 and 4, the words "paragraphs 1 and 2" should read "paragraph 1 or 2" in both sections. As written, no proceedings could be brought unless the carrying vessel had been arrested, which, of course, is not the intention.

Article 22, paragraph 2 (*b*) should be amended to read "any *additional* place *that may be* designated *for that purpose* in the arbitration clause or agreement".

III. Comments by specialized agencies

INTERNATIONAL CIVIL AVIATION ORGANIZATION

[Original: English]

No specific comments are made on the draft articles prepared by the Working Group, but sent herewith for your information are copies of the four Protocols for the amendment of the Warsaw Convention of 1929 and that Convention as amended at The Hague (1955) and Guatemala City (1971) which were adopted by the International Conference on Air Law held under the auspices of ICAO at Montreal from 3 to 25 September 1975.[1] These instruments were adopted by a majority of more than two thirds of the Conference which was composed of delegations of 67 States.

The Montreal Protocol No. 4 may be of particular interest for the Working Group since it deals primarily with the carriage of cargo by air. The basic features of that instrument are:

(a) Simplification of the documentation permitting substitution of the air waybill by "any other means which would preserve a record of the carriage to be performed" thus permitting use of electronic and computerized data procesing (article III);

(*b*) Introduction of the régime of "strict liability" of the carrier with limited deferences (article IV);

(*c*) The limit of liability for cargo was not increased; however, the limit is not expressed in a gold clause but in special drawing rights of the International Monetary Fund; nevertheless, States which are not members of the International Monetary Fund may declare that in judicial proceedings in their territories the limits of liability will be expressed in the traditional Poincaré franc consisting of 65.5 milligrammes of gold of millesimal fineness 900 (article VII).

Extract from the Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air. Signed at Warsaw on 12 October 1929, as Amended by the Protocol. Done at The Hague on 28 September 1955.

THE GOVERNMENTS UNDERSIGNED
CONSIDERING that it is desirable to amend the Convention . . .
HAVE AGREED as follows:

CHAPTER I

AMENDMENTS TO THE CONVENTION

Article I

. . .

Article II

. . .

Article III

In Chapter II of the Convention:

Section III (articles 5 to 16) shall be deleted and replaced by the following:

"Section III. Documentation relating to cargo

"Article 5

"1. In respect of the carriage of cargo an air waybill shall be delivered.

"2. Any other means which would preserve a record of the carriage to be performed may, with the consent of the consignor, be substituted for the delivery of an air waybill. If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a receipt for the cargo permitting identification of the consignment and access to the information contained in the record preserved by such other means.

"3. The impossibility of using, at points of transit and destination, the other means which would preserve the record of the carriage referred to in paragraph 2 of this article does not entitle the carrier to refuse to accept the cargo for carriage.

"Article 6

"1. The air waybill shall be made out by the consignor in three original parts.

"2. The first part shall be marked 'for the carrier'; it shall be signed by the consignor. The second part shall be marked 'for the consignee'; it shall be signed by the consignor and by the carrier. The third part shall be signed by the carrier and handed by him to the consignor after the cargo has been accepted.

"3. The signature of the carrier and that of the consignor may be printed or stamped.

"4. If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

"Articles 7-16

. . ."

Article IV

Article 18 of the Convention shall be deleted and replaced by the following:

"Article 18

"1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, any registered baggage, if the occurrence which caused the damage so sustained took place during the carriage by air.

"2. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the occurrence which caused the damage sustained took place during the carriage by air.

"3. However, the carrier is not liable if he proves that the destruction, loss of, or damage to, the cargo resulted solely from one or more of the following:

"(*a*) Inherent defect, quality or vice of that cargo;

"(*b*) Defective packing of that cargo performed by a person other than the carrier or his servants or agents;

"(*c*) An act of war or an armed conflict;

"(*d*) An act of public authority carried out in connexion with the entry, exit or transit of the cargo.

"4. The carriage by air within the meaning of the preceding paragraphs of this Article comprises the period during which the baggage or cargo is in the charge of the carrier,

[1] The full texts of the Protocols are found in the following ICAO publications: Protocol to amend the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the Protocol done at The Hague on 28 September 1955. Signed at Guatemala City on 8 March 1971. ICAO, 1971, Doc 8932. Additional Protocol No. 1 . . ., signed at Montreal on 25 September 1975. ICAO, 1975, Doc 9145. Additional Protocol No. 2 . . ., signed at Montreal on 25 September 1975. ICAO, 1975, Doc 9146. Additional Protocol No. 3 . . ., signed at Montreal on 25 September 1975. ICAO, 1975, Doc 9147. Montreal Protocol No. 4 . . ., signed at Montreal on 25 September 1975. ICAO, 1975, Doc 9148.

whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

"5. The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air."

Articles V-VI

...

Article VII

In article 22 of the Convention:

(*a*) In paragraph 2 (*a*) the words "and of cargo" shall be deleted.

(*b*) After paragraph 2 (*a*) the following paragraph shall be inserted:

"(*b*) In the carriage of cargo, the liability of the carrier is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than the consignor's actual interest in delivery at destination."

(*c*) Paragraph 2 (*b*) shall be designated as paragraph 2 (c).

(*d*) After paragraph 5 the following paragraph shall be inserted:

"6. The sums mentioned in terms of the Special Drawing Right in this Article shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgement. The value of a national currency, in terms of the Special Drawing Right, of a High Contracting Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgment, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a High Contracting Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that High Contracting Party.

"Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 2 (*b*) of Article 22 may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier in judicial proceedings in their territories is fixed at a sum of two hundred and fifty monetary units per kilogramme. This monetary unit corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. This sum may be converted into the national currency concerned in round figures. The conversion of this sum into the national currency shall be made according to the law of the State concerned."

Articles VIII-XXV

...

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorized, have signed this Protocol.

DONE AT MONTREAL on the twenty-fifth day of September of the year One Thousand Nine Hundred and Seventy-five in four authentic texts in the English, French, Russian and Spanish languages. In the case of any inconsistency, the text in the French language, in which language the Warsaw Convention of 12 October 1929 was drawn up, shall prevail.

INTERNATIONAL LABOUR ORGANISATION

[*Original: English*]

In the ILO's opinion, the combination of articles 5 and 7 of the draft Convention provides the protection for the servants and agents of the carrier which, in the case of conventions of this kind, the ILO has always endeavoured to ensure.

IV. Comments by other intergovernmental organizations

CENTRAL OFFICE FOR INTERNATIONAL RAILWAY TRANSPORT

[*Original: French*]

A. SUBSTANTIVE COMMENTS

Article 5, paragraph 1

We suggest that these provisons should be worded as follows:

"1. The carrier shall be liable for loss, damage or expense resulting from loss of or damage to goods, if the occurrence which caused the loss or damage took place while the goods were in his charge as defined in article 4; he shall also be liable for loss, damage or expense resulting from delay in delivery.

"The carrier shall be relieved of liability if he proves that he, his servants and agents took all measures that could reasonably be required to avoid the loss, damage or expense."

Reasons

Apart from other considerations it would seem pointless to make the carrier's liability for delay *a priori* subject to "the occurrence which caused the delay in delivery took place while the goods were in his charge as defined in article 4".

First of all, the person who claims that the carrier is liable for a delay might find it difficult to prove *in concreto* what occurrence caused the delay since he is unable to verify the transport process; secondly, if the delay was caused by an occurrence which took place before the carrier took charge of the goods, the carrier will always be free to prove that he, his servants and agents took all measures that could reasonably be required to avoid the loss, damage or expense caused by the delay.

Furthermore, in the Warsaw Convention, which, to some extent, served as a model for the provisions in question, the basic rule on carrier liability for delay also calls for no such condition as the one in article 5, paragraph 1, of the draft.

It would be better to have one clause dealing with the liabilty of the carrier and a separate clause setting forth the conditions in which the carrier can be relieved of liability.

Article 5

We suggest the inclusion of the following clause as paragraph 2 (new):

"When it is proved that the loss or damage to the goods occurred during the carriage or that there was a delay in a delivery, it may be presumed, failing proof to the contrary, that the occurrence which caused the loss, damage or delay took place while the goods were in the charge of the carrier as defined in article 4."

Should our suggestion regarding article 5, paragraph 1 above be adopted, the text would have to be restricted to cases of loss and damage and would have to be worded as follows:

"When it is proved that the loss or damage to the goods occurred during carriage, it may be presumed, failing proof to the contrary, that the occurrence which caused the loss or damage took place while the goods were in the charge of the carrier as defined in article 4."

Reasons

According to the general rule of evidence *"asserenti incumbit provatio"*, the person claiming liability on the part of the carrier, i.e., the claimant, should prove not only that loss, damage or delay occurred, but also that the occurrence which caused the loss, damage or delay took place while the goods were in the charge of the carrier as defined in article 4.

Although the claimant cannot verify the transport process and usually does not know what occurrence caused the loss, damage or delay, production of the above-mentioned proof will occasion him no particular difficulties where he is able to show that the loss, damage or delay occurred during carriage. In fact, more often than not, the occurrence causing the damage and the consequences of the occurrence (i.e., loss, damage or delay) take place simultaneously.

In rarer cases, where such a coincidence is not immediately apparent from the circumstances of the case, the claimant could have serious difficulty in establishing proof. It would therefore seem fairer to have a presumption placing on the carrier, who is far better informed about the transport process, the burden of proof that the occurrence which caused the damage or delay *did not take place* during carriage. For example, when livestock die of poisoning during carriage it would be unfair to make the claimant prove that the poisoning took place during carriage rather than prior to shipment.

Article 6

We suggest adopting alternative B, in principle. However, the provision in paragraph 1 (*b*) should be amplified as follows:

"(*b*) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not, *in the case of loss or damage other than that specified in subparagraph* (a), exceed double the freight."

Reasons

It seems that, in principle, a separate (and generally lower) compensation limit should be set for damage caused by delay, since the carrier should be expected to take greater care to keep the goods in good condition than to meet the delivery date. However, this argument would seem to be less applicable in the case of the carriage of perishable foods.

The wording of the provision in paragraph (*a*) of alternative B gives the impression that the limitation set on liability applies in cases where the loss or damage was caused by delay in delivery. If our information is correct, that was the intention of the Working Group. However, the text of subparagraph (*b*) could be interpreted as meaning that the limitation provided therein applies to any loss or damage caused by delay.

The wording suggested would make it possible to avoid disputes over this very important question.

The adoption of alternative B would also make for somewhat greater consistency with the CIM and CMR Conventions.

Article 20, paragraph 1

We suggest prescribing a time-limit of one year.

Reasons

A period of limitation of one year would seem to be quite sufficient, particularly as paragraph 3 of this article makes provisions for the possibility of extending it.

Furthermore, the adoption of a period of limitation of one year would make for greater uniformity in the transport laws governing different methods of transport (the general period of limitation according to CIM and CMR is one year).

B. COMMENTS ON DRAFTING POINTS

Article 1, paragraph 4

The French words *"une unité de transport similaire"* should be replaced by the words *"un engin de transport similaire"*.

Reasons

The term suggested is closer to the English term "similar article of transport"; furthermore in the French text of alternatives C, D and E of article 6 of the draft the English words "similar article of transport" are translated as *"engin"* (it would certainly be better, in these texts as well, to speak of *"engins de transport"*).

Article 4, paragraph 2 (b)

It would seem better to replace the words *"aux usages particuliers à ce commerce"* by the words *"aux usages particuliers au commerce considéré"*.

Reasons

The text suggested is closer to the English text; furthermore, it is not clear what the word "*ce*" refers to in the existing text.

Article 5, paragraph 1

(*a*) The word *"dommage"* should be replaced by the word *"avarie"*.

Reasons

All the other transport conventions speak of the liability of the carrier for loss and *"avarie"*:

CIM, article 27, paragraph 1;

CMR, article 17, paragraph 1;

Warsaw Convention, article 18, paragraph 1.

Article 105 of the French commercial code also uses this term.

The word *"avarie"* is also used in article 11, paragraph 2, of the draft convention.

If this suggestion is accepted, all similar passages should be changed accordingly.

(*b*) The word *"préjudice"* should be replaced by the words *"la perte, le dommage (l'avarie) ou le retard à la livraison"*.

Reasons

In the English text the words "loss or damage to the goods, as well as from delay in delivery" are used here. The suggested translation corresponds exactly to the terms used in English.

We also feel that delay in delivery cannot be considered *a priori* a *"préjudice"*; *"préjudice"* may result, but need not necessarily result.

The English text makes a clear distinction between three concepts:

The *occurrence* which caused the loss, damage or delay in delivery;

Loss, damage or delay in delivery;

Loss, damage or expense *resulting* from loss, damage or delay in delivery;

and we see no good reason for not reproducing these concepts in the French text exactly as they appear in the English text.

Article 5, paragraph 4

We suggest the following wording:

"In case of fire, the carrier shall only be liable provided the claimant . . .".

Reasons

The liability of the carrier for damage caused by fire is in any case implicit in the general rule laid down in paragraph 1 of this article. The suggested wording makes it clearer that an exception to the general rule is invoked here.

Article 5, paragraph 5

The last part of the French text of this paragraph does not exactly correspond to the English text. It should be amplified to read as follows:

". . . Il est présumé que la perte, le dommage ou le retard a été ainsi causé à moins *qu'il n'y ait preuve* que la perte, le dommage ou le retard résulte, *totalement ou partiellement,* d'une faute ou d'une négligence du transporteur, de ses préposés ou mandataires".

Article 5, paragraph 7

The word *"préjudice"* (in the French text) should be replaced in three places by the words *"la perte, le dommage (l'avarie) ou le retard à la livraison"*.

Reasons

In the English text the wording *"loss, damage or delay in delivery"* is used in three places and the text we suggest corresponds exactly to this English text. It would be better to be consistent in the use of terminology in the English and French texts. Furthermore, delay in delivery does not always cause *"préjudice"* (see also our comment on article 5, paragraph 1 (*b*)).

Article 6, Alternative B

The French text of paragraph 1 (*a*) seems to be more comprehensive than the English text. In our opinion the English text should be amplified to read as follows:

"(*a*) The liability of the carrier for *loss, damage or expense resulting from* loss or damage to *the* goods according . . ."

Article 7

The French text of paragraph 1 should be amplified to read:

"1. *Les exonérations et limitations de la responsabilité prévues . . .*"

Reasons

To bring it into line with the English text, which is more complete.

Article 8

We suggest replacing the word *"dommage"* by the word *"préjudice"* in three places.

We also feel that, in the English text, the words *"loss, damage or expense"* should be used instead of *"damage"*.

We consider these changes necessary in order to ensure uniformity of terminology throughout the convention.

Article 9, paragraph 1

We suggest that the close of this paragraph should read as follows:

". . . aux usages particuliers *au commerce considéré* ou aux règlements en vigueur".

Reasons

The suggested text is closer to the English text; furthermore, it is not clear what the word *"ce"* refers to in the existing text.

Article 13, paragraph 1

The words *"leur caractère dangereux"* should be replaced by the words *"la nature du danger"*.

Reasons

The suggested text is closer to the English text, which would seem to be more accurate.

Article 15, paragraph 1

We suggest that the introductory sentence should read as follows:

"1. Le connaissement doit contenir *notamment* les indications suivantes:"

Reasons

The proposed wording seems more flexible.

Article 15, paragraph 1 (f)

We suggest the following wording:

"(*f*) le port de chargement en vertu du contrat de transport et la date de prise en charge des marchandises *par le transporteur* au port de chargement".

Reasons

For the sake of consistency with the English text.

Article 16, paragraph 1

(*a*) The words *"d'unité"* should be replaced by the words *"de pièces"*.

Reasons

For the sake of consistency with the terminology of article 15, paragraph 1 (*a*).

(*b*) We suggest that the French text should be brought into line with the English text as follows:

"... prise en charge *ou mise à bord, lorsqu'un connaissement 'embarqué' a été délivré*, ou qu'il n'a pas eu les moyens..."

Article 17, paragraphs 1, 2 and 4

The words *"de toutes pertes, dommages ou dépenses"* should be replaced by the words *"de tout préjudice"*.

Reasons

To ensure uniform terminology throughout the convention (see the text of article 5, para. 1, for example).

Article 21, paragraph 2 (b)

We suggest the following wording:

"Le Tribunal du lieu de la saisie statuera sur le point de savoir si la garantie est suffisante *ainsi que sur toutes autres questions relatives à la garantie.*"

Reasons

The present French text does not correspond exactly to the English text.

V. Comments by other international organizations

INTERNATIONAL CHAMBER OF SHIPPING

[Original: English]

PREAMBLE

The proposed revision will have effects in a number of spheres:

A. Economic

What is proposed is a substantial extension of the liability of the carrier which in effect means a shift from the cargo underwriter to the liability insurer of the carrier. The cost yardstick must be borne in mind when examining the effect of the shift as well as the effect of such a shift on world insurance arrangements. Placing a high liability on the carrier will increase the carrier's costs and ultimately freight rates. It is quite clear from all the studies that have been undertaken that no commensurate decrease in cargo insurance costs can be expected. In this connexion the study by the UNCTAD secretariat on marine cargo insurance, document TD/B/C.3/120 issued on 9 May 1975 should be consulted and in particular part one, chapter 8, paragraph 176:

"Last but not least, entrusting carriers with purchase of the entire insurance cover for cargo loss or damage—and bearing in mind that the majority of shipowners are from a few developed market economy countries—would result in a further concentration of marine cargo insurance in the hands of the insurance markets of the developed countries concerned. Such a result would be harmful to the emerging insurance markets of the developing countries and would clearly be at variance with recommendations 42/III adopted by the third Conference (Santiago, May 1972), according to article 1 of which developing countries should take steps to enable their domestic insurance markets to cover in these markets—taking into account their national economic interests as well as the insured interests—the insurance operations generated by their economic activities, *including their foreign trade*, as far as is technically feasible."

The abolition of the defences of fire and error in navigation and the specific inclusion of liability for delay coupled with changes in the burden of proof will bring about a situation approaching that of strict liability. All studies show this to be uneconomic and undesirable. It will also not merely militate against but actually reverse the trend towards the development of local insurance markets as the burden placed on carriers will mainly be covered in traditional international markets.

B. Legal

In the detailed commentary a number of cases will be pointed out in which it is clear that the new revision will cause extensive and expensive litigation. It introduces unsolved questions of law as well as extraordinarily difficult questions of proof which will defeat the object of simplification and clarity. This could only be justified if it can be demonstrated that substantial economic benefits can be obtained.

C. Practical difficulties

In a number of instances carriers see practical reasons why the new rules would be difficult to implement and would be liable to restrict innovation in commercial documentation and this would hamper the development of more efficient transport services.

It must be recognized that a convention of this type would probably have a considerable effect on documentation for many years to come.

Article 1

Paragraph 4[1]

This definition includes live animals as goods whereas they were specifically excluded under the 1924 Convention. Carriers may well find themselves unwilling to carry animals unless they are permitted to do so under

[1] For corresponding provisions, see article 1 (*c*) of the International Convention for the Unification of Certain Rules relating to Bills of Lading, done at Brussels, 25 August 1924 (hereinafter referred to as "the Brussels Convention, 1924" or "the 1924 Convention").

the terms of a special contract. The following points must be considered:

1. Control of the animal is frequently in the hands of an attendant.

2. There are special risks, particularly with regard to the care that must be exercised for extremely valuable animals, e.g. special diet and water. The behaviour of animals in crowded shipboard conditions cannot be foreseen.

3. It is extremely unlikely that an innocent third party would suffer, as title would rarely, if ever, be transferred by endorsement of a bill of lading.

4. Proof of care is difficult. *Post mortem* facilities do not exist.

5. To compel the shipper, in practical terms, to insure these risks via the carrier will be the least economical method. It will also mean that all animals will be insured in this way, whether the shipper wishes it or not. In some cases shippers probably prefer to ship uninsured as the cost of insurance by whatever method is probably not economically justified.

In order to avoid any overlap with the Athens Convention, passengers' luggage should also be excluded. The first phrase should therefore read: "Goods means any kind of goods, excluding live animals and passengers' luggage, liability for which is governed by the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, done at Athens on 13 December 1974".

Paragraph 5[2]

There seems to be no justification for including contracts which are negotiated at arm's length in an open market where the shipper is in at least as strong a position as the carrier. Items such as personal effects, second-hand cars, experimental cargoes and vehicles on ferries are not carried on Hague Rules terms.

Values in these cases are subjective or otherwise difficult to ascertain making insurance rating so difficult that charges will always contain a substantial element for uncertainties. These uncertainties the shipper can resolve for himself.

There is also some doubt as to whether volume contracts are included.

It is recommended that these categories be excluded. This could be effected by the proposal under article 2.

Article 2

(a) *The article as a whole*[3]

The effect of this article will be to reduce to a very small number the cases where general cargo carried under a bill of lading will be carried otherwise than under a Hague Rules type of bill. Carriers are in principle prepared to offer Hague Rules conditions where a bill of lading is the appropriate document but application to all contracts for carriage of goods by sea seems to place an unnecessary restriction on innovation in commerce. It is wrong to assume that in all cases the shipper is in need of and desires protection.

For example, volume contracts, experimental cargoes and goods of no commercial value are carried outside the Hague Rules to the advantage of all concerned. It is therefore recommended that the following paragraphs be restored to the text:

"Where a bill of lading or similar document of title is not issued, the parties may expressly agree that the Convention shall not apply, provided that a document evidencing the contract is issued and a statement of the stipulation is endorsed on such document and signed by the shipper.

"For the purpose of this article, contracts for the carriage of certain quantity of goods over a certain period of time shall be deemed to be charter-parties."

(b) *Paragraph 4*[4]

It is urged that the words "not being the charterer" be added at the end of article 2, paragraph 4 in order to remove any ambiguity in cases where a bill of lading form is used as a receipt under a charter-party.

Article 4

Paragraph 1[5]

This article greatly increases the liability of the carrier. Under the old rules, the carrier accepted responsibility from ship's tackle on loading to ship's tackle on discharge. He would now be obliged to accept liability from the time he takes over the goods until he delivers them. Basically, the effect of this will be a change from cargo insurer to ship's liability insurer. It will also undoubtedly bring about a state of uncertainty and considerable expensive litgation in the future. It is by no means certain that all the litigation in the various countries will produce the same result and the prudent cargo owner will, in all probability, have to insure as though the existing rules remained in force. Consequently, the cargo will be doubly insured for a considerable part of the transit time, which will undoubtedly increase costs.

Paragraph 2

In a substantial number of cases the shipowner, "having taken over the goods" is not the person "in charge of the goods". He may well be obliged to hand them over to a port or warehouse authority at the port of loading or at an intermediate port and cease to have custody or control.

This is another instance where the insurance placement will be taken out of the hands of the traditional cargo insurer and placed on the shipowner whose overall exposure will be increased. This will lead to higher insurance costs for the carrier which will ultimately be reflected in increased freight rates. It should also be noted that it will impose liability on the carrier in cir-

[2] The comments that are made in relation to this paragraph are also applicable to article 2 of the draft convention on the carriage of goods by sea. For corresponding provisions, see articles 1 (*b*) and 6 of the Brussels Convention, 1924.

[3] For corresponding provisions, see article 10 of the Brussels Convention, 1924, and article 5 of the Protocol to amend the International Convention for the Unification of Certain Rules relating to Bills of Lading, signed at Brussels 25 August 1924, 23 February 1968 (hereinafter referred to as the **Brussels Protocol, 1968).**

[4] For corresponding provisions, see articles 5 and 6 of the Brussels Convention, 1924.

[5] For corresponding provisions, see article 1 (*e*) of the Brussels Convention, 1924.

cumstances where he has no control and in which, therefore, additional liability will not improve performance.

Litigation may be reduced by defining "taken over the goods" as clearly as "delivery". The first sentence of paragraph 2 of article 4 should therefore be amended to read:

"For the purpose of paragraph 1 the carrier shall be presumed, in the absence of evidence to the contrary, to be in charge of the goods from the time he has taken them into his custody within the port area until he has delivered them:

"(*a*) By handling them . . . etc."

Article 5

Paragraphs 1, 2 and 4[6]

A burden of proof is placed upon the carrier to show that he took all measures that could reasonably be required to avoid the occurrence and its consequences.

Carriers could accept that some tightening of the burden of proof might be justified in cases where the cause lies principally within the knowledge of the carrier himself. The proposed wording is, however, an over-correction and leads to a new type of liability approaching strict liability.

A reduced defence of fire remains (see para. 4 of article 5 of the draft convention) but error in navigation and fault in management are no longer available as defences to the shipowner. Again, this will largely be a matter of shifting the insurance burden.

The interest of the shipper is served by placing upon the shipowner sufficient liability to ensure that he acts responsibly towards the goods. In the case of fire and error in navigation this is sufficiently ensured by the carrier's self-interest. If the burden placed upon him does not produce better performance but concentrates risk to a degree where cover becomes difficult to obtain and very expensive, nothing has been gained and the cost of world trade will increase. The number of imponderables makes it virtually impossible to quantify this increase on an international basis. What can be said is that the presence of uncertainties inevitably leads to higher rates.

It should be noted that shippers, carriers and underwriters all oppose the proposal.

The Commission should carefully examine the economic aspects of these changes and satisfy itself that the proposed changes will not have the effect of increasing freight rates with little or no compensatory reduction in cargo insurance premiums. If unable to so satisfy itself the defences available under the 1924 Convention should be retained to the extent necessary to avoid this danger.

It has taken several decades of litigation to establish the meaning of "due diligence to make the vessel seaworthy" and the words are still interpreted differently in various jurisdictions. Only lawyers will not regard with apprehension the litigation which will be involved in establishing the meaning of "all measures that could reasonably be required to avoid the occurrence and its consequences".

It is recommended that the following provisions be inserted in place of paragraphs 1 and 2 of article 5:

"*Article 5, paragraph 1.* The carrier shall be liable for loss, damage or expense resulting from loss or damage to the goods, if the occurrence which caused the loss or damage took place while the goods were in his charge, as defined in article 4, and was due to the negligence of the carrier, his servants or agents.

"Negligence of the carrier or his servants or agents shall be presumed unless the contrary is proved if the damage or loss arose from or in connexion with shipwreck, collision, stranding or explosion or from defect in the ship.

"*Article 5, paragraph 2.* Notwithstanding the provisions of paragraph 1 of this article the carrier shall not be responsible for loss, damage, or expense resulting from any neglect or default in the navigation of the ship, or from fire, unless it is proved that the occurrence giving rise to such loss, or damage, or expense has been caused by the actual fault or privity of the carrier."

Paragraph 3

Cargo whose whereabouts is known can sometimes not be delivered within 60 days. It is recommended that the following sentence be added: "If at the expiry of the 60 days the carrier can establish the whereabouts of the goods a further period of 60 days shall elapse before the person entitled may treat the goods as lost".

Paragraph 5

If the case for amendment of paragraph 4 of article 1 is not accepted it will still be necessary to alter the wording of paragraph 5 of article 5 to remove a number of ambiguities. The following text is proposed:

"The carrier shall be relieved of his liability for live animals if loss or damage results from:

"(*a*) Any special instructions, or lack thereof, given by the shipper.

"(*b*) Special risks inherent in the carriage of animals. It shall be presumed in the absence of evidence to the contrary that any loss or damage resulted from these special risks."

Paragraph 6[7]

The defence of reasonableness applies only to measures taken to avoid an occurrence or its consequences. If a delay is caused by diversion of a ship to land an injured seaman whose life is in no danger but who requires prompt medical help the carrier will not be exonerated by this clause. If a carrier fails to divert he will in many jurisdictions be liable for denial of medical attention and will be open to criticism on humanitarian grounds.

Reasonable measures to avoid an occurrence reasonably apprehended would not appear to be covered.

Delay resulting in physical damage can be caused by industrial action. If the argument is conducted in

[6] For corresponding provisions, see articles 3 and 4 of the Brussels Convention, 1924.

[7] For corresponding provisions, see article 4(4) of the Brussels Convention, 1924.

moral terms neither carrier nor shipper is normally responsible. (An interesting but expensive case could be fought on the question of whether a carrier had taken all reasonable measures to avoid a seamen's strike.) If the argument is conducted in practical terms, liability for delay will be one more instance of an impractical extension of shipowner's liability, leading to higher costs.

It is therefore recommended that the words of paragraph 6 of article 5 be amended as follows:

"The carrier shall not be liable for loss, damage or delay resulting from:

"(*a*) Measures to save life or preserve health.

"(*b*) Reasonable measures to save property at sea.

"(*c*) Labour disputes."

Article 6[8]

Final comment cannot be made until the final proposals are known. The following general statements can, however, be made:

1. The issue should be decided on purely practical considerations. Under the 1924 Convention the shipper had the option of declaring a higher value in return for which the carrier could demand a higher freight rate. This option has seldom been exercised as the rates demanded by carriers were higher than could be obtained from cargo insurers. (The shipboard risks form only a part of the cargo insurer's exposure—the carrier's liability cover is almost entirely concerned with these risks.) If a high limitation is imposed the proportion to be borne by the carrier's liability insurance will be greater. The experience of the marine insurance industry is that this is the more expensive way to buy the additional insurance and the cost of goods will, therefore, in the long-term, rise.

2. If a high limitation is imposed the shipper of low value goods will be subsidizing the shipper of high value goods.

3. A high limit will raise the carrier's over-all exposure and cause the carrier's liability insurer to reinsure at a high price in international markets thus usurping part of the normal function of the shipper.

4. The UNCTAD secretariat study TD/B/C.3/120, paragraph 189, reads as follows:

"In conclusion, while it seems absolutely necessary to create a clear pattern of shipowner's liability both easily applicable and reducing litigation to a minimum—as regards the amounts of carrier's liability per package, unit or kilo—there is no need to introduce limits which would be higher than the real value of the ordinary cargo. As already explained in other chapters of the present study, liability insurance cover provided globally for a relatively high total amount is generally more expensive than property insurance cover for the exact value of each individual consignment. Hence the need to maintain the global liability "per ship's bottom" within reasonable insurance limits. By doing so, the aggregate cost of cargo insurance, plus carrier's liability cover, reaches its most economic level."

[8] For corresponding provisions, see article 4(5) of the Brussels Convention, 1924, and article 2 of the Brussels Protocol, 1968.

Article 7

Paragraph 1[9]

The phrase "in contract or in tort" is well understood in commercial circles but is not of universal application. It is recommended that the words "or otherwise" be added at the end of this clause.

Article 9

Paragraph 1[10]

It is generally understood that it is the usage in all container trades to carry containers on deck. To avoid possible litigation the following should be added at the end of paragraph 1 of article 9:

"Shipment in containers shall be deemed to constitute agreement to carriage on deck."

Paragraph 4

It would be possible for goods to be carried on deck without the degree of recklessness required in article 8. The paragraph should be deleted.

Article 13

Paragraph 1

Carriers have experienced cases where hazardous and polluting substances have been shipped without disclosure of their contents and it is submitted that these substances should be treated in the same way as dangerous goods.

The words "if necessary" and "whenever possible" should be deleted as they provide loop-holes for any negligent or dishonest shipper.

It is recommended that paragraph 1 of article 13 be amended to read as follows:

"When the shipper hands dangerous goods, which for the purpose of this article shall be deemed to include hazardous or polluting substances, to the carrier he shall inform the carrier of the nature of the goods and indicate the character of the danger and the precautions to be taken. The shipper shall mark or label in a suitable manner such goods as dangerous."

Article 14

Paragraph 1[11]

For clarity this should be amended to read: "When the goods are received into the custody of the carrier within the port area . . ." to accord with paragraph 2 of article 14.

Article 15

Article 15 as a whole, and paragraph 1 thereof [12]

It is desirable to insert requirements based on current practice which is constantly under review. Commercial requirements of shippers and banks will determine the contents of a bill of lading. Article 16 gives

[9] For corresponding provisions, see article 3 of the Brussels Protocol, 1968.

[10] For corresponding provisions, see article 1 (*c*) of the Brussels Convention, 1924.

[11] For corresponding provisions, see article 3 (3) of the Brussels Convention, 1924.

[12] For corresponding provisions, see article 3 (3) (*a*) and 3 (3) (*c*) of the Brussels Convention, 1924.

the shipper the protection he requires. The entire article 15 should be deleted.

In certain instances the requirements are, in any event, unworkable. In particular subparagraph (*f*) could not be complied with in the case of a consignment received over a number of days, nor would it be appropriate for a "shipped" bill of lading. Subparagraph (*h*) implies that there may be more than one original. The present aim is to reduce the number of bills of lading with only one original. Subparagraph (*k*) could create difficulties and mean extra documentation if the cargo were resold.

Paragraph 2[13]

For reasons stated under paragraph 1 of article 15 "the date or dates of loading" should be deleted.

Article 16

Paragraph 4

The second sentence contains an illogical conclusion, particularly in charter-party cases where charterer and shipper are one and the same and where thus the bill of lading at issuance was a receipt only and the non-mentioning of freight may have been charterer's legitimate wish. The more reasonable presumption to apply at the time of the later negotiation of the bill of lading—a transaction to which the carrier is not a party—is that carriers do charge freight for their services and that there must exist a debt for which carrier's lien ought to be preserved. Therefore, deletion of this paragraph is suggested in order to retain the present situation where the carrier forfeits his lien solely by an explicit receipt—the "freight prepaid" note on the bill of lading.

Article 17

Paragraph 3

We find it undesirable and unnecessary that the relationship between the shipper and carrier in connexion with letters of indemnity should be dealt with in this convention. The paragraph should be deleted.

Paragraph 4

The carrier in such a case will either be the innocent victim of a dishonest employee or will already be debarred from limitation under article 8. The paragraph should therefore be deleted.

Article 18

If article 4 be not amended as recommended this article should be amended to read:

> "When a carrier issues a document other than a bill of lading to evidence the receipt of goods under a contract of carriage such document shall be *prima facie* evidence of the taking into custody in the port area of the goods as therein described."

Article 19

Paragraph 5

It is recommended that if there is to be liability for delay at least the words "his servants or agents" be added at the end of this paragraph.

[13] For corresponding provisions, see article 3 (7) of the Brussels Convention, 1924.

Article 20

Paragraph 1[14]

Commercial necessity demands an early end to disputes: "one year" is to be preferred, in line with the CIM[15] and CMR[16] Conventions.

Article 21

Whilst appreciating the desire of those proposing this article it does again seem to be an over-correction. It is recommended that (*b*), (*c*) and (*d*) be deleted or if this be not acceptable at least two of them as the present drafting would lead to "forum shopping" and consequent uncertainties leading in the long run to increased insurance costs.

Article 23

Paragraph 3

This provision is unnecessary and should therefore be deleted.

Article 25

Paragraph 2[17]

It is recommended that the words "the Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material done at Brussels on 2 December 1971, or . . ." be added.

International Maritime Committee (Comite maritime international—CMI)

[*Original: English*]

In order to enable the CMI as such to consider the amendments to the present 1924 Brussels International Convention on Bills of Lading as well as the 1968 Protocol thereto, some important matters of substance were discussed by the XXXth Hamburg Conference of the CMI which resulted in its so called "Hague Rules Recommendations". These Recommendations, apart from recommending the immediate ratification of the 1968 Protocol, dealt with the following questions:

Period of responsibility

Basis of liability

Delay in delivery

Limitation of liability

Time bar

During the work by the UNCITRAL Working Group, the CMI has previously recommended to the Working Group in writing that the subject of letters of indemnity ("back-letters") should not be dealt with in the Convention. The CMI feels that the suggested provisions may indirectly be understood as a legal recognition of the use of such letters of indemnity and, apart from this, that the provision proposed in arti-

[14] For corresponding provisions, see para. 4 of article 3 (6) of the Brussels Convention, 1924, and article 1 (2) of the Brussels Protocol, 1968.

[15] International Convention Concerning the Carriage of Goods by Rail, done at Berne, 25 October 1962.

[16] Convention on the Contract for the International Carriage of Goods by Road, done at Geneva, 19 May 1956.

[17] For corresponding provisions, see article 4, Brussels Protocol, 1968.

cle 17, paragraph 3, barring the carrier's recourse against the shipper, is undesirable, primitive and unjust.

The CMI and the International Chamber of Commerce (ICC), in 1974, set up a special Working Group for the purpose of studying the possible effects of changes in the carrier's liability system on "risk" costs and a report on the findings of that Working Group has been made on 8 October 1975. It should be noted that the findings of the Working Group closely correspond with the observations by UNCTAD's Committee on Marine Cargo Insurance in its meeting in Geneva in October-November 1975 (see in particular the draft resolutions contained in documents TD/B/C.3 (VII)/SC/L.2, para. 3 and TD/B/C.3 (VII)/SC/L.5, para. 3 as well as the draft report TD/B/C.3 (VII)/SC/L.6, para. 15).

The Hague Rules Recommendations

adopted by the CMI at its XXXth Hamburg Conference

At the CMI Hamburg Conference 1-5 April 1974, where experts in maritime law from some 30 countries took part, some of the main issues presently under consideration in the UNCITRAL Working Group on Shipping Legislation were discussed. The National Associations of the CMI had earlier been invited to declare their views and the International Sub-Committee in August 1973 had submitted a reply to the UNCITRAL Working Group with respect to some questions (i.e., the carrier's liability for delay).

The present Recommendations are intended to express the general views of the shipping community. They reflect a synthesis of interests of carriers and shippers. Efforts have been made to suggest simplifications of the present rules to the benefit of all parties. A shifting of the risk allocation from the carrier to the shipper has not been considered worth while *per se*. There is, of course, an interrelation between the distribution of the risk and the freight. A fundamental change of the risk allocation to the detriment of the carrier will therefore inevitably lead to increased transportation costs.

Ratification of the 1968 Protocol

The rules and practices of shipping are subject to constant change and quite rightly. When unification of law is achieved in this respect by means of international conventions special considerations are required to broaden the scope of the application of the rules and to safeguard that the international uniformity that does exist at present is not jeopardized. It is necessary to ascertain that any proposal for amendments of the present law is well-founded and supported by a great number of countries.

At the Conference is was considered that the 1968 Protocol to amend the 1924 Bills of Lading Convention contains important improvements which should be adopted without further delay. Hence, the 1968 Protocol contains provisions removing some of the difficulties met by applying the unit limitation to container traffic by introducing a "container formula" making the packages within the container rather than the container itself the relevant units provided they have been enumerated in the bill of lading. Further, the position of claimants is considerably improved with respect to heavy units by the per kilo limitation (30 francs Poincaré) supplementing the unit limitation. The rules entitling the servants of the shipowner to the same exemptions from and limitation of liability as the shipowner himself are equally well warranted and urgently needed as well as the rules clarifying the position of bona fide transferees of bills of lading. Further, the provisions with respect to the possibility of prolonging the time for the prescription of claims as well as the specific three month's limit for the prescription of recourse actions are needed to remove the present uncertainty in some convention countries and thus facilitate the settling of claims. For these reasons the CMI adopted the following recommendation:

Considering

That further amendments to the Hague Rules beyond those included in the 1968 Protocol are warranted;

That it will necessarily require some time before international agreement to further amendments can be achieved, and

The urgent need of international commerce to obtain the benefit of the 1968 Protocol, the CMI

RECOMMENDS that the 1968 Protocol be ratified as soon as possible.

Period of Responsibility[1]

The principle of the Hague Rules that the period of responsibility is limited to the time from loading to discharge (the so-called "tackle-to-tackle" principle) may be adequate in tramp shipping where the carrier will often have no facilities of his own to store the goods before loading or after discharge. However, the situation may be quite different in liner trade, particularly when the carrier himself has not parted with the goods at the moment when the Hague Rules cease to apply. There is considerable doubt what rules then apply with respect to the carrier's liability and to what extent the carrier is entitled to exempt himself from liability under various national laws. For these reasons and for the purpose of achieving better uniformity the CMI, in principle, agreed with the present draft provision prepared by the UNCITRAL Working Group on International Shipping Legislation and adopted the following recommendation:

Considering that, in principle, the period of liability should cover the entire period whilst the goods are in the custody of the carrier, and that, therefore, an extension of the carrier's responsibility beyond the present period covered by the Hague Rules ("tackle-to-tackle") is required, the CMI

RECOMMENDS that the period of responsibility be extended to cover the period during which the goods are in the custody of the carrier at the port of loading, during the carriage, and at the port of discharge, provided, however, that, *in particular,* the goods shall not be deemed to be in the custody of the carrier

at the port of loading

prior to actual receipt by the carrier for shipment or

at the port of discharge

[1] Article 4 of the draft convention on the carriage of goods by sea.

if the goods, according to law or usage, have been handed over to an authority or to an appropriate third party which cannot be controlled by the carrier.

Basis of Liability[2]

Following the aim to suggest only such amendments which work to the benefit of all parties involved and to refrain from changes which may produce unwarranted economic effects, the CMI agreed to *narrow* the present defence of the carrier for error in the navigation or the management of the ship but to *maintain* the defence in so far as it relates to pure navigational errors.

The deletion of the latter half of the defence—the management of the ship—is suggested. Difficulties have been experienced in several convention countries to determine exactly what is meant by "management of the ship" as distinguished from "care and custody of the cargo". It is felt that the deletion of this part of the defence will greatly facilitate the settling of claims and avoid litigation. On the other hand, a deletion of the defence for error in navigation would imply a fundamental change of the present risk allocation between the carrier and the cargo-owner. It should also be borne in mind that an express provision subjecting the carrier to a liability for delay would accentuate the change even more. Similarly, a deletion of the fire defence would have a significant effect on the present risk allocation. The "compromise" suggested by the UNCITRAL Working Group to delete the fire defence and to place the burden of proving negligence on the part of the carrier on the cargo-owner would not counter-balance the change of the risk allocation. This being so, it is certain that the premiums for the carrier's Protection and Indemnity insurance will rise and, owing to a number of factors, there will be no corresponding reduction of the premiums for cargo insurance. Cargo underwriters recover from carriers no more than between 10 and 20 per cent of the amounts paid out to the cargo-owners. The *difficulties to estimate* the increased possibilities to institute recourse actions that will follow from the deletion of the carriers' traditional defences (i.e. error in the navigation and fire) will prevent the cargo underwriters from reducing the present premiums, at least until definite experience has been gained on the effects of the change. Hence, a deletion of the defences will cause a *higher total of insurance costs* to the detriment of all parties involved.

Further, in order to make clear that no fundamental change of the risk allocation is intended, it is necessary to spell out in any "general liability formula" that it is based on the concept of negligence so as to avoid the impression that the basis is more or less of the type "strict liability with exceptions". For these reasons, the CMI suggested the following recommendation:

1. *Considering*

That the expression "management of the ship" has proved difficult to interpret and has therefore given rise to much litigation, and

That its deletion would not have any serious economic effects, the CMI

RECOMMENDS that the defence of error "in the management of the ship" be deleted.

2. *Considering* that the deletion of the defence of error "in the navigation of the ship" would result in higher over-all transportation costs, since an increase of the carrier's liability would lead to higher freight rates without corresponding decrease in cargo insurance costs, the CMI

RECOMMENDS that the defence of error "in the navigation of the ship" be retained.

3. *Considering* that the deletion of the "fire defence" would result in higher over-all transportation costs, since an increase of the carrier's liability would lead to higher freight rates without corresponding decrease in cargo insurance costs, the CMI

RECOMMENDS that the "fire defence" be retained.

4. The CMI further

RECOMMENDS that, if the present liability provisions of the Hague Rules were to be altered, it be expressly stated in any such new provisions that the liability of the carrier be based on fault or negligence.

Delay in Delivery[3]

The question whether the present Hague Rules include a liability of the carrier for delay is much debated. In any event, it is clear that, in determining whether there is a liability for delay, due consideration must be paid to the uncertainties with respect to the duration of a sea voyage as compared with air and land transportation. The reasons for making the sea carrier mandatorily liable for delay may widely differ according to the type of trade, the length of the voyage and other circumstances. While such liability may seem perfectly natural in modern short sea liner trade, it is questionable whether there should be a mandatory liability for delay in transocean tramp shipping, where the difficulties for the carrier are often accentuated by his lack of control of the facilities ashore. Nevertheless, the mere fact that the States which are parties to the Hague Rules in their present wording do not agree on the proper interpretation of the Rules in this respect is sufficient to warrant a clarification of the matter in any forthcoming revision of the Hague Rules. And, in view of the fact that the Courts of some Convention States have already accepted a mandatory liability of the "Hague Rules carrier" for delay—a principle which in some States has already been embodied in the national legislation implementing the Hague Rules—the CMI suggested the following recommendation:

Considering that the present wording of the Hague Rules does not include any specific provision on liability for delay in delivery but that, in some countries, the Hague Rules are interpreted as covering such liability, the CMI

RECOMMENDS that the Hague Rules be supplemented with express provisions relating to delay in

[2] Article 5 of the draft convention on the carriage of goods by sea.

[3] Article 5, paras. 1 and 2, of the draft convention on the carriage of goods by sea.

delivery, following the same rules of liability as apply to loss of or damage to goods, but that compensation for delay should always be limited to such direct and reasonable loss as, at the time of entering into the contract, could reasonably have been foreseen by the carrier as a probable consequence of the delay and, further, limited to an amount not exceeding the freight charge. However, in no case should the aggregate liability of the carrier for loss, damage or delay exceed the limit that would apply for total physical loss of the goods in respect of which liability was incurred.

Limitation of Liability[4]

It is a well-known fact among practitioners of maritime law that the present wording of the limitation provisions of the Hague Rules tends to produce litigation whereby the claimants—often quite unsuccessfully—seek to "break" the limitation. This gives rise to costs to the benefit of no one and creates uncertainty with respect to the carrier's maximum exposure with ensuing difficulties to establish the necessary insurance coverage. The CMI therefore favoured a new text for the purpose of clarifying the issue and suggested the following recommendation:

Considering that the primary purpose of limitation provisions is to establish clearly the carrier's maximum liability exposure and thus to constitute a firm basis for the insurance of such liability, the CMI

RECOMMENDS that the carrier should always be entitled to limit his liability, unless the loss, damage or delay has been caused by his own personal act or omission done with intent to cause damage or recklessly and with knowledge that damage would probably result.

Time Bar[5]

Provisions relating to prescription of claims are always unfortunate for claimants as they tend to cut off their remedies even when actions, apart from the time bar, could have been successfully pursued. This, however, is a necessary consequence of any rule relating to prescription. The *ratio* behind prescription rules as such is not questioned, but the rules should be clear and easy to handle in practice. An *extension* of the present period for the bringing of a suit is no guarantee that the claimants will always be in time; on the contrary, a change of the present one year period may create uncertainty in other fields—e.g. national legislation—as to the correct period. Further, the fact that a longer period than one year may be necessary for the settlement of claims does not require an extension of the legal period for prescription as that period may be extended by agreement between the parties. This is often done in practice. To avoid any uncertainty on this point the 1968 Protocol to amend the Hague Rules expressly provides that such an agreement is possible. The CMI therefore suggested the following recommendation:

Considering the benefit of maintaining the well-established one-year limitation of time for the bringing of suit, the fact that a one-year period is not so short as to have caused difficulty in practice, and the possibility of extending the period by agreement between the parties as expressly provided for in the 1968 Protocol, the CMI

RECOMMENDS that the one-year period for the bringing of suit be retained.

[4] Articles 6 and 8 of the draft convention on the carriage of goods by sea.

[5] Article 20 of the draft convention on the carriage of goods by sea.

REPORT BY THE JOINT CMI/ICC WORKING GROUP ON LIABILITY AND INSURANCE

1. *Introduction*

The above Working Group was set up by the CMI and the ICC in 1974 for the purpose of undertaking a statistical study on the possible effects of changes in the carrier's liability systems on "risk" costs (see ICC Doc. 301/261, 1974-03-18). The Working Group was instructed initially to deal with maritime transport only.

Professor Jan Ramberg, Chief Legal Officer of the CMI, was elected as Chairman and the following experts have participated in the meetings of the Working Group: Messrs K. Schalling and J. C. Macé (International Union of Marine Insurance—IUMI), Mr. Descours (Shippers), Mr. C. W. Rees (ICC), Mr. G. B. Brunn (Deutscher Transport Versicherungs-Verband e.v.), Mr. R. M. F. Duffy (International Chamber of Shipping—ICS), Mr. N. M. Hudson (Institute of London Underwriters), Miss Claire Legendre (Syndicat des Société Françaises d'Assurances Maritimes).

The Working Group has met on 12 March 1974 and 8 October 1975 at the ICC headquarters in Paris. At the meeting on 12 March 1974 it was decided that the study, as a first step, should be limited to an appreciation of the effect of the deletion of the sea carrier's particular defences of error in navigation and management of the ship and fire. Since, subsequently, the final draft of the UNCITRAL Working Group on International Shipping Legislation has appeared, the study has been focused on the new liability provision contained therein (article 5), whereby the deletion of the said defences is suggested but with a modified burden of proof-rule to the benefit of the carrier with respect to damages caused by fire.

2. *Statistical information*

It has been suggested—i.e. in the CMI 1974 Hamburg Hague Rules Recommendations where the *retention* of the defences of error in navigation (but not including the "management of the ship" defence) and fire is proposed—that such a changed risk distribution between carrier and cargo-owner would lead to a *higher total* of "risk" costs. It is expected that the carrier's premiums for Protection and Indemnity (P and I) insurance will go up but that the premiums for cargo insurance will not be reduced to a corresponding degree. This is primarily due to the fact that the *net* amount recovered by cargo interests never equals the *gross* amount paid out by carriers and their insurers. The difference between the gross and the net comprises

overhead expenses and external costs for lawyer's fees, arbitrators etc. on both sides.

The Working Group has requested P and I and cargo insurers to substantiate the above assumption with statistical data but has received the answer that it is impossible to provide true statistical information based on an entirely hypothetical situation. It is not until settlements of the claims have been made on the basis of a new liability rule that one could substantiate by true statistical information that the change would lead to a higher total of insurance costs. However, the information had been received from various quarters that the amount paid by cargo insurers for so-called FPA risks (that is risks primarily connected with collisions, strandings and fire as well as general average which frequently results therefrom) amounted to about one fifth of the *total* amount paid for all risks. This means that a deletion of the carrier's defences of error in navigation and fire most certainly would shift the risk on to the carrier to a considerable extent and also lessen the motivation for the cargo-owner to cover himself by cargo insurance for FPA risks.

3. *The optimal liability rule*

The Working Group, at this stage, did not wish to enlarge on the geenral question of how a liability rule in the law of carriage of goods should be designed in order to produce the best result from an economical viewpoint. However, with respect to the proposed deletion of the defences of error in navigation and fire the Working Group wishes to make the following statements:

3.1. *Reasonableness*

The question of *reasonableness* is wholly irrelevant, since it is easy to translate an increase of the risk into a cost factor. Ultimately the cargo-owner—directly or indirectly—would have to pay for the cost increase following from an increase of the carrier's liability.

3.2. *Loss prevention*

It is not expected that the proposed change would have any *"disciplinary" effect* so as to lead to a reduction of loss or damage to cargo, since errors in navigation and fire inevitably will engage the carrier's own property which would be quite a sufficient deterrent.

3.3. *Harmonization of the law of carriage of goods*

The deletion of the defences of error in navigation and fire would lead to a better harmonization of the law of carriage of goods by sea with other branches of transport law. Such a simplification would be of particular value in situations where the carrier undertakes to transport goods with different modes of transport. However, it is difficult to assess what *economic* advantages could follow from such a simplification.

3.4. *Coverage of the risk for loss of or damage to goods by carrier's liability or by cargo insurance*

There is definitely an international consensus that the risk for loss of or damage to goods should, at least primarily be covered by cargo insurance. By no means should a cargo-owner be forced by mandatory legislation to buy himself protection for such risk from the carrier only. A cargo-owner, who wishes to protect himself by an "insured bill of lading" offered to him by the carrier should of course have the opportunity to do so but he should not—directly or indirectly— be forced to use this as the only way to get the desired protection. This is also observed in the recent study by UNCTAD on marine cargo insurance (TD/B/C.3/120 dated 9 May 1975) where it is particularly stressed that the developing countries should have a greater control of the insurance of such risks than they have had so far.

3.5. *Is there a need for protecting cargo insurers' recourse actions by mandatory legislation?*

The Working Group did not wish to make any general statement as to the desirable scope of mandatory carrier's liability legislation but emphasized the danger that an increase of recourse actions may well lead to increased total "risk" costs to the detriment of cargo interests. Forthcoming international conventions on the law of carriage of goods should be drafted in such a manner as to avoid the "dual" coverage through the carrier's liability and his insurance as well as through the cargo-owner's own insurance. Technically, this may be achieved by permitting the cargo-owner to *lessen* the carrier's liability in cases where he is protected by cargo insurance.

3.6. *Does the proposed deletion of the carrier's defences promote the trend towards a "full carrier's liability"?*

Inevitably, the additional burden placed on sea carriers by the suggested change of the liability would give new arguments to those who profess a system of "full carrier's liability". As long as such an extended liability is *optional* for the cargo-owner it may be acceptable but the Working Group can see no advantage for the cargo-owner if he were to be *forced* into such a system by way of mandatory legislation increasing the present risk of the carrier and thereby inducing him to take on the additional risks up to the level of a "full carrier's liability".

3.7. *International uniformity of the law of carriage of goods by sea*

The Working Group wishes to stress the danger of a destruction of the present international uniformity of the law of carriage of goods by sea which has been achieved by the 1924 Brussels Bill of Lading Convention (The Hague Rules). By all means, it has to be avoided that some States ratify a new convention while other States refrain from doing so. This would lead to endless complications, disputes as to the applicable law and jurisdiction and to a kind of "forum shopping", whereby claimants would try to select a place for the institution of legal proceedings where they believe that their interests are best preserved. This would be detrimental for all. The Working Group therefore considers that the suggested change of the risk distribution should *not* be accepted unless there is an adequate guarantee that a new convention containing such a new liability rule will be accepted at least to the same extent as the present Hague Rules.

INTERNATIONAL SHIPOWNERS' ASSOCIATION

[*Original: English*]

Article 1

Paragraph 1

The contract of carriage of goods by sea on the bill of lading basis is not always concluded by the shipper. In cases when booking of ship's space precedes surrender of cargo to the carrier, in the sale and purchase FOB or FAS transactions, the contract of carriage of goods by sea is concluded by the consignee. This is why mentioning the shippers as the only contractors of the carrier seems not quite exact. It is desirable to use the term "cargo disponent" instead of "shipper", otherwise to give a definition of what the term "shipper" means for the purpose of this convention.

Paragraph 4[1]

If such definition is accepted, then the carrier shall be liable not only for the loss of the cargo, but also for damage to and wear and tear of its packaging. Meanwhile, the packaging could be of the kind that in the process of transportation is inevitably exposed to damage and natural amortization. The carrier must not be liable for damage to, or wear and tear of, the packaging.

Carrier's liability for packaging is possible only when durable packaging, like containers, pallets or similar articles are used for transportation. In this connexion it is desirable to word paragraph 4 of article 1 as follows:

> " 'Goods' means any kind of goods, including live animals; where the goods are consolidated in a container, pallet or similar durable article of transport or packing, such article of transport or packing, if supplied by the shipper, is meant as 'goods'."

Paragraph 5[2]

As set forth above (see remarks on para. 1 of this article) the contractor to the contract of carriage of goods by sea is not always the shipper.

Article 2

Paragraph 3

This provision has no practical value. It goes without saying that any of the contracting States may apply provisions of the convention to the relations within domestic trades. And there is no need to set forth such a right in the convention aimed at governing the international trades.

Article 5

Paragraph 1

Occurrences which may cause the loss of or damage to the goods or delay in its delivery are mentioned twice in this paragraph. The carrier could be exonerated from responsibility if he proves that he or his servants or agents took all reasonable measures to avoid such occurrences and their results. If such wording is retained, then the carrier has to prove that the damage was caused by particular occurrence which occurred not because of his fault, and for prevention of which he, his servants or agents took all reasonable measures. Consequently, if a particular cause of the loss of, or damage to, the goods or delay in their delivery is not found, the carrier could not be relieved from his responsibility even provided that he performed his duties properly. Since this provision puts the carrier into a very hard position, it is desirable to work out some other wording of this rule to the effect that the carrier could be exonerated from liability by proving that he took all reasonable measures to avoid losses or damage to the goods or expense resulting from delay in delivery, i.e. proving to the cargo-owner the fact of the proper execution of the carrier's duties. The fact of the proper execution of such duties being proved, the carrier is exonerated from liability, even if particular causes of loss of, or damage to the goods, or delay in their delivery have not been found.

Approximately on these lines the basic principles of exoneration of the air carrier from liability are worded (see articles 18 and 20 of the Warsaw Convention, 1929).[3]

In this light it is worth mentioning that the basic rule of shipper's liability is worded in such a way that in order to relieve him from responsibility it is sufficient to prove that the damage has not resulted from the fault or negligence of the shipper, his servants or agents.

Therefore it is desirable that article 5, paragraph 1, should read as follows:

> "The carrier shall be liable for loss, damage or expense resulting from the loss of or damage to the goods, as well as from delay in delivery which took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid such loss, damage or expense."

Paragraph 2

In case the ship's capacity was not fully utiiized by the cargoes contracted, the carrier cannot be deprived of the right to complete the cargo by filling the free space left during the voyage. Consequently time spent on such a completion in the ports en route should not be regarded as "delay".

Analogically the shipper whose goods constitute a part of the ship's cargo only, parallel to the goods of other shippers, cannot demand that his goods should be transported directly to the destination, disregarding the goods of other shippers. Also in that case, the time

[1] The text of para. 4, with emphasis added to the words with special reference to which the comment is made, is as follows:
" 'Goods' means any kind of goods, including live animals; *where the goods* are consolidated in a container, pallet or similar article of transport or where they *are packed*, *'goods' includes such article of* transport or *packaging* if supplied by the shipper."

[2] The text of para. 5, with emphasis added to the words with special reference to which the comment is made, is as follows:
" *'contract of carriage' means a contract whereby the carrier agrees with the shipper* to carry by sea against payment of freight, specified goods from one port to another where the goods are to be delivered."

[3] Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw, 12 October 1929, 137 League of Nations, *Treaty Series* 11.

spent at the ports en route for discharge of goods carried by one ship together with other goods cannot be regarded as "delay in delivery" of the latter, for which "delay" the carrier could bear liability.

Therefore it is necessary to add at the end of paragraph 2 the following:

"The term 'delay' does not include the time used during voyage for loading or discharging the goods."

Paragraph 5

The rule on a special risk inherent in carriage of live animals offers a very complicated solution of the division of burden of proof between the carrier and the cargo-owner. First, the carrier has to prove that he has complied with any special instructions given to him by the shipper respecting the animals, and that in the circumstances of the case the loss, damage or delay in delivery could be attributed to the risks inherent in that kind of carriage. Then enters to light the presumption that the loss, damage or delay in delivery was so caused. The burden of disproof is transferred to the cargo-owner. It is especially hard to make a division between facts providing that the damage to the cargo-owner could be attributed to the risks inherent in the carriage of live animals (the burden of proving those facts lies on the carrier) and presumed facts evidencing that the loss, damage or delay in delivery results from such circumstances. If the carrier must prove that the loss, damage or delay in delivery could be attributable to the risks inherent in carriage of animals, then there remains not much space for the application of the aforesaid presumption. In other words, at such division of duties it is almost impossible to set forth where the duty of the carrier in proving ends, and where begins the presumption the duty of disproving which lies on the cargo-owner. Practical application of this rule seems to cause great difficulties. In order to avoid these, it is desirable to relieve the carrier from the burden of proving that the loss, damage or delay in delivery are attributed to the risks inherent in carriage of live animals. Assuming that, after the carrier proves that he complied with every special instruction of the shipper respecting the animals, the presumption that the damage has resulted from special risks inherent in carriage of live animals would appear. Thus it is proposed to delete the words "... and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks ...".

Paragraph 6

The provision that only reasonable measures to save property at sea are the basis to relieve the carrier from liability is not acceptable. It is difficult to find in practice any criteria for dividing reasonable measures to save property at sea from unreasonable ones. In particular, this problem could not be solved on the basis of comparing the value of the goods subjected to risk and that of the property being saved. These amounts are not subjected to exact count until the salvage operation is accomplished. Moreover, starting such operation the carrier is not always fully aware whether his efforts are directed on salvage of goods or life (in the latter case he is relieved from liability by virtue of para. 6). In such situation the carrier has no right to abstain from taking salvage measures, even if they result in salving property of less value than that subjected to risk.

Thus it seems feasible to delete the word "reasonable" after the words "measures to save life and from" ... in paragraph 6. However, if this wording appears to be unacceptable to the majority of the participants at the UNCITRAL session, we would propose as an alternative to lay on the cargo-owner the burden of proving that measures taken by the carrier to save property were deliberately unreasonable. This fact being proved the carrier would not be relieved from responsibility. If this proposal is accepted, then the wording of paragraph 6 after the words "... measures to save life ..." would read: "... and from measures to save property at sea if there is no proof that in salving the property the carrier acted deliberately unreasonably".

General remarks on article 5

It seems reasonable to provide in article 5 a regulation relating to exoneration of the carrier from liability for the loss of, or damage to, the goods or delay in their delivery resulting from errors in navigation, unless it is proved that such loss of, or damage to, the goods or delay in their delivery resulted from the fault of the carrier himself. Retaining of a modified wording of the navigational error regulation seems justified in virtue of a number of reasons. Sea voyages continue to involve high risks. The shipowner does not have continuous effective contact with the captain, the crew, pilots and sometimes is not in the position to carry on effective control over them. Progress in shipbuilding resulted in advanced technical equipment of ships, the great increase in their size and cost of their devices. In connexion with the increase of ship's cost her owner suffers tremendous losses. It leads to the increase of insurance premiums paid by shipowners. The elimination of the exception relating to the errors in navigation would result in considerably higher insurance premia for carriers, which in turn would cause an increase in freight rates. This is why the real economic effect of the elimination of this exception is at the present time unknown and incalculable.

Article 6

Article 6 offers five alternatives for settling the problem of limiting the carrier's liability. A unified system of limitation of the carrier's liability regarding all the claims when liability of the carrier is limited with a determined amount per kilo of the goods appears to be inadequately flexible. Under a comparatively low limit the owners of low weight but highly valuable cargoes will not be able to cover their losses to a considerable extent. This is why one can imagine that this issue alone would make cargo-owners obtain a limit of liability as high as possible. If the limit is very high, it would not be applicable to the comparatively cheap cargoes. In fact the damage caused to such cargoes while carrying would be reimbursed according to their actual cost.

The system of limitation of liability for the loss, damage or expenses related to them when liability is limited with determined amounts per package of any other shipping unit or per kilo of gross weight, takes to greater extent into consideration the differences in properties and costs of carried cargoes and therefore looks more flexible.

Moreover, using one and the same limit of liability for the loss of or damage to the goods, as well as for

delay in their delivery would mean in practice that the carrier bears unlimited liability for delays in delivery since this limit in the claims arising out of delays would be too high. Limitation of liability for the losses caused by delays in delivery of the goods has to be based on other principles than that for the loss of or damage to the cargo. It seems more reasonable to limit the liability of the carrier for damage caused by delay in delivery with the amount of freight due to the carrier. Thus the best solution of all the issues involved could be achieved if alternative D is accepted provided that the liability for delay is limited with the regular amount of freight.

Nevertheless one must mention that the solution given in alternative D cannot be taken as ideal. In particular, some difficulties may arise in interpretation of paragraph 1 (*a*) of alternative D. In cases where some packages or other shipping units of different weight are lost or damaged, it is not quite clear, whether in determining the highest limit of liability to take into account each separate package or shipping unit or the aggregate lost or damaged goods. This item has to be clarified by way of a correspondnig addition to paragraph 1 (*a*) of alternative D. Besides, in order to extend the right of limitation of liability to the servants or agents of the carrier acting in the frames of their duties, it is reasonable to insert the words "his servants or agents" in the first line of paragraph 1 (*a*) of alternative D after the words "... the carrier".

Article 9

Paragraph 1

The wording of this paragraph evokes confusion, since it is not clear whether it is necessary for the carrier in any case to obtain agreement of the shipper for on-deck carriage or whether it will be sufficient for the carrier to fulfil one of the three requirements mentioned, i.e. making an agreement, or complying with the usage in the particular trade, or complying with statutory rules or regulations.

Article 12

The general rule on the liability of the shipper should be rather worded in the positive mood by mentioning that the shipper is liable for the loss or damage sustained by the carrier, the actual carrier or the ship except when such loss or damage was not caused by the fault or neglect of the shipper, his servants or agents. The positive wording of this rule on the liability of the shipper would be in harmony with that of the carrier (article 5, para. 1 of the draft convention).

The rule set forth in article 12 is worded in such a way that in order to be exonerated from the liability it is sufficient for the shipper to prove the absence of his fault, or of his servants or agents. In other words, the shipper is not burdened with proving that the damage was caused by circumstances of the case to prevent which the shipper took every reasonable measure. In a case where there is no fault the shipper is exonerated from the liability even if the real causes of the loss or damage have not been found. As set forth above, in virtue of the basic rule on the liability of the carrier (article 5, para. 1 of the draft convention), to be relieved from liability, the latter has to prove that the damage had been caused by circumstances of the case which he could not prevent by reasonable measures taken by him.

Such a divergence between the rules on liability of the carrier and the shipper seems to be not justified. In order to eliminate that, the rule on the liability of the carrier has to be modified as proposed above (cf. remarks on article 1, para. 5 of the draft convention).

General remarks on chapter III

It is advisable to add to part III of the draft convention a regulation governing the relations among the carrier, shipper and consignee in case the latter has not accepted the goods in the port of delivery and setting forth the legal consequences of such fact. In the corresponding article it would be desirable to specify that in case the consignee does not claim the goods or refuses to take delivery thereof, the carrier may, after having notified the shipper, discharge the cargo and place it in custody in a warehouse or at some other suitable place at the consignee's risk and expense.

Article 13

Paragraph 1

It would be reasonable to word this paragraph as follows:

> "When the shipper, his servants or agents hand dangerous goods to the carrier, they shall inform the carrier of the nature of the goods and indicate, if necessary, the character of the danger and the precautions to be taken. The shipper, his servants or agents shall, whenever possible, mark or label in the suitable manner such goods as dangerous."

Paragraphs 2 and 3

Each of these paragraphs stipulates the right of the carrier to unload, destroy or render innocuous dangerous goods "as the circumstances may require". One may conclude that in both mentioned cases the carrier has the right to dispose of the dangerous goods when they become a danger to the ship or other cargo, but not only in the case set forth in paragraph 3. In this situation the manner of disposal has to be based on the circumstances of the case. It stems from here that if a claim arises, the carrier has to prove that the manner of disposal of the dangerous goods chosen by him correlates with the circumstances of the case. This fact being proved, the carrier sustains all the related unfavourable consequences, in particular the payment of the corresponding compensation to the cargo-owner.

The requirement of correlation of disposal of the dangerous goods with the circumstances of the case is not always possible to comply with, but the legal consequences of the case for the carrier arising from the infringement of this requirement are very strict. The carrier is not always in a position to determine the extent of the danger connected with carriage of a particular cargo and therefore is practically deprived of the possibility to choose the adequate manner of disposal of the cargo. One cannot require that from the carrier in the really dangerous situations threatening the ship or other cargo. Therefore it would be quite desirable to retain in the convention the principle of freedom of choosing by the carrier the manner of disposal of the cargo which becomes a danger.

In order to avoid the regulation set forth in paragraph 2 looking like a sanction for solely the fact of loading dangerous goods without the knowledge of the carrier, we would propose to add to paragraph 2 after the words "... where they have been taken in charge by him without knowledge of their nature and character" the words "and such goods become a danger for the ship or other cargo". The words "as the circumstances may require" should be deleted from paragraphs 2 and 3 in order that the carrier would not be limited in choosing the manner of disposing with the cargo when such danger arises.

The draft convention does not deal at all with the right of the carrier for the payment of freight in cases where the dangerous goods are unloaded earlier than at the place of destination, destroyed or rendered innocuous. The solution of this problem would have to be interdependent on whether the carrier had the knowledge of the nature of the cargo and of precautions to be taken. In the former case, the carrier had been aware that the carriage was connected with a definite danger and received a higher freight for that. Therefore, if in this case the result of the carriage has not been achieved or was achieved only partially, it would be reasonable to admit that the carrier has the right to the freight in the amount proportional to the distance in fact covered by the ship with that cargo.

In the latter case, the carrier when entering a contract of carriage was not aware of the danger connected with carriage of the cargo taken care of by him. Consequently, if as a result of a danger which could not be foreseen by the carrier, the cargo cannot be delivered to the port of destination, the carrier retains his right to the freight received, and where the freight has not been received in the port of loading, he can recover it in full. These rights of the carrier have to be stipulated in the rules on dangerous goods.

Article 15

Paragraph 1 (b)

As set forth above the definition of "goods" requires some revision since this term should not include the packaging (see remarks on para. 4 of article 1 of the draft convention). If the corresponding modification is introduced into the definition of goods, paragraph 1 (*b*) of this article has also to be revised. Speaking of the packed goods one should mean not the condition of the goods themselves, but that of their packaging. Therefore, the wording of paragraph 1 (*b*) of this article ought rather to read as follows: "the apparent condition of the goods or their packaging".

Article 16

Paragraph 1

This paragraph does not directly stipulate the right of the carrier to make reservations. Such right is just meant here. But in the whole, the rule set forth in paragraph 1 relates only to the obligations of the carrier to specify the grounds on which he suspects the particulars of the bill of lading inaccurate or which he has no reasonable possibility to check.

Such wording of the paragraph does not fully correspond with paragraph 3 of this article which stipulates a reference to reservations set forth in paragraph 1 and means reservations of the carrier concerning the particulars of the goods. In fact, paragraph 1 does not read anything about such reservations. In this connexion it is preferable to set forth directly in the convention the right of the carrier to make notes of the cargo on the bill of lading.

As for the obligation imposed on the carrier in virtue of paragraph 1 of this article to specify the grounds for which he suspects the particulars of the bill of lading inaccurate or has no means of checking them, this regulation is not fixed in every legal system. As stated in the fourth report of the Secretary-General on responsibility of ocean carriers for cargo (para. 37),[4] the practical application of this regulation would meet considerable difficulties.

The requirement to specify the grounds for which the carrier suspects the particulars of the bill of lading to be inaccurate or has no means of checking them, would in practice lead to elaboration by the carrier of some standard or unified reservations which he would introduce in bills of lading. If the holder of the bill of lading being a third person disagrees with such reservations he has to disprove them. Thus, a burden of proving discrepancy of the motives noted by the carrier with the circumstances of the case is cast on the holder of the bill of lading. If a holder of the bill of lading manages to prove such discrepancy, then the carrier's reservations concerning particulars stipulated in the bill of lading would have no legal effect. In other words, notwithstanding the availability of a reservation, the bill of lading has to be admitted as clean. However, if groundlessness of the motives shown by the carrier has not been proved and the bill of lading is not consequently clean, then its holder has to prove that the loss of, or damage to, the cargo occur in the period when the cargo had been taken care of by the carrier. Consequently the process of proving for the holder of the bill of lading is divided here into two parts. First, he disproves the motives given by the carrier, and then their groundlessness being not proved (such fact has to be fixed by a court or arbitration body) tries to prove that the loss of, or damage to, the cargo occurred in the period when the cargo has been taken care of by the carrier. Thus because of setting forth in the convention of the requirement to show the grounds for which the carrier suspects that the particulars of the bill of lading are inaccurate or that he had no means of checking them, proving this fact for the court or arbitration body becomes considerably difficult.

Paragraph 2

Here, after the words "apparent condition of the goods" used twice, it is desirable to add correspondingly twice "... or its packaging" (cf. remarks on article 15, para. 1 (*b*) above).

Paragraph 3 (b)

Mentioning that the notion of the holder of the bill of lading—third party—includes any consignee in good faith, is superfluous.

[4] A/CN.9/96/Add.1; UNCITRAL Yearbook, Vol. V: 1975, part two, IV, 2.

Paragraph 4

The rule stipulated in this paragraph puts the carrier into a desperate situation by depriving him of the right for the lien on the cargo when the freight has not been paid by the shipper and the bill of lading by any reason has no indication that the freight should be payable by the consignee. It should be better to delete this rule from the draft convention.

Article 17

Observations common to paragraphs 2, 3 and 4

Everywhere in all these texts there is no need to add "including any consignee" after the words "... third party".

Paragraph 3

This provision puts the carrier into a very hard position. Receiving a letter of guarantee from the shipper and issuing in exchange a clean bill of lading always means a refusal from some reservations concerning particulars of the bill of lading. Such refusal quite naturally gives rise to an assumption of the intention to defraud a third party. From that easily comes the conclusion about the letter of guarantee being void for the shipper as well.

The provision set forth in paragraph 3 puts the carrier in a position unequal to that of the shipper. The latter in case of issuance of a letter of guarantee with the intention to defraud a third party bears practically no responsibility, although he is the initiator of the fraud. Therefore it would be much better to let the corresponding national legislations and legal and arbitral practice regulate the validity and importance of letters of guarantee as regards shippers.

Paragraph 4

The draft convention stipulates a general rule on the loss of right to limit the liability of the carrier (article 8). In order to avoid discrepancies in the contents of the convention, only the criteria set forth in that article should be taken into consideration in settling the problem whether the provisions on limitation of the liability are applicable or not. Therefore, the provision of paragraph 4 dealing with a particular case of loss by the carrier of his right to limit the liability is better omitted.

Article 18

The pure fact of concluding the contract of carriage is not equal to taking over the goods by the carrier. In other words, the contract of carriage cannot constitute by itself any evidence of such taking over of the goods. Consequently the provision of this article should refer only to the documents other than bills of lading, evidencing not only the contract of carriage (e.g. charter-party, booking note), but also taking over the goods by the carrier. Therefore the wording of article 18 is to be amended in the following way:

> "When a carrier issues a document other than a bill of lading to evidence a contract of carriage *and receipt or acceptance of the goods,* such a document shall be *prima facie* evidence of the taking over by the carrier of the goods as therein described".

Article 19

Paragraphs 2 and 5

In order to avoid ambiguities in interpretation of the word "days" (consecutive days, working days, etc.) an indication that in both cases the consecutive days are meant is preferable.

Article 20

Paragraph 1

The limitation period for actions for indemnity against the carrier seems to be one year. Such period is quite sufficient for foundation and bringing up an action against the carrier. On the other hand, a year's period permits to settle up a claim without unnecessary delays. Moreover, one more thing in support of a year's period is that in accordance with paragraph 3 of this article this period may be extended.

Article 21

The provisions on jurisdiction set forth in this article seem not to be acceptable for a number of reasons. If these provisions were adopted and included in the convention it would mean a flat denial of many years' practice in settling the problem of jurisdiction on the basis of the agreement of the parties.

The content and construction of paragraph 1 reveal that although it provides the possibility to bring an action in the place designated in the contract of carriage, it does not exclude for the claimant the possibility to choose any place of the four listed in the paragraph, i.e. the port of loading, the port of discharge, the principal place of business of the defendant or the place where the contract was made. Practically, this gives the claimant the possibility to reject unilaterally the agreed place for settling the claim and in fact makes the importance of such an agreement null.

Giving the claimant the right to bring the action in the place where the contract was made would practically mean that the legal proceedings arising out of the contract of carriage could be brought in courts situated far away both from the principal place of the carrier's business and from the ports of loading or discharge.

Paragraph 2 of this article provides the possibility to bring up an action at the place of the arrest of the carrying vessel. This paragraph is not acceptable in general for the countries which follow the principle of the sovereign immunity of vessels owned by State bodies and assert the impossibility of their arrest.

One should also bear in mind that according to the legislation of a number of States, bringing up actions *in rem* is impossible.

The above considerations make the provisions of the draft convention on jurisdiction unacceptable in the whole. It is preferable to give up the intention to include in the convention any provision on jurisdiction giving thus the parties the right to choose the place of bringing up actions and the legislation to apply by means of corresponding agreements at their option.

Article 22

The provisions on arbitration give rise to mainly the same objections as set forth in connexion with the preceding article.

The option given to the parties to designate the place of the arbitration proceedings in the arbitration clause or agreement (para. 2) (*b*) does not prevent the plaintiff from enjoying his right to choose the place of institution of the arbitration proceedings given to him in virtue of paragraph 2 (*a*) (para. 4). This provision devaluates the importance of the agreement of the parties about the place of arbitration proceedings and introduces doubt in the purposefulness of such agreements.

The complicated provision on arbitration, limitation of the parties' choice of the place of institution of arbitration proceedings may make shipowners give up the inclusion of arbitration clauses in bills of lading.

Bearing in mind the aforesaid considerations one has to admit that the inclusion of the arbitration provisions in the convention is not justified. Much better would be to give the right to the parties to settle the problem of arbitration proceedings by mutual agreement and by way of introducing corresponding clauses and agreements into the contracts of carriage.

INTERNATIONAL UNION OF MARINE INSURANCE

[*Original: English*]

GENERAL OBSERVATIONS

First, IUMI wants to draw attention to the fact that the shipping legislation as enacted in the 1924 Brussels Convention, the Hague Rules, has been generally adopted by trading nations in the world and has created a high degree of stability as far as the liability of shipowners for goods is concerned. The bill of lading based on this legislation may still be considered as one of the most important commercial documents in international trade. As it takes a considerable time before an international convention is generally adopted, and in the case of the 1924 Brussels Convention this state was reached only after World War II, a redrafting should be based on careful considerations of the achievements that could be made.

It should also be taken into consideration that shipping legislation is a field which concerns international trade and principally parties who are directly engaged in such trade with a perfect knowledge of the risk-takings involved.

The Hague Rules compromise of 1924 laid down a certain allocation of the risks between the carrier and cargo. The risks particularly allocated to cargo, especially those of nautical fault and fire, were listed in the Convention. Compensation in case of loss or damage under these risks is ensured by cargo insurance. Risks that are allocated to the carrier are compensated for under the carrier's liability insurance (P and I). This explicit allocation of the risks to the two parties of the freight contract has helped international trade to create an adequate protection of the goods against loss and damage in transit. Though experience has shown that the borderline between the risks attributed to the carrier and those borne by cargo is not perfectly clear, the allocation nevertheless has effectively contributed to limit the number of litigations.

The draft proposed by UNCITRAL would change the fundamental relationship that presently exists between the carrier and cargo. There will be a considerable transfer of the risk to the carrier with consequences in the insurance arrangements. The situations where the carrier may be exempted from liability will be less precise. Basing the comments on its experience and knowledge in the field of insurance protection of goods in transit, IUMI will lay particular emphasis on the consequences of this transfer of the risks.

In conclusion, it is the considered opinion of IUMI that world trade is better served under the system set out in the current Hague Rules than would be the case under the proposed draft convention. It is recognized, however, that this view may not be acceptable to the delegates dealing with the next stage of the revision. Accordingly IUMI draws attention also to certain specific matters in the draft.

SPECIFIC COMMENTS

Article 1

Paragraph 4

The proposed definition of goods in the draft implies that the carrier would assume the same liability for cargo carried under deck and on deck considering however the particular prescriptions in article 9 concerning deck-cargo. IUMI finds this new formula satisfactory and in line with modern transport technique.

Article 2

IUMI has no objection to the new criteria for the scope of application which conform in principle with the technique of other conventions in the field of transport. In carriage between two States one of which is a contracting State the new rules will have full effect, however, only if legal proceedings take place in the contracting State. The non-contracting State will of course not be bound by the rules of the Convention.

Article 4

The new wording regarding the period of responsibility means that the tackle-to-tackle coverage under the present Hague Rules is replaced by a coverage from the moment when the carrier has taken the goods in charge at the port of loading until delivery of the goods at the port of discharge. IUMI believes that this change would be workable. It is also in conformity with practice developing in certain liner trades.

Article 5

The new text under this article means a fundamental change of the present allocation of risks between the carrier and the cargo. The list of exonerations in the Hague Rules is replaced by a general formula which means that the carrier shall be liable unless he proves that "he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences". The new formula would leave a wide field open for interpretations which would require extensive litigation. The Hague Rules-catalogue on the other hand has the advantage of being well known and clarified by a number of interpretations in court, which means that litigation nowadays is needed only in few cases.

The new formula would also mean a transfer of risks from the cargo to the carrier. The consequence would

be a considerable increase in the premium for the carriers' liability insurance protection. It is clear that this higher premium will be passed on to the cargo owner through an increased freight charge. The cargo owner would nevertheless be in need of his cargo insurance on a "warehouse to warehouse" basis in order to be sure that he will be compensated in case of loss or damage to the goods in transit. Bankers and other credit institutions would also, under the new formula, require a cargo insurance when advancing money under a letter of credit or a documentary proceeding.

There would be an increase of recovery actions taken by cargo insurers against ocean carriers. On the one hand the greater liability of the carrier ought, in theory, lead to a reduction of the premium for the cargo insurance, but on the other hand it is to be expected that this reduction will only be limited due to the costs involved in recovery actions, as it is a well-established fact that recovery actions consume time, energy and money. The over-all effect would be an increase of costs for the cargo owner.

The risk allocation as proposed under the present draft would, in the long run, reduce the over-all capacity of the cargo insurance system by shifting the risk from the cargo to the carrier. This would no doubt make it more difficult to assume under the cargo insurance the very high risks that come under consideration today.

The draft also introduces a liability for delay in delivery. Though such a liability on a contractual basis seems to correspond to certain trends in modern transport, IUMI will question whether it is advisable to introduce a liability for delay in shipping legislation.

If a particular time-limit has not been expressly agreed upon between the shipper and the carrier, the application of the formula of "the time which it would be reasonable to require of a diligent carrier" seems to lay the way open to litigation. The most complicated issue in relation to delay, however, will be what kind of damages should be compensated for. If the problem of the time-limit is clear, it would be natural to accept damage to the goods due to delay, which in fact already is an accepted interpretation of the Hague Rules in certain countries. What is much more complicated is the determination of consequential losses due to delay. If such a liability would be included IUMI strongly urges that it should be limited to what could reasonably be foreseen by the carrier as a probable consequence of the delay.

IUMI holds the view that the main purpose of shipping legislation should be to define as clearly as possible the obligations of the parties to the freight contract. This purpose seems to be fulfilled to a higher degree under the current Hague Rules than it is under the draft convention. IUMI is thus in favour of maintaining the present allocation of risks between the carrier and cargo. For a more extensive argument in this field reference is made to the IUMI brochure on "The Essential Role of Marine Cargo Insurance in Foreign Trade" which will be published in the next few weeks.

Article 6

As no limits of liability have been proposed under this article, IUMI will only suggest that the limits be as reduced as possible in order not to stimulate any further recourse actions from cargo insurers. It should also be borne in mind that, if article 5 of the draft convention is accepted, the carrier in most cases will be liable for total loss of the cargo. This implies that he must have an insurance protection which covers the maximum limitation of a full cargo carried on board the ship. Any amount exceeding the limits laid down in the Visby Rules would lead to excessive exposure particularly for modern ships designed to carry general cargo.

The various alternatives put forward seem rather confused, particularly as far as limitation in case of delay is concerned. If such a liability is accepted, it should in the opinion of IUMI be limited to the amount of freight in all cases where there is no physical loss or damage to the cargo. It has to be decided, however, whether freight means the freight for the whole cargo or for the whole bill of lading or for the cargo delayed. The latter alternative seems to be more in conformity with a possible limitation per kilo of gross weight of the goods lost or damaged.

In discussing the limitation it should also be taken into consideration what will be the over-all limit of liability for the sea-carrier under the 1957 Convention.[1]

Article 8

When a limit of liability once has been agreed upon, it would be to the advantage of all parties concerned if it be applied to all loss and damage irrespective of circumstances. The proposed wording seems to meet this view. It would be acceptable, however, in accordance with the draft, if the right of limitation is lost when the damage is intentionally or recklessly caused with knowledge that such damage would probably result.

Article 9

IUMI has no objection to the new formula under which the carrier shall be entitled to carry the goods on deck, if this is in accordance with an agreement with the shipper, with the usage of the particular trade or with statutory rules or regulations. Particularly in container transports on ships designed for this purpose it is already general practice in most countries to insure the cargo under the same conditions whether it is carried in container on or under deck. It is not entirely clear, however, what would be the situation in a deviation, where the carrier gives an under-deck bill of lading and then stows the cargo on deck. Even if paragraphs 3 and 4 purport to take care of the quantum of damages, the common law of deviation has not been excluded.

Article 10

By introducing the concept of the contracting carrier in the convention there is also a possibility to introduce a second level of carriers' liability, that is if the contracting carrier uses his prerogative to assume obligations not imposed by the convention. It may be questioned whether it is necessary to deal with the contracting carrier-concept in the convention. It may be left entirely to solutions in private contract.

[1] International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships, done at Brussels, 10 October 1957.

Article 15

With the current world moves to simplification of shipping documents IUMI feels that there are too many mandatory particulars proposed in this article. Only those items which are commercially necessary should be specified in the bill of lading.

Article 17

IUMI suggests that paragraphs 2, 3 and 4 of this article dealing with letters of guarantees be deleted. This does not mean that IUMI favours the use of letters of guarantee. On the contrary, IUMI has on many occasions taken a firm attitude against the fraudulent use of letters of guarantee. Considering, however, the very complicated issues in this connexion, IUMI fears that the present wording of the paragraphs in question could lead to difficult litigations. It would therefore be better not to deal with this question in the convention.

2. Note by the Secretary-General: comments by Governments and international organizations on the draft Convention on the Carriage of Goods by Sea (addendum): additional comments by international organizations (A/CN.9/109/Add.1)*

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Central Office for International Railway Transport

[*Original: French*]

We acknowledge receipt of document A/CN.9/109** of 29 January 1976 entitled "Comments by Governments and international organizations on the draft convention on the carriage of goods by sea", for which we thank you warmly.

It is clear from this document that several States and some international organizations are critical of article 5 of the draft convention, which no longer provides for "nautical fault", one of the traditional defences under the law relating to maritime transport. In our view, it would be unfortunate if the calls for the reinstatement of that defence were heeded. In the first place, the omission of that defence, as advocated by the majority of States concerned, would make it easier to take account of the necessary legal considerations concerning the carrier's responsibility; secondly, it would contribute to the harmonization of laws relating to transport at the international level.

International Chamber of Shipping

[*Original: English*]

The International Chamber of Shipping[1] has read with interest the report of the UNCTAD Working Group on International Shipping Legislation[2] dealing with the draft convention on the carriage of goods by sea prepared by the UNCITRAL Working Group on International Legislation on Shipping.

ICS has already sent its comments on the draft convention and its views are unchanged.

When commenting on the draft convention, ICS did not comment on article 8 because it was broadly acceptable. The UNCTAD Working Group report recommends that consideration be given to the extent to which the concept of the carrier might be broadened to include servants or agents, in the light of the limit of liability to be inserted in article 6, paragraph 1. It is submitted that any such consideration should produce the same result as that arrived at in the UNCITRAL Working Group and reflected in the draft convention as the effect of weakening in any way the carriers right to limit can only have a most serious lowering effect on the amounts which could be inserted in draft article 6, paragraph 1. Further it would constitute a shift which could only be considered as radical, not merely in its effect on the relative insurance burdens borne by cargo insurers and carriers liability insurers, but in its effect on insurance costs. The formula developed through international compromise in the 1961 Carriage of Passengers Convention,[3] the 1969 Luggage Convention[4] and the 1974 Athens Convention on the Carriage of Passengers and their Luggage[5] and incorporated in the draft Convention on the Limitation of Liability in respect of Maritime Claims cannot be swept aside in relation to cargo claims without affecting the position with regard to those conventions.

For these reasons it is strongly urged that article 8 be not amended.

The ICS view on article 5 remains as stated in the comments already tabled. Those opposed to reinstatement of the defence of error in navigation at the UNCTAD Working Group meeting mainly based their arguments on one of three premises:

* 30 March 1976.

** Reproduced in this volume, part two, IV, 1, *supra*.

[1] Hereinafter abbreviated as ICS.

[2] TD/B/C.4/ISL/21.

[3] International Convention for the Unification of Certain Rules relating to the Carriage of Passengers by Sea, Brussels, 29 April 1961.

[4] International Convention for the Unification of Certain Rules relating to Carriage of Passenger Luggage by Sea, Brussels, 27 May 1967.

[5] Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, Athens, 13 December 1974.